



## CRIMINAL

Ø S. 131 Criminal Procedure Code sets out the procedure the court should follow when a person bound by recognizance absconds.

### REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA

### AT MERU

### CRIMINAL APPEAL CASE NO. 171 OF 2010

GEORGE AMATA ONGAWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

### RULING

George Amata Ongalua stood surety for the accused Fredrick Ogelo in Criminal Case No. 996 of 2009 at Magistrate Court Isiolo. He became his surety on 2<sup>nd</sup> November 2009. the accused during the pendency of his trial absconded. The surety was arrested on 3<sup>rd</sup> December 2009. The surety requested the court to give him an opportunity to trace the accused person who he said was in Kisumu area. The matter was adjourned on various dates when the surety informed the court that he had not been able to trace the accused person. On 27<sup>th</sup> July 2010, the court ordered the surety to provide his own surety in the matter. He did so and was released to enable him to trace the accused person. Again the matter was adjourned on various dates when the surety informed the court that he was still trying to trace the accused person. Finally, on 17<sup>th</sup> September 2010 the court asked the surety to show cause why he should not surrender the recognizance. The surety again asked for more time stating that the accused was his cousin and he wished to try to trace him. He also stated that he had children in secondary school and was therefore unable to raise Kshs. 300,000/= for which he had bound himself when he stood surety. The court on that date ruled that the surety should pay Kshs. 200,000/= and in default was committed to serve 6 months imprisonment. The surety filed an appeal against that decision. In looking at the procedure adopted by the learned magistrate I must state that the said magistrate erred. If the court was not satisfied that the surety had shown sufficient cause why the penalty should not be paid by him as per section 131 (2) of the Criminal Procedure Code, the court then should have ordered for a warrant of attachment and sale of the moveable property belonging to the surety. This would have been in accordance with section 131 (3) of the Criminal Procedure Code. That section provides as follows:-

***“131 (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 the 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.”***

It is only when the money is not recovered through the warrant of attachment that the court could order imprisonment not exceeding 6 months. The learned magistrate failed to follow the correct procedure in respect of this surety. That surety should

have been ordered to show why he should not pay the amount in the surety and if sufficient cause was not shown, the court should have issued a warrant of attachment for the sale of the surety's moveable goods. If the amount could not be recovered by attachment and sale, the court may sentence the surety to jail sentence not exceeding 6 months. It is also noted that the surety often informed the court of the progress he was making to trace the accused person. The court, in my view, should have taken into account those attempts. Since the court failed to follow the correct procedure as set out in section 131, I, by virtue of the power of revision given to the High Court under section 364 of the Criminal Procedure Code, I set aside the order of Isiolo Magistrate Court Criminal Case No. 96 of 2009 made on 17<sup>th</sup> September 2010. I order George Amata Ongalua ID No. 8552551 to be released from prison forthwith unless otherwise lawfully held.

Dated and delivered at Meru this 8<sup>th</sup> day of October 2010.

**MARY KASANGO**

**JUDGE**