



REPUBLIC OF KENYA



**Omolo v Republic & another (Criminal Revision E110 of 2025)
[2025] KEHC 16205 (KLR) (6 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL REVISION E110 OF 2025
DR KAVEDZA, J
NOVEMBER 6, 2025**

BETWEEN

SAMWEL AKUMU OMOLO APPLICANT

AND

REPUBLIC RESPONDENT

AND

CLARKSON ONYANGO ACCUSED

RULING

1. The applicant stood surety for the accused, Clarkson Onyango, in Kibera Chief Magistrate's Court Sexual Offence Case No. E041 of 2022. He deposited his title deed as security. The accused subsequently absconded, prompting the trial court to summon the applicant to explain the accused's whereabouts. On 18th December 2024, the applicant appeared before the court and requested additional time to trace the accused. However, instead of granting his request, the trial court ordered his detention until 23rd December 2024.
2. Aggrieved, the applicant filed a revision before the High Court in Criminal Revision No. E094 of 2024. This court which found that his detention was unlawful and set aside the impugned orders. The court further directed that the surety be released forthwith and that if the accused was not traced within six months, the trial court would be at liberty to proceed as provided under the law.
3. Subsequently, the accused was convicted in absentia on 27th February 2025, as he was never traced. On 10th September 2025, the trial court once again committed the applicant to jail for the accused's failure to attend court. Vide an application dated 8th October 2025, the applicant moved the High Court seeking revision of the said orders.



4. In his supporting affidavit, the applicant deposed that the trial magistrate failed to comply with the mandatory provisions of Section 131(1) of the Criminal Procedure Code (CPC), by not giving him an opportunity to pay the penalty or to show cause why it should not be paid before resorting to imprisonment. He averred that the decision was irregular, harsh, and excessive considering that he is a 74-year-old asthmatic who had already served two months and nineteen days in custody during the first detention, and was again in custody from 18th September 2025. He urged the court to revise and set aside the orders of the trial court. The respondent did not file a response.
5. Upon consideration of the record, the application, and the applicable law the issue for determination is whether the trial court complied with the procedure stipulated under Section 131 of the Criminal Procedure Code before ordering the imprisonment of the surety.
6. Section 131 of the Criminal Procedure Code provides as follows:
 - “(1) Whenever it is proved to the satisfaction of a court by which a recognizance under this Code has been taken, or, when the recognizance is for appearance before a court, to the satisfaction of that court, that such recognizance has been forfeited, the court shall record the grounds of proof, and may call upon any person bound by the recognizance to pay the penalty thereof, or to show cause why it should not be paid.
 - (2) 2) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable property belonging to such person, or his estate if he is dead.
 - (3) 3) If the penalty is not paid and cannot be recovered by attachment and sale, the person so bound shall be liable, by order of the court which issued the warrant, to imprisonment in civil jail for a term not exceeding six months.”
7. The wording of the above provision is explicit. It sets out a sequential process that must be observed before a surety can be committed to prison. First, the court must record the grounds of proof showing that the recognisance has been forfeited. Secondly, the surety must be called upon to either pay the penalty or show cause why it should not be paid. Only when sufficient cause is not shown and recovery by attachment and sale of property fails may the court, as a last resort, order imprisonment.
8. In the present case, the trial court did not record any proceedings demonstrating that it called upon the surety to pay the penalty. Further, the court did not initiate the recovery process through attachment and sale of the surety’s property. The applicant had deposited a title deed as security, which could have been attached in satisfaction of the recognisance. The trial court, therefore, failed to adhere to the clear statutory procedure and prematurely resorted to imprisonment.
9. The principles laid down in *John Mwanje Mutongoya v Republic* [2017] KEHC 8473 (KLR) and *John Taracha Sindikha v Republic* [2005] KEHC 1947 (KLR) reaffirm that a surety is entitled to a fair hearing before any penalty or sanction is imposed. Imprisonment is not automatic upon the accused’s failure to appear. It is only permissible after the court has exhausted all other lawful avenues of recovery. The court must exercise its discretion judiciously and in accordance with due process.
10. The decision of the trial court to imprison the applicant, initiating recovery proceedings against his land, was therefore an error in law and a violation of Section 131 of the Criminal Procedure Code. The process adopted was irregular, unjust, and amounted to a miscarriage of justice.



11. Accordingly, and pursuant to Section 131 of the Criminal Procedure Code, I find that the trial court fell in error in committing the applicant to jail. Imprisonment of a surety should be the last resort, only after all measures to recover the recognisance through attachment and sale have been exhausted. In the premises, I hereby make the following orders:

- i. The orders of the trial court dated 10th September 2025 committing the applicant to prison are hereby set aside. The applicant shall be released forthwith unless otherwise lawfully held.
- ii. A caveat be registered forthwith against the property known as Karachuonyo/Koyugi/540 by the Land Registrar, pending the determination of the forfeiture proceedings. The said property shall remain preserved, and no transfer, charge, or other dealing shall be effected thereon until further orders of the Court.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 6TH DAY OF NOVEMBER 2025

D. KAVEDZA

JUDGE

In the presence of:

Mwangale for the Applicant

Mutuma for the Respondent

Karimi Court Assistant.

