REPUBLIC OF KENYA`

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 69 OF 2013

MORRIS ABUGA …..APPLICANT

VERSUS

REPUBLIC …... RESPONDENT

RULING

This application for revision is brought by way of a letter dated 20th June, 2013 and addressed to this Court. It is premised under article 165 of the Constitution and Section 362 of the Criminal Procedure Code.

The grounds are that the learned trial magistrate failed to take cognizance of the law and tenets of rules of natural justice before Sentencing the applicant to six months imprisonment.

That there is no evidence of service of Summons, Warrant of arrest and or Notice to show cause.

Further that the magistrate did not follow the provisions of Section 131 of the Criminal Procedure Code and that the applicant was never given a hearing before the Sentence was pronounced against him.

The Accused in Mombasa Criminal Case No. 3272 of 2011 **LYEON ODUOR KOWIDO** was arraigned in Court on 21st October, 2011 and charged with two counts of obtaining by false pretences contrary to section 316(a) of the Penal Code and one of issuing a bad cheque contrary to section 316(A) of the Penal Code.

He was admitted to a bond of Ksh. 200,000/= with one surety of similar amount and the matter was fixed for hearing on 18th November, 2011.

Three days later on 24th October, 2011 the applicant presented himself in Court and offered to stand surety for the Accused. After due examination he was approved and the Accused was duly released.

The matter was adjourned on 18th November, 2011, 13th February, 2012, 16th April, 2012 and 28th May, 2012 when Counsel for the Accused Mr. Okuthe informed the Court that the Accused was admitted at Women's Hospital Ngong.

The Court ordered for a mention on 29th June, 2012.

On 29th June, 2013 the Accused did not attend Court prompting the learned trial magistrate to issue

a Warrant of arrest against him. A further mention date was fixed for 31st July, 2012.

On 31st July, 2012 the Accused did not attend Court and a further Warrant of arrest was issued and in addition Notice to show cause to the surety. A mention was set for 31st August, 2012. On 31st August, 2012 the magistrate proceeded to issue a Warrant of arrest against the surety. The matter was fixed for a mention on 28th September, 2012 and a Notice to Show Cause was issued to the Investigating officer and a mention date fixed for 5th October, 2012. A further mention date was fixed for 19th October, 2012 and 23rd October, 2012.

On 23rd October, 2012 the surety who is now the applicant presented himself in Court and informed it that he did not know why the Accused was not attending Court and asked for two weeks to look for him.

He was remanded in custody but was admitted to a cash bail of Ksh. 100,000/= on 26th October, 2012 he was released on his own bond of Ksh. 200,000/= and was given upto 27th November, 2012 to avail the Accused in Court.

The surety absconded on 27th November, 2012 and a Warrant of arrest against him was issued by the Court.

The matter was mentioned on 4th December, 2012, 18th December, 2012, 18th January, 2013, 23rd January, 2013, 6th February, 2013, 1st March, 2013, 23rd March, 2013, 5th April, 2013 and on 5th June, 2013 the surety was arrested and presented before the Court whereupon he told the Court that he did not know that he was supposed to return to that particular Court and asked for more time. The prosecution had informed the Court that the Surety had failed to avail himself after having been granted a bond since last year. He had been arrested when he had gone to stand Surety for another person at the Municipal Court. It was then that the Court ordered that he forfeits to the Government Ksh. 200,000/= in default to serve Six months imprisonment.

I have deliberately given the history of this case so as to find out whether the grounds adduced in favour of the revision do bear any weight.

Having called for the original file and perused it, I do find that it is a fallacy to state that the Surety was not given a hearing before he was Sentenced to six months imprisonment.

The surety/Applicant in this case is a teacher when he was being examined he did state that he understood his obligations as a surety.

The Accused absconded on 28th May, 2011 and the surety went to a slumber till the Court issued a Notice to show cause against him and the investigating officer. He presented himself to Court on 23rd October, 2012 five months after the Accused had disappeared and stated that he did not know why the Accused was not attending Court. After he was released he did not attend Court from 27th November, 2012 to 5th June, 2013 when he was arrested after he was found in another Court wanting to stand surety for another Accused person. The applicant appears for all intends and purposes to be a **“professional surety**”. Why should he stand surety for another Accused person whereas the previous one he had stood surety for could not be found? Could he be one of those **“Sureties for hire**” who litter our Court corridors?

Section 131(1) of the Criminal Procedure Code provides for forfeiture of recognizance thus,

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 satisfactory 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 jurisdiction of the Court which issued it and it shall authorize the attachment and sale off the movable property belonging to the person without these 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 imprisonment."**

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.

Pursuant to section 132 of the Criminal Procedure Code the Sentence of six months is temporary set aside pending the compliance of section 131 of the Criminal Procedure Code in full as above recorded.

The surety will be released on a bond of Ksh. 100,000/= with one surety.

Ruling dated and delivered this **19th** day of **July, 2013**

…..........................

M. MUYA

JUDGE

<u>In the presence of:-</u>

Learned Counsel for the applicant

Mr. Egunza

Learned Counsel for the state Mr. Tanui

Original file to be taken back to the trial magistrate for further action

M. MUYA

JUDGE

<u>19TH JULY, 2013</u>