



**Republic v Rono & 2 others (Criminal Revision E470 of 2024)
[2025] KEHC 1382 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL REVISION E470 OF 2024
HI ONG’UDI, J
FEBRUARY 28, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

MESHACK RONO 1ST RESPONDENT

JOSHUA KIPKEMBOI LELEI 2ND RESPONDENT

JACKSON KIPLAGAT MANDAGO 3RD RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated 9th September, 2024 where the applicant seeks the following orders:
 - i. Spent
 - ii. That this honorable court be pleased to issue an order staying the orders of the Chief Magistrate’s Court at Nakuru (Hon Alyoce Ndege, SPM) dated 9th September, 2024 ordering the arrest of Jonathan Bii, Edwin Bett, Stephen Lelei and John Barorot who are prosecution witnesses pending the hearing and determination of this Application.
 - iii. That the High court does call for and examine the record of the proceedings of the subordinate court for purposes of satisfying itself as to the correctness, legality and/or propriety of the orders therein.
 - iv. That the court be pleased to vary and/or reverse the orders of warrants of arrest of the above stated prosecution witnesses.
2. The application is founded on the grounds on its face plus the supporting affidavit of Angeline Chinga prosecution counsel Nakuru sworn on 9th September, 2024.



3. A brief summary of the grounds and affidavit is to the effect that the prosecution witnesses, Jonathan Bii, Edwin Bett, Stephen Lelei and John Barorot had been bonded to appear and testify in Nakuru Chief Magistrate's Criminal Case No. E2050 of 2023 *Republic v Mesback Rono and 2 others* on 9th September, 2024.
4. The said witnesses did not show up in court forcing the prosecution to seek for an adjournment of the matter, and apply to court for summons for the said witnesses to appear in court.
5. That the learned trial Magistrate (Hon Aloyce Ndgege SPM) granted the adjournment and suo moto issued warrants of arrest against the said witnesses. Further that this action went against the provisions of section 145 of the [Criminal Procedure Code](#) which provides that a warrant of arrest is only issued when a witness refuses to honour a court summons. Counsel prayed for the lifting of the warrants of arrest.
6. The 1st and 2nd respondents filed a replying affidavit sworn by the 1st respondent on 25th October, 2024. He averred that under section 115 of the [Criminal Procedure Code](#) when a person bonded under the said code fails to appear the presiding officer may issue a warrant directing for the arrest of the person. Further that section 145 of the [Criminal Procedure Code](#) does not bar the issuance of a warrant of arrest.
7. Reference was also made to section 53 of the [National Police Act](#) on failure to obey a bond to attend court. He deponed that as an accused person he has as right under Article 50 of the [Constitution](#) to a fair trial and unreasonable delay is a denial of that right. The respondents therefore argue that there should be no interference by this court in the proceedings before the trial court.
8. Parties canvassed the application by written submissions.

Applicant's submissions

9. These are dated 13th November, 2024 and were filed by M/s Emma Okok the principal prosecution counsel. Counsel referred to Article 165 (6) and (7) of the [Constitution](#) which gives the High Court revisionary and supervisory powers over various bodies. She further referred to section 362 of the [Criminal Procedure Code](#) which gives the High Court power to call for and examine the record of any criminal proceedings. It is therefore her argument that this court has powers to entertain this application.
10. On the issuance of summons and warrants by the court, counsel relied on sections 144 – 146 of the [Criminal Procedure Code](#) and the case of [Republic v Cornelius Turgut Chobo & 2 others](#) [2019] eKLR. She thus argues that a warrant of arrest can only be issued after a witness has failed to obey the summons issued by the court. In the current case counsel submitted that the trial Magistrate did not follow the proper procedure by issuing warrants of arrest when there was no disobedience of any court summons. She was however aware that the warrants of arrest against the said witnesses had been lifted.

1st and 2nd respondents' submissions

11. The same were filed by Limo & Njoroge advocates and are dated 29th November, 2024. Counsel identified two issues for determination. On whether the lower court erred in issuing warrants of arrest following the breach of a bond of attendance by the prosecution witnesses, counsel answered in the negative. He pointed out that the said witnesses had been bonded to attend court for hearing of the criminal case on 9th September, 2024 but they did not. No reasons were given for their non-attendance. He thus supported the issuance of the warrants of arrest then.



12. While relying on Articles 50 (2) (e) and 159 (2) (b) of the *Constitution of Kenya* and the case of *Charo Karisa Salimu v Republic* [2016] KECA, counsel submitted that matters must be heard without unreasonable delay. He added that the case before the lower court had attracted a lot of public interest as it involved more than 180 victims hence the need to deal with it expeditiously. Reference was made to the case of *Law Society of Kenya v Attorney General & another; National Commission for Human Rights and another (interested parties)* 2020 eKLR. Referring to section 115 of the *Criminal Procedure Code* he contended that this application is baseless and of no consequence as it seeks prayers contrary to the primary law that guides all criminal matters including this matter.
13. On the second issue he submitted that the applicant is not entitled to the prayers sought because the same had been overtaken by events, and was thus an abuse of the court process. Reference was made to the case of *Graham Rioba Sagwe & 2 others v Fina Bank Ltd & 5 others* [2017] eKLR.

