



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 72 OF 2016

REPUBLICAPPLICANT

VERSUS

REMIRESHA LUGULU.....RESPONDENT

RULING

Introduction

1. By the Notice of Motion dated 25.11.2016, the state which is the applicant seeks stay of or setting aside of the orders dated 06.09.2016 by which the trial court acquitted the respondent under the provisions of section 202 of the Criminal Procedure Code, pending trial and determination of Kakamega CMC Cr. Case No. 298 of 2016
2. The application is supported by an affidavit sworn by Patrick Etyang Oroni dated 25.11.2016 plus the annexures thereto.
3. The application is opposed vide the respondent's replying affidavit sworn on 19.12.2016. The respondent contends the application is incompetent as it is not brought under any known provision of the law and secondly on the ground that the trial court had jurisdiction to dispose of the case in the manner it did.

The law

4. Section 202 of the CPC provides that where a complainant fails to turn up in court, having had notice of the time and place appointed for the hearing of the charge against an accused then the court shall thereupon acquit the accused, "unless for some reason it thinks it proper to adjourn the hearing of the case until some other date....." The above provisions thus give the court the absolute discretion to acquit an accused or adjourn the case where a complainant who has notice of the hearing date fails to turn up. In the instant case, the deponent of the supporting affidavit says the complainant was not notified.

The submissions.

5. The applicant's counsel submitted that he was not in a position to make any meaningful submissions in the absence of the lower court record and asked court to call for the record to assist it in making a fair ruling.
6. The respondent filed written submissions as directed by the court on 21.12.2016. The gist of the

respondent submissions is that the material before court is insufficient to enable the court grant the orders sought. It is also the view of the respondent that the applicant would have fared better if it had filed an appeal. The respondent urged the court to dismiss the application and award costs on the basis that the application is brought in bad faith.

Analysis and Determination

7. I have now carefully read the application, the supporting affidavit and annexures thereto. I have also carefully read the replying affidavit and considered the applicant’s oral submissions and the respondent’s written submissions. In light of the above, the absence of the lower court record notwithstanding, I am of the considered view that the applicant’s application is misplaced. As rightly submitted by counsel for the respondent, the best course of action for the applicant was to prefer an appeal. In such a case, the whole record of the lower court would be available to enable the court to determine the question of legality or otherwise of the trial court’s order made on 06.09.2016.

8. It is also worth noting that since the first orders of this honourable court were made on 30.11.2016 requiring the applicant to effect service of the application upon the respondent, no effort was made by the applicant to avail copies of the lower court record. This perhaps explains the respondent’s perception that the application before court is made in bad faith.

Conclusion

9. For the above stated reasons, and for the further reason that the application appears not to be anchored in any known provisions of the law, the Notice of Motion dated 25.11.2016 be and is hereby dismissed. The applicant is however at liberty to prefer an appeal against the impugned ruling, the provisions in limitation allowing.

Orders accordingly,

Ruling delivered, dated and signed in open court at Kakamega this 21st day of February, 2017

RUTH N. SITATI

JUDGE

In the presence of

.....Miss Tarus (present).....for applicant

.....Miss Shirika (present).....for Respondent

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