



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R MWONGO, J.)

CRIMINAL REVISION NO. 5 OF 2019

GEOFFREY KINUTHIA WAMUTI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The Applicant was the surety of the 1st Accused in Naivasha Chief Magistrate's Court Case No. 223 of 2018, in which Irene Mbene Kinuthia (alias Jane Steinmetz Mbene) was charged with obtaining by false pretenses. The lower court proceedings in which the issues before the High Court are material are contained in both CMCR No 223 of 2018 and CMCR No 939 of 2018. The reason is that at some stage the 1st accused's latter case was consolidated with the earlier case. This court called for and perused both files of the trial court in exercise of its supervisory jurisdiction, and mandate under Article 165(6) of the Constitution,
2. In any event, following the charges against the 1st accused, she pleaded not guilty and was granted bond of KShs. 5 million with one surety of similar amount. On the 6th July 2018, in CMCR 939 of 2018, the applicant stood surety on her behalf. He deposited a title No. Nachu/Mikuyuni/649 as security. The title was assessed and found to be authentic and admitted by court.
3. On 4th October, 2018, however, the accused did not attend court and warrants of arrest issued against her. On 29th October 2018, the accused's advocate appeared in court and was asked to avail his client and the surety on 30th October, 2018. On that day however, the advocate, the accused and the surety did not appear. An arrest warrant was therefore issued against the surety.
4. The surety was then arrested on 13th Feb 2019, and was arraigned in court on 14th Feb 2019 to explain the whereabouts of the accused. The lower court then ordered that the surety be detained at Naivasha Police Station for ten (10) days. In 25th February, 2019, the surety explained that the accused is his daughter and that he last saw her in November of 2018. The court ordered he be remanded in custody at the GK prison.
5. On 4th March, 2019, counsel appeared for the surety and protested the arrest, pointing out that the surety had medical difficulties and sought that he be given bond terms. The court directed that the surety be attended medically but did not order his release.
6. Thus, the present application for revision of the lower court's decision in this matter was brought under certificate of urgency on 5th March, 2019. The notice of motion seeks the following orders:

"1.Spent

2 That this honorable court do call for and examine the record in Chief Magistrate Court Criminal Case No. 223 of 2018 and revise, review and set aside the order issued on 14th February 2019, detaining the 1st accused's surety, the applicant herein and subsequent orders of 25th February 2019 and 4th March 2019 directing continued detention of the applicant.

3. That this honourable court do order the forthwith release of the applicant from custody.

4. This this honourable court be pleased to grant other or further relief it deems fit."

7. This matter was certified urgent and set for hearing on 7th March, 2019. However, as the state needed time to file its response., it was

agreed by consent as follows:

- a. That the surety be released on a cash bail of Kshs 200.000/=
- b. That the surety shall report to court for the hearing of the application
- c. That failing attendance by the applicant at the hearing a warrant of arrest shall automatically issue
- d. The hearing of the application to be on Monday 11th March 2019.

Parties' Cases

8. The applicant alleges that the actions of the lower court in ordering his custody were unjustified. He states that he was not served with the summons to enable him to explain himself. That he only received a call from an unknown person, and further that no explanation was given to the surety that his attendance was mandatory. Further, that the consequences of his not honouring the court's summons, was not explained to him.

9. The applicant also asserts that he is 72 years old, that he suffers from diabetes and hypertension, and was ailing at that time and therefore unable to attend court. He said that he explained all this to the said caller. The appellant further states that he was remanded in custody because the prosecution had doubts as to whether the title he had offered was genuine, yet there was no evidence by the prosecution to back up the allegation of suspicion. Finally, he stated that there was a report on 25th February, 2019 by the directorate of criminal investigations office confirming that the title was genuine.

10. The respondent's case, however, is that the surety was unable to explain the whereabouts of, and the failure of the accused to attend hearings as scheduled. Accordingly, the prosecution sought for a further verification of the title offered by the applicant as security (Title No Nachu/Mikuyuni/649) to enable the court to start the process of realization/ recovery of the security. On that basis, the court ordered the surety/applicant to remain in custody. This action was as a result of the conduct of both the accused and surety absconding court even after being properly summoned leading to doubt on the prosecution side on the genuineness of the title.

11. According to annexures to the Replying Affidavit of Corporal Andrew Langat for the state, the applicant's title was valued by Circuit Valuers at Kshs 6.5 million. The Lands office, Kiambu, verified the title to be owned by the surety as at 1st August, 2018. After the surety did not attend court, the court doubted the surety documents and sought further verification, and the Directorate of Criminal Investigation confirmed the genuineness and ownership of the title by the surety by a letter dated 29th February, 2019.

12. It is clear from the record of the lower court file that the applicant was to be remanded in custody until the 4th March 2019 to enable the prosecution to provide a further valuation report. However, on that day the same had not been done and despite application by applicant's counsel to be released on bail or bond, the court still declined and further remanded the applicant. The applicant submits that his continued detention is capricious, illegal, against public policy, national values and principles of governance and a gross violation of his fundamental rights and freedoms.

Analysis and determination

13. I have carefully perused the record of proceedings of both files of the lower court. This is what I have observed: There were three accused persons in the lower court charged with obtaining by false pretenses. The record shows that on 15/2/2018 the court in CMCR 223 of 2018 ordered that the accused could each be released on a bond of Kshs 5 million, with one surety of similar amount.

