



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**REVISION NO. E036 OF 2020**

**NELSON KIEMA KITHEKA .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. Learned Counsel Mr. Muumbi for the Applicant has presented a request for revision orders vide a letter dated 21/12/2020 brought pursuant to the provisions of Section 131, 132, 362, 364 of the Criminal Procedure Code and Article 165 (3), (6) and (7) of the Constitution. The case for the Applicant is as follows:-

- (i) That he had stood as surety for one Nicholas Mutinda Musyimi who is the accused in Mavoko CM Criminal Case (Sexual Offence) No.20 of 2019 and that he had deposited his logbook for motor vehicle registration No. KBA 484 K as security.*
- (ii) That the accused later absconded court and he was thus summoned to avail him but unfortunately he was unable to trace him whereupon the trial court on 17/12/2020 sentenced him to serve a three month imprisonment.*
- (iii) That due to the foregoing, he has suffered prejudice and now presents his complaint against the trial court as follows:*
  - (a) That the trial court did not comply with the procedure for forfeiture set out under section 131 of the Criminal Procedure Code as the surety was not heard or given any notice of forfeiture.*
  - (b) The court should not have jailed the surety unless the security was first forfeited and was not adequate to cater for the fine and he was unable to pay for any shortfall.*
  - (c) The court should have first sought to forfeit the security which it is holding.*
  - (d) The surety was not given a chance to pay the fine in form of the sum he stood as surety being the penalty having his vehicle forfeited.*
  - (e) The trial court should not have jailed the surety when he had not declined to pay any penalty which should come first.*
  - (f) The court did not make any order as to what will happen to the motor vehicle deposited as security and which the police intent to auction as he cannot serve a jail term and at the same time have his motor vehicle auctioned which amounts to double punishment which is illegal.*
  - (g) The orders negate the essence of a surety depositing security for bond.*

2. Learned counsel for the Applicant sought for the following reliefs namely:-

- (a) The court do suspend the sentence meted upon the surety/Applicant on 17/12/2020 pending the hearing of the revision application.*
- (b) The court do grant bond to the Applicant and order that the Surety/Applicant be released from prison forthwith pending the hearing of this revision application.*
- (c) That the court do order the security deposited by the surety in the trial court do act as sufficient security for bond.*

*(d) The court do stay any further proceedings in the lower court including the intended forfeiture of motor vehicle registration KBA 484 K deposited as security with the court pending the hearing of this revision application.*

*(e) The court do set aside the orders of the trial court made on 17/12/2020 and order that the procedure for forfeiture as provided for under section 131 of the Criminal Procedure Code.*

*(f) The court do grant the surety more time to look for the accused and the police be ordered to assist him trace the said accused before the court can resort to the procedure for forfeiture.*

*(g) Any other order this court deems appropriate.*

At the exparte stage the court granted some interim reliefs pending interparte hearing of the revision application.

3. Miss Njeru learned counsel for the Respondent indicated that they are not opposed to the request for revision since the procedure was not followed correctly by the trial court.

4. I have considered the request for revision by the Applicant and the relevant statutory provisions guiding the same. The power of revision donated to this court is vide section 362 and 364 of the Criminal Procedure Code as well as Article 165 (6) of the Constitution and which provides as follows:-

**Section 362 of the Criminal Procedure Code:-**

*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 subordinate court.*

**Section 364 (1) (b) of the Criminal Procedure Code:**

*In the case of a proceeding in a subordinate court the record of which has been reported for orders, or which otherwise comes to its knowledge, the High Court may – in the case of any other order other than an order of acquittal, alter or reverse the order.*

Article 165 (6) of the Constitution gives the High Court supervisory jurisdiction over subordinate courts as follows:-

*“There is established a High Court which –*

*(a) ..... has supervisory jurisdiction over the subordinate courts and over person, body or authority, exercising a judicial or quasi-judicial function but not over a superior court.”*

Going by the above provisions of the law, I am satisfied that the Applicant herein has properly approached the court for the requisite relief. From the averments and complaints raised in the Applicant’s Advocate’s letter dated 21/12/2020 it is clear that the Applicant was not accorded a fair trial before he was hauled to jail for three (3) months. The Applicant having been a surety to an accused who had jumped bail and having deposited security for the release of the said accused was entitled to be given notice to show cause why his said property should not be forfeited upon the failure of the accused to appear in court and that in the event of non- forfeiture of the property he was to pay up the sums pledged in the bond and failing which he would then be sent to prison for a term not exceeding six (6) months. It seems the trial court did not follow this procedure which is provided for under Section 131 of the Criminal Procedure Code. The same is 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 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 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 those 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 (6) months.*

Further section 132 of the said Criminal Procedure Code provides as follows:-

*“All orders passed under section 131 by a Magistrate shall be appealable to and may be revised by the High court.”*

I have perused the lower court proceedings dated 17/12/2020 and note that the Applicant herein briefed the court on the efforts he was making in tracing the accused who was still at large. The court prosecutor was of the view that the Applicant needed the help of the

investigating officer who was to team up with him in tracking the accused. However, the Learned Trial Magistrate summarily ordered him to pay a fine of Kshs.500,000/- or in default to serve three (3) months imprisonment. Obviously, the Applicant had not expected the turn of events and was not prepared with any such money and thus ended up in jail. He has now through his counsel raised a germane issue namely that he had earlier offered his vehicle as security and which the trial court has ignored yet the same could have been forfeited instead of sending him to jail. It is apparent that the trial court did not follow the proper procedure regarding the matter in question. As the Applicant had deposited his security with the court, he ought to have been given a notice to show cause why the said security should not be forfeited. If no such cause is shown then the trial court could then proceed to issue a warrant of attachment and sale of the said security. It is only after the court fails to realize the sale that it can proceed to order the surety to be imprisoned for a term not exceeding six (6) months. In the present case the Applicant who has been fined Kshs.500,000/= or serve three (3) months imprisonment is asking the question “**what then becomes of his security still deposited with the court?**” This question leads me to come to the conclusion that there was some irregularity or propriety of the lower court proceedings conducted on the 17/12/2020 leading to the imprisonment of the Applicant. It seems the trial court jumped the gun by resorting to the tail end procedure provided by section 131 of the Criminal Procedure Code instead of going step by step. This calls for revision of those orders.

5. Form the record of the trial court the laid down procedures under section 131 of the Criminal Procedure Code seems not to have been followed by the trial court thereby warranting interference by this court. The Applicant was not given a hearing before the order was made and who has thereby suffered prejudice.

6. In view of the foregoing observations, it is my finding that the Applicant’s Revision Application dated 21/12/2020 has merit. The same is allowed in terms of prayer (E). The trial court’s orders made on 17/12/2020 are hereby set aside and that the trial is directed to adhere to the procedure for forfeiture as provided for under section 131 of the Criminal Procedure Code upon the surety failing to avail the accused person to court.

It is so ordered.

Dated and delivered at **Machakos** this **21<sup>st</sup>** day of **January, 2021**.

**D. K. Kemei**

**Judge**