

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CRIMINAL APPLICATION NO 295 OF 1986

BETWEEN

REPUBLIC APPELLANT

V

SHAH.....RESPONDENT

RULING

(In an intended appeal from Conviction(s) and Sentence of the Chief Magistrate's Court at Nairobi)

July 31, 1986, **Madan Ag CJ** delivered the following Ruling. The data of this application calls for the resolution of a novel judicial problem.

The respondent was tried and convicted of theft of money contrary to section 275 of the Penal Code in Criminal Case No. 3099 of 1983. He was sentenced to two years' imprisonment. He appealed against both conviction and sentence. After conviction and sentence the appellant was released on bail pending appeal by order made by my predecessor in office.

The application is for an order that the respondent's bail pending appeal be cancelled and he be committed to prison to serve his sentence of two years' imprisonment.

The respondent's appeal was first listed for hearing on 5th August, 1985 before two Judges of the High Court. Owing to one of the two judges becoming disabled the appeal was not heard on that day. It was heard for about three and half days ending on 29th November, 1985 by Court consisting of Justices Lady Aluoch and Sheikh Amin. The learned judges reserved their judgement to 17th December, 1985. Judgement was not delivered on that day owing to Justice Lady Aluoch having been unfortunately taken ill. It was adjourned to 29th January, 1986. It was not delivered on that day also. The appeal was mentioned on 4th July, 1986 in the Chambers of Sheikh Amin, J. who disbursed the information to the parties that judgement would be delivered on notice as Justice Lady Aluoch was well again and she was working on the judgement. Justice Lady Aluoch resumed her duties on 3rd June, 1986.

The foregoing is a narrative of the events in this appeal. There is an affidavit of Assistant Commissioner of Police Peter Kimundi sworn in support of the application for cancellation of the bail. He has deponed that he has been informed (verily believed) that the respondent tried to influence one of the judges during the hearing of the appeal. He was warned by the judge personally to stop trying to interfere with the process of the law but the respondent did not heed the warning in as much as he tried to talk to the judge through his sister Mrs. Java when the judge was in the United Kingdom. The respondent also personally wrote a letter to Dr. A. Aluoch who is spouse of the judge with the intention of influencing the outcome of the appeal judgment in his favour. The letter has been produced.

Objection has been taken to the contents of the affidavit that it is defective being merely hearsay. I do not think it is hearsay. Moreover I think the time has arrived for our jurisprudence to begin to shed the bondage of technicalities. If the contents of an affidavit solemnly deponed give the impression of being correct the affidavit ought to be accepted. In addition the respondent has not controverted the letter by a replying affidavit. I therefore accept the contents of Assistant Commissioner Kimundi's affidavit;

therefore an attempt by the respondent to pervert the course of justice is established.

There is no section in the Penal Code or Criminal Procedure Code which seems to deal with a situation such as this one. The Assistant Deputy Public Prosecutor Mr. Chunga referred to section 357 of the Criminal Procedure Code. That section however refers to interference with witnesses before or during the course of a trial. The marginal note to it reads "Admission to bail or suspension of sentence pending appeal."

The absence of a specific provision in the law does not mean that the court has no jurisdiction to entertain the application. I am satisfied that the court has inherent power to put an end to misbehaviour or misconduct by a person who is involved in or is the subject of criminal proceedings by cancelling his bail or by any other order to prevent both the perversion and miscarriage of justice. Attempted perversion of justice on the part of the respondent having been established I would have no hesitation in making an order cancelling his bail.

There is however an unusual factor in this case which is causing concern. It is that the appellant has been out on bail for about 499 days since the order granting him bail was made by my predecessor in office on 7.2.1984, and for about 160 days since contact was attempted to be made with the judge while she was in the United Kingdom. This situation arises principally owing to judgment in the appeal not having been delivered which would have determined the respondent's fate. A part of the delay is of course due to the unfortunate prolonged illness of the judge concerned. Deducting the period taken by her illness there was an interval of time previously, albeit a short one, when judgement could have been delivered but it was not; and thereafter also since the 5th of June, 1986 when the judge resumed duty. Even then the judgement has not been prepared and delivered. I am informed that the judgement of the court is not likely to be delivered before 17th September, 1986. This adds another 47 days delay attributable solely to the court. It might be an item for taking into account if application for bail is renewed owing to there being still further postponement of the judgement. I have mentioned the time factor involved at some length because it must be very vexing for litigants to be subjected to long periods of uncertainty in the determination of their affairs. The delay itself indicates the unfairness of non-delivery of the judgement by the court so far. In spite of it I am of the opinion that an attempt to pervert the course of justice is so serious a matter that I would be condoning it if I refuse this application even though I am convinced that our judges would remain impervious and unaffected by such attempts. No court administering justice in a straight forward manner ought to countenance such conduct. It is reprehensible conduct of a nature which could erode the very roots of administration of justice.

The application is allowed. The bail granted to the respondent is ordered to be cancelled.

July 31, 1986

MADAN Ag CJ