



REPUBLIC OF KENYA



KENYA LAW
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**Wairagu v Republic (Criminal Revision E001 of 2024)
[2024] KEHC 579 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E001 OF 2024
FR OLEL, J
JANUARY 31, 2024**

BETWEEN

DUNCAN KABURU WAIRAGU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The applicant did file an application dated 4th January 2024 under Article 49(1) of *the constitution* of Kenya 2010, seeking that this court be pleased to abridge the cash bail of Kshs.100,000/= to a more level-headed amount. The applicant chose to rely on the affidavit supporting his application, where he did deposed that he was arrested and charged with the offence of obtaining contrary to section 313 of the penal code and had been given bond with a surety, which his kinsman stood in for him by depositing a car logbook, but after some time withdrew the same.
2. Prior to withdrawal by the surety, he had religiously attended court and was therefore not a flight risk. The applicant thus urged this court to reduce the bond terms/cash bail to a lower more equitable amount of less than Kshs.100,000/= to enable him enjoy his rights as enshrine under Article 49(i)(h) of *the constitution* of Kenya 2010.
3. This application was opposed by the state/prosecution counsel, who stressed that initially the appellant had been given bond of Kshs.300,000/= which was reviewed downwards to a more affordable amount of Kshs.100,000/=. The applicant had a surety who stood in for him and he was released, but eventually the said surety withdrew and the applicant was sent back to remand. The applicant if dissatisfied with the review of his bond terms ought to have appealed as against the said review, but it was not open for him to file a second review application before the high court.



4. To that extent the applicant had wrongly moved court and the court lacked jurisdiction to entertain the application as filed. The Respondent thus urged this court to dismiss this review Application.

B. Analysis of Law

5. I have considered the application as well as the response by the Prosecution counsel.
6. The powers of the High court in revision are contained in Section 362 through to 366 of the [Criminal Procedure Code](#) (cap.75). Section 362 specifically 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”.

7. What the High Court can do under its revision jurisdiction is stated under Section 364 of the [Criminal Procedure Code](#) Cap 75, which states as follows: -

“(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 section 354, 357 and 358, and may enhance sentence;

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

(2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through 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.

(3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

8. The applicant has been charged before the trial court with eleven (11) counts of various offences, which include making a document without Authority contrary to Section 357(a) of the [penal code](#), uttering a false document contrary to Section 353 of the penal code and obtaining money by false pretense contrary to section 313 of the penal code. From the court proceedings, it can be deduced that the applicant was granted bond of Ksh.300,000/= with a surety of a similar amount on 02.11.202.



This bond terms were later reviewed and pushed downwards to Ksh.100,000/= with one surety on 07.02.2022.

9. The applicant was subsequently released after securing a surety, who pledged his Motor vehicle KCR 816B. On 30th October 2023, the said surety applied to withdraw his security, which application was allowed by court and the applicant remanded back in custody. The applicant being dissatisfied with the obtaining position has opted to move this court and seek a review of bond terms and requests that it be reduced further to enable him secure bail/bond on more fairer terms.
10. Section 364(5) of the *Criminal Procedure Code* provided that ;

“When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”
11. The applicant cannot directly apply to this court for a review of bond terms, where he had an option to appeal against the decision to grant him bond of Kshs.100,000/= with one surety. He enjoyed the said terms for over one year and was released, before his surety withdrew from standing in for him. The law expressly prohibits this cause of action.
12. The Supreme Court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* (2012) eKLR stated as follows: -

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law”

Disposition

13. The Application dated 4th January 2023, has no legal legs to stand on so to speak and is hopelessly incompetent. It is therefore dismissed.
14. It is hereby so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 31ST DAY OF JANUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 31ST DAY OF JANUARY, 2024

In the presence of: -

Applicant present from Machakos Prison

Mr. Mongare for Respondent

Sam Court Assistant

