



**Ngetich v Republic (Criminal Revision 001 of 2023)  
[2023] KEHC 20155 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ITEN  
CRIMINAL REVISION 001 OF 2023  
RN NYAKUNDI, J  
JULY 13, 2023**

**BETWEEN**

**NAOMI JELAGAT NGETICH ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This is an application filed under certificate of urgency on 6/6/2023 by learned counsel Mr. Chemwok on behalf of the applicant seeking the following orders:
  1. That this application be certified urgent and service thereof be dispensed with in the first instance.
  2. That this Honourable court be pleased to stay the proceedings in Senior Principal Magistrate court at Iten, Criminal Case No. 183 of 2019 pending the hearing and determination of this application.
  3. That this Honourable Court be pleased to reinstate the bond and/or bail terms granted to the applicant in Senior Principal Magistrate Court at Iten, Criminal Case No 183 of 2019 and that she be released from custody pending the hearing and determination of this application
  4. That this Honourable Court be pleased to set aside and revise the orders issued by Hon. V. Karanja (PM) on 30<sup>th</sup> May, 2023
  5. That this Honourable Court be pleased to order that Senior Principal Magistrate court at Iten Criminal Case No 183 of 2019 be transferred to another court of competent jurisdiction for hearing and determination
2. Its expressed to be brought under Article 49 (1) (h) 50, 165 (6) and (7) of the *Constitution* as read with Section 362 and 364 of the *Criminal Procedure Code*.



3. The supporting grounds to invoke revisionary jurisdiction as pleaded in the motion comprise of the following:
- a. The applicant was charged with the offence of obtaining money by false pretense contrary to Section 313 of the Penal Code in Senior Principal Magistrate's Court at Iten, Criminal Case No. 183 of 2019.
  - b. The applicant was admitted to bond and/or bail terms by the Trial Court and throughout the proceedings in the criminal case, she has never been absent from any court proceedings without any justifiable reasons(s)
  - c. On 30<sup>th</sup> May, 2023, when the criminal case came up for ruling on whether the applicant has a case to answer, the Trial Court placed her on her defence and further made an order for her to be remanded in custody
  - d. The applicant has a right to be released on bond or bail, on reasonable conditions, pending trial unless there are compelling reasons not to be released.
  - e. The trial court made the order for the applicant to be remanded in custody without any compelling or justifiable reason and without affording her the right to be heard considering that she was not represented by counsel during the proceedings.
  - f. The criminal case is still pending full trial and the denial and/or cancellation for the applicant's bond and or bail terms without any reasons(s) is a violation of the right of the applicant to be presumed innocent until proven guilty
  - g. The order by the trial court made on 30<sup>th</sup> May 2023, constitutes a glaring error which this Honourable Court has the unfettered discretion to revise, regularize and/or correct
  - h. In circumstances, it is the interest of justice that this Honourable Court exercise supervisory and revisionary powers by setting aside and revising the order of the Trial Court made on 30<sup>th</sup> May, 2023
  - i. It is equally in the interest of justice for the applicant's bond and or bail terms to be reinstated and for her to be released from custody pending hearing and determination of this application since there are no compelling reasons for the cancellation of the same.
  - j. The criminal case is scheduled for defence hearing on 8<sup>th</sup> June, 2023 and the applicant is apprehensive that the Trial Court may proceed to make further adverse orders against her if this Honourable Court does not stay proceeding thereon pending the hearing and determination of this application.
  - k. On the basis of information received from the applicant, she is apprehensive that following the decision of the trial court to cancel her bond and/or bail terms justice may not be served to her if the criminal case proceeds for hearing and determination of the court.
  - l. This Honourable Court has supervisory jurisdiction over subordinate court to make any orders or give any direction it considers appropriate to ensure the fair administration of justice under Article 165 (6) of the Constitution of Kenya.
  - m. That it is therefore just and expedient for this Honourable Court to order that the criminal case be transferred to another court in order to ensure fair administration of justice



## Determination

4. Under Article 165, (6) & (7) of the Constitution as read simultaneously with Section 362 and 364 of the criminal procedure code. The hallmark is that any person aggrieved with the proceedings, order, decision before a magistrate court may move to High Court to exercise its supervisory and revisionary jurisdiction. The applicant being the accused person is in fact legally affected by the findings or impugned decision of the learned principal magistrate on cancellation of bond during the pendency of the criminal proceedings. She is one qualified to apply for a revision of that decision in compliance with the complied with the filed notice of motion.
5. The applicable law Article 165 (6) & (7) of the Constitution provided that:
  6. The High court has supervisory jurisdiction over the subordinate court and over any person body or authority exercising a judicial or quasi-judicial function but not over a superior court
  7. For the purpose of clause 6 the high court may call for all the record of any proceeding before any subordinate court or person, body or authority referred in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of
6. Whereas, Section 362 of the criminal procedure states as follows:

