



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 336 of 2004

(From original conviction and sentence in Criminal Case No. 607 of 2003 of the Chief Magistrate's Court at NAKURU – S. MUKETI (MRS))

JOEL OMULO NYANDIEKA.....APPLICANT/APPELLANT

VERSUS

REPUBLIC.....DEFENDANT/RESPONDENT

RULING

The applicant was convicted for the offence of stealing by servant and was sentenced to 12 months imprisonment. He applied to the High Court for his release on bail pending appeal and the court ordered his release on his own bond of Kshs.100,000/- with a surety for a similar amount. The applicant was released from custody and his appeal was listed for hearing on 19th October, 2005. On that day he failed to attend court for no apparent reason. Mr. Juma Advocate held brief for the applicant's advocate who was on record then, Mr. Orina, and sought an adjournment saying that Mr. Orina was engaged before another court. Nothing was said regarding the appellant's absence. Justice Kimaru adjourned the hearing of the appeal to 23rd November, 2005 and ordered that the appellant be present on that day. On 23rd November, 2005 both the appellant and his advocate did not appear before Justice Kimaru for the hearing of the appeal as ordered. The court cancelled the bond which he had been granted and issued a warrant for his arrest and committal to serve his jail term. The court further ordered that the hearing of the appeal could be fixed while the appellant was serving his sentence.

On 25th November, 2005 the appellant filed an application under Section 357 of the Criminal Procedure Code seeking to set aside the orders made on 23rd November, 2005. In his affidavit in support of the application, he stated that on the material day he attended court but realised that the matter was not listed in the cause list and he was advised by an officer in the criminal registry that he could go away and wait for another date to be fixed and he did so, only to learn later that the file had been taken to court and the aforesaid orders issued.

The applicant did not say that he made any effort to trace his advocate to find out from him the fate of the matter. He did not appear before Justice Kimaru's court to confirm if the file was there or not. There was no affidavit sworn by the criminal registry officer who was said to be one Carol, confirming that she actually told the appellant to go home upon realising that the matter was not in the cause list.

I find the application lacking in merits. I am also not satisfied by the explanation given by the

applicant for his absence. The application is also brought under the wrong provisions of the law. I dismiss the application and order that the applicant continues to serve his sentence. His appeal will be heard on 30/1/2006.

DATED, SIGNED AND DELIVERED at Nakuru this 2nd day of December, 2005 in the presence of Mr. Rabera for Mr. Makori for appellant and Mr. Gumo, Assistant Deputy Public Prosecutor.

D. MUSINGA

JUDGE

2/12/2005

MUGA APONDI

JUDGE

2nd December, 2005