



**Mairura v Republic (Criminal Revision E149 of 2024)
[2024] KEHC 13516 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL REVISION E149 OF 2024
TA ODERA, J
OCTOBER 23, 2024**

BETWEEN

ROBERT ONDATI MAIRURA APPLICANT

AND

REPUBLIC RESPONDENT

(Arising from Ogembo Magistrate Court Case Number; MCSO No E125 of 2023)

RULING

Introduction

1. This Ruling relates a review application dated 1st October, 2024 filed under section 357(1) of the [CPC](#) instituted by the Applicant herein seeking the following orders.
 - a. Spent
 - b. This court be pleased to review the orders and/or conviction of the applicant to civil jail for reasons that the accused person to who he had stood as surety for had gone missing and did not appear in court
 - c. In the alternative this court be pleased to order for the release of the Applicant from Jail as the accused person was arrested on 19th September, 2024.
 - d. Any other order that this court may deem fit to grant
2. In support of the Application, the applicant averred that being a surety in Ogembo MCSO E 125 of 2023, he was condemned to serve 6 months imprisonment or in the alternative to pay a sum of Kshs. 200,000 after the accused person, who had been charged with the offense of committing an indecent act with a minor contrary to section 11(1) of the [Sexual Offenses Act](#) of 2006 failed to appear in court. As a result of the said conviction, the applicant is currently in custody. He narrated that warrants



of arrest were issued against the accused person on 10th November, 2023 after he failed to appear in court. Pursuant to the warrants, he was summoned to court on 18th September, 2024 to explain the whereabouts of the accused persons. On his arrival and despite his explanation and mitigation, the learned trial magistrate opted to convict him to serve 6 months in prison or alternatively pay a fine of Kshs. 200,000. He decried that the sentence meted upon him was harsh and the trial court did not consider his mitigation.

3. He revealed that a day after his said sentence i.e on 19.9.24, the accused person arrested and hence he urged this court in the interest of justice to review the orders of the magistrate and order for his release from jail. He decried that he is a secondary school teacher and thus he stood to lose his job should he continue being in serving the jail term.
4. The matter was heard Interpartes on 14th October, 2024 wherein the Counsel for the Applicant urged the court to allow the Application to set him free. He also informed the court that he is a teacher and was likely to lose his job if his Application was for review was not allowed. Mr. Koima left it upon the court to determine the Application.

Analysis And Determination

5. From the record of the trial court which I directed to be placed before this court to enable me make a just determination, it detailed that on 29th March, 2023 and 6th June, 2023 the accused person failed to show up in court. The Applicant herein appeared in court on both dates and informed the court that the accused person was unwell. However, on 2nd August, 2023, the accused person failed to show up again, the Applicant appeared in court with changed tune wherein he reported that accused had gone missing and he was trying to locate him. On 2nd November, 2023, when the matter was mentioned to confirm whether the accused person had been located by the surety the court noted that both accused and the Applicant were absent and thus it was forced to issue warrants of arrest against the accused person and summons to the Applicant. Similar orders were issued on 29th November, 2023, 13th December, 2023 and 22nd December, 2023 since Applicant were absent in court.
6. On 19th January, 2024 the Applicant appeared in court. He reported that he had information that that the accused person had been spotted in Eldoret but he travelled there he found that it was another person not accused. He promised to make efforts in tracing him. The court overlooked the various mention he had gone missing, indulged him and gave him yet another chance to look for the accused person.
7. On 24th April, 2024, the Applicant came to court with yet another excuse. This time round he told the court that accused person went missing on 10th January, 2024. Since the court was tired of the chain of excuses the Applicant kept on giving it granted him a last chance to produce the accused person on 24th May, 2024.
8. On 24th May, 2024, Applicant informed the court that he had tried to trace the accused person in Nairobi but he had not been able to find him. The trial court had no other option left other than to order for the Applicant to be placed in custody.
9. However, on 29th May, 2024 the trial court extended its mercy upon him and ordered for his release. The trial court proceeded to give yet another chance to enable him locate the accused person.
10. On 4th September, 2024 when the matter was mentioned, the Applicant did not show up in court and the court proceeded to issue warrants of arrest against him. On 18th September, 2024, the applicant showed up in court with the Investigating officer. He claimed that he has tried to look for the accused person in vain, he requested the court to give yet another three months to look for him. The trial court



this time round was not ready to entertain the Applicant given that since March, 2023 the Applicant had failed to produce the accused person in court and the court had indulged him severally. The trial court proceeded to sentence him to pay a fine of Kshs 200,000/= or serve 6 months imprisonment under section 131 of the *Criminal Procedure Code* which he is seeking to be reviewed by this court based on the grounds that the same were harsh and the trial court did not consider his mitigation.

11. Based on the above review of the proceedings of the trial court that gave rise to the orders that the Applicant wants this court to review, it's outright that court gave the surety enough time to look for this accused. This court takes note that applicant on the first occasion claimed that accused persons was unwell only to turn up in court and report that he had gone missing. This court equally notes that there are so many instances when the surety failed to show up in court and the court was forced to issue warrants of arrest against him. Also that on 29th May, 2024 showed mercy upon him after it had remanded him in custody and on 25th of May, 2024, ordered for his release and gave him four months to look the accused person only for him not to show up in court on the next, which was on 14th September, 2024.
12. The trial court cannot therefore be faulted for issuing adverse orders against the Applicant whom it gave a last chance on 29th May, 2024 to present the accused person after ordering for his release. Further, given that the surety entered into a cognizance with the court to avail the accused and in default he was to forfeit Kshs 200,000/= to the court or serve 6 months imprisonment. The trial court did not err in imposing the said fine as the surety was in default by failing to avail accused in court and he took the court for a ride for a long time. He cannot therefore be heard to ask this court to release him since accused has been traced while he is in custody.
13. However, taking cognizance of the fact the accused person has since been arrested and in consideration of the fact the accused person has been in custody for a period of month and that the surety/ applicant is a teacher who is in service, I am inclined to exercise some leniency by directing that he be released reviewing the fine from Kshs 200,000/= to the sum of Kshs. 50,000/= or 6 months imprisonment in default. File is closed.

It is so ordered.

T.A ODERA

JUDGE

23.10.24

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:

Koima for the State

Applicant -Present

Oigo – Court Assistant

