



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CR. APPLICATION NO. 940 OF 2003

JAMES KARANJA RITHO APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

In December 2003, I was assigned by The Hon. The Chief Justice to be the duty Judge for three days, dealing with the criminal bench. I received various applications that were coming in by way of a Chamber Summons supported by an affidavit, some of which were deponed to by the advocates themselves. I requested three advocates and the state Counsel to address me on the procedural point namely:-

“How should an application be brought into court for criminal High court matters.

Is it by way of chamber summons;

originating summons; notice of motion or originating motion?”

For ease of reference Criminal High Court Nairobi Miscellaneous application 940/03 consolidated:- James Karanja Ritho v Republic was used.

Mr. Ng’anga Thiongo led the arguments on behalf of S. Kangari and G. Morara, J.M. Nyamosi was for the state.

The application in questions are those for:-

i) Leave to appeal out of time

ii) Bail pending appeal

iii) Review

Others mentioned by the way are:-

iv) Habeas corpus

v) Constitutional References.

vi) Should an advocate be permitted to depon to an affidavit?

After being given time to look up the law on this point, the advocates came up with the following findings:- That the procedure in coming into court is silent except for a few cases. The courts jurisdiction is established by the constitution (see the judicature act section (1) Cap 8 of the Laws of Kenya).

Where the act is not silent the procedure is quite clear.

For instance

i) Habeas corpus

Section 389(2) , (1) and rules LN. 474/1963.

This is where a person alleges that he is improperly detained. An application/exparte is made supported by an affidavit in triplicate to the judges in chambers.

The judge may dismiss the exparte application. Where he does not dismiss such application he would direct that summons to be issued and directed to the person in whose custody the persons alleged to be properly detained to appear. A copy of the affidavit is attached to the summons.

ii) Revision

Section 364(1) Criminal Procedure Code

Cap 75 Laws of Kenya

The High Court, under its supervisory powers of the subordinate courts is permitted to call up the records of a case and satisfy itself of the legality, correctness and propriety of any finding, sentence or order recorded or possessed and as to the regularity of the proceeding.

When exercising the power of revision section 365 CPC on the procedure states:-

“No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision.”

A party therefore merely writes a letter to bring it to the attention of the high court the irregularities

. See Procedures in Criminal Law in Kenya

Moranyi Buorawang’a 1994 Edition

Initiation of Revisionary Proceeding. There is a proviso under section 365 CPC where at the court discretion a party may be called to be heard.

“Provided that the court may, when exercising those powers hearing any party either personally or by an advocate, and nothing in this section shall effect section 364 (2) (that deals with correcting a finding of acquittal into one of conviction).

It is therefore through the invitation of the court that an advocate appears. Thus the procedure is – a letter to the court for the revision required or the court on its own motion.

A file (revision) is opened. The Hon. Judge deals with the revision by calling up the original file and making a finding. The Hon. Judge would call the party concerned or his advocate to address him on the point, only if it is necessary. There is no application by way of chamber summons.

iii) Constitutional Reference

Under the constitution Part 5(V)

parties are permitted to bring constitutional reference to the High court under both the criminal and civil laws. The section 84 of the constitution:-

“The enforcement of protective provision,” required that the Chief Justice makes rules. Since independence no rules had been made until the year 2001. By LN 133/01 Chunga CJ (as he then was). Provided that an application under the said rules be:-

“made by originating summons and procedure laid. Order 36 CPR shall be as far as practical apply.

” The rules are known as “The Constitution of Kenya (Protection of fundamental rights and freedoms of the individuals) Practice and procedures rules 2001.

iv) Leave to appeal out of time

The law is silent on this. Section 349 of the Criminal Procedure Code allows an application to the High Court where delay in filing an appeal has been occasioned for good cause. The rules in which to come into court is silent as earlier stated. The advocate referred me to the case law of:-

Yusufu Mulindwa v Republic (1950) EACA 131

Whereby the appellant was convicted in the magistrates’ court and applied to the superior court for leave to appeal out of time.

The judge dealt with the application summarily and without hearing the parties. It was held that the application cannot be dealt with summarily and in chamber. Such application must be dealt with in open court after the applicant has been notified of the date.

By this authority other advocates conclude an application to the High Court should not be by way of a chamber summons.

Under the civil laws, chamber summons are heard in chambers whilst notice of motions are heard in open court unless the court otherwise directs.

I have indeed the finding of the said decision before me. The advocate suggests that such application be heard by way of Notice of Motion.

v) Bail pending appeal.

I have elsewhere ruled in the issue of bail pending appeal and I did so on the many irregularities that occurs with such application namely, that an appeal should first be filed before applying for bail pending appeal . The reasons being that many times the applicants would not file an appeal but apply for bail pending appeal. Because of the poor record keeping of the courts I have served in in Kenya, most of such applicant would not be return to court. No appeal is ever heard and thus no justice as such is done. What therefore is before me is how should such an application be undertaken? The application should be done in open court. It should be by way of a notice of motion or motion. The practice I see at Nairobi High Court of Kenya is to file the said application in a separate file.

I wish to mention that these application are normally supported by affidavits. Can a advocates depon to such an affidavit? I have seen instances where the client is in prison and cannot depon to the affidavit.

vi) Affidavit

My attention was brought to section 9 proviso of the advocates Act Cap.16 Laws of Kenya.

