



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 43 OF 2017

[FORMERLY ELDORET HCCRA NO. 9 OF 2014]

BENSON MIRKISSI KOMOLKOL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the Ruling of the Principal Magistrate's Court at Kabarnet in Criminal Case NO. 87 of 2013 delivered on 27th January 2014 by Hon. E. Bett, SRM]

JUDGMENT

Introduction

1. This appeal is important as it raises, albeit obliquely, the issue of the impropriety and practical problems that arise from the practice of government officers standing surety for the bail of accused person's in criminal cases. The trial court convicted the sureties in this following the failure of the accused to attend having found that the explanation as to the death of the accused given by the sureties was false as follows:

“REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE' S COURT AT KABARNET

CRIMINAL CASE NO. 87 OF 2013

REP V. NYAKORI ACHALE

RULING

On the 6th March 2013 one Nyakori Achale was arraigned in court faced with a charge of robbery with violence. On the 8th of March 2013 the accused was admitted to a bond of Ksh.200,000/- with two sureties of a similar amount. Later, on the 20th March 2013 Lomutongole Joshua Yatta and Benson Mirkissi Komolkol were approved to stand surety for the accused. When the trial commenced, the accused faithfully attended court until the 27th of May 2013 when he absconded. The court summons were subsequently issued to the two sureties to come to court and explain the whereabouts of the accused or produce him in court.

On the 5th of June 2013 the two sureties appeared in court and alleged that the accused was killed after Turkana raiders attacked his village. They however did not have a death certificate to prove this point and the court gave them time to avail one. The sureties would on the 19th June 2013 appear in court and produced a death certificate in respect of the accused.

The court owing to the seriousness of the charge decided to investigate the matter and this time summoned the registrar of births and death Baringo to shed light into the matter.

On the 19th of July 2013, one Evans Kiplangat, deputy registrar of birth and deaths appeared in court and told the court that the death certificate originated from their office, further to confirm death of the subject, they relied on a letter from the chief; one Joseph Yatta and also a signal from the in charge of Administration police officers Kolowa. The in charge of A.P Kolowa was also summoned to shed light on the matter and according to him he did not see the body of the accused and only relied on information supplied to him

by chief Yatta Joseph and Benson mirkissi; the sureties in this matter. The two sureties have now approached the court seeking that they be discharged as sureties on account of the alleged demise of the accused person

Before proceeding to do so the court has to satisfy itself that indeed the accused passed on as alleged by this two sureties.

Ordinarily a death certificate would be conclusive proof of a person death. However there are issues raised in this case which greatly raise doubts on the accused death and the authenticity of the death certificate.

Firstly it ought to be noted that the issuance and production of the death certificate was prompted by the court. When the two sureties appeared before me on 5th of June, I made it clear that in the absence of a death certificate the court would not accept the sureties' contention that the accused passed on. It is this action that prompted them to rush to the registrar of birth on the 14th of June 2013 and obtain death certificate. Interestingly, as per by the registrar of death testimony in court, he relied on information from chief yatta and the in charge A.P officers Kilowa to ascertain death. The said chief Yatta is the 1st surety. When this chief appeared in court he was categorical that he did not see the body of the accused as it was left in the bush. As for the in charge of A.P officers Kolowa, he says in his signal that the accused body was taken away for burial by members of the pokot community. He also says he did not see the body.

Clearly the sources of information through which the registrar of births and deaths relied on are contradictory; one says the body was removed by members of the Pokot

community for burial and the other says the body was left behind at the scene of war.

But of concern and most important to note is that none of the sources of this information was the accused body

What is apparent from the foregoing is that the alleged death of the accused and the produced death certificate are a creation of the two sureties in collusion with the accused person, so purposely choreographed to ensure the accused escapes the hearing of the matter and the possibility of a death penalty should he be convicted.

Accordingly for their failure to produce the accused person herein I order that the two sureties do deposit a sum of Kshs.200,000 each within 30 days from the date hereof.

I would also wish to caution the Registrar of Births and Deaths Baringo and staff working under him that such incidents where certificates of birth or deaths are issued under suspicious or fraudulent circumstances shall not be tolerated in future. This court has noted with concern a number of Births and certificates issued by that office irregularly and notably obtained with the sole purpose of defeating justice. A copy of this ruling be served on the said Registrar.”

