



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC. CRIMINAL CASE NO. 22 OF 2018

JOSPHAT NGARE NDEGE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant stood surety for accused person Hillary Kagunya Wahome in **Baricho PMCC No. 1236 of 2017** by depositing his title deed to **Mwerua/Kabiriri/2720**. The accused jumped bail and the applicant was summoned to court to produce the accused and show cause why the land should not be sold and/or he be committed to jail. He attempted to trace the accused person in vain and on 26/06/2018 he was sentenced to serve 6 months imprisonment and/or pay fine of Kshs.300,000/=. Unfortunately, he was unable to pay the fine and was incarcerated.

The accused person was later arrested and arraigned in court on 20/08/2018 when his bond terms were cancelled and he was remanded in custody. Therefore he is now seeking that the orders made on 26/06/2018 be reviewed and/or set aside and he be set at liberty.

The matter arises from **Section 131 of the Criminal Procedure Code** which provides;

- 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.*

Section 132 of the Criminal Procedure Code states;

All orders passed under section 131 by a magistrate shall be appealable to and may be revised by the High Court.

The applicant filed an application under **Section 362 of the Criminal Procedure Code** seeking and that the orders by the Principal Magistrate Baricho dated 26/6/2018 be reviewed. It was based on the following grounds:-

1. That the applicant herein stood surety for the accused person in Baricho PM's Criminal Case No. 1236 of 2017.
2. That the aforesaid surety was by way of depositing the applicant's title deed to land parcel No. Mwerua/Kabiriri/2720.
3. That however, the accused person, one Hillary Kagunya Wahome, jumped bail by failing to attend court proceedings.
4. That consequently, the applicant herein, being the surety, was summoned to court to produce the accused person, show cause why

the aforesaid land ought not to be sold and/or he be committed to jail.

5. That the applicant attempted but failed to trace the accused person and on the 26th day of June, 2018, he was sentenced to serve 6 months imprisonment with the option of paying a sum of Kshs 300,000/-.

6. That the applicant was unable to pay the aforesaid fine and he was incarcerated. He has since been languishing in jail.

7. That however, the accused person was traced, arrested and arraigned in court on the 20th day of August, 2018 when his bond/bail terms were cancelled and he was remanded in custody.

8. That is now in the interests of justice and fairness that the orders made on the 26th day of June, 2018 be reviewed and/or set aside and the applicant herein be set at liberty.

9. That it is mete and just that the application be allowed.

Revision

The power of this court to revise any order issued by a subordinate court in a criminal case is provided for under **Section 362 and 364 of the Criminal Procedure Code**.

Section 362 of the Criminal Procedure Code states;

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.

Section 364 (1)(b) of the Criminal Procedure Code states;

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— in the case of any other order other than an order of acquittal, alter or reverse the order.

Article 165(6) of the Constitution gives the High Court supervisory jurisdiction over sub-ordinate courts. It provides:-

“There is established a High court, which –

(6) ----- has supervisory Jurisdiction over the sub-ordinate courts and over any person, body or authority exercising a Judicial or quasi – Judicial function, but not over a superior court.”

Thus this court has jurisdiction upon application by a party or of its own motion to call for the lower court file and reverse the order.

In the case of Francis Kagwa Maina v Republic [2018] eKLR

The High Court in dealing with revision stated;

That the Applicant must bear the consequences of standing surety to secure the release of his son on bail pending trial is not without doubt.....

This court agrees with the Applicant that the order issued by the trial court that he forfeits the property where his home is situate is draconian. That order of forfeiture and sale is set aside.

Morris Abuga v Republic [2013] eKLR

The High Court in dealing with revision stated;

It is noted that the trial magistrate did order the surety to pay the penalty but did not adhere to the second requirement which is found in Section 131(2) of the Criminal Procedure Code namely that if the penalty is not paid, the Court may proceed to recover it by issuing a Warrant for attachment and sale of the movable property belonging to the surety.

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 before the trial magistrate it is quite evident that not all necessary procedures were followed before the surety was sentenced to six months imprisonment.

The accused person has since been arrested and his bond terms cancelled. The state did not oppose the release of the applicant since the accused has been arrested and will carry his cross. The record of the trial Magistrate shows that the proper procedure was not followed. The first step was to realize the security which was deposited in court by the surety. No order was made for the applicant to show cause why the security should not be forfeited. This would be then forfeiture of the security, followed by warrant of attachment and sale. It is only after the court is unable to execute the warrant of attachment and sale that the court can order the surety to be imprisoned for a term not exceeding six months. The procedure followed by the trial Magistrate was clearly wrong. I order that the orders of the trial Magistrate dated 26/6/18 be reviewed and set aside.

I have considered the fact that the applicant was imprisoned on 26/6/18 and was discharged by this court on 17/9/2018 a period of nearly three months. I consider this enough punishment. I will therefore not direct the trial Magistrate to comply with **Section 131(4) of the Criminal Procedure Code**. I direct that he be discharged as a surety and his security returned since bond of the accused has already been cancelled.

The file be returned to the trial court for hearing and determination of the case.

Dated at Kerugoya this 27th day of September 2018.

L. W. GITARI

JUDGE

Read out in open Court,

Mr. Kahiga Holding Brief for Mr. Macharia for accused, who is present.

Court Assistant – Naomi.

L. W. GITARI

JUDGE