



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 5 OF 2017**

**BETWEEN**

**JOHN MWANJE MUTONGOYA.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**R U L I N G**

**Introduction**

1. The applicant in this matter stood surety for Mercy Moraa Lemayan. The accused was arraigned before the Chief Magistrate's court at Kakamega on 6 counts of stealing. After taking of plea, she was admitted to bond of Ksh.200,000/= plus a surety of similar amount or to cash bail of kshs.100,000/=. The applicant who is father in law to the accused executed the bond. He undertook to ensure that the accused person attends all court proceedings during the trial. The applicant also covenanted to forfeit the security, namely LP No. S/ Kabras/Chesero/1510 valued at Kshs.600,000/= if the accused failed to attend court when required to do so.

2. On 13.12.2016, the accused did not turn up in court and has not shown up since then. There is a warrant for her arrest. Again on 16.01.2017, the accused did not attend court and the applicant asked for time to trace her. The applicant informed the court that the accused person had switched off her phone. The same story was repeated on 30.01.2017 but on that day, the applicant was arrested and sent to remand.

3. The applicant was aggrieved by the detention order and through a letter dated 31.01.2017 the applicant's advocates M/S D.G.G. Mango & CO. Advocate wrote to call for and examine the lower court record with a view of satisfying itself with the correction legality and/or propriety of the court order made on 30.01.2017. This court is moved under the provisions of Section 362 of the criminal procedure code.

**Submissions**

4. Counsel appeared before me and made their oral submissions on 07.02.2017 for the applicant, it was contended that the trial court in ordering detention of the applicant acted contrary to the provisions of Section 131 of CPC in response, counsel for the respondent submitted that if the trial court acted contrary to the legal provisions, then he would not oppose the applicant's plea for review of the orders made on 30.01.2017 by the learned trial Magistrate.

## **Analysis and Determination**

5. Section 131 of the CPC provides as follows:-

“ 1. 131(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 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 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.

5. The court may remit a portion of the penalty mentioned and enforce payment in part only.

6. when a person who has furnished security is convicted of an offence the commission of which constitutes a breach of the conditions of his recognizance, a certified copy of the judgment of the court by which he was convicted may be used as evidence in proceedings under this section against his surety or sureties, and, if the certified copy is so used, the court shall presume that the offence was committed by him unless the contrary is proved.

6. Mr. Mango for the applicant submitted that under Section 131(2) above the court can issue warrants of attachment if the surety fails to comply with the orders made by a court under section 131(1). Under Section 131(1), the court has two options for dealing with a person who is in breach of a cognizance. Court may;-

i) Call upon any person bound by the cognizance to pay the penalty thereof or

ii) Call upon the person to show cause why it should not be paid.

7. I have carefully perused the record of the trial court on 30.01. 2017 and note that after the applicant informed the court that he was unable to trace accused, and that he needed to be given one more chance to trace her, the court made the following orders;-

“Court mention on 13.2.2017 in the meantime, surety Remanded in Custody.”

8. It is therefore clear that the trial court did not follow the procedure laid down by Section 131(1) in dealing with the applicant who clearly had failed in ensuring that the accused person attended court each and every time she was required to do so. Accordingly to the order remanding the applicant in custody was clearly not the first option open to the trial court and was clearly illegal and I hereby set it aside.

9. What should be done to the applicant? There is no doubt that the applicant has failed to honour the cognizance. He has failed to produce the accused. He even told the court on 16.01,2017 that the accused had switched off her phone and that as such he could not reach her. The court must point out at the outset that an undertaking such as the one entered into by the applicant is never made in jest. When an accused person jumps bail/bond, there is a clear miscarriage of justice because the truth of the allegations made

against such accused person will never come to light.

10. Having examined the lower court record, and having found that the trial court took the wrong step in remanding the applicant in the first instance, and considering the powers conferred upon me by the provisions of Section 364 of the CPC and after hearing the submission by counsel, I make the following orders:-

1. The order made by the learned trial Magistrate on 30.01.2017 be and is hereby set aside.
2. The applicant shall by 1.00pm on Friday 17.02.2017 pay the sum of Kshs.200,000/= (shillings two hundred thousand only) UNLESS by the said time, he produces the accused person before the trial court or shows sufficient cause why the penalty shall not have been paid by the said date and time
3. If the orders in (2) above is not obeyed and sale of the applicant's movable property, shall issue without any further reference to the court.
4. Mention before the trial Magistrate at 1.0pm on Friday 17.02.2017

Orders accordingly

Ruling delivered, dated and signed in open court this 14<sup>th</sup> day of February, 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of

.....Mr. Mango (present).....for applicant

.....Mr. Ngetich (present).....for state

.....Mr. Polycap.....Court Assistant