



**Simiyu & another v Republic (Miscellaneous Criminal Application  
E002 of 2025) [2025] KEHC 3033 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 3033 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2025**

**WM MUSYOKA, J  
FEBRUARY 5, 2025**

**BETWEEN**

**FREDRICK SIMIYU ..... ACCUSED**

**AND**

**JARED PETER OSORE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Arising from a sentence order, in Busia CMCSOC No. E004 of 2020, by Hon.  
Richard Odenyo, Senior Principal Magistrate, SPM, of 16th January 2025)*

**RULING**

1. The applicant, Jared Peter Osore, alias Gerald Peter Osore Buluma, had offered himself as a surety, in Busia CMCSOC No. E004 of 2020, for the accused person in that case, Fredrick Ojiambo Simiyu. The bond, of Kshs. 100,000.00, was approved on 10<sup>th</sup> June 2021, and the applicant deposited a title deed for Bukhayo/Matayos/5600, to support the surety.
2. Although the bond approval proceedings were conducted on 10<sup>th</sup> June 2021, the bond form was signed on 9<sup>th</sup> June 2021. The part for the accused was not signed, but that for the surety was signed by the applicant herein. The purport of the surety is as follows:

“I, Gerald Peter Osore Buluma, of Busia do hereby declare myself surety for the above-mentioned Fredrick Ojiambo Simiyu that he shall attend the Chief Mafistrate’s Court at Busia on the 15<sup>th</sup> day of June 2021 (or on such day as he may thereafter be required to attend) further to answer to the charge pending against him/her, and in case of his making default therein, I hereby bind myself to forfeit the sum of Kshs. 100,000.



Dated this 9<sup>th</sup> June 2021

(signed)

Witness to signature(s)

(signed)

Signature.”

3. The record does not reflect that the accused person attended court on 15<sup>th</sup> June 2021, after being released on bond, for that record is silent on whether he was present or absent that day. He was clearly absent on 12<sup>th</sup> July 2021, and a warrant of arrest was issued, which was extended on 31<sup>st</sup> August 2021, 7<sup>th</sup> October 2021, 22<sup>nd</sup> February 2022, 16<sup>th</sup> May 2022, 13<sup>th</sup> June 2022, 15<sup>th</sup> May 2022, 17<sup>th</sup> October 2022, 9<sup>th</sup> February 2023, 10<sup>th</sup> April 2023, 20<sup>th</sup> June 2023, 3<sup>rd</sup> August 2023, 18<sup>th</sup> December 2023, 6<sup>th</sup> May 2024 and 19<sup>th</sup> August 2024.
4. On 3<sup>rd</sup> December 2024, a notice to show cause order was made against the surety, the applicant herein, to attend court on 9<sup>th</sup> January 2025. He did not attend court on 9<sup>th</sup> January 2025, and a warrant for his arrest was issued. He was arrested the same day, 9<sup>th</sup> January 2025, and was presented in court the same day. He informed the court that:

“I was not aware that the accused stopped coming to court. There was a time I tried to have the accused arrested and brought to court but my efforts were thwarted by members of the public.”
5. The matter was put off for mention on 14<sup>th</sup> January 2025, and the applicant was remanded in custody. The applicant was not produced on 14<sup>th</sup> January 2025, and the matter was put off to 16<sup>th</sup> January 2025. On 16<sup>th</sup> January 2025, he requested as follows:

“I ask for one last chance. My family were to look for the accused in company of the police officers, but he ran away. Accused is now in Uganda. I will ensure he is arrested and brought to court.”
6. The court then ordered the applicant to pay to the Government of Kenya Kshs. 100,000.00, or in default the applicant to serve 6 months imprisonment. He was informed of his 14 days right of appeal against that order. The warrant of arrest for the accused person was reinstated, and the matter was marked for mention on 8<sup>th</sup> April 2025.
7. Thereafter, a warrant of commitment where fine imposed was raised, dated 16<sup>th</sup> January 2025, where the applicant was identified as an accused person, whose offence was failure to produce the accused in court, and who had been sentenced to a fine of Kshs. 100,000.00, or 6 months’ imprisonment in default.
8. It is the events of 16<sup>th</sup> January 2025 which provoked the initiation of these proceedings at the High Court, by way of the Motion, dated 16<sup>th</sup> January 2025, for stay of the order of 16<sup>th</sup> January 2025, revision of the order and grant of a chance to the applicant to trace the accused person, or otherwise for review of the said orders. In his purported affidavit in support, purported because, although at the opening paragraph it claims to be his affidavit, at the end the deponent is depicted as Wilson Ochieng Otieno, it is averred that the accused person had been evasive, and in 2020, he, I suppose the applicant, had wanted to cease being his surety, but the accused had promised to change his character. It is decried that he was denied an opportunity to trace the accused. It is stated that on 4<sup>th</sup> November 2024, he



had traced the accused person, raised alarm for members of the public to assist him, but the accused mobilised the said public against him. It is stated that he had been detained at Korinda GK Prison, for failing to avail the accused person. It is said that he was never given warrants to assist trace and have the accused person arrested.

