



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**Criminal Revision 4 of 2004**

**From Original Webuye SRM's Cr. Case No. 727 of 2003**

**JOHN TARACHA SINDIKHA.....APPLICANT**

**VS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

Samwel Walubengo Masoni appeared before the Senior Resident Magistrate sitting at Webuye on the 27th day of October 2003 and denied committing the offence of attempted defilement of a girl under the age of 16 years contrary to section 145(2) of the penal code. He was granted a bond of Ksh 100,000/= with a surety of like sum. On the 29th day of December 2003, one John Sindikha Taracha stood surety for the accused by pledging title number NDIVISI/NDIVISI/2056 as security.

The accused for some strange reason jumped bail on 25th day of June 2004 and the trial court issued a warrant of arrest and further directed the executive officer to summon the surety to appear before it on 8th July 2004. It would appear on that date the surety did not appear and the court summoned the surety to appear before it on 22.7.2004. But the surety still did not appear and this prompted the learned senior Resident Magistrate to direct the Executive officer of her court to write a notice to the surety of her court's intention to realize the security by selling L.R. NO. NDIVISI /NDIVISI/2056.

On the 9th day of August 2004 the learned Senior Resident magistrate directed the executive officer of her court to auction the security. In the meantime the accused was apprehended and brought to court under a warrant on 7th day of September 2004 and was immediately placed in custody until the 21st September 2004 when he was convicted and sentenced to serve 2 years in prison for the offence he was charged with.

The surety has now sought to have the decision to sell his property set aside on revision. It is alleged that the trial court did not comply with the procedure for forfeiture set out under section 131 of the Criminal Procedure Code. It is the contention of the applicant that he was not given notice nor heard before the order for forfeiture was made.

The applicant also complains that his moveable assets in form of cattle were attached and sold by auctioneers without notice on 11.9.2004. The applicant has beseeched this court to call for and examine the said proceedings with regard to the forfeiture with a view of ascertaining the correctness, legality or propriety of the orders made on 22nd July 2004 and on 9th August 2004.

The revisional jurisdiction of the court is stated under the provisions of section 362, 364 365, 366 and 367 of the criminal procedure code. Pursuant to the provisions of section 362 of the criminal procedure code I called for the proceedings for perusal and examination. The record reveals that the trial senior resident magistrate directed the executive officer of the lower court to realize the security i.e NDIVISI/NDIVISI/2056 by sale on public auction after summoning the applicant to appear in vain. What is curious is that the record does not indicate how the surety was contacted. There is a possibility that he was not served at all. It is always the duty of the court issuing such draconian orders to ensure that there was proper service to avoid a miscarriage of justice occurring.

The record shows that the laid down procedures regarding forfeiture under section 131 of the criminal procedure code were not adhered to by the trial court. These procedures are well defined and mandatory in nature. This court has the jurisdiction to interfere with a decision in exercising its revisional powers when the objection raised is as to the non-compliance of a mandatory provision of law.

My conclusion in this matter is that the learned senior resident magistrate failed to ensure that the applicant herein was accorded the right to be heard. He should have been served with a notice to show cause why his property should not be disposed of. This obviously caused a great miscarriage of justice on the part of the surety.

It is also quite apparent that the learned senior resident magistrate did not comply with the procedure laid down under section 131 of the criminal procedure code when ordering for forfeiture. In short, she did not hear the applicant before making the order. This was a great misdirection which entitles this court to interfere with her decision.

The applicant has complained that his cattle were seized by siuma auctioneers purporting to recover their fees. I have examined the record and I have not seen any order for auctioneer fees. There was also no order to attach moveable assets like cattle. There is nothing I can revise in this respect. However the applicant if properly advised will seek for the available legal redress to recover the proceeds. In the final analysis I am satisfied that this is a matter I have the discretion to exercise my revisionary powers. Consequently the orders issued on the 22nd day of July 2004 and 9th August 2004 by the Senior Resident Magistrate in Webuye S.R.MC. Cr Case No. 727 of 2003 REPUBLIC VS SAMUEL WALUBENGO MASAI are set aside.

The deputy Registrar is directed to have aforesaid file sent back to Webuye S.R.M'S Court.

**DATED AND DELIVERED THIS 18th DAY OF February 2005**

**J.K. SERGON**

**JUDGE**