14. This was also the case In CMCR 939 of 2018 where the only accused was Irene Mbene Kinuthia (1st accused in CMCR223 of 2018). The order for release on a bond of Kshs 5 million was made on 2/7/2018.

15. The applicant offered his title No Nachu/Mikuyuni/64 aforesaid as security on 6/7/2018 in CMCR 939 of 2018. During bond approval before Abdul Resident Magistrate, the shows as follows:

“Geoffrey Kinuthia Wamuti Identity card number 3278394 sworn and states in Kiswahili.

I live at Gathanga, Kiambu County. It is next to St. Barnabas ACK church.

I am a businessman. I operate Sobon Safari Kenya ltd. It is in Ngara road near Kenya Police Sacco Plaza, Grand Care Building. I am the Company Director.

I wish to stand surety for Irene Mbene Kinuthia who is my daughter with my Title Deed Number Nachu/Mikuyuni/649. I know the charges she is facing and bond terms given.

I will ensure she attends court.

PW 1 – No objection.

Court – Surety approved

Title deed to be deposited in court until the case is finalized.”

16. It is clear from the above proceedings that the surety/Applicant despite his age at 72 years, understood his obligations as a surety. He understood that there were terms of the bond. He understood that it was his responsibility to ensure that his daughter attends court. Upon those assurances, the court approved the surety and accepted the title as security until the case was finalized.

17. The proceedings show that the authenticity of the title was confirmed, and accordingly on 23/8/18 the verified Title Deed was received from the State counsel and kept in the security documents cabinet. The Title deed was also returned by the State Counsel.

18. The law relating to sureties and other recognisances is provided in **Section 131(1)** of the **Criminal Procedure Code**. Forfeiture of a recognisance is provided for thus:

“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 jurisdiction of the Court which issued it and it shall authorize the attachment and sale of the movable property belonging to the person without these 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 imprisonment.”

19. The applicant provided three authorities for consideration. In **George Amata Ongawa v Republic [2010] eKLR**, Kasango J, faulted the procedure used by the trial court and stated that it is only when the surety money is not recovered through a warrant of attachment that the court can order imprisonment.

20. In **John Taracha Sindikha v Republic [2005] eKLR**, Serگون J, emphasized the importance of following the mandatory procedures of section 131. He stated that it was essential to ensure that an applicant was served with a notice to show cause why his property should not be disposed of; and that he should be given a right to be heard. He went on to set aside the lower court’s orders.

21. In **Maximilian Nganda v Republic [2004] eKLR** the court stated the procedure for dealing with recognisances in accordance with **Section 131** Criminal Procedure Code as follows:

“..... If sufficient cause is not shown by appellant the first step to be taken would have been to order the appellants property to be attached in accordance with Section 131 (2) Criminal Procedure Code and if the penalty was not paid or recovered by attachment then the magistrate would have invoked Section 131 (4) Criminal Procedure Code to sentence the appellant to prison. Appellant’s conduct of absconding may have contributed to how the magistrate decision in taking this drastic measure of imprisoning him. He was behaving just like the 1st accused had. I do agree that the court acted excessively by not considering the procedure in dealing with provisions of Section 131 Criminal Procedure Code.”

22. In this case, the trial magistrate 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 the recognizance by issuing a Warrant for attachment and sale of the 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.

23. Nevertheless, it is noted from the proceedings in CMCR 233 of 2018 as recently as 18/2/2019 that the 1st Accused – whose attendance in court was sought to be secured by the applicant’s security – has not attended court since being released on bail. The state counsel stated in court:

“I have one witness in court....1st accused has not been apprehended, Surety for 1st accused was apprehended. He is assisting in the arrest of 1st accused....”

24. The detention of the surety is not in accord with the provisions of section 131. The state cannot keep him detained but must first require the surety to show cause why the recognizance should not be forfeited and the penalty paid. If sufficient cause is not shown, the court may issue a warrant to attach and sell the surety’s property to recover the amount of KShs 5 million secured by the bond.

25. It is only if the amount recovered by attachment and sale, cannot cover the secured amount that the surety, as the person bound by the recognisance shall be liable, by order of the Court which issued the Warrant to imprisonment for a term not exceeding six months

imprisonment.

Disposition

26. From all the foregoing, it is evident that the trial magistrate did not follow all the requisite procedures when ordering the detention of the surety. The action of detaining the applicant was unlawful on account of being un-procedural, and cannot be allowed to stand. It is hereby set aside.

27. In the present circumstances, I consider that the proper order to give on how the matter is to proceed, is as follows:

- a. In light of the fact that the 1st accused has still not been availed or become available at the hearing of the trial, the 1st accused may be treated as a flight risk and the bond terms are hereby vacated;
- b. The applicant shall therefore appear before the lower court to show cause why the security held by the court should not be forfeited or treated as forfeited in terms of **section 131** of the **Civil Procedure Code**;
- c. The cash bail of Kshs 200,000/= paid into court by the applicant shall be released if, or when, the full value of the security availed shall have been recovered or satisfied by or to the lower court in respect of the criminal case, as appropriate;
- d. The determination herein shall be brought to the attention of the lower court forthwith;
- e. The lower court shall in all other respects comply with **section 131** of the **Civil Procedure Act** herein.

28. Orders accordingly.

Dated and Delivered at Naivasha this 3rd Day of May, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Morris Mburu for the Applicant
2. Geoffrey Wamuti in person
3. Mr. Koima for the Respondent

Court Clerk - Quinter Ogutu