



**Muthoni v Republic (Criminal Revision E136 of 2024)
[2024] KEHC 7248 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 7248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E136 OF 2024
DO CHEPKWONY, J
MAY 22, 2024**

BETWEEN

GEORGE WANYOIKE MUTHONI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. For determination before the court is the Chamber Summons application dated 16th April, 2024 which seeks the following orders:-
 - a. Spent.
 - b. That pending for hearing and determination of this application the Applicant be admitted for cash bail/bond.
 - c. That the Honourable Court be pleased to alter and/or revise the orders of the Honourable Chief Magistrate issued on 4th April 2024.
 - d. That in the alternative to serving a jail sentence the Applicant's salary be attached in satisfaction of his obligation as a surety and or other security as the court may deem fit.
 - e. Any other orders that the court may deem fit to grant in the best interest of justice.
2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of George Wanyoike Muthoni sworn on 16th April, 2024.
3. According to the Applicant, he stood as a surety for Fredrick Shivachi Angwenyi who had been charged with the offence of Obtaining Money by False Pretences vide Kiambu Chief Magistrate Criminal Case No.E013 of 2021. The Accused person was released on a bond of Kshs.500,000.00 with one surety of a similar amount but he absconded and has been at large. The Applicant has failed to apprehend and



- or avail him in court. As a result, on 4th April, 2024 the trial court committed him to serve six months in prison as a result. It is the Applicant's contention that when he was committing himself to stand as surety for the accused for the said sum of Kshs.500,000.00, he presented his payslips to the lower court.
4. The Applicant is ready and willing to deposit any other security as the court may direct and his continued detention will cause a lot of suffering to his family as a sole bread winner and he risks losing employment if he remains in jail.
 5. In response to the application, the prosecution's counsel filed Replying Affidavit sworn by Jeniffer Ndeda sworn on 13th May, 2024. She confirmed that the Applicant stood as a surety for the Accused person in this case. She stated that in the trial court, the accused pleaded not guilty to the charge of Obtaining Money by False Pretences contrary to Section 313 of the Penal Code and was granted bail/ bond of Khss.500,000.—with one surety. It is the counsel's contention that the accused absconded court and Warrant of Arrest was issued on 15th August, 2022. On 29th September, 2022, Summons were issued against his surety to come and to date, he has not shown any effort made by himself to trace he accused person or given any justifiable reason why has failed to do so despite the court having given him more than one year to bring the accused to court.
 6. According to the State counsel, the Applicant was aware of his duties when he stood surety for the accused person and therefore the application is an abuse of the court process. She admits that this court has revisionary jurisdiction under Section 362 of the Criminal Procedure Code but she holds that the six months imprisonment was not excessive as it was within the law and therefore the application should be dismissed.
 7. The parties argued the application orally on 14th May, 2024.

Analysis and Determination

8. Having listened to both counsel for the parties in their oral submissions with regard to the Chamber Summons application dated 16th April, 2022, I have also read through the grounds upon which the same is premised.
9. From the presentations, the issues for determination are:
 - a. Whether the Applicant can be admitted to cash bail.
 - b. Whether the court can alter and/or revise the orders of the Honourable Chief Magistrate issued on 4th April, 2024.
 - c. Whether the jail term granted to the Applicant can be substituted with an attachment of his salary to satisfy his obligation.
10. All the prayers being sought call upon this Court as a High Court to exercise its supervisory jurisdiction. Article 165(6) of *the Constitution* provides that:-
 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.”
Article 165(7) goes on to provide that:-
 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.

11. In Criminal cases, the power to exercise revisionary jurisdiction is provided for under Section 362 of the *Criminal Procedure Code*. For this particular case, Section 362 states as follows:-

[362]. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”

12. In this case, the accused is charged with the offence of Obtaining Money by False Pretense contrary to Section 313 of the Penal Code. He was granted bond of Kshs.500,000.00 with a surety similar amount and or in the alternative a cash bail of similar amount on 27th January, 2021.
13. On 16th July, 2021, the Applicant approached the court on his own volition and offered to stand as a surety for the accused for Kshs.500,000.00. for security, he offered his payslips and a letter of employment to confirm he was in gainful employment with the County Government of Kiambu as a Senior Assistant Community Development Officer. He confirmed to court that he had understood that he was required to ensure the accused attends court whenever he would be required and if he failed, the would forfeit Kshs.500,000.00.
14. Since 22nd July, 2021, the accused has never attended court todate, hence the pending Warrant of Arrest against him. Summons were also issued against the Applicant who was also given time to trace the accused. This goes to show that the surety understood that as surety, his role was to ensure that the accused attends court as and when he would be required to, failure to which there would be consequences.
15. The law on surety is enshrined under Section 131 of the *Criminal Procedure Code* which states as follows:-
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.



16. The duty of the surety and the consequences of not performing the said duty were explained by the court in the case of Stephen Githinji Kinyanjui v Republic [2016] eKLR as follows:-

“In a case where one has offered to stand surety for an accused person it’s the duty of the surety to ensure that the accused person turns up in court every time the court requires him. If the accused does not do it for whatever reason the court has no option but to call upon that surety to forfeit his security ...”

17. In its Ruling, the trial court stated that it had been lenient and had advised the Applicant that if he failed to avail the accused, he would have to forfeit the surety sum to court which he did not do, but instead provided his payslips. The court then ordered the Applicant to pay the bond of Kshs. 500,000.00 to court, in default to serve six months imprisonment.

18. From that ruling, the Trial court gave the Applicant liberty to either pay the bond of Kshs 500,000.00, in default suffer six months imprisonment. It is this court’s view that the imprisonment is a draconian measure and should be a last resort depending on circumstances of each case. In this case, since the Applicant had surrendered his payslips to confirm he was in employment with a monthly income/ salary, the proper procedure would have been to attach his salary.

19. For that reason, in exercise of its supervisory powers under Section 362 of the *Criminal Procedure Code*, this Court proceeds to set aside the orders given by the trial court on 4th April, 2024 and substitutes the same with the following orders:-

- a. The Applicant’s salary to be attached in satisfaction of his obligation as a surety and or provide other security as it may deem fit in he terms of court.
- b. The imprisonment of six (6) months is hereby set aside.
- c. The Applicant, George Wanyoike Muthoni, to be released forthwith, unless otherwise lawfully held.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 22ND DAY OF MAY, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Marube counsel for the Accused

Court Assistant - Martin

