



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRIMINAL REVISION NO. E122 OF 2021

NELSON SIMIYU WANYAMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

AND

MOSES SUVERIA SIMIYU.....ACCUSED

RULING

The accused was charged in the subordinate court with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. Upon arraignment, the applicant herein stood surety for the sum of Kshs 300,000/= and deposited in court his title deed for E. Bukusu/N. Mateka/2822.

On 2/6/2021, the accused attended court and applied to be supplied with witness statements. The matter was later called out at 1. 39 pm and the accused was not in court consequent upon which warrant of arrest was issued against the accused and summons to the applicant were issued upon application by the prosecutor.

On 16/6/2021, the prosecutor informed court that she had called the applicant who informed her that she was working on availing the accused consequent upon which the court issued a warrant of arrest against the applicant.

On 17/7/2021, the applicant presented the accused in court and both were arrested. The applicant was fined Kshs 300,000/= or serve 6 months imprisonment in default.

Aggrieved by the order, the applicant moved this court by way of a letter dated 25/8/2021 praying this court sets aside the prison term meted out on him.

Directions were given for the disposal of the application by way of written submissions. The respondent however informed the court on 7/9/2021 that it was not opposing the application and therefore did not file their written submissions. The applicant's submissions on record have been considered

This is a matter inviting the court to invoke its supervisory powers as donated by Article 165 (6) and (7) of the Constitution and Section 362 of the Criminal Procedure Code. Article 165(6) provides;

(6)The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

Section 362 of the Criminal Procedure Code provides:-

The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the

regularity of any proceedings of any subordinate court.

It is undisputed the applicant was surety to the accused who later absconded court. He was presented before court on 12/7/2021 under a warrant together with the accused. The court has perused the proceedings of that day and the record shows the applicant informed court that he did not have money to pay into court and did not wish the land to be forfeited. He prayed court to exercise its discretion.

The legal provisions relating to forfeiture of security is found in section 131 of the Criminal Procedure Code. The Section provides;

(1) Whenever it is proved to the satisfaction of a court by which a recognizance under this Code has been taken, or, when the recognizance is for appearance before a court, to the satisfaction of that court, that the recognizance has been forfeited, the court shall record the grounds of proof, and may call upon any person bound by the recognizance to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover it by issuing a warrant for the attachment and sale of the movable property belonging to that person, or his estate if he is dead.

(3)

(4) If the penalty is not paid and cannot be recovered by attachment and sale, the person so bound shall be liable, by order of the court which issued the warrant, to imprisonment for a term not exceeding six months.

In *Morris Abuga v Republic [2013] eKLR*, it was held;

It is noted that the trial magistrate did order the surety to pay the penalty but did not adhere to the second requirement which is found in Section 131(2) of the Criminal Procedure Code namely that if the penalty is not paid, the Court may proceed to recover it by issuing a Warrant for attachment and sale of the movable property belonging to the surety.

Under section 131(4) it is only when the penalty is not paid and cannot be recovered by attachment and sale that the person so bound is liable to imprisonment for a term not exceeding six months.

From the proceedings before the trial magistrate it is quite evident that not all necessary procedures were followed before the surety was sentenced to six months imprisonment.

Similarly in, *Josphat Ngare Ndege v Republic [2018] eKLR*, the court held;

The accused person has since been arrested and his bond terms cancelled. The state did not oppose the release of the applicant since the accused has been arrested and will carry his cross. The record of the trial Magistrate shows that the proper procedure was not followed. The first step was to realize the security which was deposited in court by the surety. No order was made for the applicant to show cause why the security should not be forfeited. This would be then forfeiture of the security, followed by warrant of attachment and sale. It is only after the court is unable to execute the warrant of attachment and sale that the court can order the surety to be imprisoned for a term not exceeding six months. The procedure followed by the trial Magistrate was clearly wrong.

From the above legal provisions and case law, the correct procedure in such a case would then be;

1. Upon the accused absconding, the surety is summoned to court to explain the whereabouts of the accused.
2. If the surety appears in court and gives a satisfactory explanation on the whereabouts or brings the accused before the court and wishes to be discharged from the bond, he should then be discharged and the accused's bond is consequently cancelled.
3. If the surety is unsuccessful in apprehending the accused, he should then be called upon to show cause why the security should not be forfeited.
4. If at the show cause hearing, the surety fails to give a satisfactory explanation, a warrant of attachment then issues for the forfeiture of security.
5. If for a reason, the warrant of attachment and sale cannot be executed or the security cannot be traced, a warrant of arrest should then issue against the surety who can then be imprisoned for a period of Six months.

In this scenario, both the accused and the surety were in court after a warrant had been issued against them. It is not clear who brought them before the court where the accused bond was cancelled and the surety imprisoned.

The court seems to have acted on the surety's explanation that he was unable to pay the money and was ready to serve jail term to save his land from being auctioned.

This court finds that the accused's bond having been cancelled, there was no need in imprisoning the accused. The accused should have carried his own cross. The surety ought to be discharged and the security deposited be released to him. Clearly, the above procedure was not

followed.

In the end, the court issues the following orders;

1. The applicant be and is hereby released from prison forthwith unless otherwise lawfully held.
2. The security deposited by the applicant be released to him forthwith.
3. This file is hereby returned to the Subordinate Court for disposal.

DATED at **BUNGOMA** this 3rd day of November, 2021.

S. N. RIECHI

JUDGE