



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION No.E333 OF 2021

MORRIS KYALO KITILI.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The application herein is a **Notice of Motion** dated **26th July, 2021**, wherein the Applicant is seeking for orders that the court be pleased to review the Ruling issued by **Hon B. Ochoi, Milimani Criminal Case No.1616 of 2017**.

2. The application is supported by the affidavit annexed thereto sworn by the Applicant on the even date.

3. The background facts of this case are that the Applicant jointly with others are facing a charge of **Stealing contrary to Section 268 (1) as read with Section 275** of the **Penal Code** in two Counts. The hearing has commenced and four (4) witnesses have been heard.

4. The Applicant who is the first accused in the case, failed to attend court on **2nd December, 2020** and a Warrant of Arrest was issued. His bond was cancelled on **7th June, 2021** and on **15th June, 2021**, **Mr. Masinde** counsel for the accused person/Applicant applied for it to be reinstated, but the same was opposed by the prosecutor. In his Ruling, the trial Magistrate declined to grant the orders sought hence this application which was disposed of orally by the parties on **1st December, 2021**.

5. In his submissions, the applicant prayed for reinstatement of his bond terms since he is suffering in custody. He submitted that he did not attend court due to COVID-19 Pandemic as he was sent away at the Law Courts gate. He also submitted that, the matter was transferred to a different court and fixed for hearing without his knowledge. It was his view that it was the Investigating Officer who was to inform him about the court dates but he failed to do so. He concluded by stating that he had been attending court from **2016 to 2019** without failure.

6. On the other hand, the Respondent, through its counsel, **M/S Joy** opposed the application by stating that the purpose of bond is to secure one's attendance in court, whenever he is required to do so. The counsel stated that the Applicant herein failed to attend court even before the pandemic, which was on **2nd December, 2020**, and by **7th June, 2021** when he was arrested, the Applicant had failed to attend court for over a year. It was her submission that one is placed on bond to secure their court attendance so that if they fail, the same should be withdrawn. She thus urged the court to dismiss the application and uphold the lower court's Ruling on cancellation of bond.

7. I have carefully considered the application, the affidavits on record and the oral submissions made by the Applicant and Respondent. I find that by his application, the Applicant has invoked this court's supervisory powers provided for under **Section 362 to 366** of the **Criminal Procedure Code**.

8. **Section 362 of the Criminal Procedure Code** provides as follows: -

“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”.

9. **Section 364** empowers the court to exercise the following powers:

(1) 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—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

10. I have perused the proceedings in **Criminal Case No.1616 of 2017**. It is noted that it is not in dispute that the Applicant was granted bail but failed to attend court from **2nd December, 2020** when he was supposed to do so. A warrant of arrest was issued and case adjourned. The Applicant was subsequently arrested in **June, 2021** following the Warrant of Arrest. In his application and affidavit, the Applicant says that he was prevented from attending court by factors such as COVID-19 Pandemic and the transfer of his case to a different court without his knowledge.

11. I wish to point out that the Applicant is expected to attend court at all times when he is required to do so. And if he is unable to attend court for any reason, either himself or his surety or a person authorized by him, must bring to the court's attention that ability to attend court and explain the reason with proof. He cannot fail to attend court and expect the court to take it casually. It is the obligation and duty of an accused person to abide by the bond terms granted by the court.

12. I have considered the application and the explanation by the Applicant of the circumstances that prevented him from attending court thus leading to cancellation of his bail. I find the explanation not quite plausible since he failed to attend court before the pandemic and there is no evidence that he was attending court to follow up on his case. The court operations resumed on time and it was in the public domain. It had to take his arrest for the Applicant to be here. Also, with regard to the case being transferred to another court, the court record shows that there is no indication that the matter had been transferred to another court.

13. I therefore find no fault in the learned Magistrate's reasoning in cancelling the Applicant's bond terms. However, in exercise of this court's discretion, I take judicial notice of the fact that the outbreak of Covid-19 and the subsequent lockdown led to a lot of interruption and scaling down of court's operations and proceed to grant the Applicant a second chance.

14. I hence allow the Applicant's application and order his bond terms before the trial court reinstated with a stern warning that he must take court attendance seriously, failure to which the bond terms will be cancelled.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 14^H DAY OF DECEMBER 2021.

D. O. CHEPKWONY

JUDGE

IN THE PRESENCE OF:

MR. MASINDE COUNSEL HOLDING BRIEF FOR MR. MUNGAI COUNSEL FOR APPLICANT

M/S AKUNJA COUNSEL FOR THE STATE

Court Assistant - Gitonga