



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL REVISION CASE NO. 67 OF 2018**

**SAMWEL MUTHEE KIGO.....APPLICANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**RULING**

1. This revision came to me through a letter dated 8/10/2018 written and filed by Mr. Omwancha, the applicants Counsel. It is brought under section 362 and 364 of the Criminal Procedure Code and Article 65 (6) and (7) of the Constitution.
2. Upon perusal of the application, I called up the record of the lower court and owing to the circumstances of the matter, directed the parties to appear before me.
3. The applicant seeks this courts intervention to set aside the sentence imposed on him on 27/9/2018 and give appropriate directions in the matter.
4. The background to the application is an ongoing Criminal case being **Lamu PM'S Court Criminal Case No. 146 of 2017, Republic –vs- Erick Kariuki Muthee**. The accused in this case faces 3 counts. In Count I, he is charged with robbery with violence contrary to section 295 as read with Section 296 of the Penal Code. In Count II, he is charged with attempted murder contrary to section 220(a) of the Penal Code; while in Count III he is charged with causing grievous harm contrary to section 224 of the Penal Code. The accused was placed on his defence on 17/4/2018. Since then he absconded his trial by skipping court on 25/6/2018, 5/7/2018, 9/8/2018 and 27/9/2018.
5. The applicant Samuel Muthee Kigo ID No.XXXXXXXX and one other person had stood surety for the accused. The accused is the applicant's son. According to the proceedings, the applicant was summoned twice when the accused absconded. He requested the court for time to trace the accused whom he said had gone underground. The court issued a warrant of arrest against the accused on 25/6/2018.
6. On 27/9/2018, the accused failed to attend court yet again. The applicant told the court on oath that he was unable to produce the accused. He asked the court to forfeit the Kshs. 200,000 surety sum. The prosecution counsel responded with an objection telling the Court that by asking the court to forfeit the surety sum, the applicant would be conclusively buying the freedom of his son. The court (Hon. A.T. Sitati) seems to have lost patience with the surety and retired to write a ruling.
7. In the ruling delivered the same day, the court observed that the applicant had not applied serious effort to trace his son and had applied to be penalized for the disappearance of his son by being asked to forfeit the bond sum. The court then went ahead to impose the sentence now being sought to be revised.
8. The relevant law dealing with matters of surety is found in section 126 to section 133 of the Criminal Procedure Code. Section 131 provides for forfeiture of recognizance as follows:-
  - (1) . Whenever it is proved to be satisfaction of a court by which a recognition 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 of 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.

9. The gist of the provision is that the court shall call upon the recognizance to pay the penalty thereof, or to show cause why it should not be paid. If the penalty is not paid the court may proceed to recover it by issuing a warrant for attachment and sale of the movable properties belonging to the surety. The trial magistrate is duty bound to pronounce to the surety that he is required to pay the penalty and the require him to show cause why it should not be paid. The record does not show that the applicant was ordered to pay the penalty of Kshs. 100,000/= which was the amount of the bond or any other amount set by the court. Neither was the applicant required to show cause as provided for by the law.

10. 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. From the proceedings it is clear that the procedures set out under section 131 were not followed before the surety was sentenced to six months imprisonment. It was therefore a misdirection on the part of the trial magistrate to impose the sentence of imprisonment against the applicant.

11. In the premises, I find that the correct procedure was not followed. The law is that it is the court who should ask the surety to show cause why he cannot forfeit the surety sum. In the present case the applicant jumped the gun and offered to forfeit the surety sum. While such a step might demonstrate mischief on the part of the surety, as suspected by the trial magistrate, there is no law that allowed him to impose a stiffer punishment than that provided by law.

12. In consequence, the Orders of **Hon. Sitati** issued on 27/8/2018 are set aside and substituted therefore with an order to the trial court for the correct procedure of forfeiture be undertaken.

13. The trial file is returned to the principal Magistrate’s court in Lamu for the trial to proceed.

14. The applicant’s bond before this court is discharged.

Orders accordingly

**Ruling delivered dated and Signed at Garsen on 19<sup>th</sup> day of November 2018.**

.....

**R.LAGAT KORIR**

**JUDGE**

**In the presence of:-**

.....C/A

.....Appellant

.....for Appellant

.....for Respondent