



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CRIMINAL REVISION NO. 1 OF 2016

JACKSON KELI APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The applicant *CPL Jackson Keli* moved this court in his application for revision dated 6th January 2016. He requested the court to call for and examine proceedings in the Principal Magistrates Court at Eldama Ravine Criminal Case No. 351 of 2015 in which on 10th December 2015, he was sentenced to pay a fine of Ksh 30,000/= for disobedience of a court order issued by the learned trial magistrate Hon. *R. Yator* (SRM) which fine he duly paid.

2. The applicant requested this court to examine the lower courts record to satisfy itself of the correctness, legality, or propriety of the orders made on 10th December 2015 in which the above sentence was imposed.

3. The revisionary jurisdiction of this court is donated by *Section 362* as read with *Section 364* of the *Criminal Procedure Code*. The court has power to call for and examine the record of Criminal Proceedings before any subordinate court to satisfy itself about the correctness, legality or propriety of any finding, sentence or order recorded or passed by a subordinate court and the regularity of any impugned proceedings.

4. I have examined the record and proceedings of the lower court which have been forwarded to this court. I note that the applicant was the investigating officer in a case in which one *Wilson Kesingot Cherono* had been charged with the offence of rape Contrary to *Section 3(1) (a)* as read with *Section 3(3)* of the *Sexual Offences Act*. On 26th October 2015, the applicant gave his evidence after which the prosecution successfully applied for adjournment to call its remaining two witnesses *Dr. Arafa* and *Noah Kibet*. Hearing was scheduled to continue on 9th December 2015.

5. On 9th December 2015, hearing failed to take off as the police file had not been produced. The learned trial magistrate noted that Mogotio Police station was delaying the hearing of cases by failing to produce police files in many criminal cases and bonding witnesses. She issued a warrant of arrest against the applicant.

6. On 10th December 2015, the applicant attended court and explained that he had not deliberately failed to perform his duties as he had been sent by the Deputy OCS one *Mr. Mburu* to Eming police post from 29th December 2015 on relieving duties.

7. The trial magistrate then made the some findings but those relevant to this matter were as follows;

“As for CPL Kelly the Investigating Officer I find that he is not being genuine as to why he was not in court during the hearing nor why he failed to avail the police file and furthermore the OCS indicates that he was not aware of being re-assigned duties at Emining Police Post and as such I do find that he failed to obey orders of attending court during hearing and in particular his duties as Investigating Officer to bond witnesses and avail police file and as such PC. Kelly is hereby fined Kshs. 30,000/= or 6 months in default for disobedience of lawful orders under Section 131 of the Penal Code.

8. Section 131 of the Penal Code under which the applicant was summarily convicted and sentenced creates the offence of unlawful disobedience of court orders. The applicant was found to have disobeyed court orders requiring him to attend court during hearing of the case. However, the court record does not bear any indication that any such order had been made in the course of the proceedings.

9. Secondly, production of police files and bonding of witnesses are duties which investigating officers carry out in furtherance of the prosecution case. They are not duties that are imposed by the court unless for some reason, a court expressly gives orders that the investigating officer bonds a particular witness for a certain date or produces a police file on a given date. In that event, if the concerned officer failed to comply with those express orders without giving any reasonable explanation, then a case may be made out for invoking the provisions of Section 131 of the Penal Code. This is not what happened in this case.

10. The applicant was apparently produced under a warrant of arrest by the O.C.S on 10th of December 2015 as earlier directed by the court.

It is my finding that the Hon Magistrate erred in issuing a warrant of arrest against the applicant in the first instance without having issued him with summons and evidence was availed to the effect that he had been served with the summons and refused to attend the court. Nevertheless, when the applicant was produced in court, he explained why he was unable to bond witnesses or avail the police file.

11. In as much as it was in the discretion of the Hon. Magistrate to either accept or reject the explanation offered, it is an established legal principle that the court’s discretion must always be exercised judiciously in accordance with the law. It should not be exercised capriciously or at the whims of the judicial officer.

12. In this case, it is clear to me that the Hon. Magistrate improperly exercised her discretion in dismissing the appellant’s explanation in a perfunctory manner and in failing to satisfy herself that there were actually orders on record which the applicant had as a matter of fact disobeyed before passing her sentence. And though the sentence should not have been imposed in the first place there being no order that had been disobeyed, it is important to note that it was passed before the applicant was given an opportunity to mitigate.

13. For all the foregoing reasons, I am satisfied that the orders made by the Hon. Magistrate on 10th December 2015 had no legal basis. They were not only irregular but were also plainly illegal. They must therefore be set aside which I hereby do. I accordingly allow the application and order that the fine of Ksh 30,000 paid by the applicant be refunded to him.

C.W GITHUA

JUDGE

DATED and SIGNED at ELDORET this 8TH day of March, 2017.