



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER 1 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PAUL MUNIU KAMAU.....ACCUSED

RULING

1. The accused person Paul Muniu Kamau faces the charge of **Murder contrary to Section 203 as read 204 of the Penal Code Cap 63 laws of Kenya**. It is alleged that on 26th October, 2014 at Kiamchanjo village Nyandarua West District within Nyandarua County he murdered Harrison Kimani Masherri.

2. He was arraigned in court on 7th January, 2015 and took plea on 14th January, 2015.

3. He was granted bond of Kshs. 500,000/= with a surety of similar amount on 11th June, 2015. By 29th September, 2016 five witnesses had testified before *M. Odero Judge*.

4. On 16th December, 2016 one *Kamau Mwangi Njoroge*, the father to the accused stood surety for him, depositing his title deed Nyandarua/Silibwet/4556 valued at Kshs.3.3 million. He told the court on oath that he would ensure that the accused person attended court as and when required. By 27th April, 2018, eight (8) witnesses had been heard. All this time the accused attended court.

5. The matter landed in my docket on 23rd September, 2019. The record showed that prior to that he was in court on 25th May 2019. Mr. Nyagaka appeared as his counsel. He was given a mention date of 10th July 2019 for the fixing of a hearing date. The record shows that on that date he was present, with his counsel. He was given a hearing date for the 23rd of September 2019.

6. On 23rd September 2019 the accused was not in court. In his absence, Ms. Nyakira for the prosecution sought a Warrant of Arrest. His counsel Mr. Nyagaka who was present requested the court to give him time to trace him. The file was placed aside. Later on Mr. Bosire appeared and held brief for Mr. Nyagaka and informed the court that Mr. Nyagaka could not trace his client. I allowed the application for a warrant of arrest for the accused as provided for by **Section 115 of the Criminal Procedure Code**.

“S. 115 Arrest for breach of bond

When a person who is bound by a bond taken under this Code to appear before a court does not so appear, the officer presiding may issue a warrant directing that the person be arrested and produced before him.”

7. I fixed the matter for mention on 24th October 2019.

8. The matter was mentioned on 9th October, 2019, 16th December, 2019, and on 30th January, 2020, when I issued summons for the surety. There was to be a further mention on 26th March, 2020 but COVID 19 struck and court services were disrupted for a while.

9. The file was placed before me on 14th July, 2020 and I issued fresh Warrant of Arrest and Summons to the surety, the mention on 22nd September, 2020 did not happen but there was mention before the Deputy registrar on 3rd November, 2020 and accused was still absent.

10. On 23rd March, 2021 I directed the prosecutor to obtain the particulars of the surety from the court file and to avail the same to Officer Commanding Ngano Police Station for effecting of the Warrant of Arrest and the Summons. The next mention on 29th June 2021 the

accused was still absent and the summons and warrant of arrest were extended to 5th October, 2021.

11. On 21st July, 2021 the accused was presented before *Chemitei J.* He was committed to Nakuru GK Prison pending mention before the trial court on 18th August 2021.

12. On 18th August 2021 the accused person appeared virtually before me. His task was to explain his failure to comply with the bond terms. This is what he said:

“Accused: I have never been given a date by my lawyer.

Court: Who is your lawyer?

Accused: I do not know his name. He is the one who was to give me a date. My father is in court. He is the one who used to be called for the dates.”

13. I put several questions to the surety, Kamau Mwangi Njoroge to explain why the accused had not attended court as required:-

“Surety: I cannot not recall the last time we were in court. Corona came we never got a date. When they came to arrest him I was the one who showed them where he was. He had not absconded. I am sorry the advocate who was representing my son did not call me.”

14. From the record the accused person was last in court on 10th July, 2019. He was given a date for 23rd September, 2019. He never showed up. There was no Corona then and the blame on his advocate is clearly unfounded as the accused person was in court himself when the date was given.

15. To this the accused explained that he had an accident with a motor bike in August. He said he could not recall the date of the accident. Asked for the evidence of this accident or treatment documents, he said they were at home. Asked whether his surety could go bring them he said they were in a place only he could find. It is noteworthy that the surety made no mention of the alleged accident.

