



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[CORAM: MRIMA, J.]

MISC. CRIMINAL REVISION APPLN. NO. 12 OF 2019

DAVID LUMATETE MWANJE.....APPLICANT

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

1. **David Lumatete Mwanje**, the Applicant herein (hereinafter referred to as '**the Applicant**' or '**the Surety**'), stood surety for one *Joseph Amunga Ochieng*, the then accused person in *Rongo Senior Resident Magistrate's Court Criminal Case No. 491 of 2012* (hereinafter referred to as '**the Criminal Case**'). The accused person was charged with several counts of obtaining money by false pretence. The Applicant deposited the Title Deed to his parcel of land known as *S/Kabras/Chesero/1564* as security (hereinafter referred to as '**the security**') on approval of his request to stand as the surety to the accused person.

2. The criminal case proceeded on until 21/09/2015 when the Accused person failed to attend court and a warrant of arrest was issued. Efforts to trace the accused person yielded no fruits. On 18/04/2017 the trial court issued Summons to the Investigating Officer and ordered the forfeiture of the security. The Executive Officer was directed to commence the sale of the security. On 24/08/2017 one *Joel Ombima Mwanje* (hereinafter referred to as '**Joel**') attended court at Rongo and informed the Learned Magistrate that the Applicant had been poisoned and admitted in hospital. He also stated that the accused person was at his home in Kakamega County. Thereafter Joel assisted the police and the accused person was arrested and arraigned before court on 31/08/2017, barely a week thereafter. The surety also attended court.

3. The issue of non-attendance was dealt with and the bond was suspended. The court however declined to discharge the surety until the auctioneer fees were paid. The Auctioneer, *Messrs. Oscar Otieno Odongo t/a Odongo Investment Auctioneers* (hereinafter referred to as '**the Auctioneer**'), filed a Bill of Costs which was assessed at Kshs. 346,323/60. The discharge of the surety and the release of the security was hence subject to payment of the said amount of money. That is the order which prompted the filing of the revision.

4. Directions were made and the Auctioneer was served. Mr. Oscar Otieno Odongo then filed a Replying Affidavit wherein he narrated how he discharged the court's instructions. The security was however not sold. Counsel for the Applicant filed written submissions and the prosecution relied on the Replying Affidavit of the Auctioneer.

5. I have carefully perused the revision application and the Replying Affidavit. I have also read the submissions. The crux of the matter is whether the court made a proper forfeiture order and rightly refused to discharge the surety.

6. The power of this Court to supervise the subordinate courts on revision is provided for in **Article 165(6)** and **(7)** of the **Constitution** and in **Section 364** of the **Criminal Procedure Code**. The purpose is to ensure checks and balances on the administration of justice in the subordinate courts. **Article 165(6)** and **(7)** states as follows: -

(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.

7. **Section 364** of the **Criminal Procedure Code** provides as follows: -

(1) In the case if a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-

(a) in the case of a conviction exercise any of the powers conferred on it as a court of appeal by section 354,357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c) in proceedings under section 203 or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, The Sexual Offences Act and the Counter- Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filling of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

8. The provisions on bond/bail are provided for in **Sections 123 to 133** inclusive of the **Criminal Procedure Code**. The main purpose of admitting an accused person to bail/bond is to accord the accused person an opportunity to attend to the case outside custody. It is premised on **Article 49(1)(h)** and **Article 50(2)(a)** of the **Constitution** since every person is presumed innocent until the contrary is proved.

9. There are many options a court can emancipate that constitutional duty. One of the ways is to admit an accused person to bond/bail with surety(ies). When a court settles for that option, formal proceedings must be undertaken on approval of a surety. Once approved the surety undertakes to ensure that the accused person attends court as and when required to do so. The surety is usually called upon to deposit security for the sums ordered.

10. In the event the accused person fails to attend court the first stop is on the surety. A court ought to immediately summon the surety for an explanation. Upon hearing the surety a court may then make any suitable orders in the circumstances of the case.

11. The duty to hear a surety before making any order is constitutionally demanded. A court must issue summons to the surety with sufficient detail to enable the surety prepare a response. The summons must be personally served upon the surety. In case the surety fails to attend court as ordered the court must first ensure that there is evidence of service in form of an Affidavit. It is upon satisfying itself that the surety was well made aware of the intended proceedings and failed to attend court without any justifiable reason that further orders may be made including forfeiture of the security.

12. In this case there the order on the forfeiture of the security was made on 18/04/2017. Both the Applicant and the accused person were absent. The order was therefore made in the absence of the Applicant. There were no proceedings in respect to the service of the surety to attend court on that day. The only time the surety appeared in court was when the security had been proclaimed by the Auctioneer. The surety then attended court to protest the proclamation. Of importance is the fact that when the surety appeared before court he gave information which led to the arrest of the accused person without any delay. There being no evidence to the contrary one can reasonably presume that had the surety been summoned at the first instance the accused person failed to attend court, the further proceedings would not have been necessary. That includes *inter alia* the order on forfeiture.

13. The order made on 31/08/2017 to the effect that the surety would be discharged once the Auctioneer's charges were paid was hence made in furtherance to the forfeiture order made on 18/04/2017.

14. It is on the cardinal principle that no one ought to be condemned unheard that the orders made on 18/04/2017 and 31/08/2017 cannot stand. The surety was condemned without a hearing. Respectfully, there is no evidence on record that the court even attempted to reach the surety in any way whatsoever. That was a glaring infringement of the right to a fair hearing of the surety.

15. Consequently, the orders of forfeiture and refusal to discharge the surety until the Auctioneer's fees are paid must be and are hereby set aside. I now unconditionally discharge the surety and order that the security be forthwith released to the depositor.

16. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of October 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Mr. Odhiambo Kanyangi Counsel instructed by Messrs. Odhiambo Kanyangi & Company Advocates for the Applicant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Oscar Otieno Odongo *t/a* Odongo Investment Auctioneer in person.

Evelyne Nyauke - Court Assistant