



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**CRIMINAL REVISION NO 88 OF 2019**

**JOHANA KIBE MWANGI.....ACCUSED**

**AND**

**ISAAC NJUGUNA MWAURA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(A revision from the decision of the trial magistrate in Engineer PMCC No 466 of 2014)*

**JUDGMENT**

1. There is only one issue for determination in this revision application: Whether the trial court properly found the applicant, who had posted bail for the accused, is duty bound to pay the bail money he had bound himself to pay in circumstances where the accused escaped from police custody in respect of another case.
2. The applicant bound himself to pay Kshs 500,000/- as a surety for the accused – who had been charged with defilement – in Engineer PMCC No XXX of 2014. The trial in the lower court commenced, and the accused turned up at the hearings. After the fourth prosecution witnesses testified, the accused failed to turn up in court on 20/6/2016, and a warrant of arrest was issued. The record shows that summons were also issued for the applicant, as surety. He eventually showed up in court on 29/7/2016.
3. He explained that the accused had been arrested in connection with another offence, that he spoke to him where he was held at Kipipiri police station, but that the accused had escaped from the cells on the night of 23/24<sup>th</sup> May 2016; that despite his enquiries, he could not procure the attendance of the accused from the hands of the police; and that he did all he could including visiting the senior officers of the police at Kipipiri Police station. He stated that he was not culpable for the disappearance of the accused, and sought to be discharged as a surety.
4. The trial court ruled on 17/8/2016 that the applicant was duty bound as surety to ensure the accused attended court; that until the accused was found and arrested, the surety could not be discharged. The accused's warrant of arrest remained in force, and court mentions continued until 2019.
5. On 4/7/2019 the surety was asked to show cause why the bond should not be executed. His response, in essence, was that the accused had attended court until his arrest; that the accused had disappeared from police custody; that he had no control over what happened. The prosecution stated that the court had earlier ruled that the applicant was still responsible as surety; that the police had sought to trace the accused with no success; and that the security should be forfeited.
6. The court ruled on 22/7/2019 that the accused was still at large despite a warrant of arrest since 20/6/2016. That the trial court had earlier ruled that the applicant's responsibility as surety persists until the accused is arrested; that the ruling had never been appealed or reviewed; and that the case would be mentioned every two months to enable the police and the applicant trace the accused; and that:

***“For the avoidance of doubt, I wish to state that if it gets to a point where it is established that the warrant of arrest cannot be executed, this court will have no choice but to make appropriate orders against the surety as it is provided under the law”***

7. In this review the applicant argues through counsel that the accused was placed in custody pursuant to an order of the court in another matter in **Crim Misc No 32 of 2016**; that that implied the duty of the surety had been relieved; and that the accused was under the mercies of the state when he escaped from police custody; that the applicant had no control in the circumstances; and that placing the burden on the applicant is prejudicial and unfair.

8. Further the applicant pointed out that while the Bail and Bond Guidelines 2015 provide that the security put up by the surety can be forfeited if the accused fails to appear in court, it would be difficult in this case for the surety to ensure attendance when the accused had been incarcerated; that the applicant had no control over the accused, and the disappearance occurred from police custody. The applicant seeks that the ruling of the trial court be set aside and that the surety be discharged unconditionally.

9. The prosecution submitted that the procedure in these circumstances is as set out in **Section 131** of the **Criminal Procedure Code**: that if it is proved to the satisfaction of the court that the recognizance for appearance in court has been forfeited, the court merely records the grounds and may call for the person bound by the recognizance to pay the penalty thereof, or show cause why it should not be paid.

10. The prosecution submitted that when an accused absconded a trial, all that was required was that it be shown that the trial court had followed the correct procedure under **Section 131** of the **Criminal Procedure Code** to recover the security from the person who had bound himself as recognizance; that the authorities are clear that the superior courts are concerned with the procedure; and that it is only when the correct procedure had not been followed that the appellate courts faulted the trial court.

11. The DPP relied on the following authorities: **Criminal Revision No 1 of 2019 Isaac Mwetish Chematia v Rep [2019] eKLR** where Wendoh J listed the steps to be taken as follows: the court should first summon the surety to show cause why he cannot produce the accused or pay the recognizance; if he fails then the court can be given reasonable time to trace the accused; if he failed the court can call on the surety to forfeit the sum he bound himself to forfeit; if the surety failed to pay then the next option is attachment of his property( sec 131(4); if attachment failed the last option open to the court is to imprison the applicant for six months.

12. In **John Mwanje Mutongoya v Republic [2017] eKLR**: Sitati J found that the procedure had not been correctly followed; set aside the lower court's decision and substituted it as follows:

***“10. Having examined the lower court record, and having found that the trial court took the wrong step in remanding the applicant in the first instance, and considering the powers conferred upon me by the provisions of Section 364 of the CPC and after hearing the submission by counsel, I make the following orders:-***

***1. The order made by the learned trial Magistrate on 30.01.2017 be and is hereby set aside.***

***2. The applicant shall by 1.00pm on Friday 17.02.2017 pay the sum of Kshs.200,000/= (shillings two hundred thousand only) UNLESS by the said time, he produces the accused person before the trial court or shows sufficient cause why the penalty shall not have been paid by the said date and time”***

13. **Section 131 (1) to (5) of the Criminal Procedure Code** provides:-

***“(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 the 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) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover it by issuing a warrant for the attachment and sale of the movable property belonging to that person, or his estate if he is dead.***

***(3) A warrant may be executed within the local limits of the jurisdiction of the court which issued it; and it shall authorize the attachment and sale of the movable property belonging to the person without those limits, when endorsed by a magistrate within the local limits of whose jurisdiction the property is found.***

***(4) 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 for a term not exceeding six months.***

***(5) The court may remit a portion of the penalty mentioned and enforce payment in part only.”***

14. Having carefully examined the lower court's record, I do not see any hint of illegality or mis-procedure in the way the trial court has conducted the surety process vis a vis the applicant. The mandate of the High Court in a case brought for revision under **section 362** of the CPC, enables it to peruse the subordinate court record and to exercise its discretion:

***“...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 courts.***

15. In my view, the concern by the applicant that the accused was in police custody in connection with another case at the time he escaped, is a red herring concern. It makes the need for a surety all the more responsible for the accused persons conduct. The whole purpose of a court requiring a surety, and the responsibility of undertaking to be a surety, is that irrespective of the circumstances, the surety undertakes to

ensure that the accused person is available to attend court. That is to say, that the business of the court is to ensure the expeditious administration of justice for the common good of the state; and that such administration is effective only if promises made are kept; that if not kept the system breaks down.

16. If it had been argued by the applicant that after the police took the accused into custody in respect of the other matter, or he had thereby been terminated or exiled by force of the state, the court could in such circumstances discharge the surety.

17. In this case, the court finds no reason to interfere with the trial court's proceedings, and the matter is referred back to the trial court to complete the steps and procedures commenced under **Section 131** of the **Criminal Procedure Code**.

18. Orders accordingly.

**DATED AND DELIVERED AT NAIVASHA THIS 25TH DAY OF FEBRURY, 2022.**

---

**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Makori holding brief for Karanja for the Applicant
2. Ms Maingi for the Respondent
3. Court Clerk - Kamau