16. The accused asked the court to forgive him.

17. The prosecution counsel Ms. Mumba objected to this request, urging the court not to take into consideration the excuses given by the accused, and his surety. She submitted that the surety was liable to arraignment for failing to avail the accused person to court. She urged the court to forfeit his title deed.

18. The surety in response told the court that he was seventy five (75) years old man whose memory sometimes failed him. That it was not desire to fail to produce his son, it was just that his memory was going.

19. On his part the accused urged the court not to revoke his bond, that he had young children, that he just forgot the date, and would never forget the same again.

20. I have set out this as the background to the issue whether the accused bond ought to be revoked and the whether surety's title ought to be forfeited or any other action taken against him.

21. Bond is the constitutional right of every accused person **to be released on bond or bail, on reasonable conditions** as per **Article 49 (1) (h) of the Constitution**. Bond is given on reasonable conditions. Every accused person who is granted bond is required to abide by those conditions. The key and main condition is that upon release on bond the accused person will attend court as and when required to do so till the determination of his case. This is the purport of **Section 124 of the Criminal Procedure Code**

“Before a person is released on bail or on his own recognizance, a bond for such sum as the court ... thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court...”

22. It is the duty of the accused to know the next date, to ask questions if he did not hear the date, and to have the same date entered into his bond documents by the court assistant if he is in the open court, as the case was here. That way he has a record of his date. If he cannot recall his date thereafter it is his duty to find out. He can come to the court or he can come to the court registry to enquire. He can also call the court. He could also have called his lawyer. He can go to the police station and inquire from the investigating officer. He can inquire from the prosecutor. The duty lies on him as he is the accused person.

23. The accused person herein stayed away from 10th July, 2019 to July, 2021 without making any effort to find out what had happened to his case. Surely he cannot blame his lawyer or his surety for simply not bothering.

24. As for the surety, his role is clear, to abide by his oath on the date he presented himself to court as a surety; to ensure that the accused attends court as and when required. That means he must at all times keep a tab on the accused and his whereabouts and always be aware of the next hearing date. Should the accused be unable to attend court for any reason it is his duty as the surety to attend the court and report the reason for the accused's failure to attend and or report the accused's absconding if that be the case, so that he can be assisted to look for him.

Failure to do so the surety risks penalties which include the forfeiture of his security.

25. When this was put to the surety he indicated his incapacity to keep track of time due to his age and urged the court to forgive him. This memory problem if it is this serious that for two (2) years he did not recall that they needed to come to court is a clear indication that he may not be suitable to continue standing surety for this accused.

26. More importantly he appears not to have been aware of the whereabouts of the accused as he did not appear to know that the accused had been involved in an accident. He has demonstrated his inability to abide by the conditions set out for him as the surety.

27. Both the accused and the surety waited until the day the accused was arrested. The situation would have been different if the accused had brought himself or the surety had done so.

28. **Section 128 (3) of the Criminal Procedure Code** provides that once a warrant of arrest has been executed or the voluntary surrender of the accused ***“the magistrate shall direct the bond be discharged either wholly so far as it relates to the applicant... and shall call upon the person to find other sureties and if he fails to do so may commit him to prison”***

29. The provision of the law applies squarely to the accused. He failed to attend court for two (2) years, his surety failed to avail him to court for two (2) years,.

30. The surety has failed, and has demonstrated his incapacity, to abide by the conditions of being a surety. Since the accused has been arrested it would not be necessary to take any action against him or his title deed. In the circumstance he is discharged and his title deed be released to him.

31. As for the accused person, his bond is not revoked but he will have to avail another surety.

32. In the meantime he remain in custody.

33. Considering the age of the matter Hearing is set for the 13th of October 2021.

Dated, signed and delivered virtually this 17th day of September, 2021.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant Edna

Nyagaka S. M. & Co. Advocates for accused

samsonnyagaka@gmail.com

Accused present at GK Prison Nakuru

N/A for ODPP

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