



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 5 OF 2020**

**ALVIN JUMA OMOLLO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the Ruling of Hon H.M. Nyaberi (SPM) delivered at Winam in Criminal Miscellaneous Case No 661 of 2018 on 1<sup>st</sup> October 2019)**

**JUDGMENT**

**INTRODUCTION**

1. In his decision of 1<sup>st</sup> October 2019, the Trial Court, Hon H. M. Nyaberi, Senior Principal Magistrate, found that the Appellant herein failed to play his role as a surety for one Ibrahim Oluoch alias Justice an accused person in **Winam Criminal Case No 636 of 2018, 661 of 2018, 662 of 2018 and 735 of 2018**. The Trial Court ruled that the Appellant should take responsibility in all the matters that he stood as a surety for the Accused person and consequently ordered that:-

- a. In Criminal Case No 636/2018, the surety was to pay the bond amount Kshs 100,000/= or in default to serve six (6) months in prison.**
- b. In Criminal Case No 661/2018, the surety was to pay bond amount Kshs 200,000/= or in default to serve six months in prison.**
- c. In Criminal Case No 662/2018, the surety was to pay bond amount Kshs 200,000/= or in default to serve six (6) months in prison.**
- d. In Criminal Case No 735/2018, the surety was to pay bond amount Kshs 200,000/- or in default to serve six (6) months in prison.**

2. Being aggrieved by the said decision, on 10<sup>th</sup> February 2020, the Appellant filed his Petition of Appeal dated 10<sup>th</sup> December 2019 which set out four (4) grounds of appeal.

3. He filed undated Amended Grounds of Appeal and Written Submissions on 19<sup>th</sup> August 2020. However, on 16<sup>th</sup> March 2021, his counsel filed further Written Submissions dated 15<sup>th</sup> March 2021. The Respondent's Written Submissions were dated 30<sup>th</sup> March 2021 and filed on 15<sup>th</sup> April 2021.

4. Parties relied on their respective Written Submissions which they relied upon in their entirety. The judgment herein is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

5. The Appellant submitted that the Trial Court failed to follow the procedure provided in Section 131(1) of the Criminal Procedure Code without first initiating show cause proceedings against him. He relied on the case of **Dickson Kimathi vs R [2014] eKLR** in which it was held that no forfeiture could be legally made before giving an opportunity to the surety to show cause why the forfeiture should not be made.

6. He argued that the object of Section 131 of the Criminal Procedure Code was not to punish or jail sureties but to ensure that all efforts were made to avail accused persons to court. He pointed out that the use of warrants to obtain his presence was excessive for the reason that there was no evidence that he had been summoned to court and failed to honour court summons. He was emphatic that jailing of a surety

should only be used as a last resort.

7. He pointed out that the court ought to have summoned him to notify him of the attendance by the 1<sup>st</sup> Accused who first absconded from court from 28<sup>th</sup> March 2019. He also averred that warrants of arrest were issued against him on 2<sup>nd</sup> April 2019 yet he had not been summoned to attend court. He contended that he could not have traced the whereabouts of the Accused person while he was in jail from 8<sup>th</sup> May 2019 to 6<sup>th</sup> June 2019. The matter was subsequently fixed for mention on 7<sup>th</sup> September 2019.

8. He added that the matter was recalled on 12<sup>th</sup> September 2019 as 7<sup>th</sup> September 2019 was a Saturday but that instead of being summoned on 12<sup>th</sup> September 2019, the Trial Court issued warrants of arrest against him. The Trial Court took the view that the warrants of arrest issued previously were still live. He attended court on 30<sup>th</sup> September 2019.

9. He submitted that having deposited his pay slip to court as security, the court ought to have moved to actualise warrants of attachment and sale of his moveable property as provided in Section 131 (2) of the Criminal Procedure Code.

10. He also took issue that the sentence was made to run consecutively rather than concurrently so that in effect he served in excess of the six(6) months provided under Section 131 of the Criminal Procedure Code, which was then, an illegal sentence.

11. He argued further that he was imprisoned by the Trial court on 1<sup>st</sup> October 2019 when the matter was listed for a mention and the court further confirmed the sentence at a mention on 31<sup>st</sup> October 2019. He argued that this was inappropriate and relied on the cases of **Amos Muthinja Mutua vs R [2007] eKLR and Penginepo Hassan Kuvua vs R Criminal Appeal No 131 of 2004** (eKLR citation not provided) where it was held that a mention of a case was not the same thing as a trial of the case “where orders were made mentions” (sic).

12. On its part, the State opposed the Appeal. It argued that witness summons and warrant of arrests were issued by the court against the surety and were executed and the Appellant presented in court and given an opportunity to explain the whereabouts of the Accused person and that following his failure to satisfy the court, he was ordered to forfeit the bond amount of Kshs 100,000/= in default to serve six (6) months imprisonment.

13. It further added that on 6<sup>th</sup> June 2019, the Trial Court reviewed its orders and allowed the Appellant to look for the Accused person. However, upon being released, the Appellant never brought any report to court nor presented himself.

14. It pointed out that the Trial Court was in order in having made the orders of forfeiture of the bail and that Section 131(1) of the Criminal Procedure Code was satisfied as it gives the court two ways in which trial for forfeiture of bond terms may be made; one way being the right to call upon any person bound by the recognizance to pay the penalty thereof and the right to show cause.

