



REPUBLIC OF KENYA



**Githinji v Republic (Criminal Revision E298 of 2024)
[2024] KEHC 12740 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL REVISION E298 OF 2024
RM MWONGO, J
OCTOBER 22, 2024**

BETWEEN

IRENE WAMBUI GITHINJI APPLICANT

AND

REPUBLIC RESPONDENT

*(In the Matter of Wang’uru Principal Magistrate’s Court Sexual
Offence Case No. 2 of 2020 Republic v Jackson Mureithi Thatu)*

JUDGMENT

1. The Applicant, Irene Wambui Githinji, offered herself to be the surety in CMCCSO No. 2 of 2020 *Wang’uru R v Jackson Mureithi Thatu*.
2. According to the proceedings of the lower court case, the accused was released on a bond of Kshs.70,000/=. The court stated on 22.6.2022 as follows:

“Based on report dated 18.05.2021 accused granted bond of Ks.70,000/= (seventy thousand) with one surety of similar amount since the victim has already testified.”

3. When the accused’s surety was ready, she appeared in court on 18.7.2022 and agreed to stand surety for the accused who was her brother.

She stated:

“.....Bond is Kshs. 70,000.....I wish to use log book for KCK 080 Z my vehicle. Valued at Kshs. 750,000/=”

The particulars of Surety Form show the amount of bond is Kshs. 70,000/=”



4. According to the applicant after the accused's court attendance on 9th November 2022, the accused absconded, burnt down his house and fled. He has never been traced to date. She made futile efforts to trace him, and has been attending court mentions.
5. On 14th December 2023, she says she was arrested, locked up and later released on a cash bail of 50,000/= . She was ordered to look for the accused. On 7th August 2024 the court directed her to surrender her motor vehicle No. KCK 080 Z to the OCS Wang'uru pending hearing and determination of the case or until she avails the accused.
6. I have perused the proceedings of 7th August 2024 and have confirmed that the Court stated:

“The Surety to take the vehicle to the station at Wang'uru until she avails the accused”.
7. Dissatisfied by the Court's order, and noting that she had done all she could to avail the accused, the applicant seeks to be discharged from her surety obligation by topping up the balance of 20,000/= to the cash bail paid of 50,000/= and retrieve her vehicle held as security in this case. She asserts that there is no legal basis for the Court to keep her vehicle which she uses for taxi business. She seeks that the court do review the trial court's order as urged herein.
8. An accused person is entitled under Article 49(i)(h) of the Constitution to be “released on bond or bail”. Neither bond nor bail are defined in the Constitution.
9. Sections 123- 133 of the Criminal Procedure Rules deal with provisions at to bail. From those provisions one can glean the expected court practice on them. Section 123(1) provides that an accused person whilst in custody or at any stage of the proceedings may be admitted to bail. The proviso to that section indicates that the court may, instead of taking bail from an accused person “release him on his executing a bond without sureties for his release”.
10. Section 123(2) provides for the amount of bail to be fixed and requires that such amount is reasonable and not excessive.
11. Thus, bail normally refers to an amount of money paid by or for an accused person, whilst bond refers to a recognizance.
12. Section 124 CPC introduces the term “bail bond”. The provisions is as follows:

“Before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer.”
13. My understanding of Section 124 CPC is that a person may be released either on bail or on a recognizance; that the court can order a bond for a sum determined by the court to be executed by the accused; that if the accused is released on bail the court can order a bond to be executed by one or more sureties; that the bond shall be conditional on the accused attending at the time and place mentioned on the bond until otherwise directed by the court.
14. Section 126 CPC allows for execution of a bond with or without sureties, and without deposit of any sum of money or deposit of property, in the case of a bond for good behaviour.
15. To recap, and in simple terms, bail is an amount taken from or on behalf of an accused person to secure his release; whilst bond is a document executed by the accused and or a surety by which the person



executing it commits him or herself to conditions set out by the court to secure the accused's release. A bond may incorporate or secure an amount of money or property, or in the case of a bond for good behaviour, need not to do so. A bond may be executed by an accused and or a surety who is bound by the conditions for the released of the accused.

16. Section 131 of the [CPC](#) deals comprehensively with the process and procedure for forfeiture of a recognizance. The provision is 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.
- (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) When a person who has furnished security is convicted of an offence the commission of which constitutes a breach of the conditions of his recognizance, a certified copy of the judgment of the court by which he was convicted may be used as evidence in proceedings under this section against his surety or sureties, and, if the certified copy is so used, the court shall presume that the offence was committed by him unless the contrary is proved.”

17. In essence, under Section 130 [CPC](#), recognizance becomes forfeited where it is proved to the satisfaction of the court that appearance in court has not been fulfilled, and the court may call upon any person bond by the recognizance to show cause why it should not be paid.

18. If sufficient cause is shown and the penalty is not paid the court can recover the amount of security held under the recognizance, including issuing a warrant for the attachment of property belonging to the person or his estate.

19. If the penalty is not paid and cannot be recovered order of the court to imprisonment for a term not exceeding six (6) months.

20. I have set out and discussed the foregoing provisions in some detail to contrast with the actions taken by the learned trial magistrate in the present case. The law clearly provides for forfeiture by first recovering any amount due under recognizance or bond, and if what is recovered is insufficient to meet the amount



secured, then disposal of security proceeds, and if the proceeds are insufficient, then imprisonment of the person who executed the recognisance may follow.

21. In my view the trial court is not entitled to move away from the forfeiture procedure under the CPC, and hold the surety's vehicle until the accused is located and arrested.
22. Where as in this case the surety is able to pay the penalty secured by the recognisance, that amount is sufficient for the release of any security held under the terms of the bond.

Disposition

23. In the circumstances I would allow the applicant/surety herein to pay the secured bond amount of Ksh.70,000/=, in full settlement of her obligation under the bond. Thereafter, the applicant is entitled to the release of the security which was held for the fulfilment of the obligation under the bond.
24. The application therefore succeeds and her application is allowed as prayed. The trial court's order in that regard is hereby set aside.
25. Orders accordingly.

DATED AT KERUGOYA THIS 22ND DAY OF OCTOBER, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

1. Mamba for the State
2. Mugambi for the applicant/surety
3. Mr. Murage, Court Assistant

