



REPUBLIC OF KENYA



**Wangari & others v Republic (Criminal Revision E44 of 2022)
[2023] KEHC 2478 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 2478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E44 OF 2022
JM CHIGITI, J
FEBRUARY 9, 2023**

BETWEEN

PETER WANYOIKE WANGARI & OTHERS APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application against the ORDERS of the Chief Magistrates
Court Magistrate's Court at Thika (Hon. A. Mwangi CM) issued
on 9th September, 2021 in Thika CMCR No. 4306 of 2018)*

RULING

Brief background:

1. What is before the court is the application dated October 19, 2022 filed by the applicants on October 31, 2022. It is supported by the affidavit of Peter Wanyoike Wangari dated October 19, 2022.
2. The applicants seek the following orders:
 - a. That this honourable court be pleased to review and set aside the orders of Hon A Mwangi; Chief Magistrate issued on September 9, 2021 of withdrawing Thika Criminal Case No 4306 of 2018 under Section 87 (a) of the *Criminal Procedure Code*, CAP 75 of the Laws of Kenya.
 - b. That upon review and setting aside of the orders of September 9, 2021, this honourable court be pleased to discharge the warrants of arrest issued against the applicants.
 - c. That the costs of this application be in the cause.



Analysis & Determination:

3. The applicants' case is grounds as set out in his affidavit of Peter Wanyoike Wangari where he deponed *inter alia*:
 - A. That this matter was instituted by the Respondent who charged preferred the charged of malicious damage to property contrary to Section 339 (1) of the [Penal Code](#).
 - B. That my co-applicants and I were arraigned whereby we plead not guilty to the charges and we were granted a cash bail of Kshs 30,000 for each of us.
 - C. That consequently the matter was fixed severally for hearing but it never took off.
 - D. That the last court attendance was on March 29, 2021 when we were all present for the mention but we were informed that the court was not proceeding and we were advised notices on the fresh hearing dates would be issued however, the said notices were not forthcoming.
 - E. That consequently and in our absence the matter was withdrawn under Section 87 (a) of the [Criminal Procedure Code](#) on September 9, 2021 and warrants of arrest were issued against us. Further our cash bail was forfeited to the state.
 - F. That since our attendance on March 29, 2021, we were not notified of subsequent mention and which our counsel on record came to learn on perusal of the court file.
 - G. That we are still interested in defending ourselves against the malicious damage charge but our chance to do so was denied by the arbitral withdraw of the case and the issuance of the warrants of arrest against us.
 - H. That our counsels on record advise us which we verily belief to be true that orders of September 9, 2021 went against the rules of natural justice as we were not informed of the application to withdraw the charges nor were we served with the notice to show cause why the cash bail should not be forfeited.
 - I. That further no evidence was adduced by the responded to the court to show that the Investigating Officer attempted to execute the warrants of arrest unsuccessfully as we have been within the local limits of the court.
 - J. That my counsels on record inform me that this honourable court has the power and discretion to revise the order under Section 364(1) (b) of the [Criminal Procedure Code](#), Cap 75 Laws of Kenya as the decision by the learned magistrate was not only illegal, unfair and unjust but also procedural.
 - K. That from the foregoing we therefore invite this honourable court to call for the lower court file and review, set aside the orders of September 9, 2021 and also discharge the warrants of arrest issued against us.
 - L. That from the foregoing I therefore invite this honourable court to call for the file from the lower court and declare that the decision by the learned magistrate was illegal and unprocedural and should not be allowed to stand.
4. Miss Ngesa for Republic on her part opposed the application orally. She argued that:
 - (i) The lower court file shows that the Applicants have absconded court five (5) times and there is a warrant of arrest in force.



- (ii) That the State was compelled to withdraw the Criminal Case under Section 87(a) Criminal Procedure Code, so as to rearrest the Applicants.
 - (iii) The applicants were represented by counsel.
 - (iv) They failed to act diligently.
5. The issues for determination are:
- i) Does this court have jurisdiction.
 - ii) Can the court grant the prayers sought?

6. Jurisdiction;

The Constitution at Article 165 (6) provides:

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.

168(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

Article 50 of the Constitution provides that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Article 50(2) stipulates that:

Every accused person has the right to a fair trial, which includes the right—

- a. to be presumed innocent until the contrary is proved
- b. to be informed of the charge, with sufficient detail to answer it
- c. to have adequate time and facilities to prepare a defence;
-
- (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
- (k) to adduce and challenge evidence;

Section 362 of the Criminal Procedure Code provides for the power of High Court to call for records. 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.