Which states:-

“No advocate may appear as such before any court or tribunal in any matter in which he has reasons to believe that he may be required as a witness to give evidence whether verbally or by declaration or affidavit and if, while appearing in any matter it becomes apparent that he will be required as a witness to give evidence . . . he shall NOT continue to appear Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit or formal or non contentious matter of fact in any matter in which he acts or appears.”

I believe the above section is clear on this point. The procedure for bail pending appeal is that an application is initially made to the trial magistrate, where such application is refused the person so convicted is to file a petition in writing presented by the appellant or his advocate.

Thus section 357 (1) of the Criminal Procedure Code has specific rules. Namely, The Criminal Procedure (appeal from refusal of bail) rules LN 363/59. These rules provide

“Where a person convicted on a trial held by a subordinate court, who has entered an appeal to the High Court and has been refused bail by the subordinate court desires to appeal against refusal to the High Court under the provision to subsection (1) of section 357 of the code. (The proviso under section 357 (1) the code provides that on refusal a party may appeal)

His appeal against refusal shall be made in the form of a petition in writing presented by the appellant or his advocate.” The petition is to set out clearly and fully the grounds for the application of bail. The petition is then lodged with the registrar of the High court. A copy of the petition shall be served at least 3 days before the hearing of the appeal on the Attorney - General by the appellant or his advocate Unless the judge disposes for special reasons with the services”.

It is therefore clear that Bail pending appeal has to first be applied for in the subordinate courts. If refused its thereafter appealed against such refusal. A petition is prepared and lodged with the Registrar of the High court. The Attorney General is served. The Attorney General files an affidavit.

The hearing proceeding on such application or a further affidavit is required by the court is filed. I therefore find at no time should an application by way of a chamber summons be filed in the High court. This is irregular. At no time should an applicant apply to the High Court for bail pending appeal without first applying to the original trial court and it is refused. A petition in writing is presented to court and lodged with the Registrar of the High court.

From the submission made by the parties and from the statute and text book law. I would summarize the method of coming into the High court.

In Summary

1) Habeas Corpus Section 389(2) rules LN 474/1963

a) Ex parte application by way of originating summons supported by an affidavit in triplicate for directions.

b) If application is not dismissed judge shall order summons to issue directed to person in whose custody the person alleged to be improperly detained.

c) The summons shall be accompanied by a copy of all affidavits lodged. If the person is

alleged to be detained in public custody – such as the police station the Attorney General is to be served with a duplicate of application (ie originating summons) all the affidavits lodged which is to be deposited in court.

Procedure:- the applicant is to file an originating summons

2) Revision

Section 364(1) Civil Procedure Code Cap 75 laws of Kenya

a) *Suo moto* The court out of its own motion may call up a file and review the same after satisfying itself of the legality and correctness.

b) A letter is written to the court (the Registrar of the High court) on the complaint.

A file for revision is opened. The Hon. Judge makes finding alone. No party has a right to be heard either personally or by an advocate before the High court when exercising its powers of revision.” Provision If the judge infact using his or her discretion calls up a party to be heard. The judge has no power to reverse a finding of acquittal to one of conviction. Procedure a letter written to the court and addressed to the Registrar – the High Court of Kenya. Revision file is opened *Suo motu* powers by the Hon. Judge.

3) Constitutional Reference

By way of an originating summons LN 133/01 as read with order 36 CPR. The rules under the Constitution of Kenya (Protection of fundamental rights and freedom of the individuals) Practice and procedure rule 2001.

4) Leave to appeal out of time

Yusuf Mulindwa v R. (1950) EACA 131. Parties must appear to court (ie applicant and the state counsel) and be heard in open court application. Application originating motion supported by an affidavit.

5) Bail pending appeal.

Petition to the High court lodged with the Registrar. The applicant – convicted person must first apply to the subordinate courts. If application is refused – petition in writing is to be lodged (as mentioned earlier) with the registrar and a copy served on the Attorney General. Attorney to file an affidavit. Court may direct more affidavits to be filed. Proof of bail pending appeal is contained in the case of *GIRDHAR DHANJI MASRANI V* 1960 EA 320.

I find that this is the correct position according to our law and orders accordingly.

Dated this 4th day of March 2004 at **Nairobi**.

M.A. ANGA’WA

JUDGE

Ng’anga Thiongo Advocates for the applicant

J.N. Nyamosi for stat/respondent

Criminal Division

2) Practice and Procedure

3) How should a criminal case application be brought to the High Court?

Is it by way of

chamber summons

originating summons

by way of a notice of motion

or originating motion?

4) Held:

i) Habeas Corpus:-

By way of a chamber summons *ex parte*

before a judge in chambers

ii) Revision

By way of a letter. No appearance unless

otherwise directed by the court.

iii) Leave to appeal out of time

Summons with supporting affidavit

iv) Bail pending appeal

Application is first made to the trial court.

Refusal by petition to the High Court.

v) Section 84 Constitution of Kenya

Constitutional reference

Originating Summons

5) Case law

a) Yusuf Mulindwa V Republic

EACA 131 (Leave to appeal out of time)

b) Girdhar Dhanji Masrani v R 1960 EA 320

Statute law

a) Judicature Act Cap.8 Laws of Kenya Section 3(1)

b) Advocates Act Cap 16 Laws of Kenya Section 9 proviso.

Practice Rule

Circular to magistrates No.5 of 1954.

Law reports of Kenya 1954 Vol XXVII

6) Advocates

Ng'ang'a Thiog'o for the applicant

J.N. Nyamosi for the state/respondent