9. The Motion was placed before me, on 17<sup>th</sup> January 2025. I gave directions on it, for service, and hearing on 22<sup>nd</sup> January 2025. On 22<sup>nd</sup> January 2025, when the matter came up for hearing, Mr. Ouma, the Advocate for the applicant, was not in court, and it was Mr. Onanda, for the respondent, who addressed me. I reserved the matter for ruling thereafter.
10. Release on bond/bail is a constitutional right, provided for under Article 49(i)(h) of *the Constitution*.
11. The more elaborate provisions on bond and bail are in the *Criminal Procedure Code*, Cap 75, Laws of Kenya. Under section 123(1) of the *Criminal Procedure Code*, an accused person in custody, or at any stage of the proceedings, may be admitted to bail. Bail appears to be the principal entitlement, and the bond the alternative, for the proviso to that section indicates that the court may, instead of taking bail from the person, “release him on his executing a bond without sureties for his appearance.” Section 123(2) provides for bail to be fixed, and requires that such amount should be reasonable and not excessive. Bail, therefore, would refer to an amount of money paid by or for an accused person, whilst bond refers to a recognizance or promise or an undertaking, given by the accused person, that upon his being admitted to bond, and released, he would attend court. There is elaboration on bond and bail in sections 124 and 126 of the *Criminal Procedure Code*.
12. So, what happens where there is breach of the terms of a bond with a surety? Section 131 of the *Criminal Procedure Code* comes into play. The provision provides the process and procedure for forfeiture of the property offered as security. It states:
  - “(1) Whenever it is proved to the satisfaction of a court by which a recognizance under this Code has been taken, or, when the recognizance is for appearance before a court, to the satisfaction of that court, that the recognizance has been forfeited, the court shall record the grounds of proof, and may call upon any person bound by the recognizance to pay the penalty thereof, or to show cause why it should not be paid.
  - (2) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover it by issuing a warrant for the attachment and sale of the movable property belonging to that person, or his estate if he is dead.
  - (3) A warrant may be executed within the local limits of the jurisdiction of the court which issued it; and it shall authorize the attachment and sale of the movable property belonging to the person without those limits, when endorsed by a magistrate within the local limits of whose jurisdiction the property is found.
  - (4) If the penalty is not paid and cannot be recovered by attachment and sale, the person so bound shall be liable, by order of the court which issued the warrant, to imprisonment for a term not exceeding six months.
  - (5) The court may remit a portion of the penalty mentioned and enforce payment in part only.
  - (6) ...”



