REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRA NO.53 OF 2014

(Appeal from the conviction of Hon. M. N. Nzibe in Malindi Misc. Appl. No.91 of 2014)

IBRAHIM KATANA MZUNGU ..... APPELLANT

VRS

REPUBLIC .....RESPONDENT

JUDGMENT

The appellant herein was arraigned before the Malindi Resident Magistrate on 25/9/2014. He was not charged with any offence but was bonded to keep peace for a period of one year and was further ordered not to leave Kenya during the bond period. The appellant was to execute a bond of Ksh.200,000/- with a surety of similar amount.

Being dissatisfied by the ruling of the Resident Magistrate that was delivered on 29/9/2014, the appellant preferred this appeal. A summary of the grounds of appeal is that there was no evidence before the court to warrant the execution of the bond, that there was no evidence on likelihood of breach of peace, that the appellant was denied the opportunity to show cause or explain his position, that the magistrate's court erred in law by allowing a confidential report yet the appellant had no prior knowledge about it and also that the appellant was not accorded an opportunity to cross examine the source of such report or evidence, that the appellant's fundamental rights as enshrined in the Constitution were violated, that the lower court erred in law by imposing binding terms without an inquiry as to his means and that the appellant the appellant was held in custody for a longer period than that allowed by the Constitution.

Mr. Kimani, counsel for the appellant submitted that it was alleged that the appellant was soliciting for the support of Al-shaabab, an illegal organisation. There was no tangible evidence to prove those allegations. Sections 43, 47 and 52 of the Criminal Procedure Code requires the court to make an inquiry into the truth of such allegations there was an alleged informant who was not called to testify. It is also submitted that the subordinate court did not bother about the appellant's liberty or freedom of movement.

Mr. Kimani further contends that the court was shown a confidential report and this was unprocedural. The fact that the report was shown to the defence counsel did not legalize the procedure. The court abdicated its role of being an umpire. Counsel relies on the Case of **Abdalla v Republic, [1984] KLR 667** where the court stated at pg 669 the following:

> ***"We think the order referred to in section 47 (a) is the order requiring the person against whom the information is laid to show cause, for he must know the substance of the information against him so as to be able to show cause. The section does not refer to the main order to execute bond to keep peace or be of good behaviour. As we have already said the appellant was called upon to show cause, but then no order***

was made setting forth the substance of the information.

The magistrate inquiries into the truth of the information under section 52 (1) of the Criminal Procedure Code when he has issued an order under section 47 (a), and, as he did not do so in this case he could not observe the requirements of section 52 (1).”

Mr. Kimani also cited the Case of **Mwajuma Binti Kitoja v Republic [1960] 924** which dealt with a similar issue. Counsel urged the court to set aside the ruling of the magistrate's court so that the appellant's freedom of movement can be restored unconditionally.

The State opposed the appeal. Miss Mathangani, prosecution counsel, submitted that the appellant was suspected to be supporting the commission of terrorism activities contrary to section 9 (1) of the Prevention of Terrorism Act. However, there was no sufficient reason to tie the appellant to the offence. The learned magistrate only applied the law as per the provisions of sections 43 and 47of the Criminal Procedure Code. There was an intelligence report which made the court come to the conclusion that there was was need to bind peace.

The record of the lower court shows that the appellant was brought before the court as a suspect. Inspector Kimayo Samati had sworn an affidavit on 25/9/2014 and was examined by the court on the same day. The appellant was represented by the current counsel, Mr. Kimani. There was no trial as the appellant was only a suspect. Upon examination of Inspector Kimayo by the court, Mr. Kimani was allowed to submit and he made submissions against the idea of bonding the appellant. Thereafter, the court placed the appellant in custody pending its ruling on 29/9/2015. the court ruled that the appellant executes Ksh.200,000/= bond with one surety to keep peace for one year and he was not to leave Kenya during that period.

