



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION CASE NO. 6 OF 2019

MORRISON NJURURI NYAGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

A. Introduction

1. This is a revision brought under Section 362 and 364 of the Criminal Procedure Code. It seeks for revision orders in regard to the ruling of the Senior Principal Magistrate Runyenjes in Criminal Case No. 566 of 2016 with a view of reinstating the bond of the applicant.
2. The background facts are that the applicant jointly with another was facing a charge of conspiracy to defraud contrary to Section 317 of the Penal Code. The hearing has commenced and five (5) witnesses have been heard. The applicant who is the first accused in the criminal case failed to attend court on and a warrant of arrest was issued and bond cancelled until the determination of the matter.
3. On 20/02/2019, the applicant presented himself in court with treatment notes. The counsel prayed for lifting of the warrant of arrest before another magistrate other than the trial magistrate who was not sitting on the material day.
4. The magistrate directed that the applicant makes the application before the trial magistrate the following day.
5. On 21/2/2019 the application to lift the warrant of arrest was made before the trial magistrate but was vehemently opposed by the prosecutor. In her ruling, the trial magistrate declined to grant the orders sought.
6. In this application, the applicant avers that he was not given a right of hearing and that his rights of being represented by an advocate of his choice were violated in that the court gave a hearing date of 18/03/2019 and ordered that the case would proceed in the absence of the advocate. The said date is not convenient to the advocate for he is engaged elsewhere.
7. The applicant states he was unwell on 13/02/2019 when he failed to attend court and was on bedrest prescribed by his doctor. He states that on the material day, his advocate informed the court that the applicant was indisposed and sought adjournment. A warrant of arrest was issued and bond cancelled by the court without hearing the applicant.
8. The applicant states that he went to court on two occasions with his advocate and found that the magistrate was not sitting.
9. It is further averred that the plea by the applicant's advocate to change the date was dismissed by the magistrate.
10. The respondent in its replying affidavit sworn by the prosecution opposed the application on ground that the trial magistrate was not to blame. Further that the advocate did not avail himself in court on 13/02/2019 to explain to the court that his client was sick. That the case had been adjourned previously which influenced the decision of the trial magistrate to issue the warrant of arrest and cancel bond.
11. It was also argued that this matter does not fall under Section 362 of the Criminal Procedure Code and thus not suitable for revision.
12. The right to Bail is discretionary according to the respondent and therefore, the magistrate did not make any error in cancelling bond.
13. **Section 362 of the Criminal Procedure Code** provides as follows: -

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 such subordinate court.

14. **Section 364** empowers the court to exercise the following powers:

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

15. I have perused the proceedings in Criminal Case No. 66 of 2016. It is noted that the applicant failed to attend court on 19/06/2017 when the case was coming for hearing. A warrant of arrest was issued and case adjourned. The magistrate noted that it was the final adjournment. The prosecution had two (2) witnesses present in court, one of them from Kiganjo in Nyeri.

16. On 30/06/2017 the applicant attended court with his advocate who presented treatment notes which were accepted by the court and warrant of arrest was lifted.

17. On 13/02/2019, the applicant was absent for the 2nd time during a hearing. His advocate was absent too without any explanation. The court issued a warrant of arrest and cancelled bond. It was ordered that the applicant remains in custody till disposal of the case.

18. The argument of the defence is that the applicant was not given a chance to be heard. In this regard, my view is that the advocate should have attended court since it was a hearing date and the date was take I his presence which means it was convenient to him. It was wrong for the advocate to skip court attendance and not even send a representative if he had a challenge.

19. As for the accused, there was not even a relative sent to court to say that he was unwell. The magistrate cancelled the bond on that day. However, the law gives the applicant the right to be heard before his bond is cancelled. Although it was a second time of absence, the trial magistrate ought to have issued a warrant of arrest but await the next mention for the applicant to give an explanation for not attending court.

20. It is my considered view that the applicant ought to have been heard before cancellation of the bond.

21. On 21/02/2019 the accused was present. The applicant's counsel applied for lifting of warrant of arrest and for reinstatement of bond and presented the treatment notes. The prosecution opposed the application arguing that it was the second time of absence for the accused and that witnesses had travelled from far on the 13/02/2019 and rejected the treatment notes as unacceptable since they lacked critical details and dismissed the application.

22. I have looked at the said letter dated 12/02/2019 by one Kezia R.C.O. and not that it lacks clarity on what illness the applicant was suffering from and its extent. It bears the stamp and letter head of County Medical Centre Embu Ltd but it leaves a lot to be desired.

23. For this reason, I am of the view that the trial magistrate had a sufficient reason to doubt the authenticity of the document.

24. For the reason that the applicant was not given a chance to be heard before the cancellation of bond, I will hold the application as merited. I therefore set aside the orders for warrant of arrest and cancellation of bond.

25. The bond of the applicant is hereby reinstated to the original terms.

26. He is hereby ordered to appear before the SPM Ruyenjes on 1/05/2019 for further orders.

DATED, DELIVERED AND SIGNED AT EMBU THIS 24TH DAY OF APRIL, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Applicant present in person