



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Crim Appli 29 of 2007

BONIFACE MWAURA MWICHIGI APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

The applicant BONIFACE MWAURA MWICHIGI through his counsel NJIRU BONIFACE & COMPANY ADVOCATES filed an application dated 21st December, 2006 seeking for two orders, that :-

1. This Honourable Court be pleased to stay execution of the order given on 21st December, 2005 by senior resident Magistrate Gatundu in Inquest No. 1 of 2003.
2. This Honourable court be further pleased to make such other orders as may meet the ends of justice.

When the application came up for hearing before me on 26th February 2007, the learned State Counsel Mrs Kagiri raised preliminary objections. She submitted that this same matter had already come to the High Court for revision, and dealt with. Therefore the court was functus officio. The number of the revision case had not been mentioned by the applicant in the present application, however.

Secondly, this application was brought under section 357 of the Criminal Procedure Code, which dealt with admission to bail and suspension of sentence pending appeal. The prayers sought in this application were totally different. Therefore the application was incompetent and should be struck out.

In response learned Counsel for the applicant Mr Njiru submitted that it was true that the court had made an order in revision, and that they filed a notice of appeal. Pending the hearing of the appeal they had made this application for stay. He submitted that the ruling of the High court should have been annexed, but asked for an adjournment to annex the ruling. He further submitted that though the section relied upon relates to convictions, he wanted the matter to be determined on its merits. He sought for an adjournment to file the ruling of the High court in revision.

I have considered the objections herein raised by the learned State Counsel as well as the counter arguments by learned counsel for the applicant.

This is an application which is not headed either as summons or notice of motion or in any other way whatsoever. It is an application following a revision order whose date and contents are not disclosed in this application. Worse still the decision of the High Court in revision is not annexed. Mr Njiru has

asked for an adjournment to annex that ruling in revision of the High Court.

I have noted that there is also an allegation in ground (e) of the application that a previous application No. 487 of 2006 was dismissed for non-attendance. What orders the previous application, which was dismissed for non-attendance sought for, is not disclosed.

I cannot allow the applicant an adjournment to file the order in revision of the High Court. Counsel for the applicant should have filed that order with the application. He has filed all the subordinate court proceedings, but has failed to file the High Court's order in revision. He has not even disclosed the High Court revision case number. The application is incurably defective and incompetent and has to be struck out on that account. I cannot grant an adjournment purportedly to cure incurable defects of an application, as the application is already incompetent and cannot be cured in the way proposed by counsel for the applicant.

Secondly, this application is brought under section 357 of the Criminal Procedure Code (cap 75). The first limb of section 357 (1) is relevant. It provides-

“357 (1) After the entering of an appeal by a person entitled to appeal, the High Court, or the subordinate court which convicted or sentenced that person, may order that he be released on bail with or without sureties, or, if that person is not released on bail, shall at his request order that the execution of the sentence or order appealed against shall be suspended pending the hearing of his appeal.”

Clearly the above provisions of the law show that an application under section 357 of the Criminal Procedure Code relates to a situation where a person has been convicted of a criminal offence and sentenced. The application should be for release on bail pending appeal or stay of execution of sentence. In our present application there is no allegation of a conviction against the applicant or a sentence imposed on him. The applicant is dissatisfied with a ruling by the Gatundu Senior Resident Magistrate that he be charged with the offence of murder.

In my view, the application is clearly incompetent as it is brought on the wrong legal basis. This court has no jurisdiction to entertain the application and grant the orders sought. On that basis also, the application has to be struck out.

For the above reasons, I find the application to be incurably defective and incompetent. I accordingly strike it out.

It is so ordered.

DATED and delivered at Nairobi this 12th day of March 2007.

George Dulu

Judge