



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Misc Crim Appli 15 of 2006

JOHN MUMALI SHITABULE.....APPLICANT

VS

REPUBLIC.....RESPONDENT

RULING

On 15th May, 2006 I heard arguments from the accused and the state counsel and thereafter dismissed the application dated 24th January, 2006. I reserved my reasons which I now give, but first the background:-

By an application by way of Chamber Summons dated 24th January, 2006 the applicant seeks an order that:

(a) The applicant be allowed to file an appeal out of time in Busia P.M.C. Juvenile Cause No.102 of 2005.

The application is supported by the annexed affidavit of John Mumali Chitabule and on the grounds that:

(i) The intended appeal has high chances of success.

(ii) The delay in filing the appeal was due to the fact that the applicant was not aware the existence of Busia P. M. C. Juvenile cause No.102/2005 as even the record of the said cause shows that the applicant was absent all through, as no charge was ever read to him.

(iii) That the applicant became aware of the existence of the said cause when he was arrested and charged in Busia SRM CC No.2107/2005. The charge was that of neglect of a child.

The thrust of the applicant's case is that, he never attended court because he was not aware of the existence of the case (Busia P.M.C Juvenile Cause No.102/2005) in October 2005. That he only became aware when he was arrested and charged with the offence of neglecting a child in Busia P.M. C. Cr. Case No.2107/2005.

That had he been aware of the said ruling, he would have filed his appeal in time time. That the delay in filing the appeal was not deliberate. That in any event the appeal has high chances of success.

For the respondent it was argued that the applicant was present when the order was given on 9th July, 2005. Accordingly, the absence of the applicant at the mention on 11th September, 2005 was deliberate.

That having failed to attend the mention the court consequently made an order that the applicant be arrested and charged. This gave rise to Busia SRM CC No.2107/2003. That is the case he intends to have transferred to a different court in Misc. Criminal Application No.14/2006 citing bias as the main reason.

I have carefully perused the record of proceedings which I take the liberty to quote in extenso:

“28.7.05

Coram: J. R. Ndururi RM

D. O. Otuko – children’s officer

Nashon: CC

Accused

10.8.05

Coram: E. H. Keago RM

Court Prosecutor: IP Warui

CC: Musundi

Accused: Absent

Court: W/A to issue. Mention on 19/9/05.

E. H. KEAGO

R.M.

9.9.05

Coram: E. H. Keago RM

Pros: IP Warui

CC: Mercy

Accused: Present

COURT: The respondent is ordered to be remitting Ksh.3000/= through children department on every 9th month starting September 2005. In default the respondent be arrested and charged accordingly. Mention on 11/1/05 to establish compliance.

E. H. KEAGO

RM

11/10/05

coram: E. H. Keago RM

Pros: IP Warui

CC: Musundi

Accused: Absent

COURT: E. H. Keago RM

Pros: IP Warui

CC: Musundi

Accused: Absent

COURT: Respondent has not complied with the order which was passed. He will now be arrested and charged with the offence of neglect.

E. H. KEAGO

RM”

By record of proceedings the accused was absent all along save for the 9th September, 2005 when the Resident Magistrate ordered that he be arrested and charged with the offence of neglect.

In the circumstances, the complaint of the applicant is based on falsehood and half truths. The applicant is economical with truth.

Those are the reasons why I dismissed the application dated 24th January, 2006.

DATED and delivered at Bungoma this 22nd day of May 2006.

N.R.OP. OMBIJA

JUDGE