



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CONSTITUTIONAL REFERENCE NO. 1 OF 2019

GEORGE OTINA CHIBAYI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant herein GEORGE OTIINA CHIBAYI filed this Constitutional Reference dated 31/10/2019 seeking for orders that the surety in Kericho Chief Magistrate's Criminal Case No.2773 of 2015 be discharged unconditionally from his obligation as surety for reasons that has made enough effort to locate the Accused person.
2. Further, the Applicant is seeking for orders that this court calls for and examines the record in Kericho Chief Magistrate Criminal Case No.2773 of 2015 and issues directions in the said case on the legal parameters that are required to be taken into consideration for the withdrawal of the Applicant as surety.
3. The Application is supported by the Affidavit of ERATUS MENGE ORINA in which it is deposed that the Applicant herein stood surety for the Accused person in Kericho Magistrate's Criminal Case No.2773/2015 who has since gone missing.
4. Further, that a report was made at Huruma Police Station vide OB No.53/18/03/2018 and further a report was made of missing person in the Daily Nation Newspaper of 25/9/2018 and also in vernacular and national radio announcements but the Accused person has not been traced.
5. The Applicant has conducted the services of a private investigator to help him trace the Accused person to no avail and he has been attending court for the past one year faithfully thus incurring a lot of travel expenses.
6. The Applicant is now seeking to be relieved of his duties as surety unconditionally since he has suffered psychological torture in the quest for to locate the Accused person whom he suspect is dead and he risks losing his job.
7. The Applicant GEORGE OTINACHIBAYI also swore an affidavit dated 9/4/2019 in support of the Application in which deposed that he stood surety for the Accused person in CMCC No.2773 of 2015 of Kshs.300,000/= by depositing his payslip.
8. That on 16/3/2018 the Accused person went missing and a car he had hired was found at Kasarani Nairobi on 19/3/2018.
9. The Applicant filed a report at Huruma Police Station of missing person vide OB No.53/18/03/2018.
10. The Applicant further advertised in the Daily Newspaper dated 25/9/2018 and he further hired private investigators to help him find the Accused person to no avail.
11. The Applicant further deposed that he has been attending court faithfully and he has incurred a lot of travelling expenses from Nairobi to Kericho yet he is not the one charged in the pending case.
12. The Applicant is now seeking to be discharged unconditionally as he has suffered psychological torture in his quest to find the Accused person and he is at risk of losing his job.
13. The parties were directed to file written submissions in the Application. The Applicant filed submission dated 11/3/2021 in which he stated that ever since the Accused person in CMCC No.2773 of 2015 absconded the Applicant has been attending court faithfully and has made every effort to trace him as deposed in his Supporting Affidavit.

14. The Applicant submitted that the efforts he has made include making a missing person report to Huruma Police Station in Nairobi, making advertisement in the Daily Newspaper and local and National radio announcements and also hiring private investigators to trace the Accused person to no avail.

15. The Applicant who said he is at risk of losing his job and further that he has suffered psychological torture and has incurred a lot of expenses travelling from Nairobi to Kericho to attend court is also seeking to be unconditionally relieved of the obligation to trace the Accused person.

16. The Applicant relied on the case of **JAMES MWIKWABE WAIROGA v REPUBLIC [2020]eKLR**.

17. The Respondent did not file written submission but stated orally that the Applicant should either pay the cognizance or serve sentence for failure to avail the Accused person.

18. I have considered the Application dated 31/10/2019 together with the Affidavits in support of the same and also the written submissions filed by the Applicant's counsel.

19. It is not in dispute that the Applicant stood surety for the Accused person in CMCC No.2773 of 2015 who is now at large.

20. The Applicant has made efforts to trace the Accused person to no avail including reporting missing person, advertising in the Daily Nation Newspaper and the vernacular and National radios and also reporting at Huruma police station and hiring private investigators.

21. The Application dated 31/10/2019 is brought under Article 165 (1) and Article 23 of the Constitution of Kenya 2010 and also section 362 of the Criminal Procedure Code.

22. I find that the Applicant has not demonstrated how his constitutional rights has been violated.

23. It is the duty of the Applicant to avail the Accused person in court or to forfeit the cognizance.

24. To discharge the Applicant from his obligation would be setting a dangerous precedence whereby sureties would collude with Accused persons to defeat the ends of justice.

25. The possibility of colluding with the Accused person to evade trial cannot be ruled out.

26. I find no basis to call or examine the lower court's record.

27. I accordingly dismiss the Application dated 31/10/2019 and direct that the case proceeds before the trial court.

28. The trial court to call upon the Applicant to forfeit the entire cognizance or part thereof and in default the trial court to impose a prison sentence.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 9TH DAY OF JULY 2021.

A. N. ONGERI

JUDGE