



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO.58 OF 1998

BURKA AHMED SALIM

SHALHA AHMED APPELLANTS

VERSUS

STEPHEN C. NGALA RESPONDENT

RULING

The application before this court is dated 9.5.2002. The applicant among others, seeks that this court reviews and vacates its orders made on 7th May, 2002, releasing and discharging the contemnor, Mohamed Mahmoud Awadh from a contempt prison sentence of two months ordered on 9.11. 2001 by this court. This was done under an application dated 3rd May, 2002 brought by the firm of Khaminwa & Khaminwa. The application that led to the order of release and discharge of the applicant therein, aforementioned was to the effect that such a discharge was possible and lawful if the contemnor had at the relevant time, purged the relevant act of contempt, was remorseful and undertook not to repeat or continue with the act constituting contempt.

The issue raised in this application by the applicant to be determined is whether or not this court has authority or jurisdiction to release and/or discharge a contemnor once the latter has been condemned to serve a prison sentence. The applicant herein argued that this court has no such jurisdiction and that a contemnor can only appeal to the higher court or serve the sentence meted out. The respondent herein on the other hand, argued that this court has power to release and discharge a contemnor under suitable circumstances and that this court had jurisdiction to do so in relation to the respondent herein Mohamed Mahmoud Awadh. This is what this court has now got to put to a rest.

Contempt of court is provided under section 5 of the Judicature Act, (Cap 8) of the Laws of Kenya. The section states;

“5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.
(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

The clear interpretation of sub-section (1) above is that the court shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. To my mind therefore, the court has to look to England at any given time to know what the state of the law is in order to apply same to the situation in hand touching matters concerning contempt of court. To that effect order

52 rule 8 (1) of the rules of Supreme Court of England states:

“The Court may, on the application of any person committed to prison for contempt of court, discharge him.

This means that in England a contemnor may in suitable circumstances proved to the court, be discharged whether it arose from criminal or civil proceedings. The issue therefore is left at the discretion of the court which discretion shall be exercised judicially taking into account the circumstances of the case. In England the application for discharge will be made by the contemnor or someone on his behalf. Where committal to jail is to enforce obedience to an order of the court, it will not in every case be continued until the order is obeyed; the contemnor may be released if it is clear that further imprisonment will not secure compliance provided that he has been sufficiently punished for his disobedience. The application to discharge should if possible, be made to the court which made the order of committal by a notice of motion but there are no hard and fast rules about it. It can therefore be dealt with by any Judge of the High Court in which the order was made if the Judge who made it is not available. Such a motion takes presidency over all other applications in the relevant file at a given time. (Reference made to the cases of *Re Barrell Enterprises* [1972] 3 All ER 631, CA and *Yager v Musa* (1961) 2 QB 214.)

I have examined the Judicature Act, (Cap 8) of the Laws of Kenya. Section 5 thereof, earlier quoted herein donates power to this court to exercise the power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. Our Judicature Act does not therefore itself expressly provide any substantive law governing contempt of court nor is it self sufficient. As Mr Asige purported to assert. Nor did he make reference to any local legal authority to support his arguments and to guide the court.

I have considered his arguments carefully. I am of the opinion that the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed which in this case has already been hereinabove stated.

Applying the same to the facts of this case, I hold that this court had powers to revisit the orders of committal made against the contemnor herein on 3.5.2002 when it made orders discharging the contemnor from prison. The contemnor as earlier stated had been sent to prison for two months for failing to break down a wall between his land and that of the complainant. Mr Khaminwa had strongly submitted before me that in view of the fact that the contemnor had now obeyed the court order in breach of which he had been condemned to prison, and had recanted his sin so to say, as well as undertaking not to repeat the offence, the court should reconsider the case, not to find him not guilty of the contempt, but to forgive him for the offence already committed. This court accepting that the contemnor had undertaken not to repeat the offensive conduct, discharged him. It is my view that contempt proceedings are intended to uphold the authority and dignity of the courts. It follows therefore that if the court is satisfied that the contemnor's conduct has been genuinely reformed to the extent of once more fully recognizing the authority, the court may in its discretion, revise the punishment earlier meted out against the contemnor. Such power and authority of the court, in my view, is not donated under order 41 of the Civil Procedure Rules which deals powers and the basis for review of orders generally as Mr Asige asserted before me, but under the English order 52(8) (1) of the Supreme Court Rules, hereinabove quoted, and imported to our jurisdiction by s. 5 of the Judicature Act, (Cap 8). The exercise of such jurisdiction and discretion, is not intended to reverse the contempt order made on the ground that such order is in any wrong or contrary to the law. The court discharges the contemnor on the basis that the conduct of the contemnor which threatened or stood to undermine the integrity, dignity, honor and authority of the court, has been purged to the satisfaction of the court and that the contemnor has satisfactorily undertaken not to repeat such conduct. In my further understanding, the court would even have authority and power under the circumstances, to take a different course other than discharging the contemnor. For example the court may in suitable case, substitute the imprisonment term not with a discharge from prison *per se* but with the fine or the taking of security for good future conduct or behavior, or even grant an injunction against repetition of the act of contempt. The conclusion therefore is that the only limitation is that such discretion must be exercised carefully and judicially. In this particular case this court finds no fault with the course it opted to follow and followed to discharge the contemnor herein who the court was satisfied

had purged his contempt action by removing the offensive wall. He also through his advocate gave his undertaking to this court not to repeat the offensive act and this court was in its wide discretion satisfied with it.

Having arrived at the decisions I have as above, I find and hold that this application has no merit. I accordingly dismiss it. Costs are to the respondents.

It is so ordered.

Dated and delivered at Mombasa this 29th day of October, 2002

D.A. ONYANCHA

JUDGE