



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL REVISION NO. 102 OF 2018

ISMAEL CHWEYA ANUNDA.....APPLICANT

VERSUS

REPUBLIC.....1ST RESPONDENT

ESHIKONI AUCTIONEERS.....2ND RESPONDENT

RULING

1. These revision proceedings arise from the criminal proceedings in Mumias SPMCCRC No. 262 of 2017, where Anthony Nzababa Kumaruti stands charged, on divers counts of forgery, contrary to sections 345 and 349 of the Penal Code, Cap 63, Laws of Kenya, and of giving false information to a person employed in the public service contrary to section 129(b) of the Penal Code.
2. The accused person took plea on 16th March 2017, and was admitted to a bond of Kshs. 200, 000.00, with a surety of like amount, or a cash bail of Kshs. 60, 000.00. His uncle, Ismael Chweya Anunda, the applicant in these revision proceedings, stood surety for him. The actual hearing commenced on 24th July 2017, and continued till 2nd October 2017. Three prosecution witnesses testified. After the matter was adjourned on 2nd October 2017 for the state to call more witnesses, the accused person did not turn up at the next scheduled hearing on 9th October 2017. A warrant for his arrest was issued, and subsists to date. Thereafter the matter was mentioned on 19th October 2017, 8th November 2017, 17th November 2017, 4th December 2017, 8th January 2018, 29th January 2018, 14th February 2018, and 5th March 2018, to no avail.
3. When the accused person failed to attend court on 9th October 2017, the court issued a warrant for the arrest of the surety and directed the executive officer of the court to commence the process of realising the security. On 8th November 2017, another order was made for summons to issue upon the surety. The said summons was renewed on 17th November 2017. On 29th January 2018, the executive officer of the court informed the court, in open sitting, that the auctioneer, instructed by the court, to realise the security, had commenced the process, by writing to the surety and giving him notice to pay.
4. These revision proceedings were commenced by the surety, complaining that the process of disposing of his property to recover the security did not accord with the law, and in particular section 131 of the Criminal Procedure Code, Cap 75, Laws of Kenya.
5. In *John Mwanje Mutongoya vs. Republic* [2017] eKLR, the court underscored the fact that the undertaking that a surety enters into, to ensure that the accused person shall attend court at all times, as and when required, is a serious one. No doubt, when the accused person jumps bail there would be a breach of the undertaking, and that has the consequence that proceedings could be undertaken to realise the security offered by the surety.
6. The procedure to be undertaken where an accused person jumps bail is set out in section 131 of the Criminal Procedure Code. It is required that in such case the surety would be called upon to pay the penalty thereof, or to show cause why it should not be paid. Where sufficient cause is not shown and the penalty is not paid, the court may then proceed to recover the same by raising a warrant of attachment and sale of the movable assets belonging to the surety or his estate, if he is dead. Thereafter, the warrant may be executed. Where the penalty is not paid, and it cannot be recovered by way of attachment and sale, then the court may opt to have the surety committed to jail.
7. In summary, once the accused person absconds, the trial court should give notice to the surety to pay the surety amount. Should he fail to pay the said amount within the reasonable time, that the court should give him, then he should be required to show cause why recovery proceedings should not commence against him. Should he not pay and fail to show sufficient cause, then proceedings to realise the security should commence. If the said proceedings yield nothing, or are unlikely to yield anything, then the final option is to order that the surety be committed to jail.
8. It was emphasized in *John Mwanje Mutongoya vs. Republic* (supra) and *John Taracha Sindikha vs. Republic* [2005] eKLR, that affording the surety a fair hearing is a prerequisite before the recovery proceedings commence or are embarked upon. He should be served with a

notice to pay the money within a specified and reasonable period of time, or show cause why his property should not be disposed of for breach of the undertaking to ensure that the accused attends court at all times. The two processes may happen simultaneously or follow each other sequentially, although it would be fairer and prudent for them to follow seriatim.

9. In the instant case, when the accused person absconded, the trial court ordered for his arrest and for proceedings to commence for realisation of the security. That did not accord with section 131 of the Criminal Procedure Code. The surety was apparently not arrested, after which the court opted to have summons issued for him to attend court, ostensibly to show cause. At the same time, the executive officer of the court engaged a court broker to have notices issued to the surety to pay the penalty, failing which recovery proceedings were to commence. Again, all these steps did not accord with section 131. The trial court should have made an order requiring the surety to pay the surety amount within a specified period of time. The court should have handled that directly without delegating it to a court broker. Upon his failing to pay the penalty, then the court should have required him to attend court to show cause why the security should not be realised. It was only after he had failed to show sufficient cause that the proceedings to realise the security should have commenced. There is nothing on record to show that he was ever served with the summons to appear to show cause, before the recovery proceedings were ordered.

10. The actions and orders of the trial court in that regard are, therefore, amenable to revision under section 364 of the Criminal Procedure Code. I hereby, therefore, set aside all the orders that had been made by the trial court in that behalf, and direct as follows:

(a) That the surety, the applicant herein, Ismael Chweya Anunda, shall pay the surety amount of Kshs. 200, 000.00 in the next fourteen (14) of the date of this order, or otherwise produce the accused before the court;

(b) That the matter, in Mumias SPMCCRC No. 262 of 2017, shall be mentioned, before the trial court, on 26th October 2020, to confirm compliance with (a) above;

(c) That, should the applicant fail to comply with (a) above, within fourteen (14) of the date of this order, the trial court shall, at the mention on 26th October 2020, require him to show cause why the said amount cannot be recovered, by way of attachment and sale of his assets, in terms of section 131(2)(3) of the Criminal Procedure Code;

(d) That the original trial records, in Mumias SPMCCRC No. 262 of 2017, shall be returned to the trial court for further action in terms of (b) and (c) above; and

(e) That this revision file shall be closed.

11. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2nd DAY OF October, 2020

W MUSYOKA

JUDGE