



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 228 OF 2013**

**PETER WACHIRA KARUA .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. The applicant herein was charged in Principal Magistrate's Court at Mavoko Criminal Case No. 220 of 2012. He was admitted to bail. He however failed to turn up for trial on **three (3)** occasions. His bail was cancelled. Consequently he was incarcerated.
2. In his application he seeks an order setting aside the order of the trial court issued on the 16<sup>th</sup> day of December 2013 cancelling bail. The application is supported by an affidavit deponed by **Jacob Auma Okoth**, counsel for the applicant who depones that the trial magistrate did not consider medical documents submitted by the applicant; the refusal by the Doctor to appear in court could not have been a consideration for making such an adverse order; the accused did appear in court regardless of the warrant of arrest that subsisted.
3. The application is opposed by the state. It is argued by **Mrs. Abuga**, Learned State Counsel that the application is an abuse of the court process. She stated that following an allegation that the applicant was unwell, an order directing her and the doctor to attend court was disregarded. No evidence of treatment notes were availed. Counsel made a professional undertaking to avail it to her to no avail. Further she stated that the doctor who allegedly treated the applicant filed no affidavit to establish the allegation. The surety had also failed to explain why the applicant never attended court.
4. I have considered rival submissions by both counsels and the ruling of the trial magistrate dated 16<sup>th</sup> December 2013.
5. A warrant of arrest was issued against the applicant who had failed to turn up for trial on various occasions. The applicant when released on bail was to abide with conditions set by the court. It is stated he had a surety and there was also a contact person. Those were people required to ensure his attendance whenever required by court.
6. Following what has been stated in the ruling by the learned Magistrate, the two (2) persons who took recognizance with the applicant failed to honour their obligation. When the applicant failed to turn up on the hearing date and after subsequent issuance of the warrant of arrest, the advocate who was also away came to court. He even made an undertaking to avail a doctor who could notify the court of the applicant's whereabouts following an allegation that he had been hospitalized. This was not done. An allegation that he was admitted at **Kerogoya District Hospital** and later at **Kenyatta National Hospital** was not established by production of any medial documents.
7. The applicant failed to turn up for trial from **July 2013** to **October 2013**. He was given an

opportunity of availing medical documents to establish the allegation that he was ailing but he failed to do so.

8. In the supplementary affidavit sworn by his advocate he states thus:

***“That further to the foregoing I have also since obtained the medical report from my client of Kerugoya District Hospital where he had undergone treatment. Annexed herewith and marked (Exhibit “JAU 2”) is a copy of medical report and discharge card from Kerugoya District Hospital.”***

9. I have perused the annexure, a purported general outpatient record dated 24/7/2013. The diagnosis indicates the patient had a severe headache, wheezing, coughing and loss of appetite. On 26/7/2013 there was an indication of chest complication. On 5/8/13 it was confirmed he had asthma. There is nothing to indicate he was admitted. The document also lacks a stamp impression to confirm if indeed it was issued by any doctor or alleged hospital.
- 10.No explanation was given as to what happened that he was not able to go to court thereafter. There is also nothing to show that he ever attended Kenyatta National Hospital.
- 11.In the premises the learned trial magistrate was not in error when he reached a finding that the applicant and his co-accused had absconded.
- 12.Bail is an accused person’s fundamental right but where it is breached the repercussion should be to remain in custody. It would therefore not be right for this court to interfere with the discretion of the lower court.
- 13.There is always a chance of review. It is apparent the applicant failed to convince the court that he had a genuine reason for staying away but having learnt a lesson following the incarceration he could renew the application before the trial court which has heard evidence and knows the strength of the case.
- 14.From the foregoing, I find the application not being meritorious. It is dismissed.

**DATED, SIGNED and DELIVERED at MACHAKOS this 21<sup>ST</sup> day of MAY, 2014.**

**L.N. MUTENDE**

**JUDGE**