



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 23 OF 2018

JOHN WILLIAMS NJIRU NJUNG'A.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. This is a ruling on an application dated 12/06/2018 seeking for orders that:-

(a) That this Honourable court be pleased to call for and examine the court proceedings in Criminal Case No. 8 of 2016 before the Principal Magistrate's court, Runyenjes for the purpose of satisfying itself as to the correctness, legality or propriety of the order(s), ruling(s) and/or proceedings passed between 1st February 2018 and 7th June 2018.

(b) That upon examining the said record, this Honourable Court be pleased to alter or reverse the said order(s), ruling(s) and/or proceeding(s) and direct the immediate release of the Applicant from the prison custody.

(c) That the Applicant's advocate be granted leave to be heard if the court deems it necessary, expedient and in the interests of justice.

2. The advocate on record for the applicant E.M. Njiru explains the facts leading to this application in his affidavit sworn on 8/06/2018. He deposes that the applicant was a surety in Runyenjes Criminal Case No. 8 of 2016 in which the accused absconded court on 12/02/2018. Hon. B.M. Kimemia Senior Principal Magistrate was seized of the case. The surety was given time to avail the accused person in court which he failed to do leading to the court imposing a sentence of six (6) months imprisonment on 28/05/2018.

3. The matter was taken before the Senior Resident Magistrate Runyenjes on 4/06/2018. The applicant pleaded with the court to release him since the accused had been arrested. The court granted the surety bond pending appearance before the trial court. On presentation of release order to the Officer In Charge of GK Prison Embu, he declined to release the surety.

4. The applicant is said to be suffering from diabetes and is not in a position to get proper diet and medication at the prison. The continued confinement of the applicant is excessive and against the spirit of justice, fairness and the exercise of judicial discretion.

5. The application was opposed by the respondent on grounds that the order for cancellation of the bond issued in favour of the surety by the Resident Magistrate was procedural. It was submitted that Section 132 of the Criminal Procedure Code was complied with and that it was only the High Court that was empowered to revise the sentence.

6. The respondent further states that the applicant under Section 131(5) was subject to orders for payment of the amount as ordered by the court or to serve six (6) months imprisonment. The court is urged to enforce the provisions of Section 133 of the Criminal Procedure Code.

7. The court called for the original record and noted that the accused absconded on 12/02/2018 and a warrant of arrest was issued against him. Summons requiring the attendance of the applicant were issued. He presented himself in court on 28/02/2018 and was given 14 days on his request to avail the accused. On 15/03/2018, the applicant was absent and a warrant of arrest was issued against him. He appeared in court on 21/03/2018 and explained himself. The court lifted the warrant of arrest and granted him a further 14 days to look for the accused.

8. On 5/04/2018 the applicant told the court that he had made effort to trace the accused by traveling to Tana River where the accused was said to be hiding. The applicant said he had reported the matter to Garissa police station. The matter was mentioned again on 17/05/2018 whereas the applicant was given more time to avail the accused.

9. On 28/05/2018, the applicant pleaded with the court to give him more time. The court declined his request and sentenced him to six (6) months imprisonment unless he avails the accused person to court.

10. The court record shows that the matter was mentioned on 4/06/2018 before L.K. Mwendwa Senior Resident Magistrate. On application by the counsel for the applicant, the magistrate issued a production order for the applicant to be brought to court at 3.00 p.m. the same day. The counsel informed the court that the accused person had been arrested and arraigned before the court. He applied to the court to release the applicant on a personal bond pending production before the trial court the following day. The court ordered release of the applicant on personal bond of Kshs.50,000/= pending determination of the matter before the trial court on 7/06/2018.

11. The accused was not produced in court on 7/06/2018. It was 8/06/2018 and in the presence of the accused the prosecutor asked for the cancellation of the bond of the accused which application was allowed by the court. The case was fixed for hearing on 25/07/2018.

12. This application is brought under Section 362 and 364 of the Criminal Procedure Code. Under Section 362 the High Court may call 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 findings, sentence or order recorded or past and as to the regularity of any proceedings before such subordinate court.

13. The applicant calls for revision of orders made in Runyenjes Criminal Case No. 8 of 2016 between 1/02/2018 and 7/06/2018. From the supporting affidavit, the orders relevant to this application are those made by the trial magistrate B. M. Kimemia Senior Principal Magistrate on 28/05/2018 and those made by L.K. Mwendwa Senior Resident Magistrate on 4/06/2018.

14. The orders of B. M. Kimemia issued on 28/05/2018 read as follows:-

Since the surety has not demonstrated any cause or any reasonable explanation why the accused has not been traced since he absconded on 12/02/2018, I hereby order for the surety to serve six months imprisonment unless he avails the accused person to court.

15. The relevant law dealing with matters of surety are found in Section 126 to Section 133 of the Criminal Procedure Code. Section 131 provides for forfeiture of recognizance 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 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.

16. The gist of the provision is that the court shall call upon the recognizance to pay the penalty thereof, or to show cause why it should not be paid. If the penalty is not paid the court may proceed to recover it by issuing a warrant for attachment and sale of the movable properties belonging to the surety.

17. The trial magistrate is duty bound to pronounce to the surety that he is required to pay the penalty and to require him to show cause why it should not be paid. The record does not show that the applicant was ordered to pay the penalty of Kshs.100,000/= which was the amount of the bond or any other amount set by the court. Neither was the applicant required to show cause as provided for by the law.

18. Under Section 131(4) it is only when the penalty is not paid and cannot be recovered by attachment and sale that the person so bound is liable to imprisonment for a term not exceeding six months. From the proceedings it is clear that the procedures set out under Section 131 were not followed before the surety was sentenced to six months imprisonment. It was therefore a misdirection on the part of the trial magistrate to impose the sentence of imprisonment against the applicant.

19. The orders of L.K. Mwendwa Senior Resident Magistrate issued on 4/06/2018 were as follows:-

In the premises I grant the surety (one John Williams Njiru Juma) a personal bond of Kshs.50,000/= pending the determination of counsel's application before the trial court.

Parties to appear before the trial court on 7/06/2018; production order to issue to accused person.

20. The relevant law in this regard is Section 132 of the Criminal Procedure Code which provides:

All orders passed under Section 131 by a magistrate shall be appealable to and may be revised by the high court.

21. At the time that these orders were issued by Hon. Mwendwa, the applicant was already serving sentence of six months imprisonment. Whether the sentence was unlawful or irregular, the orders of the Senior Principal Magistrate remained valid until reviewed by the high court

in accordance with the provisions of Section 364 and 132 of the Criminal Procedure Code.

22. The effect of granting the applicant a personal bond pending hearing of his application before the trial magistrate was irregular and amounted to sitting on revision for the orders of the trial magistrate who was his senior. The learned Senior Resident Magistrate lacked the jurisdiction to revise the said orders. It is only the high court that has the powers to revise orders made by a magistrate under Section 131 of the Criminal Procedure Code.

23. For the foregoing reasons, the orders of L.K. Mwendwa made on 4/06/2016 are hereby declared null and void for want of jurisdiction.

24. In the same breath, the orders of B.M. Kimemia made on 28/05/2018 are hereby set aside.

25. The file Criminal Case No. 8 of 2016 is hereby returned to the trial magistrate for compliance with Section 131 of the Criminal Procedure Code as well and completion of the trial.

26. In the meantime, the surety is hereby released on a personal bond of Kshs.100,000/= pending further orders by the trial court.

27. This application is merited and is allowed accordingly.

28. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 18TH DAY OF JUNE, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Eddie Njiru for Applicant

Ms. Mwanza for Respondent

Applicant