3rd respondent's submissions

14. These were filed by Kibungei & company advocates and are dated 23rd January 2025. Counsel gave a summary of the facts of the case. He argued that the lower court had lifted the warrant of arrest and proceeded with the hearing of the case. He further submitted that the guiding principle for issuance of warrants of arrest for breach of bond terms is section 115 of the *Criminal Procedure Code*. He added that the said section 115 allows for the arrest of a person who has breached a bond, unless there is sufficient cause or explanation for failure to attend court when bonded.
15. It was his submission that section 145 of the *Criminal Procedure code* does not precede section 115 of the *Criminal Procedure Code* before issuance of warrant of arrest. Further that the court has the power to issue warrants of arrest at any time where a witness bonded has failed to appear in court and there is no sufficient cause for such failure. It is therefore his submission that the lower court did not err in issuing the warrants it did.
16. Finally, on whether this court should issue the orders sought counsel submitted that it should not as that would amount to inference with the lower court. Further that the said orders had been overtaken by events.

Analysis and Determination

17. I have carefully considered the application, affidavits and the submissions of all the parties. The main issue I find falling for determination is whether the application herein is merited.
18. In answering this I will deal with three (3) issues namely:
 - i. Whether this court can call a lower court file to examine it
 - ii. Whether the lower court erred in issuing the warrants of arrest against the prosecution witnesses on 9th September, 2024
 - iii. Whether this court should grant the orders sought by the prosecution
19. On whether this court has the power to call for a file from the lower court for purposes of examining the record this is provided for under the law. Article 165 (6) and (7) of the *Constitution* provide as follows:
 - (6) 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.



- (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.
20. Additionally, section 362 of the *Criminal Procedure Code* provides:
- “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”.
21. This is done under the High court’s supervisory jurisdiction or on application by a party that is aggrieved as is the case here.

Issue No. 2 Whether the lower court erred in issuing the warrants of arrest

22. There is no dispute that the prosecution bonded five (5) witnesses who were to testify on 9th September, 2024 but they did not appear. They had been bonded on 20th August, 2024. The copies of bonds were shown to the court and the court was satisfied they had been bonded.
23. It is also not disputed that the witnesses had before this date not honoured bonds served on them by the prosecution. When this happens, the prosecution has no option but to apply for an adjournment, apply for summons or warrant of arrest or close its case.
24. The question then is what a trial court is expected to do in such circumstances. Is the presiding officer barred from issuing a warrant of arrest? Section 115 *Criminal Procedure Code* is very clear on this. A witness bonded to attend court is bound to do so. If the person does not appear then, the Magistrate or Judge may issue a warrant of arrest. The word used here is “may” which means its discretionary. Witnesses in criminal cases are bonded by the police and/or prosecution to attend court and testify. When they fail to attend court, they make it difficult for the court to proceed with the case and/or even finalize it. This kind of scenario affects the accused person/persons.
25. Section 145 of the *Criminal Procedure Code* deals with instances where the court has issued summons for court attendances and the witness fails to comply. The court once satisfied that the witness was served and the witness had failed to attend court will issue a warrant of arrest. That was the scenario in the case of *Republic v Cornelius Turgut Chobo & 2 others* (*supra*). This was a murder case and the ODPP claimed to have bonded two witnesses who had refused to attend court. The court declined to issue warrants of arrest because there was no proof of service of summons requiring attendance. Further it was not indicated whether the ODPP provided evidence of the witnesses having been bonded, or not.
26. In the matter before me the trial Magistrate was satisfied that the witnesses had been bonded as confirmed by the prosecution. The bonds issued were placed before the court. Further the absence of these witnesses had happened more than twice. The learned trial Magistrate who was incharge of the proceedings had to take necessary action so as not to cause uncalled for delay in the matter. He thus applied section 115 of the *Criminal Procedure Code*.
27. The *Criminal Procedure Code* nowhere states that section 145 of the *Criminal Procedure code* overrides section 115 of the same *Act*. Additionally, it is nowhere written that the court summons are superior to police bonds or bonds from the ODPP. All these form a commitment which must be complied with by those called to attend court. Non-compliance calls for action by the court.



28. Finally witnesses bonded or summoned must learn to communicate with the investigating officers, prosecution or lawyers to inform them of any challenges they may be facing which would make them not attend court. The lines of communication are many.
29. My last word on this would be that it is the Magistrate or Judge handling a criminal matter that is better placed to handle a matter such as this since they know the people they are dealing with and how to deal with them. In this case the trial court knew who the witnesses were and how they had been avoiding coming to court. The warrants of arrest were lifted not long after their issuance and within a short time the evidence of the said witnesses was taken.
30. My finding is that the trial court acted within the law and there was nothing wrong with what he did. Directing the court only to issue warrants of arrest after summons have been issued would be interfering with the exercise of the discretion of Magistrates and Judges and tying them to section 145 of the Criminal Procedure Code when section 115 of the Criminal Procedure Code also exists and is functional.
31. The upshot is that the application dated 9th September, 2024 lacks merit and is dismissed.
32. Orders accordingly

DELIVERED VIRTUALLY DATED AND SIGNED THIS 28TH DAY OF FEBRUARY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