The above procedure is contained in part III of the Criminal Procedure Act, Chapter 75 Laws of Kenya titled Prevention of Offences. Sections 43 to 54 are titled security for keeping the peace and for good behaviour. Sections 55 to 61A are titled; ***“proceedings in all cases subsequent to order to furnish security.”***

Section 43 (1) states as follows:

“Whenever a magistrate empowered to hold a subordinate court of the first class is informed that a person is likely to commit a breach of the peace or disturb the public tranquility, or to to any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility, the magistrate shall examine the informant on oath and may as hereinafter provided require the person in respect of whom the information is laid to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding one year, as the magistrate thinks fit.”

Sections 45, 46 and 47 of the same Act states as follows:

“45. Whenever a magistrate empowered to hold a subordinate court of the first class is informed on oath that a person is taking precautions to conceal his presence within the local limits of the magistrate's jurisdiction, and that there is reason to believe that the person is taking those precautions with a view to committing an offence, the magistrate may, in the manner hereinafter provided, require that person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the magistrate thinks fit.

46. Whenever a magistrate empowered to hold a subordinate court of the first class is informed on oath that a person within the local limits of his jurisdiction-

a) is by habit a robber, housebreaker or thief: or

b) is by habit a receiver of stolen property, knowing it to have been stolen; or

c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property; or

d) habitually commits or attempts to commit, or aids or abets in the commission of, an offence punishable under Chapter XXX, Chapter XXXIII or Chapter XXXVI of the Penal Code; or

e) habitually commits or attempts to commit, or aids or abets in the commission of offences involving a breach of the peace; or

f) is so desperate and dangerous as to render his being at large without security hazardous to the community; or

g) is a member of an unlawful society within the meaning of section 4 (1) of the Societies Act,

the magistrate may, in the manner hereinafter provided, required that person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the magistrate thinks fit, or why an order (hereinafter in this part referred to as a restriction order) should not be made that he be taken to the district in which his home is situated and be restricted to that district during a period of three years.

Provided that where a magistrate is of the opinion that, having regard to all the circumstances of the case, it is desirable that the person be restricted to some other district he may specify that the person shall be so restricted.

47. When a magistrate acting under section 43, section 44, section 45 or section 46 deems it necessary to require a person to show cause, he shall make an order in writing setting out-

a) the substance of the information received;

b) in the case of a restriction order, the district to which the person concerned is to be restricted for a period of three years;

c) in any other case-

i) the amount of the bond to be executed;

ii) the term for which it is to be in force; and

iii) the number, character and class of securities, if any, required."

The next relevant section is 52 (1) and 52 (2) which state as follows:-

"52 (1) When an order under section 47 has been read or explained under section 48 to a person present in court, or when any person appears or is brought before a

magistrate in compliance with or in execution of a summons or warrant issued under section 49, the magistrate shall proceed to inquire into the truth of the information upon which the action has been taken, and to take such further evidence as may appear necessary.

52 (2) The inquiry shall be made, as early as may be practicable, in the manner prescribed by this Code for conducting trials and recording evidence in trials before subordinate courts."

The appellant herein feels that his rights were violated and that the correct procedure was not followed. This led to a miscarriage of justice. The issue of suspects being bonded have been dealt with in several cases. In the Case of **Abdalla v Republic cited by Mr. Kimani,** the court observed as follows:

"We think the order referred to in section 47 (a) is the order requiring the person against whom the information is laid to show cause, for he must know the substance of the information against him so as to be able to show cause. The section does not refer to the the main order to execute bond to keep peace or be of good behaviour".

Similarly, in the Case of Mwagona & 3 Others v Republic [1990] KLR 514 Justice Gthinji summarised the procedure to be followed under sections under sections 43, 47 52 and 53 as follows:

"1. The first step upon receiving information as provided in S 43 (1) of CPC is to examine the informant on oath.

2. the second step as provided in S 47 of CPC is that, if the magistrate deems it necessary to require a person to show cause he should make an order in writing setting out the matters mentioned is S 47 (a) – 47 (c) of CPC.

3. After the order above is made, the third step as provided in S 52 (1) of CPC is for the magistrate to hold an inquiry into the truth of the information upon which the action has been taken.

4. The fourth step as provided in S 53 (1) of the CPC is to make an order to execute a bond if upon inquiry, it is proved that it is necessary for keeping peace or maintaining good behaviour that the person should execute a bond."

