



**Republic v Otieno & another (Criminal Revision E045 of 2024)
[2024] KEHC 10883 (KLR) (17 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL REVISION E045 OF 2024
DR KAVEDZA, J
SEPTEMBER 17, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

COLLINS OCHIENG OTIENO 1ST RESPONDENT

MOSES MWANGI WANJIKU 2ND RESPONDENT

RULING

1. The applicant filed the notice of motion for determination pursuant to Articles 159(2)(d), 165(6) & (7) of the *Constitution of Kenya* and sections 362 and 364 of the *Criminal Procedure Code*, Cap 75 Laws of Kenya. The applicant sought a revision of the order delivered on 26th February 2024 by the trial court at JKIA Chief Magistrate’s Court Criminal case no. E043 of 2024 varying the bond terms of the 2nd respondent.
2. The application is supported by the grounds on the face thereof and an affidavit sworn by the applicant's investigating officer SGT Caroline Karemba dated 24th July 2024. The averments made are that the respondents were jointly charged for the offence of trafficking narcotic drugs under section 4(a)(ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No. 4 of 1994. They pleaded not guilty and were admitted and released on a bond of Kshs. 2,000,000 each.
3. It is deponed that subsequently, the respondents absconded and warrants of arrest were issued to the respondents and their sureties. On 26th February 2024, the trial magistrate varied the bond terms and released the 2nd respondent’s surety Julius Kariuki Gatamba to a bond of Kshs. 200,000 which are payable in installments for six (6) months. It is this decision that the applicant is challenging. It is averred that the surety was erroneously discharged.
4. The respondent did not file a response to the application despite being served.



5. I have considered the application, the affidavit in support, and the applicable law. The revisionary jurisdiction of this court is donated by Section 362 of the [Criminal Procedure Code](#) which provides that:

“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.”

6. From the above provision, it is clear that the court can only revise orders or decisions of the lower court if it is satisfied that the decision, order, or finding is tainted with illegality, errors of law, or impropriety or that there was an irregularity in the proceedings that gave rise to the impugned order, finding or decision.

7. It is undisputed that Julius Kariuki Gatamba was surety to the 2nd respondent who later absconded court. The 2nd respondent is yet to be arrested under the warrant of arrest issued. The court has perused the proceedings of that day and the record shows the surety informed the court that he had been unable to trace the 2nd respondent but did not wish his land to be forfeited. In addition, he was suffering from diabetes and high blood pressure. He prayed the court to exercise its discretion.

8. The legal provisions relating to forfeiture of security are found in section 131 of the [Criminal Procedure Code](#). The Section provides;

(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)

(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.

9. Under section 131(4) it is only when the penalty is not paid and cannot be recovered by attachment and sale that the person so bound is liable to imprisonment for a term not exceeding six months. If the surety is unsuccessful in apprehending the accused, he should then be called upon to show cause why the security should not be forfeited. If at the show cause hearing, the surety fails to give a satisfactory explanation, a warrant of attachment then issues for the forfeiture of security.

10. In this case, the surety gave an explanation to the court which was not found to be satisfactory. However, the court considered that there was no benefit in keeping him in prison. This is because he was old and on treatment for his high blood pressure and diabetes. In addition, the court acted on the surety's explanation that he was unable to pay Kshs. 2,000,000 and was trying to save his land from being auctioned.



11. Importantly, courts must tender justice with mercy and I commend the trial court for reviewing the amount to Kshs. 200,000 instead of jailing him. Furthermore, this country has a robust police force that can collaborate with Interpol to ensure the respondents are apprehended within and outside our borders.
12. The upshot of the above is that I am satisfied that the trial magistrate exercised her discretion judiciously and hereby dismiss the application.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF SEPTEMBER 2024

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D. KAVEDZA

JUDGE