“That the high court may call for and examine the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to the correctness, legality, or propriety of any finding order, decision, recorded and as to the regularity of any proceedings of the other subordinate court”
7. Some common key provisions of the Constitution providing adequate sage quarrels to protect and individual Rights and fundamental freedoms include Article 19 (2) which states that:
  2. The purpose of recognizing and protecting human rights and fundamental freedom is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human being
8. In Article 20 (2) (3) (4) of the Constitution it says that:
  2. Every person shall enjoy the right and fundamental freedom in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom
  3. In applying a provision of Bill of Rights a court shall:
    - a. Develop the law to the extent that it does not give effect to a right of fundamental freedom and
    - b. Adopt the interpretation that most favors the enforcement of a right or fundamental freedom
  4. In the interpreting the Bill of Rights, a court tribunal or other authority shall promote
    - a. The value that underlie an open and democratic society based on human dignity, equality, equity and freedom
    - b. The spirit support and object of the Bill of Rights
9. Article 22(1) of the Constitution states as follows:



1. “ Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.”
10. In Article 24(1) of the Constitution states as follows
1. “ A right of fundamental freedom in the bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equity and freedom taking into account all relevant factors including:
    - a. The nature of the right or fundamental freedom
    - b. The importance of the purpose of the limitation
    - c. The nature and extent of the limitation
    - d. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedom of others
    - e. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose
11. In Article 27 (1) states as follows
1. “ Every person is equal before the law and has the right to equal protection and equal benefit of the law
12. In Article 29 (a) of the Constitution states that a person shall not be Deprived of freedom arbitrarily or without just cause
13. In Article 47 (1) of the Constitution states as follows “Every person has the right to administrative action tht is expeditious, efficient, lawful, reasonable and procedurally fair
14. In Article 49(1) of the Constitution states as follows:
1. An arrested person has the right:-
    - a. To be informed promptly, in language that the person understands of
      - i. The reason for the arrest
    - b. To communicate with an advocate, and other persons whose assistance is necessary  
.....
    - (h) To be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released
15. In Article 50(1) of the Constitution it states as follows:
1. “ 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.
16. A rational scheme of the procedural protections for a revisionary jurisprudence exercised by the High Court over subordinate courts and or Tribunals concerns itself with matters around these questions Whether the constitutional organ decision under Article 50(1) of the Constitution was independent, fair and impartial Whether the aggrieved party was given an opportunity to be heard



orally or in writing under Article 50 on rights to a fair hearing and tenets of natural justice. Whether the aggrieved party was aware of the issues that will affect his or her fundamental rights and freedoms in accordance with Article 19, 20, 21, 22 47,48 and 50 of the Constitution. There a number of other parasitic consideration to be taken into account in deciding an application of this nature where the High Court Revisional Powers are sought to be exercised in favour of the Applicant. Given the importance of the contextual lens such donated powers by the Constitution and the court can only be summoned when the following criterion is made. There must be a case chose The court choosing the case must be subordinate to the High Court No appeal should deceive the High Court against the choice In choosing the case the subordinate court must seem to have:

\* Exercised a jurisdiction not vested in it by law: or

\* Failed to exercise a jurisdiction vested in it by law: or

\* Acted in the exercise of its jurisdiction illegally or with material irregularity

17. The issues here will incorporate a notice of a hearing on the impugned decision and whether the aggrieved party was accorded an opportunity of legal representation of his or her choice in consonant with Article 49 (1) (c) and 50 (g) & (h) of the Constitution. The concept of natural justice implies fairness, reasonableness, equity, and equality. These canons developed over time binds every judicial officer tasked with the duty of making decisions that adversely affect the rights of private individuals. It is also true to answer the question whether the decision maker exercising jurisdiction of a subordinate court gave reasons for the impugned decision.
18. The other fundamental principles embodied in the general supervisory powers of the High Court pursuant to Article 165 (6) and (7) of the Constitution is to prevent abuse of the process of the court, to make orders for expeditious trial to ensure that substantive justice shall be administered without undue regard to technicalities. Similarly, the consideration of illegality, impropriety, uncertainty, irregularity, illegality, irrationality, error of fact and law on the face of the record within the scope of discretion purportedly exercised by the session magistrate or chairman of a tribunal. In this respect the persuasive dicta in *Hitila v Uganda* (1969) E.A 219. By the court of Appeal is of legal significance as follows  

“In exercising its power of revision, the High Court would use its wide powers in any proceedings in which it appeared that an error material to the merits of the case or involving a miscarriage of justice had occurred.

