



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 220 OF 2003**

**ZIPPORAH KEMUNTO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The subject of this ruling is an Appeal filed herein vide a Petition of Appeal dated 11<sup>th</sup> March 2003. It was filed by the law firm of; Mogeni & Company Advocates, against conviction and sentence, arising out of the decision of; Hon. E, Juma, Principal Magistrate, vide criminal case number; 13985 of 2000, at Makadara Chief Magistrate's Court.

2. On 6<sup>th</sup> June 2003, the Appeal was admitted for hearing by a single Judge. Thereafter, the appellant was released on bond pending the hearing of Appeal. However, the court records show that, as far as; 28<sup>th</sup> June 2004, the Appellant did not attend court. Consequently, the Prosecution applied for issuance of a warrant of arrest and the court ordered for the same accordingly. The matter was then fixed for mention on 28<sup>th</sup> July 2004.

3. Subsequently, the warrant of arrest was extended on several occasions whereupon, the Court ordered that, the Officer Commanding Station at Buru Buru, to effect the warrant of arrest through Directorate of Criminal Investigations Headquarter. The Matter Remained Dormant Until The 25<sup>th</sup> January 2006, When The Learned Appellant's Counsel; Mr Mogeni appeared in Court and stated that, he was not aware of the issuance of the warrant of arrest.

4. At the same time, the OCS Buru Buru Police Station, requested for more time to execute the warrant of arrest. On 15<sup>th</sup> February 2006, the Learned Defence Counsel, informed the Court that, he had managed to trace the Appellant, however, due to short notice, she could not attend court. He sought for re-instatement of her bond, which had by then been cancelled. The bond terms were reinstated accordingly and parties ordered to set down the Appeal for hearing.

5. On 22<sup>nd</sup> January 2007, the Appeal was heard by the Hon. Lady Justice Lessit, and set for judgment on 7<sup>th</sup> February 2007. From the court record, the Appellant did not turn up in Court, for the judgment, as she was said to be indisposed. The judgment was stood over to; 14<sup>th</sup> February 2007. On that date, the Appellant was absent, and a warrant of arrest was issued accordingly. The judgment was stood over to 28<sup>th</sup> February 2007, but was not delivered.

6. On 21<sup>st</sup> March 2007, the Court ordered for the forfeiture of cash bail of; Kshs 5,000, the Appellant was released on. The warrant of arrest remained in force. On 1<sup>st</sup> October 2007, Hon. Rtd Justice Ojwang (as he then was) indicated that, he had the judgment prepared by Hon. Lady Justice Lessit, but the Appellant had jumped bail.

7. On 25<sup>th</sup> September 2009, the Learned Defence Counsel, Mr Mogeni told the Court, that he had lost contact with the Appellant. However, the warrant of arrest remained in force. The matter continued to be mentioned occasionally, by various Learned Judges with orders that, the Officer Commanding Buru Buru Police Station, be summoned and/or compelled to appear in Court and explain why the warrant of arrest has not been executed.

8. On 20<sup>th</sup> July 2011, one No. 232704, Inspector Evans Mwangi, told the Court that, the warrant of arrest had been dispatched to; IKobe Sub-location, Basamaro Location, Kisii. However, the Appellant had been found bed ridden, that, she was so sick that, she could not be arrested. But, she had promised to avail herself to Court on, the scheduled date and indeed on this particular date she was in Court.

9. The Appellant acknowledged that, she had filed an Appeal in 2003, but had not been finalized. The Court ordered her cash bail be cancelled (apparently the cash bail, had already been forfeited but the Court did not seem to have realized it). The matter was fixed for

hearing of the Appeal on 25<sup>th</sup> July 2011.

10. However, on that date, the judgment that had been written by the Hon Lady Justice, Lessit, could not be delivered as it was yet to be availed and the matter was stood over to 28<sup>th</sup> September 2011. At the same time the Appellant applied for her bond to be renewed. She was released on cash bail of Kshs15,000.