The main issues for determination is whether the lower court followed the correct procedure and whether the information was sufficient to call upon the appellant to execute the bond. The other issue is whether the appellant's constitutional rights were violated and the Constitutionality of the prevention of offences sections.

The investigating officer's statement before the court was that the appellant was suspected to be supporting commission of terrorism acts contrary to section 9 (1) of Act No.30 of 2012. He was suspected to be a threat to the public. He was arrested on 23/9/2014 after he had disappeared from his village for quite some time. When he returned the villages reported to the village elder. Police informers also made report about him to the police. The appellant was also interrogated by the Anti Terrorism Police Unit. The investigating officer stated that he was unable to charge the appellant.

The defence counsel made his submissions and the court made its ruling. It is clear from the lower court record that the procedure was not followed as required. It was expected that an inquiry was to be held under section 52 (1) to verify the truth of the information against the suspect. Upon completion of the inquiry, then section 53 is invoked and the suspect is called upon to execute the bond.

The above procedure is in line with the provisions 48 and 49 of the Criminal Procedure Act. Section 48 envisages that the suspect could be present in court while section 49 is for situations when the suspect is absent. The provisions of section 47 do not require the magistrate handling the matter to call

upon the suspect to immediately execute the bond. What is envisaged is that the magistrate would have to first and foremost deem it necessary to require the suspect to show cause then set out the substance of the information, indicate the amount of bond and other terms such as the restriction of the suspect's movements.

Although the procedure is not a full trial, section 52 (2) calls upon the court to make the inquiry to be conducted as nearly as practicable in the manner trials are conducted.

The appellant was a suspect. There was no need to put him in custody. Indeed the investigating officer had just informed the court that he was unable to charge the suspect. The only logical option was to release the suspect and ask him to report on 29/9/2014 when the ruling was to be read. The appellant was not facing any charges and was not likely to be charged in court. He had no reason to ran away.

I have had the advantage of reading the judgment of Justice Mumbi Ngugi in Nairobi High Court Constitutional Petition number 45 of 2014. The case involved the constitutionality of sections 43 to 61A of the Criminal Procedure Act. The learned Judge declared those sections as Unconstitutional. I do entirely agree with that finding. The 2010 constitution breathed into Kenyans fresh air of freedom. Kenyans are expected to enjoy the rights enshrined in the Constitution to their full extent. One is either an accused person charged before the court or he is not. Even if one is a suspect, calling upon him to execute a bond to keep peace is to limit his rights. If there is information that his is aiding or abetting criminal activities, then such a person should be charged. If the information is not sufficient to warrant a criminal charge, then such a person should be left free and be deemed innocent. Article 50 (2) (e) calls upon ever person even if one has been arrested to be presumed innocent until the contrary is proved. In essence therefore, even those in remand custody or out on bond are innocent until their trials prove otherwise. The question then is, why would someone who is not charged with a criminal offence be called upon to execute a bond to keep peace. Mere suspicion can not withstand a charge. Execution of bonds limit the rights of those called upon to execute them. Ordinarily, like in the current case, one is called upon to bring a surety. The automatic result is that the suspect will be kept in custody presumably for the period he has expected investigations, there is no need to bond any Kenyan to keep peace. All Kenyans are deemed to be peaceful. The process of bonding a Kenyan to keep peace and the subsequent order bonding a Kenyan to keep peace is degrading and human treatment which should not be entertained in a modern Kenyan that is dedicated to enhancing freedom of its citizens and to make the country a truly democratic society.

In the end, I do …..... to keep peace. Section 43 limits the period to one year. Keeping someone in custody who has not committed any offence and who is not to be charged with any offence is unconstitutional and therefore illegal. Anyone who is bonded to keep peace will not live life freely as envisaged in our Constitution. There is always the feeling that ***"someone I watching over me."***

In the current constitutional dispensation and with the progress in criminal I find that the appeal is merited and is hereby allowed. The order of the magistrate court calling upon the appellant to execute bond to keep peace is hereby set aside. No costs shall be awarded as requested by the appellant's counsel.

Dated, signed and delivered at Malindi this 14th day of July, 2015.

SAID J. CHITEMBWE

JUDGE