13. The effect of this provision, read together with section 130 of the *Criminal Procedure Code*, is that the recognisance becomes forfeited where it is proved, to the satisfaction of the court, that appearance in court has not been fulfilled. The bond, executed by the surety, secures the attendance of the accused for his trial, and it matures on default, upon the failure to ensure the attendance of the accused at the relevant court. See *State vs Magamu; Chemagosi (Applicant)* [2022] KEHC 10298 (KLR) (Aburili, J). Before the court invokes the forfeiture procedure, it must be proved that there was a forfeiture, that is breach of the terms of the bond, by the non-attendance of the accused in court when required. See *Republic vs. Ltupuken* [2023] KEHC 25417 (KLR) (Muriithi, J). The court may call upon any person bound by the recognisance to show cause why it should not be paid. Where sufficient cause is not shown, and the penalty is not paid, the court can recover the amount from the security held under the bond, including issuing a warrant for the attachment of property belonging to the person or his estate. If the penalty is not paid, and cannot be recovered from the asset offered as security, the court may go on to order the imprisonment of the surety for a term not exceeding 6 months.
14. So, what happened here? Upon being released on bond, following approval of the bond, on 10<sup>th</sup> June 2021, the accused person never attended court. According to the bond/surety document, dated 9<sup>th</sup> June 2021, the next appearance was slated for 15<sup>th</sup> June 2021. The record of 15<sup>th</sup> June 2021 is not clear as to whether the accused person attended court on that day, for it is not indicated that he was either present or absent. But from 12<sup>th</sup> July 2021, up to when the surety was sought for, by the order of 3<sup>rd</sup> December 2025, the accused never attended court. There was a breach of the bond terms, that the accused person was to attend court whenever required of him by the court. The default by the accused, in not attending court, contrary to the bond terms, meant that the surety had also breached the terms of the surety bond, that he shall ensure that the accused person attends court as and when required by the court.
15. The failure by an accused person, particularly a persistent one, like in this case, would amount to a forfeiture of the recognisance. It would amount to the accused person forfeiting his right to bail/bond, and it ought to trigger payment of the amount that the surety committed himself to pay. See *Republic vs. Ltupuken* [2023] KEHC 25417 (KLR) (Muriithi, J). Before that amount is paid, the surety is entitled to be heard, upon a notice to show cause being issued, on why it cannot or should not be paid. See *Florence Muthoni Kamau vs. Republic* [2021] eKLR (Kasango, J) and *Otieno vs. Republic* [2023] KEHC 22818 (KLR) (Kavedza, J). Cause would be shown where the surety would account for the failure by the accused person to attend court, say by reason of illness, or incarceration, or family misfortune that forced him to keep away from court, or any other relevant reason or explanation. In short, there should be some plausible justification. See *Cheruiyot vs. Republic* [2024] KEHC 13225 (KLR) (Sergon, J). In the absence of any such justification or explanation, and the continued unavailability of the accused person, the forfeiture would be justified, whereupon the court would order payment of the amount bonded. Should the payment be not forthcoming, the court will go after the asset offered as security. Where payment is made, the asset or security ought to be released to the surety. Should the security be unrealisable, then the last option would be committal of the surety to jail. See *State vs Magamu; Chemagosi (Applicant)* [2022] KEHC 10298 (KLR) (Aburili, J).
16. When the applicant attended court, on 9<sup>th</sup> January 2025, to show cause, he was not able to show cause, or he did not persuade the court that there was a cause for the accused not attending court. He merely said he was not aware that the accused had absconded court since 2021, yet it was his obligation to ensure that the accused attended court. It was his duty to ensure that he, the surety, was aware of the dates set, when the accused person was expected in court, to take the necessary steps to ensure or secure his attendance in court on those dates. It was not the duty of the court to keep him informed of those dates, for it was his to follow up. If he failed to keep up with the dates, and to ensure attendance by the



- accused in court as required, he, the surety, would have failed in his duty to the court, and he would have breached his bond or undertaking to the court, that he would ensure that the accused attends court at all times, and that default would amount to forfeiture of the bond, exposing him to proceedings for recovery of the amount bonded.
17. Was there cause for the applicant not to pay the amount bonded? I have read and re-read his affidavit in support of the Motion, and I have not seen any cause there. The applicant cannot be believed on that account. He is not reliable. What he says in that affidavit contradicts what he informed the trial court orally on 9<sup>th</sup> January 2025. He claimed before the court that he was unaware that the accused was no longer attending court, and then he avers, on oath, in the affidavit, that he was aware, as far back as 2020, that the accused person was being evasive, and he even wanted to withdraw as a surety, but the accused person dissuaded him from doing so. Yet, the bond, by which he became a surety, had not been processed by then, in 2020, for bond approval was not done until 10<sup>th</sup> June 2021. He depones to have had attempted, on 4<sup>th</sup> November 2024, to apprehend the accused person with the help of members of the public. So, if he was unaware, as of 9<sup>th</sup> January 2025, about the accused having absconded, under what circumstances was he attempting to arrest him on 4<sup>th</sup> November 2024. The court had not summoned him, by 4<sup>th</sup> November 2024, and indeed it had not interacted with him, after 10<sup>th</sup> June 2021, until 9<sup>th</sup> January 2025, nor made any orders for him to act one way or the other, since 10<sup>th</sup> June 2021, until 3<sup>rd</sup> December 2024, so what prompted him to want to arrest the accused person on 4<sup>th</sup> November 2024.
  18. It was his duty, as surety, to ensure that the accused attended court, yet he, the applicant, disappeared at the same time with the accused person, and he only surfaced in 2025, when the court summoned him. The lengthy period of the absconding by the accused, without the applicant doing anything to assist the court, cannot possibly be ignored or overlooked, to extend time to him to locate the accused person. He has failed, miserably, in my view, in his duty as a surety. Indeed, his conduct could otherwise be treated as, or considered or deemed to be, an act of collusion with the accused person to disappear.
  19. What should the court have done with the applicant, as surety, after it was not satisfied with his explanation, or after he failed to show cause? In this case, the surety was remanded in custody. Then a document was generated, where he was treated like an accused person, who had been convicted of the offence of failure to produce an accused person in court, and the amount the court required him to pay, which he had signed up to pay in default, of Kshs. 100,000.00, was treated as a fine.
  20. The applicant was not an accused person. His failure, as surety, to produce the accused person, did not amount to a criminal offence, neither did the default to pay, if at all, the amount that he had bonded himself to pay should he be unable to produce the accused. The order to pay the Kshs. 100,000.00 was not a sentence, and that amount was not a fine, but a recognizance. He is not required to pay it for committing a crime or for some misconduct, for the process is somewhat contractual, and it is about paying a penalty for breach of obligations or terms of the contract or undertaking, being to ensure that the accused person turns up in court, secured by a promise, that should default occur, the surety would pay a specific amount of money to court. See *Edwin Simiyu Maina vs. Republic* [2021] eKLR (Riechi, J).
  21. The forfeiture process is mere enforcement of the obligation or undertaking, and not criminal proceedings with an objective of imposing a penal sanction. The committal to jail, in default, would not be a punishment or a sentence, for an offence, but something akin to committal to civil jail, for default in meeting an obligation or undertaking, as the price for the default. See *Regina vs. Horseferry Road Stipendiary Magistrate ex parte Pearson* [1976] 1 WLR 511 (Lord Widery, CJ), *Kasanga Joel Mulwa & Kibet Saina Tegekyon vs. Republic* [1983] KEHC 5 (KLR) (Simpson, J) and *State vs Magamu*;