The Appeal

2. The appellant raised principally the 3 issues in his grounds of appeal in urging that the proceedings of the trial court was a nullity in Submissions dated 13th February 2020 as follows:

- a. The learned magistrate gave a biased ruling condemning the appellant without any investigation done to prove wrong the appellants that the accused was dead.
- b. The role of the investigation and prosecution of crime lies with the police and the DPP and the court and that in the particular proceedings the appellant's right to fair hearing and trial were violated, citing **Joseph Nduvi v. R** (2019) eKLR, (Odunga, J).
- c. There was no evidence of fraud as to the procurement of the death certificate making it invalid.

3. The appellant's protest is really against the proceedings which the trial court adopted to investigate the validity of the death certificate and using its finding of invalidity thereof to convict the surety without giving the appellant an opportunity to be heard upon a charge thereon and imposing on them a fine of Ksh.200,000/- for failure to produce the accused.

The facts of the case

4. The facts of the case are well set out in the written Submissions dated 30th April 2020 by the DPP as follows:

“The appeal is NOT opposed.

The appellant herein was the 2nd surety to the accused one Nyakori Achole who was facing charges of Robbery with violence contrary to section 296 (2) of the Penal Code in Criminal case no. 87/2013 at Kabarnet Law courts. The court in the above case granted the accused a bond of Kshs. 200,000 with two sureties of the same amount. The appellant herein stood as the 2nd surety for the accused and surrendered his payslip to court as he was the chief of Lokis location. He also stated that the accused was his grandson. The 1st surety to the accused person was one Lomotongole Joshua Yatta who is deceased. He also surrendered his payslip as he was the chief, Ngolol location. He stated that the accused was his cousin.

Trial commenced on 23rd April 2013 and a total of 5 witnesses testified in this matter before the accused disappeared. Warrants of arrest were issued for the accused and summons issued to the sureties. The sureties appeared in court on 5th June 2013 and informed court that the accused was shot and died on 20th May 2013 in a raid where his son also died and his cows stolen. It is at this point that the court ordered the sureties to produce a death certificate to prove the death of the deceased.

A death certificate was produced in court by the sureties on 19th June 2013. The said birth certificate was issued after the court ordered that the same be produced which raised issues of authenticity of the same.

The Deputy registrar of birth and deaths was summoned to court and appeared on 19th July 2013. He confirmed that the certificate of death before court was from their office. He testified that in issuing the same they relied on the information they got from administration police officers from Koloa and from two chiefs who were the sureties in the case. The police and the sureties however further testified that they did not see the body of the deceased. The court concluded that the sureties may have colluded with the accused to perpetrate the escape of the accused. The court also concluded that the said birth certificate was obtained fraudulently as the right procedure was not followed. The two sureties were ordered to deposit in court a sum of Ksh. 200,000 each within 30 days for failure to produce the accused. This order was the subject of this appeal.

I have looked at the evidence on record and the circumstances that led to the appellant standing surety for the accused and the disappearance of the accused person. The sureties herein were chiefs when they stood as sureties for the accused. This caused a conflict of interest especially when they were the same people that had to prove that the accused was dead as they were also relatives of the accused. I find that the court and the prosecution were at fault by allowing the sureties in their position as chiefs to stand surety for an accused in court as they were the same people expected to assist the court in case the accused disappeared. The sureties herein obtained a death certificate after court ordered for the same. However, it was not conclusive evidence that the accused had died as it was not obtained through the right procedure.

I note with a lot of concern that although the court and the prosecution was doubtful that the accused was dead, the sureties insisted that he was. It was therefore the duty of the prosecution to prove that the accused was not dead and that the sureties were lying. The prosecution was not able to prove that. Secondly through experience from prosecuting matters from the area where the accused and the sureties come from, I note that the Pokot community do not follow up on death certificates or even postmortem on dead bodies. The reason why the sureties did not have any document to prove the death of the accused person. All said and done it is my view that the appellant herein should be given the benefit of doubt subject to discretion of court.

I urge court to allow this appeal.

DATED at KABARNET this 30th day of April 2020

ESTHER MACHARIA

ASSISTANT DIRECTOR OF PUBLIC PROSECUTIONS

FOR: DIRECTOR OF PUBLIC PROSECUTIONS.”

5. The appellant urged the court to grant reliefs as follows:

“i) Allow the appeal and

ii) Quash and or set aside the lower court’s ruling for the payment of Ksh.200,000.”

