



**Ong’amo v Republic (Criminal Revision E091 of 2024)  
[2024] KEHC 5080 (KLR) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5080 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL REVISION E091 OF 2024  
WM MUSYOKA, J  
MAY 6, 2024**

**BETWEEN**

**SYLVESTER ONG’AMO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Revision arising from an order, in Busia CMC Miscellaneous CR Application No. E064 of 2024, by Hon. E Nyaloti, Chief Magistrate, CM, of 29th April 2024)*

**RULING**

1. The revision cause herein was initiated by way of a Motion, dated 29<sup>th</sup> April 2024. It seeks revision of an order made on 29<sup>th</sup> April 2024.
2. I do not think that the Motion is properly framed. It seeks that the order made on 29<sup>th</sup> April 2024, for detention of the applicant, be declared unlawful or illegal. I say so because the said order did not command the detention of the applicant, but merely directed that a pre-bail report be done, and the matter was fixed for mention. A detention order had been made on 22<sup>nd</sup> April 2024, but that detention order was not extended on 29<sup>th</sup> April 2024, and, therefore, I am being invited to declare a non-existent order unlawful or illegal.
3. For avoidance of doubt, the trial court recorded as follows, in the proceedings of 29<sup>th</sup> April 2024:

“I agree with the Defence Counsel submissions. A internal administration issues between the DCI office, the CCI office should not lead to a violation of fundamental right. The accused had been brought with threatening to kill. He was released on cash bail of Kshs. 10,000.00.

The court notes that administrative internal matters between the DCI, CCIO and ODPP should not result in violation of fundamental rights.



I order for a pre-bail report.

Mention on 8/5/2024.”

4. So, based on what I have stated, in paragraph 2, hereabove, there is nothing to revise.
5. However, the effect of the proceedings conducted, on 29<sup>th</sup> April 2024, are disconcerting. An order had been made on 22<sup>nd</sup> April 2024, for detention of the applicant for 7 days. The 7 days were to lapse on 29<sup>th</sup> April 2024. When the matter was placed before the court on 29<sup>th</sup> April 2024, the prosecution sought to have the said detention extended by a further 7 days. The court did not grant that plea, for the detention order was not extended. Instead, the court fixed the matter for mention, on 8<sup>th</sup> May 2024, and directed that a pre-bail report be filed. Several concerns arise from that.
6. Firstly, it would appear that the applicant continued to be detained by the police, yet no order had been made to extend the detention order previously made. Without an order, extending the detention, there was no legal basis whatsoever for the police to continue to detain the applicant. It could be that the court intended to order the extension up to 8<sup>th</sup> May 2024, hence the mention date, and the order for the pre-bail report. However, that intention was not reduced into a written order, for no extension was ordered. Faced with such a vague order, the police ought to have sought clarification, before continuing to detain the applicant. In criminal proceedings, orders are not to be implied, they must be expressed in writing, especially those that affect the rights and freedoms of a citizen. So, the police were not entitled to read the order, of 29<sup>th</sup> April 2024, as impliedly ordering detention of the applicant for a further 7 days up to 8<sup>th</sup> May 2024. There was no such order, and the continued detention of the applicant is illegal and unconstitutional.
7. The next concern is the order for a pre-bail report. The applicant has not been charged with any offence. He has not pleaded to any. The issue of calling for a pre-bail report, at this stage, is unnecessary and uncalled for. The court should have either granted him bail, or placed him in custody. If the police had placed him on a cash bail of Kshs. 10,000.00 previously, I do not quite understand why they would later seek to have him detained pending investigations; and why the court should have had difficulty deciding whether to admit him to bail, or to order his detention for a definite period pending investigations, if it felt that that was justified.
8. *The Constitution*, at Article 165(6)(7), empowers the High Court to call for the record of any proceedings before any subordinate court, and may thereafter make any order or any direction it considers appropriate to ensure the fair administration of justice. The handling of the proceedings, by the trial court, on 29<sup>th</sup> April 2024, was obviously irregular and improper, for the court did not deal with the request that the prosecution had placed before it, for extension of the detention orders. No order was made to extend the detention, neither did the court reject the application. Instead, the court made a vague order, allocating a mention date, and calling for a pre-bail report, which was not necessary.
9. In exercise of the power given to this court by Article 165(6)(7) of *the Constitution*, and in view of the absence of an order extending the earlier detention order, I find and hold that there is no legal basis, whatsoever, for the police to continue holding the applicant in detention, without charge. That detention is illegal and unconstitutional. He shall either be set free forthwith, or otherwise be charged forthwith. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 6<sup>TH</sup> DAY OF MAY 2024.**

**W MUSYOKA**

**JUDGE**



Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Otieno, instructed by Messrs. Masiga Wainaina & Associates, Advocates for the applicant.

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