11. On 28<sup>th</sup> September 2011, the Court stated that the judgment written by Hon Lady Justice Lessit, had been misplaced. After hearing the parties, the Court ordered that, the Appeal be heard afresh and fixed it for hearing on 30<sup>th</sup> November 2011. However, on that date, the Appeal was adjourned indefinitely, at the request of the parties. Later on 18<sup>th</sup> April 2012, the Appeal was marked “stood over generally.”

12. On 17<sup>th</sup> September 2013, the Court noted that, the Appellant was absent and issued a warrant of arrest. Thereafter, the matter remained dormant until 11<sup>th</sup> April 2019, when the Learned Defence Counsel told the Court that, he had lost contact with the Appellant and had appeared following service of notice from the Court. However, warrant of arrest remained in force.

13. On 8<sup>th</sup> February 2021, this Court became seized of this matter and noted that, a warrant of arrest had been pending for over ten (10) years. The Respondent sought for directions from the Court. On 1<sup>st</sup> March 2021, the Court, ordered fresh warrant of arrest do issue. However, the Court was of the view that, issuance of fresh warrant of arrest would serve no purpose, due to lack of commitment to effect and/or execute the same.

14. However, the Learned State Counsel; Ms Chege informed the Court that, she had particulars that could assist, OCS Buru Buru Police Station to arrest the Appellant. The matter was stood over to 22<sup>nd</sup> March 2021. On that date, the OCS appeared and told the Court that, the Appellant had not been traced. At the same time the Learned Defence Counsel told Court that, he lost contact with the client. The OCS was directed to get full particulars of the Appellant from record, and effect the warrant of arrest.

15. The matter was then stood over to 21<sup>st</sup> April 2021. On that date, they sought for more time, the Court stood over the matter to 12<sup>th</sup> May 2021. However, the Court declined to allow any further adjournment of the matter.

16. I note that from the aforesaid and/or analysis, the following facts emerge: -

*a. The appeal herein has been in court for a period of eighteen (18) years, having been lodged in court on; 11<sup>th</sup> March 2003;*

*b. Throughout this period, the appeal has not been heard due to the absence of the appellant all through;*

*c. The judgment that was written to be delivered on 7<sup>th</sup> February 2007, has since been misplaced;*

*d. The order for fresh hearing of the appeal has not materialized.*

17. The question that arises is: for how long can a matter be kept in Court? What is the legal position where the Appeal is left un prosecuted?

18. To address these issues, an understanding of brief background facts is necessary. In that regard, it is evident from the lower Court record that, the Appellant was charged with the offence of; assault causing actual bodily harm, on 19<sup>th</sup> July 2000. She was convicted at the conclusion of the trial and on 29<sup>th</sup> January 2003, sentenced to serve six (6) months imprisonment.

19. As aforesaid, she appealed against conviction and sentence on 11<sup>th</sup> March 2003, after about one and a half (1 ½) months, she was released on cash bail of; Kshs 5,000. By that time, she had not served four months (4 ½) months of her sentence.

20. The provisions of; sections 347 to 378 of the Criminal Procedure Code, that deal with Appeals to the High Court, do not deal with a situation where the Appeal is abandoned. In my considered opinion, it is clear from the Appellant’s conduct of absconding and/or failure to pursue the Appeal that, she has, “abandoned” the Appeal.

21. In that case, by virtue of the provisions of; Article 159 (2)(b) that justice shall not be delayed; I order that: -

*a. The cash bail of Kshs 15,000, paid vide receipt number 0119066 dated 25<sup>th</sup> July 2011, be forfeited to the State;*

*b. The Appeal herein be and is hereby marked abandoned.*

*c. The appellant should be apprehended to serve the remaining period of four and half (4 1/2) remaining sentence in custody.*

*d. To facilitate the order (c) above, this ruling and/or the order shall be certified and served upon the relevant law enforcement agencies, in particular; the Directorate of Criminal investigation for action.*

*e. In the meantime, this file is marked as closed.*

22. It is so ordered.

**Dated, delivered virtually and signed on this 17<sup>th</sup> day of May 2021.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Ms Kimaru for the Respondent

No appearance for Appellant

Appellant - Absent

Edwin Ombuna - Court Assistant