



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL REVISION NO.1 OF 2019

(Originating from Nyahururu CMCR.SOA.75 of 2018 before Hon. S. Mwangi (SRM))

ISAAC MWETISH CHEMATIA.....APPLICANT

- V E R S U S -

REPUBLIC.....RESPONDENT

R U L I N G

The Notice of Motion dated 13/2/2019 is expressed to be brought under Section 131, 362 and 364 of the Criminal Procedure Code, Articles 165(6) and 7, 157(6)(c) and (9), (11), Article 50(1) and 159 of the Constitution.

The applicant, **Isaac Mwetish Chematia** prays that this court do call for and examine the record in Chief Magistrate's Court Criminal Case (SOA) No.75 of 2018 and revise, review and set aside the proceedings for 1/2/2019 committing the applicant to 6 months imprisonment.

The background of this case is that the applicant stood surety for an accused, **Moses Chematia Tutei**, who was charged with the offence of attempted defilement contrary to Section 9(1) of the Sexual Offences Act. The accused was granted bond of Kshs.150,000/= with one surety of the same amount.

The matter came up for hearing on 3/9/2018 but the prosecution sought an adjournment to 26/11/2018 but the accused did not appear on that date. A warrant of arrest was issued against accused and a request that the Probation Officer prepare a report on how the surety could be traced. The applicant was arrested on 19/12/2019 and presented to court on 24/12/2019 when the court directed that he be remanded at Thomson Falls Prison till 4/1/2019. On 4/1/2019, the applicant applied to be allowed time to look for the accused and asked to be allowed to pay the security sum, that is, Kshs.150,000/= but he was further remanded till 18/1/2019. Because the magistrate was unwell, the matter was adjourned to 1/2/2019, when the applicant was directed to pay the Kshs.150,000/= or be imprisoned for 6 months. He was allowed time till 11.56 a.m. failing which he was committed to prison. He denied ever having been summoned to court or having been given an opportunity to explain the whereabouts of the accused; that since he was detained from 19/12/2018, he could not have been able to look for the accused and it is his contention that the provisions of Section 131 Criminal Procedure Code were not complied with.

The application was opposed through a replying affidavit sworn by Mr. Jeremiah Maroro learned counsel for the State who confirmed that on 26/11/2018 the accused in Criminal Case No.75/2018 failed to attend court and the Probation Officer was asked to file a pre-bail report on how the surety could be traced; that the surety was availed in court on 24/12/2018 and the matter put off till 4/1/2019 when he failed to explain where the accused was; that the applicant committed himself to pay the Kshs.150,000/= security which he failed to do and was therefore sentenced to 6 months in default.

I have considered the application and submissions of counsel. The trial court is said to have flouted Section 131 Criminal Procedure Code which provides as follows:

“Section 131

(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.

(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.”

Under Section 131, the court has two 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.

The record shows that when the accused failed to attend court on 26/11/2018, the court never invited the applicant, who is the surety through a summons, to explain why he could not produce the accused or pay the recognizance. The purpose of bail is to ensure that an accused attends the court for hearing or mention as is required of him. The first duty of the surety is therefore to ensure that an accused attends court as is required of him.

Instead of issuing summons to the applicant, the court straight away issued a warrant of arrest for the surety's arrest which in my view was irregular.

The warrant of arrest was executed and the applicant was presented to court on 24/12/2018. The record shows that he was then remanded at Thomson Falls until 4/1/2019. He was not allowed to address the court or given time to explain the whereabouts of the accused.

On 4/1/2019 when the applicant requested to be given time to trace the accused or pay the cognizance, instead he was remanded again. I wonder how the court expected the applicant to trace the accused or even raise the money when he was locked up in remand.

In my view, the court failed to give the applicant an opportunity to produce the accused and totally failed to follow the procedure provided under Section 131(1) Criminal Procedure Code.

The court should have first summoned the surety to show cause why he cannot produce accused or pay the recognizance and allow him time to look for accused.

If the appellant was given reasonable time to trace accused and he failed, then the court would have called upon the applicant to forfeit the sum he bound himself to forfeit if he did not avail the accused.

If the applicant failed to pay within the time stipulated, then the next option was attachment of his property under Section 131(4) Criminal Procedure Code.

It is only if attachment failed that the court would have exercised the last option to imprison the applicant for 6 months. The court jumped the gun by sending the applicant to prison before following the steps provided under Section 131 Criminal Procedure Code. The applicant was not given a fair hearing as required. This court invokes its supervisory powers under Section 165(6) of Constitution and revision powers under Section 364 of the Criminal Procedure Code and makes the following Orders:

(1) The order made by the trial magistrate on 1/2/2019 sentencing the applicant to 6 months imprisonment be and is hereby set aside;

(2) The applicant shall by 4/4/2019 at noon, pay the sum of Kshs.150,000/= (One Hundred and Fifty Thousand Shillings 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;

(3) If the orders above are not obeyed, then sale of applicant's movable property shall issue without further reference to the court.

Mention before the trial court on 4/4/2019.

Delivered, Signed and Dated at NYAHURURU this 29th day of March, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for State

Mr. Nderitu holding brief for Ms. Muriithi for applicant

Soi – Court Assistant

Applicant - present