



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. E077 OF 2021

HUMPHREY GITHAIGA MUIRU.....APPLICANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. On 28th October 2013, the Anti-Narcotics Police Officers at Jomo Kenyatta International Airport arrested one, Obinna Okoronkwo Young Smart, over an offence of trafficking in narcotics drugs contrary to; section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.
2. On 29th October 2013, the suspect was arraigned before the Chief Magistrate's Court at Jomo Kenyatta International Airport. He pleaded not guilty to the charge. On 13th January 2014, he was granted bond of; Kshs 3 million with one Kenyan surety of similar amount. On 26th February 2014, the surety approval process was undertaken by the trial court. A surety by the name; Humphrey Githaiga Muiru was examined. He offered a title deed of his land as security. The accused was then released from custody.
3. On 13th March 2014, when the matter was due for hearing, the accused was not in court. He had absconded the proceedings. A warrant of arrest was issued and a notice to the surety in form of summons was issued. To date, the accused has not been arrested
4. However, one by the name of Humphrey Githaiga Muiru, was subsequently arrested and arraigned in court. He denied ever offering security and/or presenting himself in court as surety for the accused. He told the court that, he was in possession of his title deed at home and has never deposited it to court.
5. The trial court then ordered investigations in the matter. The title deed deposited in court and the one held by the alleged surety were presented to the Land Registrar for verification. By a letter dated 6th November 2020, the Ministry of Land and Physical Planning recommended that, both title deeds be submitted to DCIO Headquarters for further verification the Investigating Officer to foresee the verification process.
6. Subsequently, Ms. Minnie Wachuka, a Land Registrar produced a report in court dated 10th June 2021, indicating that, the title deed deposited in court was not genuine. It does appear from the trial court record that, the court further ordered ID No. xxxxx, presented by the alleged surety be verified.
7. On 19th July 2021, the trial Court stated that, the letter from the Anti-Narcotics Jomo Kenyatta International Airport dated 21st February 2014, attached the letter from the Land Registrar Naivasha and the particulars of Identity Card printed on; 20th February 2014, is what informed the court to approve the surety. Thus, the Court was satisfied that, the surety in court was the one who appeared and stood surety for the accused. That, he was the one who presented the documents verified and later turned out to be fake.
8. The trial court then held that, the surety is liable for the absence of the accused, whom he said he knew very well. The surety was required to indicate how he would liquidate the sum of Kshs 2.9 million as the sum was reduced by Kshs 100,000 deposited by the accused. However, as the surety was unable to pay the Kshs 2.9million, he was committed to jail for a period of six (6) months.
9. However, the surety is aggrieved and seeks for that the conviction be quashed and sentence to be set aside on grounds stated as follows:
 - a) *That the Honourable Trial Magistrate misdirected herself in arriving at a conviction of the accused person and handling him a hefty fine of; Kshs 3,000,000 (three million shillings) in default to serve 6 months' term of imprisonment in jail without any substantial evidence on record warranting her to arrive at such a determination.*
 - b) *There was no direct evidence linking the appellant herein with the alleged offence which he was charged with before the trial*

court.

c) The trial Magistrate erred in arriving at an erroneous conclusion and a determination that alleged surety (appellant herein) was culpable and subsequently convicting without ascertaining whether the appellant herein appeared before court during the pre-trial to introduce himself and confirm and express his willingness to stand surety and give his title as bond to the accused person.

d) The appellant is a total stranger to the bond terms that were given to the accused person in the criminal case i.e.; Kibera Law Court Criminal Case No. 4144 of 2013 Republic vs Obinna Yongsmart Okoronkwo, he never stood surety with the accused person and is therefore a total stranger to the accused person who is a foreign national.

10. The application was disposed of vide written submissions, which I have considered. In a nutshell, I find that, the law that deals with deposit of cognizance is provided for under sections 126 to 133 of the Criminal Procedure Code (Cap 75) Laws of Kenya. The provisions of section 131 in particular deals with forfeiture of recognizance.

11. The section states as follows: -

(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) A warrant may be executed within the local limits of the jurisdiction of the court which issued it; and it shall authorize the attachment and sale of the movable property belonging to the person without those limits, when endorsed by a magistrate within the local limits of whose jurisdiction the property is found.

(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.

(5) The court may remit a portion of the penalty mentioned and enforce payment in part only.

(6) When a person who has furnished security is convicted of an offence the commission of which constitutes a breach of the conditions of his recognizance, a certified copy of the judgment of the court by which he was convicted may be used as evidence in proceedings under this section against his surety or sureties, and, if the certified copy is so used, the court shall presume that the offence was committed by him unless the contrary is proved.

