



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE 39 OF 2004**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**JAMES KIMANI ..... ACCUSED**

**AND**

**IN THE MATTER OF P.M MUTUKU ADVOCATE - RESPONDENT**

**RULING**

The respondent in this case Mr P.M Mutuku, herein after called “Mutuku” is an advocate of the High Court of Kenya who is representing the accused person in this case. He accepted to defend the accused person as a result of the Deputy Registrar’s letter of instructions offering him the pauper brief. The record of this case shows that Mr Mutuku properly attended court each time this case was due for mention or hearing until 23/5/05 when the case in the presence of Mr Mutuku, was adjourned for further hearing on 4/10/2005. On 4/10/05, Mr Mutuku did not appear in court in the morning when the case was due to start but a colleague held his brief asking the court to delay the hearing for a period to await Mr Mutuku’s arrival. When at 1.30 p.m. Mr Mutuku had not shown up, the court adjourned the hearing to 11/10/05 but made an order that a Notice to Show Cause do issue to him to enable him to explain why he failed to attend court and represent the accused.

On 11/10/2005, Wendoh, Judge, could not proceed with the hearing in the morning of the day because Mr Mutuku did not once again show up. Mr Makau held his brief and sought that the file be placed aside until 12.00 noon of that day when Mr Mutuku would arrive from Nairobi. At 3.30 p.m, Mr Mutuku had not arrived and there was no explanation of his whereabouts. The court could not proceed with the hearing. The court then found it necessary to order for issue of a warrant of arrest against Mr Mutuku. The warrant was served upon the Machakos Officer in Charge of the Police Station for execution and the case was fixed to come on 13/10/05 for mention for the purpose of the warrant.

On 13/10/2005 the warrant of arrest had not been effected. The court then ordered for a fresh warrant to be issued and Mr Mutuku if arrested would appear before 18/10/2005, as Wendoh, Judge, was due to leave this court with effect from 17/10/05. The court at the same time took away the pauper brief from Mutuku and ordered that it be given to another advocate who might be willing to undertake the defence of the accused. On 18/10/2005, this case was mentioned before me and Mr O’Mirera the Senior State Counsel, drew my attention to the predicament and how he felt the police had failed, probably deliberately, to arrest Mr Mutuku. He mentioned that the police could not have missed Mr Mutuku who had attended this court for other cases only the day before. This court, noting the failure by the police and the advocates failure to obey court orders, fixed the case for a mention on 19/10/2005. The court at the same time demanded that the Machakos Police Station Officer Commanding Police Division do attend court on 19/10/05 at 8.30 a.m. to explain why the warrant of arrest on Mr Mutuku had not been executed.

On 19/10/2005, the Officer Commanding Police Division promptly reported to my chambers. With him came Mutuku who the court had later to learn, came on his own without having been arrested. An interesting coincidence. Mr Mutuku then, in the presence of the state counsel, explained why he had not attended court on the several dates earlier hereinabove stated. His case was that on 4/10/05 and on 13/10/05, he went to Nairobi Milimani High Court to represent a client in a Civil Case No. EJ.120 of 2005. That he had asked Mr Mutinda J.M not only to hold his brief but to conduct the rest of the trial. Thereafter he did not follow up to know whether or not Mr Mutinda attended court. But he later learnt

that Mr Mutinda had failed to attend court, but he did nothing about it. Then, admitted Mr Mutuku, he was served with the Notice to Show Cause to attend court on 11/10/2005, well before the date arrived. Instead of attending court on 11/10/2005 to explain the problem, if he had any, Mr Mutuku decided to send Mr Nyakeri to attend court and hold his brief. Mr Mutuku did not for once claim that he did not realize or appreciate the fact that he had to attend court personally in answer to the Notice to Show Cause. He on the other hand stated before the court that he on 11/10/2005 had gone to Milimani court, Nairobi again, instead of answering to the Notice to Show Cause. He argued that he had sent Mr Nyakeri to request the court to put aside the matter until the afternoon when he would have returned from Nairobi. Indeed Wendoh J. put the file aside but Mr Mutuku never appeared until 3.30 p.m. when she adjourned it. This was so despite the fact that Mr Mutuku was actually back from Nairobi by 3.30 p.m as he admitted before this court. He claimed that he found the court had adjourned but he also at the same time admitted that thereafter he did not bother, even during the following day, to see the Judge to explain his reasons for failing to attend court.

On 17/10/2005, Mr Mutuku said he attended this court and was in his office here in Machakos. He knew then that there was an unanswered Notice to Show Cause against him in respect of which he had done nothing, or putting it a different way, which he had ignored. He claimed that he did not bother to inquire from either Mr Mutinda or Mr Nyakeri both of whom had held his brief at court at one time or other, what had occurred at court. He did not claim that he forgot anything. He did not claim that these issues were not in his mind all the relevant time. He admitted that he just ignored the issue or did not bother to attend to the issue. Mr Mutuku, admitted on record that he had failed to attend court as required on both dates. He admitted that he did not make necessary inquiries as a reasonable person. He admitted that he was wrong in his conduct.

I have carefully considered his conduct. It was not simply reckless. It was deliberate. It amounted not only to an unethical conduct on his part but also to serious contempt of this court, which cannot be easily ignored.

Mr Mutuku, in mitigation, stated how he has for many years conducted himself with integrity. He said he cannot properly explain why he brought himself to disdain. He apologized and promised not to repeat the contemptuous conduct in the future. He sought leniency of this court. This court has considered the mitigation. It is the view of the court that this kind of conduct must be discouraged otherwise the court as in institution which carries heavy responsibility in enforcing the law to establish justice, will be brought into disrepute. It will thereby become a toothless bull-dog, a situation which will result into serious consequences. That should be avoided at all costs. In relation thereto, I have noticed within only a span of two weeks, I have stayed around, that court orders are often obeyed more in the breach than in obedience, even by police officers upon whom enforcement of law is bestowed. This practice must stop forthwith.

It crossed the courts mind that Mr Mutuku should be sent to jail for his contempt of the court. Taking his mitigation into account, however, and without minimizing the seriousness of his contemptuous conduct, he will pay a fine of Kshs.2,000/= or in default 14 days in prison. It is so ordered.

Dated and delivered at Machakos this 24th day of October 2005

**D.A. ONYANCHA**

**JUDGE**