It was further held that the court could do so in any proceedings where it appeared from any record that had been called for, by the court or which had been reported for orders, or in any proceedings which had otherwise been brought to its notice.”
19. The drafters of Article 165 (6) & (7) of the Constitution, Section 362 & 364 of the criminal procedure code as expressly adverted to on Revisionary jurisdiction is only intended to correct errors or mistake on the face of the record which do not go to the merits or substance of the claim, proof of element of the offence in question or determination of the real issues formulated for determination before the session magistrate/chairman of the tribunal. In so far this record of the subordinate court is concerned, indeed it has had a chequered history. For instance the Director Public Prosecution initiated criminal proceedings of obtaining money by false pretenses contrary to section 313 of the penal code. against Enock Kangogo Kipngetch Alias David Koech Chemwetich, Joyce Jepkorir Kerich alias Dinah and Naomi Jelagat Ngetich on 13/3/2019.
20. The first phrase of the proceedings seems to have been impacted by non- attendance of accused persons and their respective counsel. The proceedings was also negatively affected for a trial to proceed on the merits by an application made by the defence to have an out of the court settlement. Indeed, it’s



also clear that from the date of 14/8/2019 several adjournments were occasioned substantially by the defence for one reason or another. It also happened at one time accused Enock Kingogo Kipgetich was involved in a Road Traffic Accident necessitating his hospitalization. As if that was not sufficient cause he finally absconded from the jurisdiction of the trial court resulting in forfeiture of his cash bail. I note that the trial magistrate admitted an amended charge to exclude the accused person and proceeded with the remaining two accused persons to finality of the trial. The hearing started in earnest though belatedly despite the muddle with the record on 28/7/2021. However, the record denotes that the process commenced at that point was far from straightforward. What was the problem? Initially, the accused persons were represented by learned counsel Mr. Magut.

21. Thereafter, the record demonstrates that the accused persons in this phase elected to act in person in absence of their legal counsel. Secondly there is no evidence of the application by the legal counsel Mr. Magut to cease acting for the accused persons to warrant self-presentation. Thirdly it is crystal clear that the first two witnesses summoned by the prosecution were cross - examined by the two accused persons. Fourth, that decision which vitiated the right to legal presentation of the accused persons under Article 50 (g) of the Constitution in the cause of the proceedings remains a mirage. In this respect it was incumbent upon the session magistrate to enter into an inquiry as whether the accused persons were still being represented by the learned counsel Mr. Magut and if not so, whether there was need for them to engage another legal counsel to take over the proceedings. It's apparent from the record that during this session the learned magistrate went ahead to decline an adjournment giving room to the DPP an opportunity to prosecute the charge against the accused persons without legal representation. It is noteworthy that the record fails to indicate whether the accused persons had elected to act in person. Nevertheless, the proceedings on 1/9/2021 proceeded without reference to the right on legal representation.
22. The succeeding proceedings also suffered a blow as one accused persons namely Joyce Jepkorir Kirui Alias Dinah also absconded and cash bail forfeited on 9/5/2022. Apparently the same accused who absconded was arrested on 11/10/2022. The 2<sup>nd</sup> accused Naomi bearer of this application was stated to be indisposed. A warrant of arrest was applied for against the accused and issued by the court on 30/11/2022. The two accused persons attended the proceedings in absence of their legal counsel. Its again right to note that the session magistrate proceeded to admit the prosecution evidence without dealing with the issue of legal Representation
23. It must be acknowledged from court record that the accused persons on this particular day proceeded to act in person. In the same vein on the scheduled date of 2/5/2023 the trial failed to take off for reason of no-attendance of the 1<sup>st</sup> accused and ill health of the 2<sup>nd</sup> accused. However, on 30/5/2023 the session magistrate proceeded with the trial without the 1<sup>st</sup> accused, and legal counsel, save for the 2<sup>nd</sup> accused in attendance and further evidence of the investigating officer was received and admitted by the court.
24. At the close of the prosecution case in this context a ruling on a case to answer was instantly made against the 2<sup>nd</sup> accused. The session magistrate then embarked to cancel the accused bail terms and remanding her in custody pending the defence hearing.
25. From the constitutional stand point as espoused in Articles 19, 20, 21, 22, 24 25 ( c ) 27, 29, 48, 49 (1) (h) and 50 of the Constitution the right to protection of the law is consistent with due process and connotes procedural fairness which invokes the concept of the rule of law. Fundamental procedural justice in any criminal proceedings is therefore at the heart of the right to a fair hearing. It accords every accused person adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power of an independent tribunal provided for in Article 50(1) of the Constitution.