12. It follows from the aforesaid that, before an order is made for forfeiture of cognizance, the court shall call upon the person bound to the recognizance to pay the penalty thereof, or to show cause why it should not be paid and that person should be given adequate time for the same.

13. In the instant matter, the record reveals that, on the 8th July 2021, the surety was arraigned in court, and on the same day, the court made its decision to commit the surety. The record further shows that, immediately thereafter, the appellant's counsel brought to the court's attention the fact that, the appellant had not been given an opportunity to be heard, as provided for under section 131 of the Criminal Procedure Code.

14. However, the Court, stated as follows:

“Since the surety has not indicated how he will pay the Kshs2.9 million, I order that, he be jailed for six months.

Leave to appeal granted”

15. With utmost respect to the decision of the trial court, the appellant was not given adequate notice to show cause why the penalty should not be paid or even heard at all before he was sentenced. The appellant could not be expected to immediately indicate how he would pay a colossal sum of; money of; Kshs 2.9million, instantly without a hearing. Therefore, the provisions of; section 131 (1) of Criminal Procedure Code were not complied with.

16. Similarly, the provisions of; section 131(2) as regards the issuance of a warrant of attachment and sale of movable property, were not complied with. This is for obvious reason that, there was no valid and/or genuine title deed deposited in court. Therefore, the attachment and sale could not take place.

17. If the subject provisions could not apply, due to lack of a valid title deed, then the question that arises is whether, the provisions of section 141(4) of Criminal Procedure Code of committing the appellant to jail could apply? I don't think so. These provisions presume that, the provisions of; section 131(2) have come into force and the penalty is not paid or attachment and sale has not materialized, that is when an order for committal into custody comes into play. In view of the fact that, there was no genuine title herein and no order for forfeiture of recognizance, then an order of committal to custody could not arise.

18. On the basis of the foregoing, and in particular by virtue of the fact that, the provisions and/or procedures laid down by the law under section 131 of Criminal Procedure Code, were not complied with, then the order of committal of the appellant to six (6) months imprisonment was irregular and improper and on that ground alone, the appeal on conviction succeeds.

19. Be that as it were, even if the court were to find that, those provisions were complied with, the question that arises is whether the appellant offered a satisfactory explanation as to why he could not be bound to pay the penalty of Kshs 2.9million. I note that, the appellant denied ever offering his title deed as security in the lower court matter. He told the court that, he was still holding his genuine title deed in his possession. The Land Registry confirmed the title in court was not genuine. Therefore, investigation should have shifted as to who presented the fake title deed.

20. The trial Court in that regard stated as follows:

“I am satisfied that this surety is the same person who appeared in court and stood surety for the accused. He is the one who presented the documents that were verified. If the title deed is now found to be fake, then, he is the one who presented it”

21. The question that arises from the aforesaid decision of trial court is; how was it proved that, it was appellant who appeared in court physically to present the fake title deed? The learned trial Magistrate arrived at that decision by relying on the documents presented in court, and in particular; the title deed and identity card presented by the surety.

22. However, it is noteworthy that, other than these two documents, the court had further ordered that, the surety presents inter alia:

- a) A letter of introduction form any of his/her local administration officers (Division Officer, Chief or Assistant Chief),
- b) Copy of surety’s identity card and Kenya Revenue Authority Personal Identification Number,
- c) Two coloured photographs of surety.

23. The question is; were these documents provided before the surety was approved and/or the accused released? If so, how come at the time of arrest of the appellant, the letter of introduction was not subjected to verification? How come the photographs held in court (if at all) were not used to, verify whether it was the appellant who had appeared in court?

24. What comes out clearly, is that, the verification of the surety was not adequately done. This is usually an exercise carried out by the court with the assistance of the prosecution to verify documents presented. The appellant herein was not involved. If the exercise or process was poorly done, then an opportunity was availed for a fraud to take place. The appellant cannot be blamed for the same.

25. In my considered opinion, once the appellant denied that, he stood surety and the title deposited in court was found to be fake, the court should have ordered for criminal investigations into the matter. If the thereafter, appellant was found culpable then, the appellant would be charged accordingly. The Court should not have acted on assumption that; it was the appellant who presented the fake title to court.

26. The upshot thereof, is that, I find the conviction of the appellant unsafe and I consequently quash it and set aside the sentence, though, he has already almost served it, and is about to be released. He shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 15TH DAY OF DECEMBER 2021.

GRACE L NZIOKA

JUDGE

IN THE PRESENCE OF:

MR ONDIEKI FOR THE APPELLANT

MR KIRAGU FOR THE RESPONDENT

EDWIN OMBUNA – COURT ASSISTANT