Section 364 (1) provides that: In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may— (b) in the case of any other order other than an order of acquittal, alter or reverse the order.



7. I have looked at the trial file Criminal Case No 4306/ 2018 *Republic v Peter Wanyoike Wangari and Others* and established that; the appellants were charged with the offence of Malicious damage to property contrary to Section 339 (1) of the *Penal code* from the charge sheet.
8. On May 28, 2021 all the accused persons failed to attend court as a result of which the court issued a warrant of arrest. The matter was there after mentioned on May 28, 2021, June 17, 2021, July 12, 2021, September 2, 2021 and September 23, 2021. Ultimately on August 9, 2021 the cash bail was forfeited.
9. On September 23, 2021 the prosecution applied for the case to be withdrawn under Section 87(a) of the *Criminal Procedure Code*.
10. Contrary to the assertion by the Applicants that the warrants of arrest of arrest were issued on September 9, 2021 the trial court record shows that the warrants of arrest were issued on February 1, 2021.
11. The record further shows that on March 1, 2021 Ms Irungu Advocate for the applicants attended court when the warrants of arrest were extended to March 29, 2021.
12. The applicants indicate that they were notified of what transpired in court after March 29, 2021.
13. The applicants argue that their counsel on record advised them which they verily believed to be true that orders of September 9, 2021 went against the rules of natural justice as they were not informed of the application to withdraw the charges nor were they served with the notice to show cause why the cash bail should not be forfeited.
14. I have come to the informed conclusion that the Applicants and counsel were aware of the directions that were issued on March 1, 2021.
15. No explanation is given as to where the applicants and counsel were from May 28, 2021 to September 23, 2021.
16. A diligent litigant who is represented and ready to defend his case should follow his court file closely so as to ensure that the prosecution machinery doesn't crash them. They cannot feign ignorance.
17. I remain cognizant of the fact that victims' rights remain offended by the dilatory conduct of the Applicants. No wonder the prosecution opted to withdraw the case under Section 87 (a) of *Criminal Procedure Code* so as to pave way for a rearrest.
18. This court is under a duty to promote access to justice which includes the rights of victims as highlighted under the *Victim Protection Act*.
19. The Court is further guided by the case of *Hendrix Waswa v. Republic* where the Supreme Court held that; *Joseph Lendrix Waswa v Republic* [2020] eKLR, where the court observed as follows with regards the role of the victim's Advocate:
 - “76. Additionally, a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accord pg. 5 with section 9(2) (a) of the Victims Protection Act, victims are assisting the trial Judge to obtain a clear picture of what happened (to them) and how they suffered, which the Judge may decide to take into account. Victim participation should meaningfully contribute to the justice process.
20. Article 50 of The *Constitution* guarantees an accused person a fair hearing right. The applicants have expressed genuine fear of rearrest.



21. I have looked into the objectives behind the sentencing policy and in particular the need to deter, punish and reform convicts. This is realized through the prosecution and conviction of criminals within the appropriate legislative framework.
22. I am persuaded that the broader interest of justice will be served if the Applicants are taken through a fair trial by giving them a chance to be heard as guaranteed under Article 50 of the Constitution.
23. In his affidavit, the applicants stated that;
 - i. That since our attendance on March 29, 2021, we were not notified of subsequent mention and which our counsel on record came to learn on perusal of the court file. The Respondent did not counter this allegation.
 - ii. That we are still interested in defending ourselves against the malicious damage charge but our chance to do so was denied by the arbitrary withdrawal of the case and the issuance of the warrants of arrest against us.
24. From the foregoing it is clear in my mind that the Applicants are keen on defending themselves.
25. No prejudice will be suffered by the Respondent if the orders sought are granted. The prosecution will get an opportunity to prosecute its case to its logical conclusion. The victims' rights will also be promoted through the fair hearing process. In any event Ms Ngesa in her argument told the court that she withdrew the case so as to pave way for purposes of hearing the case, by first rearresting the applicants.
26. In the circumstance in exercise of my discretionary power under Section 364 of the Criminal Procedure Act I allow the application dated October 19, 2022 in the following terms;
 1. The Orders of Hon A Mwangi; Chief Magistrate issued on September 9, 2021 are hereby set aside.
 2. The warrants of arrest issued against the applicants are hereby discharged.
 3. The applicants bail terms be reinstated.

DATED SIGNED AND DELIVERED VIRTUALLY AT KIAMBU THIS 9TH DAY OF FEBRUARY, 2023.

J. CHIGITI (SC)

JUDGE

In the Presence of:

Applicants present in person

For Respondent:

C/A: Nancy