The general saving power of discretion should capture the spirit of the *Constitution* as Supreme law and the law's that form the exercise of the jurisdiction of the subordinate court or tribunal.

26. What machinery is necessary and proportionate to see such mistakes or errors in exercise of discretion to a minimum, in particular when the *Constitution* organs are navigating the terrain of adjudication over criminal trials or disputes is to remember the protection and guarantees provided for in the Bill of Rights. I am of the view that the correct approach would be to exercise such jurisdiction donated by the *Constitution* and statute to give effect to a purposive interpretation of the law. That would accord the individual full measure of the fundamental rights and freedoms enshrined in the *Constitution*. This interpretation in my view at any stage of criminal proceedings should be guided by the lofty aspirations by we the Kenyan people who declared themselves to be bound on promulgation the *Constitution* 2010. I am also alive to the fact that no system of decision making of a Judge/Magistrate is perfect or infallible in the duty of judging. There is always the possibility of a judge/magistrate or the chairman of tribunal at any level may get it wrong. Clearly, our legal system being a live to that fact provided a forum for another judge/s to look at the case and check the errors or mistakes, hence the provisions of review and revisionary jurisdiction in procedural law.
27. My inclination is that courts should be astute to avoid hindrances that will deter them from interpreting the *Constitution* in a manner that is faithful to its essence and its underlying spirit. It is as I see it a matter for the subordinate courts or tribunals to exercise some degree of scrutiny in every case before making a decision which limits the enjoyment of the fundamental rights. For completeness the main flaw in this proceedings is that the session magistrate in so far as possible exercised discretion to cancel the accused bail terms without adherence to Article 10 on National values and principles of governance, Article 47 (1) on fair administrative action and Article (50) of the *Constitution* on fair trial rights. The downgrading of the right to bail of the accused person without notice and an opportunity accorded for her to be heard strongly lays bare the errors, impropriety, irregularity, and illegality of the decision in the textual of Section 362 of the criminal procedure code. The aspect of the decision to place the accused on her defence and to simultaneously cancel her right to bail without any breaches cognizable in law provided in the bond terms was at odds with the superior court jurisprudence implicit in the very structure of our constitution and applicable laws. The applicable provisions being section 123(A) of the *Criminal Procedure Code*. The other identifiable issue is the duty to give reasons for the impugned decision. There is as much a judicial duty for session judges /magistrate to give reasons in appropriate cases as there is otherwise a duty to act judiciously in every adjudication of disputes such as to hear evidence, submissions, arguments of the parties, and finally to analyze the evidence, points of determination, and render a decision.
28. It's not lost that errors may be made by a judge or magistrate on any one of these procedural parameters while directing and applying facts to the law but it is always permissible to give reasons. In the review or revisionary and appeals jurisdiction courts context the adequacy on inadequacy of the reasons which forms the basis to challenge the decision. At that point reasons distinguish a judicial decision from that made arbitrarily. In the instant case judging by the records of the trial court the decision to cancel the accused bond terms and order for her detention in prison, admittedly to attend the scheduled defence hearing appears to this court to be in excess of jurisdiction vested with the trial court. Why do I say so? It's the defect in the impugned decision on grounds of want of fair administrative action procedures which at the outset meddles the jurisdiction of the court. Exactly what was required of the trial court is to conduct a trial within a trial on the issue of cancellation of bond to make a finding on compelling reasons to limit the right in Article 49 (1) (h) of the *Constitution*. It is also clear from the above dichotomy that the accused person for over 4 years has religiously and appropriately attended the scheduled court sessions without default save for excusable and justifiable circumstances duly captured by the record. In light of the aforesaid legal position on examining the fact of present application and



reference made to the proceedings in some detail certainly there is definite inference of a likelihood of prejudice from the non observance of natural justice in making of the impugned decision. This ordains the court to issue a writ of certiorari against the impugned decision.

29. The upshot of it is that the significance of this decision is to reinstate the bond terms of the accused person pending the hearing and determination of the criminal case. In the event the trial court feels strongly that the accused detention in custody is justified under Article 49 (1) (h) of the Constitution and Section 123 (A) of the criminal procedure code must be complied with appropriately. It is therefore necessary for the accused to appear before the trial court at Iten on 18<sup>th</sup> day of July 2023 for directions and priority herein of the defence case. The referenced proceedings be concluded not later than 21 days from the orders in this ruling.

30. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT ELDORET THIS 13<sup>TH</sup> DAY OF JULY 2023**

**R. NYAKUNDI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the Presence of**

Mr. Chemwok for the Accused

Mr. Mugun for the State

Accused Present