15. It added that the Appellant having been given a second chance to find the Accused person but failing to give back a report to court, then there were justifiable reasons to have had the bond terms forfeited by the Trial Court. It urged this court to dismiss this Appeal.

16. Section 131 Criminal Procedure Code Cap 75 (Laws of Kenya) provides 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 (emphasis court) 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.**

**6. When a person who has furnished security is convicted of an offence the commission of which constitutes a breach of the conditions of his recognizance, a certified copy of the judgment of the court by which he was convicted may be used as evidence in proceedings under this section against his surety or sureties, and, if the certified copy is so used, the court shall presume that the offence was committed by him unless the contrary is proved.”**

17. This court was in agreement with the State that under Section 131 of the Criminal Procedure Code, the court gives two (2) options which are:

**1. To call upon any person bound by a cognizance to pay the penalty thereof; or**

**2. Call upon the person to show cause why the cognizance should not be paid.**

18. A perusal of the court record shows that the Appellant honoured the court summons that were issued against him on 28<sup>th</sup> February 2019 and attended court on 14<sup>th</sup> March 2019. The purpose was to explain why the Accused person had not attended court. The Learned Magistrate gave him time to look for him. The Appellant attended court on 8<sup>th</sup> May 2019 and 30<sup>th</sup> May 2019 and requested for more time to trace the whereabouts of the said Accused person.

19. On 30<sup>th</sup> September 2019, the Appellant was remanded in custody and on 1<sup>st</sup> October 2019, he was directed to pay bond amounts as aforesaid and/or in default to serve the imprisonments in all the cases he had stood surety for the Accused person. The orders were suspended for one (1) month on condition that he was released on a bond of Kshs 700,000/= with one (1) surety of like amount.

20. The Appellant was released and on 22<sup>nd</sup> October 2019, he attended court and informed the Trial Court that he had travelled to Mombasa but never traced the Accused person. His request for more time was extended and the matter set down for mention on 31<sup>st</sup> October 2019. On this day, although the Prosecutor did not object to the Appellant being granted more time to look for the Accused person, the Trial Court rejected the request and directed that the suspended would take effect with effect from that date.

21. This court appreciated that the Trial Court gave the Appellant ample time to produce the Accused person. However, having failed to produce the said Accused person, the Trial Court could have called the Appellant to pay the penalty thereof, or to show cause why it should not be paid. A key word in Section 131 (1) of the Criminal Procedure Code is “**may**”. This implied that it was not mandatory for the Trial Court to have forfeited the bond.

22. Further, upon the Appellant not having availed the Accused person and the Appellant failed to pay the penalty, the Trial Court could have ordered for attachment of the Appellant’s property under Section 131(2) of Criminal Procedure Code. In this case, the Appellant had produced his pay slip as security and hence the Trial Court could have ordered its forfeiture. The Trial Court could only have exercised the last option to imprison the Appellant for six (6) months if the forfeiture could not be realised from the attachment of his property. The Trial Court also had the option of ordering that the Appellant remit a portion of the penalty aforementioned and enforce payment in part only.

23. Having considered the proceedings, this court came to the firm conclusion that the Appellant was not given a fair hearing as provided under the law and consequently, the orders granted were inappropriate and hence illegal. The Trial Court went for the last option instead of giving the Appellant the opportunity to show cause why the security could not be forfeited or to forfeit the security by way of attachment. The process for enforcing the penalty was clearly irregular and unlawful.

24. Turning to the issue of the sentence, the court had due regard to Section 7 (1) (a) of the Criminal Procedure Code which stipulates that:-

**“A subordinate court of the first class held by:-**

**A chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.”**

25. Further, in the case **Peter Mbugua Kabui vs Republic[2016] eKLR**, the Court of Appeal addressed its mind to the question of concurrent and consecutive sentences when it stated as follows:-

**“In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice. As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.”**

26. The fact that the Appellant had stood surety for the Accused person in several cases did not negate the fact that the maximum sentence he ought to have served was six (6) months in the event he did not avail the Accused person before the Trial Court. Indeed, Section 131 (4) of the Criminal Procedure Code does not qualify the fact that the term of six (6) years could be exceeded where the surety had furnished security for several cases. Indeed, he stood surety for the Accused in several cases that were being handled together.

27. This court was in agreement with the Appellant that the Trial Court erred when it did not expressly order that the sentences run concurrently. The sentences ran consecutively thus contravening the provisions of Section 131 (4) of the Criminal Procedure Code that the Appellant could only have served imprisonment for a term not exceeding six (6) months. Having been released from prison on 3<sup>rd</sup> March 2021, any time after the six (6) months stipulated by the law was clearly illegal, unlawful and had no legal basis.

## **DISPOSTION**

28. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 10<sup>th</sup> February 2020 was successful and the same be and is hereby allowed. The effect of this is that the orders that were made by the Learned Magistrate on 1<sup>st</sup> October 2019 and confirmed on 31<sup>st</sup> October 2019 in respect of **Criminal Case No 636/2018, Criminal Case No 661/2018, Criminal Case No 662/2018** and **Criminal Case No 735/2018** be and are hereby set aside for being having been illegal and having no basis in law whatsoever.

29. This court is alive to the fact that the Appellant has already served the full term of the sentence that was imposed on him by the Trial

Court, having been released on 3<sup>rd</sup> March 2021. Despite this having been a very unfortunate case, this court is unable to pronounce itself further on this issue as the same was not subject matter of the Appeal herein.

30. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JUNE 2021**

**J. KAMAU**

**JUDGE**