

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Revision 7 of 2008

JOHN MELVIN BLACKBURNAPPLICANT

VERSUS

REPUBLICRESPONDENT

(Arising from Criminal Case No. 213 of 2008 of the Senior Resident Magistrate's Court at Kilifi)

RULING ON REVISION

Pursuant to the provisions of Section 363(2) of the Criminal Procedure Code, the Deputy Registrar of this court caused the proceedings in **Kilifi S.R.M. CR. Cases No. 213 and 117 of 2008, Republic vs= John Melvin Blackburn** to be placed before this court for perusal. In exercise of this court's supervisory jurisdiction under section 362 of the Criminal Procedure code I perused the aforesaid record.

The record shows that the accused person, John Melvin Blackburn, now the applicant was arraigned before J.M. Nduna, learned Senior Resident Magistrate sitting at Kilifi on 27th February 2008 whereupon he pleaded not guilty to the offence of creating a disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1) (a) of the Penal Code in Criminal Case No. 213 of 2008. He also denied the offence of being unlawfully present in Kenya contrary to Section 13(a) (c) of the Immigration Act in Criminal Case No. 117 of 2008 when he appeared before the learned Senior Resident Magistrate on 19th March 2008. Criminal Case No. 117 of 2008 was fixed for hearing on 28th March 2008. However Criminal Case No. 213 of 2008 was fixed for hearing on 29th February 2008, just two days after plea was taken. When Criminal Case No. 213 of 2008 came up for hearing on 28th March 2008, the court prosecutor indicated to the learned Senior Resident Magistrate that the police file had been called for by the State Counsel for perusal and on that basis. The prosecutor applied for the case to be adjourned. Mr. Mouko, learned advocate for the accused did not oppose the application for adjournment. The prosecutor's application for adjournment was rejected. Mr. Mouko, then applied for the hearing to be adjourned on the ground that he had not been given witness statements and that he was feeling unwell. The court dismissed Mr. Mouko's application for adjournment and directed the case to proceed for hearing on the same day at 2.00 p.m. When the case came up for hearing at 2.00 p.m. Mr. Mouko filed an affidavit of the accused in which the accused applied for the learned Senior Resident Magistrate to disqualify himself from hearing the case for reasons deponed in the affidavit. The learned Senior Resident Magistrate reserved his ruling on the issue for 31.03.2008. On the aforesaid date the learned Senior Resident Magistrate in a well reasoned ruling refused to disqualify himself. He dismissed the accused's affidavit as full of falsehoods. On this score I am in agreement with the learned Senior Resident Magistrate that the accused and Mr. Mouko, learned advocate had falsely accused the learned Senior Resident Magistrate. The affidavit sworn by the accused contained averments which cannot stand the lowest test of evidence to prove the allegation of bias on the part of the trial magistrate. The application for disqualification was made in bad faith with the intention of securing an adjournment. This kind of practice must be stopped if the rule of law is to be promoted. Legal practitioners and their clients must not be allowed to besmirch judicial officers with the sole intention of securing an adjournment regardless of the merits of the grounds set out. I am convinced the learned Senior Resident Magistrate was right to dismiss the application for his disqualification.

However, the learned trial magistrate made certain orders which must be revised in exercise of the supervisory jurisdiction of this court. Upon dismissing the application for disqualification, the learned

Senior Resident Magistrate convicted the accused for contempt of court under Section 121(1) of the Penal Code and sentenced him to a fine of Kshs.1,400/- in default to serve one month's imprisonment. The trial Magistrate also convicted the accused for being present in Kenya without a valid visa. The learned Senior Resident Magistrate ordered the accused person to be deported from Kenya upon paying the fine or upon completion of the sentence.

In exercising its Supervisory powers under Section 362 of the Criminal Procedure Code, this court is enjoined to call and examine the record of any criminal proceedings for purposes 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. In this matter the learned trial magistrate convicted and sentenced the accused for contempt of court in contravention of Section 121(2) of the Penal Code. If the trial Magistrate felt that the accused was in contempt of court in the face of court, he was required by law to sentence the offender before the rising of the court on the same day. In this case the offence is alleged to have been committed on 28th March 2008. The sentence was pronounced on 31.3.2008. The sentence was illegal hence must be set aside on revision.

The record shows that the learned trial magistrate found the accused guilty for being present in Kenya without a valid visa. It should be noted that the accused is facing the offence of being unlawfully present in Kenya contrary to Section 13(2) (c) of the Immigration Act in Criminal case No. 117 of 2008. The accused denied this offence and the case is still pending for trial. The learned Senior Resident Magistrate ordered the accused to be deported as if he had pleaded guilty to the offence in Criminal Case NO. 117 of 2008. Again the learned Senior Resident Magistrate issued the order without jurisdiction in that there was no admission nor evidence tendered to prove the offence.

For the above reasons I quash conviction and set aside the orders issued on 31st March 2008. Any fines that may have been paid should be refunded. If serving sentence the accused be set free forthwith. Kilifi Criminal Cases No. 117 of 2008 and 213 of 2008 are hereby withdrawn from Kilifi Senior Resident Magistrate's Court and transferred to Mombasa C.M.'s Court for hearing and determination on priority basis. Let the cases be mentioned before the Chief Magistrate Mombasa for further directions on 9th April 2008.

Dated and delivered at Mombasa this 4th day of April 2008.

J.K. SERGON

J U D G E

In open court in the absence of the parties.