



Gandhi v Republic; UBA Bank Kenya Limited (Interested Party) (Miscellaneous Criminal Application E369 of 2022) [2023] KEHC 20755 (KLR) (Crim) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20755 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E369 OF 2022
DR KAVEDZA, J
JULY 27, 2023**

BETWEEN

SATYA BHAMA GANDHI APPLICANT

AND

REPUBLIC RESPONDENT

AND

UBA BANK KENYA LIMITED INTERESTED PARTY

(Being an application for revision of the orders issued by Hon. C.K Mwaniki on 28th September 2022 at Kibera Chief Magistrate's Court Criminal Case No. 4029 of 2015 Republic vs Satya Bhama Gandhi)

RULING

1. The application for determination is a notice of motion dated 6th December 2023 which is made pursuant to sections 362 and 364 of the Criminal Procedure Code (Cap 75) Laws of Kenya, Articles 29, 39 & 50 of the Constitution of Kenya, and all other enabling provisions of the law. The applicant sought orders to set aside the orders of the subordinate court issued on 28th September 2022 issuing a warrant of arrest against her.
2. The application is premised on the grounds on the face thereof which are reiterated in the supporting affidavit sworn by the applicant. The averments made are that, the applicant is an accused before the Magistrates court at Kibera where she is facing three counts of the offence of obtaining money by false pretenses contrary to section 313 of the Penal Code (Cap 63) Laws of Kenya. Since the trial commenced in 2015, only one witness has testified. She stated that she suffers from acute hypertension and bipolar disorder and has been in and out of hospital since the outbreak of the covid-19 pandemic. On 27th



September 2021, when the matter came up for hearing, she was not able to attend court due to illness and the trial court sought documents evincing the illness. On 1st December 2021 and 8th February 2022, the case did not proceed due to the absence of the police file and the indisposition of the prosecution counsel respectively.

3. On 17th March 2022, the applicant was not able to attend court due to an illness. The court directed the prosecution to undertake a verification of the claims of the illness and report back on 25th April 2022. However, the court did not sit on the said date. On 28th September 2022, the prosecution informed the court that it was unable to receive verification of the applicant's illness. The trial court proceeded to issue a warrant of arrest against her. This is despite the fact that the applicant's counsel forgot to carry the verification documents to the court. She is apprehensive that she will be arrested anytime as the warrant of arrest is still in force. Further, the case against her has not been heard and determined in reasonable time violating his rights to a fair trial. She urged the court to grant the orders sought.
4. In response, the interested party filed a replying affidavit dated 13th March 2023, sworn by Micky Matheka the Company Secretary. He contended that the case against the applicant has been delayed due to the pendency of a Constitutional Petition and Judicial Review proceedings before the High Court challenging her prosecution. In addition, the applicant has on numerous occasions sought adjournments and has thus contributed to the delay. That the interested party continues to suffer due to the delay in concluding the case against the applicant. He urged the court to dismiss the application and order trial to be heard and determined to its logical conclusion.

Applicant's written submissions.

5. The applicant through Mr. Mare learned counsel submitted that a warrant of arrest against the applicant was issued without the court verifying the claim of illness. In addition, the trial court violated the applicant's rights to a fair trial by insisting on prosecuting the case without sufficient evidence and failing to conclude the case in reasonable time. Counsel submitted that this court has supervisory jurisdiction to grant to orders sought. He cited the case of *Raymond Kipchirchir Cheruiyot & Another vs Republic* [2021] eKLR in support of the position.

Respondent's written submissions.

6. Mr. Mutuma learned prosecution counsel submitted that in criminal proceedings the accused must be present in court unless leave is granted. That bail is issued to ensure the attendance of an accused. On 28th September 2022, when the applicant failed to attend court, the prosecution applied for a warrant of arrest against her which was issued. He submitted that the trial court correctly, legally, and properly issued the warrant of arrest which is still in force.
7. It was further submitted that the applicant's right to a fair trial has not been violated. This is due to her absence in court and the trial could not proceed. He urged the court to dismiss the application for lacking merit.

Issues for determination.

8. Having considered the application, the response, the written submissions and the applicable law, the issue for determination is whether this court should revise the orders of the trial court issued.

Analysis and determination.

9. 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.

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. It is clear from the foregoing that the jurisdiction of this court in revision is somehow restricted. All the court has to do is to satisfy 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’.
11. The question which this court has to consider is the correctness, legality or propriety and/or the regularity of the order and proceedings impugned. It is clear from the record that on 28th September 2022, the case against the applicant was earmarked for hearing. The applicant neither attended nor sent a representative on her behalf. The trial court issued a warrant of arrest against her upon application by the prosecution. It is this warrant of arrest that the applicant is challenging.
12. From the record, the applicant failed to attend court on 07.07.2020, 23.09.2020, 12.10.2020, 11.12.2020, 25.01.2021, 12.04.2021, 14.6.2021, 23.08.2021, and on 27.10.2021. During this period of absence, the accused/applicant was represented by an advocate who informed the court of her illness. On 27th October 2021, the trial court directed the applicant to avail documentary evidence of her illness. The evidence was produced on 01.12.2021 and the court deemed it satisfactory. On 08.02.2022 and 17.03.2022, the applicant failed to attend court. The reason advanced by her advocate was that she was unwell. The trial court directed that she avails evidence of the illness occasioning the failure to attend court. On 01.09.2022 and 28.09.2022 the documentary evidence was not produced. In addition, the applicant failed to attend court. subsequently, a warrant of arrest was issued. The same was extended on 23.11.2022 and is still in force.
13. The above recapitulation of the events in this case is relevant to this revision request. The record shows that prior to the day the accused absconded, she had attended court as required. When she failed to do so, she provided reasons and was represented by an advocate. I need to emphasize, however that it is the duty of the accused to attend court at all times as required. And, if she fails to so appear, she must provide sufficient and plausible reason for her absence, failure to which she must be brought under a warrant of arrest, have her bond cancelled or sureties summoned and or cash bail forfeited. Previous and regular attendances in court does not excuse or licence subsequent non-attendances.
14. In my view therefore, the warrant of arrest was issued in proper exercise of discretion by the trial magistrate. In the circumstances, the applicant ought to have presented herself before the court as



soon as possible to explain to the trial court the reason for her non-attendance, and of course with appropriate and relevant documents to support her illness. Such diligent acts would have persuaded the court to lift the warrant of arrest. Had she done so, she would have been granted an opportunity to explain herself to the court, and in the event that the court found her explanation to be satisfactory, the court would be duty bound to review its orders accordingly. Surprisingly, she has not attended the court to explain the violation of the bond terms, and she is now before me pleading that she is apprehensive of being brought before the trial court under the compulsion of the warrant of arrest. The conduct of the applicant after the issuance of the warrant of arrest does not depict a person who is keen to attend court.

15. In the upshot, I find that the impugned decision by the trial court was legal, correct and in accordance with the law. The application dated 6th December 2022 is dismissed for lacking in merit.

It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JULY 2023.

D. KAVEDZA

JUDGE

In the presence of:

Ms. Chege for the State

Mr. Angaya for the Applicant

Habiba C/A

