



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL REVISION 2 OF 2006**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**SIMON KIPKURUI TAGUT ..... RESPONDENT**

**RULING**

Simon Kipkurui Tagut appeared before the Resident Magistrate at Iten on 27/1/2006, and applied to be “*arrested and brought to court and be granted bail and/or bond pending the determination of his application to restrain the Officer Commanding Station Eldoret and any other Police Station from arresting him*”. He also sought an order for the release of his goods which were allegedly confiscated by the police.

The learned Magistrate who heard the application ex-parte granted him participatory bond of Shs. 20,000/- as well as an order for the release of the aforementioned goods, pending the hearing of the application inter-partes on 17/2/2006. The Magistrate also granted him.

Being aggrieved by the said orders, the State has now moved this court in an application in which it seeks an order to set aside the aforementioned ex-parte orders on the grounds that the Resident Magistrate lacked the jurisdiction to grant participatory bond, whose effect has been to obstruct the police from performing its duties.

Tagut had moved the court under sections 38, 39 and 123 of the Criminal Procedure Code (hereinafter referred to as “the Code”)

It was the contention of Miss Oundo for the State urged the court to set aside the said orders as the court had no jurisdiction to issue them.

Mr. Kutwa, was of a different view and though he appreciated the fact that no court has jurisdiction to entertain an application for anticipatory bail under section 123 of the Code, it was however his submission that the Resident Magistrate had jurisdiction to entertain the application under section 39 of the said Code, which stipulates that “*a magistrate may at any time arrest or direct the arrest in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.*”

Indeed section 123 of the Code envisages a situation where a person who seeks bail or bond, is already arrested and charged with a particular offence. Following the amendment of section 123 vide the Criminal Law (Amendment) Act, 2003 No. 5 of 2003, it is now clear that the subordinate court has jurisdiction to grant participatory bond.

Having taken the submissions of both able counsel into account, I find that the State was right in moving this court in the manner that it did under section 362 of the Code as this 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*”. (underlining is mine).

Having established that subordinate courts cannot entertain applications for anticipatory bail, it is therefore also my humble opinion that it is this court, and not the Chief magistrate’s court which has the powers under the aforementioned provisions of the law, to set aside orders such as these contentious orders which are in any event null and void for want of jurisdiction. Being void ab initio, they can be set aside at any stage of the hearing to avoid the miscarriage of justice.

Tagut pleads section 39 stipulates that “*when an offence is committed in the presence of a magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions of this Code as to bail, commit the offender to custody*”, but the issue of arrest was not alluded to all by the Magistrate in the proceedings, and even if he had acted under the said provisions, it cannot be for a Magistrate to exercise his jurisdiction under section 39 and thereafter, proceed on his own accord, to grant bail ex parte, without giving audience to the police or the prosecution for that matter. Indeed he acted outside the laid down guidelines for he could not have been the arresting officer, Prosecutor and the Magistrate at the same time. The most appropriate thing would have been for him to set the application for inter-parties hearing to allow both parties an opportunity to be heard.

Needless to say, courts should guard their independence jealously and should not be seen to be used to hinder or interfere with Police investigations. The police force should be allowed to carry out its duties unless of course it is shown to the satisfaction of the High Court, that the police actions contravene the Constitution.

I do in the circumstances allow this application in its entirety.

**Dated and delivered at Eldoret this 14<sup>th</sup> day of February 2006.**

**JEANNE GACHECHE**

**JUDGE**

Delivered in the presence of:

Mr. Omutelema for the State

Mr. Kutwa for the respondent