



**Masinde v Republic (Revision Case E075 of 2025)
[2025] KEHC 10593 (KLR) (21 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
REVISION CASE E075 OF 2025
RN NYAKUNDI, J
JULY 21, 2025**

BETWEEN

STEPHEN WEKESA MASINDE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before this court is a letter dated 22nd day of April 2025 seeking the following orders:

Your Lordship,

We act for the applicant Stephen Wekesa Masinde who is the accused in *Eldoret MCCR. Criminal Case No. 240 of 2019*. The applicant hereby wishes to submit a request for revision pursuant to the powers of the court under the provisions of sections 362,364 and 365 of the *Criminal Procedure Code*, Cap 75. The decision the subject of revision proceedings is the ruling in *Eldoret MCCR. Criminal Case No.240 of 2019*. The Hon. Peter Areri Principal Magistrate delivered a ruling ordering the security provided by the 2nd accused person, being a title deed to be sold to recover the sum of Ksh. 100,000/= being the value of the property alleged to have been stolen. The said ruling was delivered after the prosecution made an application to withdraw the case under section 87(a), which was allowed on the 24th January, 2024.

Our client would wish to request the Honorable court to call for and examine the record of the criminal proceedings before the Magistrate Court for purposes of satisfying itself as to the correctness, legality or propriety of the findings and orders recorded and as to the regularity of the proceedings on the basis of the law on the grounds;-



1. The trial court flouted section 131 of the *Criminal Procedure Code* by failing to record the proof and failing to call upon the surety herein to pay the penalty thereof or to show cause why it should not be paid.
2. There is no proof that the surety was served with the summons and a Notice to show Cause. The court failed to inquire what steps the prosecution had undertaken to arrest the accused and proceeded to extend the warrants of arrest and later ordered that the security be sold to recover the ksh. 100,000/=without hearing the depositor.
3. The court failed to summon the depositor to show cause why he cannot produce the accused or pay the recognizance and allow him time to look for the accused. The court failed to give the depositor an opportunity to produce the accused and to show cause why the security should not be sold. There is no proof of service of the summons.
4. The initial non-attendance by the accused in court was communicated by counsel to the accused who produced treatment notes and the court was aware that the accused person was ailing. A further date was given but it is not clear if the accused person was ever made aware of the same. In fact, it is not clear if all other dates were ever communicated to the accused person or his advocate. The court therefore totally failed to follow the procedure provided under section 131(1) of the *Criminal Procedure Code*, yet the accused person had been ailing all this while.
5. The court ought to have restrained itself from issuing the orders of sale of the security deposited.

Decision

1. This application is governed by Art 165 (6) (7) of the *Constitution* which reads as follows:
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) for the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
2. This constitutional imperative has to be construed in line with section 362 and 364 of the *CPC*. The applicant is questioning the propriety, regularity, legality, correctness and justness of the decision by the lower court cancelling his bond terms issued under Art 49(1) (h) of the *constitution* as read with section 123 & 123(a) of the *CPC*.
3. It is trite that judicial discretion - the result of its exercise is referred to herein as a discretionary decision – is exercised when a judge is granted a power under either statute (‘statutory discretion’) or common law that requires the judge to choose between several different, but equally valid, courses of action. As de Smith has stated:

The legal concept of discretion implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem. Discretionary decisions are those where the judge or magistrate has an area of autonomy, free from strict legal rules, in which the judge or magistrate can exercise his or her judgment in relation to the particular circumstances of the case. As Hawkins has observed, discretion is ‘the space.... Between legal



rules in which legal actors may exercise choice.’ See SA de Smith and JM Evans (eds), De Smith’s Judicial Review of Administrative Action (4th ed, 1980) 278 and Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from Law and Social Science’ in Keith Hawkins (ed), The Uses of Discretion (1992) 11,11.

4. The leading provisions of the law on review is more entrenched in the realm of Civil Procedure Act and Rules 2010 of Kenya under section 80 and Order 45 Rule 1. It has been established over time that review errors committed in the exercise of discretion include errors on the face of the record, errors of law, acting upon a wrong principle, allowing extraneous or irrelevant matters to guide the discretion, mistaking the facts and failing to take account of a material consideration or discovery of new evidence which was not available when the trier of facts was exercising the discretion in making the impugned decision.
5. As a consequence of the dominance of criminal law cases in the relevant jurisprudence, the particular discretionary powers which have more often been in issue before the courts are those associated with the criminal process. Thus, the case law has focused on the exercise of discretion in various areas including: the granting of warrants, bail, review, resentencing, adjournments in proceedings, stays in proceedings, the determination of sentences, including the length, place and type of imprisonment, and discretion to exclude evidence, both at trial and in preliminary proceedings.
6. The case has one unusual features not present in many of the various cases involving security deposited in court on behalf of the accused pending hearing and determination of his case. This security document stands in as an instrument in fulfilment of Art 49(1)(h) of the Constitution as read with section 123 & 123(a) of the CPC. In this case is particularly important for the learned trial magistrate to go further and issue the writs on public auction of the property, the day of the sale, the appointed auctioneer as an agent of the court duly registered with auctioneers licensing board. To approach the deposal of the property in the manner reflected in the impugned ruling perhaps is not the most preferable method to be adopted by the trial courts.
7. I will certainly hold that the trial magistrate’s exercise of discretion of the kind invoked here is in a sense capable of being reviewed under section 362 & 364 of the CPC. There is ambiguity in a way not in conformity with the basic principle of due process which usually exists on our constitution and statute law. The discretionary powers of the court means:-
 - a. The exercise of the judgement by a judge or a court based on what is fair under the circumstances and guided by the rules and principles of law;
 - b. A court’s power to act or not to act where a litigant is entitled to demand for the act as a matter of right.
 - c. A judicial and judicious discretion is one which is dictated on sound judgment, honestly, pure reason, surrounding circumstances of the case and good conscience of the judge based on facts and guided by law or equitable decisions.
8. As earlier stated by the applicant he is not satisfied that the trial court exercised the discretionary powers under the above basis hence he preferred a review. To end this discussion there is merit in granting the review order by setting aside the disposal of the security in the form of a title deed to be sold by public auction. This court declares being an accountable document due process was not followed by the trial court.

DATED, SIGNED AND DELIVERED VIA CTS THIS 21ST DAY OF JULY 2025

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R. NYAKUNDI
JUDGE

