



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL REVISION NO. 49 OF 2018

PHILIP OKELLO NYONGESA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being Revision of the Order of the Senior Principal Magistrate's Court at Lodwar delivered by the Hon. M.K. Muchiri on 29th May 2018 in SPM's Criminal Case No. 761 of 2017)

RULING

1. The applicant **PHILIP OKELLO NYONGESA** stood surety for **ANN NYANDUKO OMARI** an accused charged in **THE MAGISTRATES COURT AT LODWAR CRIMINAL CASE NO. 761 OF 2017** the bond was for a sum of Kenya Shillings Fifty Thousand (Kshs.50,000).

2. On 8/2/2018 the accused was absent from court and warrants of arrest was issued against the same with summons to the Applicant to appear in court. From the court file it is clear that on 21/2/2018 the prosecutor informed the court that a relative of the accused had visited their officers with information that the accused was undergoing treatment in Eldoret.

3. On 29/5/2015 the Applicant appeared before the trial court under warrants of arrest and informed the court that the accused lives in Kitale. The prosecutor further informed the court that the Applicant had informed their office that the accused could not attend court and sought an order that the Applicant be given time to produce the accused.

4. The trial court opted to sentence the Applicant to serve an imprisonment period of six (6) months on the grounds that the he did not attend court when summoned and that the reasons given to court were different from those he gave at the time of approval of sureties.

5. Being dissatisfied with the said order the Applicant moved the court by a letter dated 21/6/2018 for revision on the grounds that the court made wrong decision on the following grounds:-

a) He did not give him time to get the accused who was said to be sick in Kitale.

b) Did not consider the sentiments made by the prosecutor.

c) Did not ask him to forfeit the surety.

d) The magistrate did not look at his age and the fact that he was about to retire.

6. **Section 362** of the **Criminal Procedure Code** gives this court powers to 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 such subordinate court. **Section 364 (1) (b)** gives this court the power to alter or reverse the order so issued. These provisions have constitutional underpinning under **Article 165 (6)** and **(7)** which gives the court supervisory jurisdiction over the subordinate court and may make any order or give any directions it considers appropriate to ensure the fair administration of justice.

7. I have considered the court record presented before me and note that there is no evidence that the Applicant had been served with summons to attend court before he was arrested and produced in court. The trial court did not given the Applicant an opportunity to produce the accused before court neither was there any evidence to show that such attempt had been made and failed noting that the purpose of bond is to secure the attendance of an accused person to attend court and not to punish the surety.

8. It is clear to my mind that there was a miscarriage of justice and therefore the decision made thereon was improper and incorrect liable to

revisionary powers of the court as the issue before the court was not the misinformation given at the time of surety approval but whether the Applicant could produce the accused before court.

9. The court ought to have given the Applicant an opportunity to attempt to secure the attendance of the accused or verify the information of her being admitted in hospital which it failed to do so and I therefore set aside the order of the trial magistrate dated 29/5/2018 and substitute the same with an order requiring the Applicant to produce the accused before any other Magistrate other than M.K. Muchiri RM on 31/7/2018 or any other such date set by the said Magistrate who shall take over the conduct of the proceedings before the Lower Court.

DATED and SIGNED at Nairobi this 2nd day of July, 2018.

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J. WAKIAGA

JUDGE