



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 1 OF 2001

REPUBLIC.....PROSECUTOR

V E R S U S

KARISA CHUCHU BAYA.....ACCUSED

R U L I N G

An Advocate of this Honourable Court, KENNEDY NYAMOKERE has been brought before me under a Warrant of Arrest. The warrant was issued by this Court on 30.4.01 after the Advocate failed to comply with a Notice served on him to Show Cause why action should not be taken against him for failing to attend Court to represent the Accused in this Murder trial.

The record so far shows as follows:-

That the Hon. The Chief Justice directed that the Advocate be requested to undertake the defence of the Accused on 26.2.01. Pursuant to that request the Advocate was served with the Committal Bundle at his offices in Mombasa on 27.2.01. The Court Process Server however endorsed on the Return of Service that the Advocate refused service but the bundle was still left in his offices that morning at 8.30 a.m. The Plea was scheduled for the same day, 27.02.01, but the Advocate did not attend. An Order was made adjourning the matter to 1.3.01 and for a Notice to be issued to the Advocate to Show Cause why he did not appear. A Return of Service made on 28.2.01 shows that the Advocate was served with the Notice to Show Cause but refused to sign it. He did not attend Court either and so, an Order was made for a Warrant of Arrest to issue. He was to be arrested and brought to Court on 5.3.01.

Apparently the Advocate was not arrested but somehow made an appearance in Court. However, the Accused was not produced and there was therefore no proper coram to proceed with the matter. An Order was made in the presence of the Advocate that he should appear in Court on 7.3.01 together with the Court Process Server. Came the 7th of March, the Advocate did not appear before the Court. An Order was made for a Warrant of Arrest to issue for production of the Advocate on 12.3.01. That Order was not complied with by the Registry on four occasions due to what the Deputy Registrar states was an oversight. That matter has been dealt with separately. The Warrant was however issued and executed on 2.5.01 and the Advocate was produced before me on 3.05.01.

In his explanation he states that he was not present when the Process Server went to serve the Committal Bundle on 27.2.01. He was in Malindi and only returned in the evening to be informed about it by his secretary. The Court appearance had come and gone. He also saw the Process Server and returned the Committal Bundle to him. On 4.3.01 he met State Counsel Mr. Ogoti in a Café who mentioned to him that he was supposed to appear in Court the following day. He appeared in Court and an Order was made for Mention before Commissioner Khaminwa. He does not remember which date the Court stated. He continued nevertheless that he did not appear before Commissioner Khaminwa when the matter came up on 7.3.01 but could not address the Court because he was not robbed. The Court record however shows

that he was not present and that is why a Warrant of Arrest was issued for him to be produced on 12.3.01. He did not return to Court and did not know what happened to the matter until he was arrested after arriving from a trip up-country on 2.5.01. Finally, the Advocate explained that he was a sick man who has been advised by the Doctor not to strain himself. He had no medical documents to show for it although he said they can be availed. He did not seek opportunity to do so.

The Court Process Server JAMES MUKUNI who testified on oath and was cross-examined by the Advocate had a different story

He swore that he found the Advocate in his offices on 27.2.01 and after having gone there the previous day and being told by his secretary to wait for him. The Advocate however started hurling abuses at the Process Server and said he would not attend Court as he had a lot of work in his office. He said pauper briefs were rubbish cases since he is not being paid. The Process Server nevertheless left the Committal Bundle there and made his Return of Service. He denied that the Advocate then met him and returned the bundle to him as contended by the Advocate.

In cross-examining the Process Server, the Advocate did not refer to his encounter with the Process Server but to one "Obara" to whom he allegedly returned the Committal Bundle. There is no court employee by that name.

I have carefully considered this matter and the explanations made by the Advocate. I saw him in the witness box and I have no doubt in my mind that he was lying through his teeth. That is as much a matter of regret as it is despicable. As an Officer of this Honourable Court the Advocate's conduct, particularly before the same Court, must be beyond reproach and his utterances must be truthful whatever the consequences. Sadly, Mr. Nyamokere did not strike me as a serious respecter of truth and candour.

I believe, as the Court Process Server states, that the Advocate was personally served with the Committal Bundle on 27.2.01 and rejected the service for his own selfish reasons. It is a matter of honour for an Advocate to be requested to render pro bono services to a fellow human being facing the ultimate charge of Murder. When that request is made as in this case by the Honourable the Chief Justice, it is double the honour. All Advocates, including the one before me, are members of the Law Society of Kenya which I take Judicial Notice, has an avowed duty to society and has pledged to assist the indigent members of Society by taking pro bono legal briefs through its members. The members of that profession practising in this region, have over the years, selflessly offered themselves for this duty. It is a matter of public record and I take Judicial Notice of it. I see no reason therefore why any self-respecting member of that society should rudely rebuff a request made by the Chief Justice in that regard.

There will obviously be the occasional exception where an Advocate will have a genuine reason for declining the request. Medical reasons and the fact that the Advocate has other pauper briefs quickly come to mind. But the civilised way to decline is not to hurl abuses at the Court Process Server or to dump the bundle on the Deputy Registrar's desk. They are only messengers! It is to attend Court and explain the predicament.

In this case the Advocate not only hurled abuses at the messenger but also says he returned the bundle to an officer not yet identified. He could have attended court on 27.2.01 but did not. He was served to attend court on 1.3.01 but declined to do so. He attended court on 5.3.01 after Warrant of Arrest was issued and heard the Order made that he should return on 7.3.01 but did not. If he was before Commissioner Khaminwa as he states 7.3.01, then he ought to have heard the Order that he was required in Court on 12.03.01. If he did not hear or understand any of the orders made, then surely the right thing to have done was to peruse the Court file and to arrange for his appearance before the Court to explain himself.

It is clear to me that the Advocate deliberately chose to be in contempt of the Court Orders. For this he has to suffer the consequences.

I sentence him to pay a fine of Kshs.5,000/- or in default to serve 14 days imprisonment.

The Advocate shall not be exempted from handling the pauper brief unless he satisfies the Court that an exemption order is necessary.

The case will be set down for Plea on 21.05.01 when the Advocate will be present. Mention on 17.05.01 before the Deputy Registrar.

Dated this 3rd day of May, 2001.

P.N. WAKI

J U D G E

3 p.m. – 03. 05. 01

Waki, J.

Ogoti – for Republic

Accused – present

Court Clerk – Sango

Ruling delivered dated and signed in open Court.

P.N. WAKI, J.