- Chemagosi (Applicant)* [2022] KEHC 10298 (KLR) (Aburili, J). Hence, there should be no rush to invoke penal or criminal sanctions, before the civil-like remedies are exhausted. See *Cheruiyot vs. Republic* [2024] KEHC 13225 (KLR) (Sergon, J).
22. What should have been done, by the trial court, should have been to declare that the right to bond had been forfeited, and the applicant, as surety, should have been required to pay to court the amount of the recognisance, that he had bound himself to pay in default, of Kshs. 100,000.00. Upon his failure to pay Kshs. 100,000.00, the property that he had offered as security, Bukhayo/Matayos/5600, would be sold, to raise the Kshs. 100,000.00. See *State vs Magamu; Chemagosi (Applicant)* [2022] KEHC 10298 (KLR) (Aburili, J). Imprisonment would only be an option after the disposal of the security has failed.
23. In view of the above, the trial court did not handle the applicant in accordance with section 131 of the *Criminal Procedure Code*. It ought to have given him time to pay the Kshs. 100,000.00, and, at the end of the period given or allowed, if he would not have paid, then ordered commencement of proceedings to recover the money from the security offered. The issue of his being committed to jail for 6 months could only arise if the security was not saleable, for whatever reason. In this case, the applicant was not given time to pay the Kshs. 100,000.00. The issue of the security being realised had not arisen, as a result, and the matter of his being committed to jail should not have been considered. He was remanded even before he was required to pay Kshs. 100,000.00. He was committed to 6 months in jail on the same day that he was ordered to pay the Kshs. 100,000.00, without having given time to raise the money, and without any efforts having been made, unsuccessfully, to dispose of Bukhayo/Matayos/5600. The trial court is not entitled to move away from the forfeiture procedure under the *Criminal Procedure Code*. See *Githinji vs. Republic* [2024] KEHC 12740 (KLR) (Mwongo, J).
24. The non-compliance with section 131 of the *Criminal Procedure Code* would mean that the detention of the applicant herein is premature and unlawful. See *Abinya vs. Republic* [2022] KEHC 13895 (KLR) (Aburili, J). I shall, as I hereby do, set aside the order, made on 16<sup>th</sup> January 2025, directing his imprisonment in default, and instead order that the applicant pays the sum of Kshs. 100,000.00, by 8<sup>th</sup> April 2025, when the matter, in Busia CMCSOC No. E004 of 2020, is due for mention. If he will have paid that amount by then, then his title deed, for Bukhayo/Matayos/5600, shall be released to him. If he shall be in default, of payment, by that date, then the process of selling Bukhayo/Matayos/5600 shall commence, to raise the amount of Kshs. 100,000.00 from that property, unless the trial court shall be minded to give him more time. Imprisonment shall only be considered thereafter, should it prove impossible or difficult to dispose of Bukhayo/Matayos/5600. In the meantime, let the applicant be released from prison forthwith, unless he is being held there on a separate warrant.
25. Let the file, in Busia CMCSOC No. E004 of 2020, be returned to the relevant registry for compliance. The instant cause is now spent, and the file herein shall be closed. Orders accordingly.

**DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA, THIS 5<sup>TH</sup> DAY OF FEBRUARY 2025.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Moses Ouma, instructed by BM Ouma & Company, Advocates for the applicant.

Mr. Onanda Antony, instructed by the Director of Public Prosecutions, for the respondent.