Determination

Proceedings against and conviction of surety a nullity

6. The court is satisfied as urged by the DPP that the evidential duty of proof to show that the sureties had lied to the court that the accused was dead, and this having not been done the conviction of the sureties was improper and a nullity. With respect, the ensuing order even if the surety were not able to produce the accused is one of forfeiture of the bond security or cash deposit. There is no offence for which a conviction could flow upon being found guilty. All that happened was that there was failure to comply with terms of a bond or cash bail security, whose remedy if forfeiture not conviction and punishment for any offence. The principle of *nullum crimen sine lege nulla poena sine lege*, that there can be no crime committed without a law and no punishment imposed without a law, which is entrenched in the principle of legality under Article 50 (2) (n) of the Constitution of Kenya 2010 in terms that a person should not be convicted for an act that was not an offence under Kenyan or international law, applies with something of compelling force here. There is no known offence against a surety, in the words of the trial court, **“for their failure to produce the accused person herein”** for trial; only a breach of conditions of security bond whose sanction is self-contained in the forfeiture of the security. The appellants ought to have been required to meet the terms of their surety bond.

7. The trial court’s finding of collusion and creation of a death certificate is a conviction for offences in making a false document and uttering for which they were not formally charged. If it were considered that the appellants may have committed offences under the law on registration of deaths of persons and or the Penal Code, they should have been so charged in a trial were they could defend themselves in accordance with the **unlimitable** constitutional right to fair trial under Article 25 of the Constitution.

8. The trial court's proceedings against the appellants, well intended and without malice though they might have been, and the resulting conviction were a nullity and must be quashed, and the orders for the deposit of what was clearly a fine of Ksh.200,000/-, therefore, set aside.

Public officers standing surety in criminal trial objectionable

9. The court takes this opportunity to reiterate the objectionable conduct of government officers in such capacity standing surety for accused persons in view of likely embarrassment it causes in the event of the accused absconding and the surety therefore being called upon to produce the accused, or forfeit his property used as security for the attendance of the accused or face other undesirable coercive measures against such government officers to compel compliance with the terms of the bond.

Breach of Ethics and Abuse of office

10. The court also notes that the two sureties both chiefs for different areas - Ngolol location and Lokis location - would appear to have abused the authority of their public offices in standing surety for bail pending trial of the accused who was respectively a grandson and a cousin to the 1st surety (deceased) and the 2nd surety, the appellant herein. **However, as they were never charged with any offences against ethics or for abuse of office under the Public Officer Ethics Act, the Leadership and Integrity Act or the Penal Code, the court shall say no more than that public officers must in their official duties steer away from situations which amount, or could potentially lead, to conflict of interest. Public officers should not use their public office to solve personal problems or to acquire or confer private benefit for themselves or any other person.**

Summary allowance of appeal

11. Had the DPP earlier intimated in writing the non-support of the appeal as now urged in the written submissions filed herein in reply to the appellants' submissions, the court might have been able to consider and summarily allow the appeal, without calling on the appellant to urge his appeal, pursuant to section 352A of the Criminal Procedure Code which provides as follows:

"352A. Summary allowance of Appeal

Where an appeal against conviction has been lodged and **a judge of the High Court is satisfied that the conviction cannot be supported, and the Director of Public Prosecutions has informed the court in writing that he does not support the conviction, the judge may summarily allow the appeal.**

[Act No. 17 of 1967, s. 34, Act No. 12 of 2012, Sch.]"

12. Such avenue of the DPP intimating no-opposition to an appeal in good time may lead to early decisions on appeals, and it must be recommended for invocation in appropriate case as a method of expeditious determination of cases contemplated under Article 159 (2) (d) of the Constitution. Of course, nothing is lost by the appellant if **summary** allowance of the appeal is not granted, as the appeal would then be heard in the usual way.

Orders.

13. Accordingly, for the reasons set out above, the court makes the following orders:

- 1. The Proceedings of the trial court relating to the investigation as to the death of the accused herein and consequent conviction and punishment of the appellants as sureties of the accused for failure to produce the accused for his trial are a nullity.**
- 2. The conviction of the appellants/sureties for failure to produce the accused in Criminal Case No.87 of 2013, R v. Nyakori Achale is quashed and the order for the deposit of Ksh.200,000/- set aside.**
- 3. Any security deposit for bail pending this appeal shall be discharged and returned to the depositor.**

Order accordingly.

DATED AND DELIVERED THIS 29TH DAY OF MAY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kipkulei, Advocate instructed by M/S Tarus & Co. Advocates for the Accused.

Ms. Macharia, Ass. DPP for the Respondent.