



REPUBLIC OF KENYA

High Court at Kericho

Criminal Revision 176 of 2012

SAMWEL MUDAVADI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

REVISION

On the 24th May 2012, the Deputy Registrar, Kericho High Court wrote a letter to the Senior Principal Magistrate, Bomet requesting for certified copies of proceedings in **Bomet Criminal Case No. 6 of 2012; Republic versus Samwel Mudavadi Maru**, having been directed by the Judge.

On the 6/6/2012 the Senior Principal Magistrate, Bomet forwarded the certified copies of proceedings as requested.

On the 7/6/2012 the Deputy Registrar, Kericho High Court wrote a letter to the Senior Principal Magistrate, Bomet expressing the fact that the original file in the matter had been forwarded to the High Court contrary to the requirement of the Resident Judge.

On 23rd July 2012 the Senior Principal Magistrate, Bomet wrote a letter to the Chief Magistrate requesting him to place the file before the Judge for Revision. The reason given was that the accused had become impossible to deal with. Per the contents of the letter, the accused had demanded that the Trial Magistrate, Hon. Jacinta Kwena disqualify herself from hearing the case. The Magistrate had declined. Thereafter the accused's demeanor in court was untenable. The Magistrate was of the view that unless the matter was revised, it would appear as if the accused's rights were not being considered.

I have perused the court record. The accused was granted bail after he denied the charge of robbery with violence contrary to **Section 296 (2) of the Penal Code**.

When the matter came up for hearing on 22/3/2012 the accused sought an adjournment on the ground that he wasn't ready to proceed. The court ruled against his request as he had provided no reason to warrant such an adjournment.

He participated in proceedings; three (3) witnesses testified the case was then adjourned to 17/5/2012. On that date the accused sought an adjournment on the ground that he was indisposed. Without inquiring into the allegation the Magistrate ordered the case to proceed. She noted the demeanor of the accused on that particular day. The conduct exhibited by the accused was his discontent following the order made. He declined to cross-examine the witness who testified. Thereafter the prosecutor sought an adjournment to enable him call the remaining witness. The order sought was granted. The accused then expressed his dissatisfaction with the conduct of the court. Pointing out the fact that the court had compelled him to proceed with the matter while unwell, he asked the magistrate to recuse herself, she however

declined. The matter came up on 24/5/2012, it was heard and the prosecution closed its case.

This is a matter whereby the High Court called for the record of proceedings before Bomet Senior Principal Magistrate's Court, a court subordinate to it.

Section 362 of the **Criminal Procedure Code** empowers the High Court to call for any record of such a court for purposes of satisfying itself as to the correctness, legality, or propriety of any order recorded or passed and as to the regularity of any proceedings in such a court.

When the accused notified the court on the 17/5/2012 of his unwillingness to proceed with the matter on account of being unwell, it was the duty of the court to ensure he was subjected to medical treatment. It was improper for the court to form an opinion that the accused was simply a difficult person who was malingering. The order made was prejudicial to the accused.

Article 50 of the **Constitution** guarantees an accused person a fair trial. Proceeding with a hearing amidst an allegation of sickness on the part of the accused would not amount to a fair trial. The order made by the Magistrate was improper. That being the case it calls upon this court to intervene to ensure justice is seen to have been done. Consequently, in exercise of my power pursuant to **Section 364 (1) (d)** of the **Criminal Procedure Code** in conjunction with **Section 81 (1) (a) (2)** of the **Criminal Procedure Code** I do order that Bomet Criminal Case No. 6 of 2012 be and is hereby transferred to Kericho Law Courts for trial. The file shall be placed before the Chief Magistrate Kericho forthwith for further hearing.

DATED at **KERICHO** this 9th day of November, 2012

LILIAN N. MUTENDE
RESIDENT JUDGE