



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 421 of 2012

ASHISH SHAHAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The applicant's application is brought by way of Notice of Motion dated 10th August 2012 supported by the affidavit of the applicant. It was brought under **Section 362 Criminal Procedure Code** and **Article 49** of the **Constitution**.
2. The backdrop to the application as supplied by Mr. Arum learned counsel for the applicant, was that a Warrant of Arrest was issued on 13th June 2012, on which day the criminal case in which the applicant was, was listed before court No. I at Kibera law court, but that court did not sit on the stated date.
3. The applicant and other accused persons were directed to go to court No. II for their matters, but it later emerged that the appellant's matter was mentioned in court No. III and a Warrant of Arrest issued even as his advocate was present.
4. The said Advocate wrote to the Executive Officer to bring up the matter before court, for the file to be consolidated with another, on 7th June 2012, on which date the applicant was present, but his father who is the accused in the other file was absent. Subsequently file **No. 2036 of 2012** which relates to the applicant, could not be traced for counsel to make an application for lifting of the Warrant of Arrest.
5. On 21st June 2012 the file was placed before the court but the applicant was not aware of that mention date and was therefore absent. On 9th July 2012 the applicant was arrested and presented before the court, where he reiterated that he had been in court earlier and was not aware of the mention of 13th June 2012. That he had never been out of the country.
6. His counsel applied for the reinstatement of bond, but the application was vehemently opposed by the prosecution. Bail was denied. On 13th July 2012 the applicant was placed in custody despite the fact that his bail was still in court and was not refunded.
7. Learned counsel Mr. Arum urged that the applicant is a Kenyan citizen, with a fixed abode in Parklands, and with parents who are also Kenyan citizens. That the applicant attended court religiously

and had never missed a mention, that he has never left Kenya since 19th April 2012 when he was arraigned in court, and that the person who went out of jurisdiction for treatment was his father in **Cr. Case No. 2192 of 2010.**

8. Mr. Arum further urged that if there was a mistake by the counsel, it should not be visited on the applicant, and that he was apologetic and had learnt his mistake. He prayed for the reinstatement of the applicant on the same bond terms already given by the trial court, and urged the court to deem the application as unopposed as the state had not filed any reply despite service.

9. The learned state counsel Mr. Mulati opposed the application on behalf of the state, and submitted that the issue before the court was for revision and on that basis there was no need for the state to put in a reply, as they would go by the record of the lower court referred to.

10. Mr. Mulati submitted that the record showed that the appellant did not abscond only once as he, on the 13th June 2012, had also been said to be absent on account of seeking treatment abroad, yet he had not sought leave of court to go abroad. Secondly that he was represented by counsel who would have produced him before the court immediately, if indeed he was within the precincts of the court when the Warrant of Arrest was issued.

11. That in fact the letter from his counsel to the Executive Officer came two days later, which shows that the applicant was not within the court on the material date. Mr. Mulati urged the court to dismiss the application.

12. **Section 362** of the **Cap 75 laws of Kenya** under which the applicant has approached this court provides that:

“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.”

The lower court record was placed before me and I scrutinised it to satisfy myself of the propriety of the order of court therein. The record shows that events unfolded as stated by the respondent and not as put forward by the applicant.

13. The record shows that on 7th June 2012 the applicant was represented by Mr. Ombwayo who was holding brief for Mr. Opundo for the applicant. The court was told that the applicant he had travelled to the United Kingdom to undergo a heart operation. Mr. Arum urged that it was the applicant’s father and not the applicant himself who was away due to a heart ailment.

14. As at 13th June 2012 however the applicant’s file had not been consolidated with that of his father and to date there is no order consolidating the two files. The statement of learned counsel Mr. Ombwayo appears in file **CM Cr. No. 2036 of 2012** which pertains to the applicant herein and not his father. The record shows that learned counsel Mr. Opundo appeared for the applicant and that learned counsel Mr. Ombwayo held his brief on 7th June 2012, told the court that the applicant was away in the United Kingdom. Learned counsel Mr. Angawa held his brief on 13th June 2012 and reiterated the position that the applicant was undergoing medical treatment in the United Kingdom.

15. **Art 49(1)(h) of the Constitution** is not couched in absolute terms. It provides that an arrested person has the right.....

“to be released on bond or bail, or reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released”.

The operative words are therefore “reasonable conditions” and “compelling reason not to be

released.” The primary consideration in this application is whether the accused person shall attend court and be available for the trial. At this stage the applicants have the presumption of innocence on their side since they have not yet been tried and found guilty on the charge with which they are faced.

16. The compelling reason herein is that the applicant is a flight risk. It beats logic that the court would go ahead and issue Warrant of Arrest for the applicant while his advocate was in court and had seen the applicant within the court precincts, without giving him a chance to fetch his client. Stranger still are the applications of learned counsels Mr. Ombwayo and Mr. Angawa who sought to adjourn the matter to other days because the applicant was away in the United Kingdom on medical grounds.

17. According to the learned counsel Mr. Angawa, the applicant was to return to the country in September 2012, yet the police located him and executed the Warrant of Arrest against him on 7th July 2012. Whereas the sins of his counsel and even those of his father who absconded from the jurisdiction of the court as deponed by the Investigating Officer, cannot be visited upon the applicant, his own demeanour does not commend itself to his cause. He does not appear to have made any effort to avail himself in court until he was brought under warrant of arrest. There is no evidence that his file went missing since there is no letter requesting for it to be located or availed.

For the foregoing reasons I decline to grant the orders sought. I order however that the case be heard expeditiously and preferably on a day to day basis.

This ruling be served upon the learned trial magistrate.

SIGNED DATED and **DELIVERED** in open court this **22nd** day of **November 2012**.

L. A. ACHODE
JUDGE