REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEALS NOS. 1264 OF 1982 & 19 OF 1983

(CONSOLIDATED)

KASANGA JOEL MULWA.....APPELLANT

KIBET SAINA TEGEKYON .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The two appellants in these consolidated appeals stood as sureties for an accused person James Aggrey Orengo who was charged with three counts, forgery, uttering a forged document and theft by an agent. He pleaded not guilty and was released on his own bond of Kshs 50,000 and two sureties in the same amount. The sureties, the present appellants, each entered into a bond for Kshs 50,000 and the accused was released. The accused duly attended court on a number of occasions but when the case was finally called for hearing on 24th November 1982, the accused was not present. A warrant of arrest was issued and the sureties were summoned to show cause why the amount of their bonds should not be forfeited. After hearing the advcates for the sureties and State Counsel the learned Chief Magistrate gave his ruling on 21st October, 1982 after forfeiting the bonds with partial remission. He ordered each surety to pay Kshs 40,000 by 31st January 1983.

It is against this ruling that the appellants now appeal.

They ask for the ruling of the Chief Magistrate to be set aside or alternatively for a reduction in the amount to be forfeited. Both appellants are advocates. They filed seperate petitions of appeal containing approximately similar grounds and the appeals were argued by Mr Kasanga Mulwa, one of the appellants.

These grounds may be summarised as follows:

> The learned Chief Magistrate erred in holding that the sureties' undertakings to secure the presence of the accused in court were absolute and their liability to forfeiture unqualified, in failing to enquire into the extent to which the sureties were to blame for the disappearance of the accused, in taking into account extraneous and irrelevant matters inluding events subsequent to the execution of the bonds, in failing to appreciate that the forfeiture is neither mandatory nor punitive, and in failing to consider the authorities cited in the appellant's favour. Mr Mulwa also submitted that the amount forfeited was manifestly excessive.

Mr Chunga, Principle State Counsel, appeared for the Republic. In his judgment the learned Chief

Magistrate said there was no doubt "that their undertaking to ensure the accused's presence was absolute and their liability to forfeiture on default was unqualified".

According to the terms of the Bond and Bail Bond each surety declared himself surety for the accused that he should attend Court to answer the charge pending against him and in case of his making default he bound himself to forfeit the sum of Kshs 50,000. This undertaking can properly be described as absolute and the liability unqualified.

Section 131(5) of the Criminal Procedure Code (cap 75) provides that the court may in its discretion remit any portion of the penalty and enforce payment of part only. This in no way detracts from the terms of the undertaking given by the sureties and indeed section 131(5) was later considered by the Chief Magistrate, when he correctly directed himself that this discretion must be exercised judicially.

Mr Mulwa relied heavily on the English case *Reg v Southampton Justics, ex parte Green* [1975] 3 WLR 277. The accused in that case was granted bail with 2 sureties, one of whom was his wife who offered herself as surety in the sum of £3,000. The Justices' clerk tried to dissuade her when she told him that she had 3 young children and admitted that if the recognizance's were forfeited she would have to sell the home which she owned jointly with her husband but she insisted. The accused disappeared. 3 or 4 months later he gave himself up and was eventually sentenced to 4 years imprisonment. She was subsequently ordered to forfeit the full £3,000. There being no right of appeal she applied to the Queen's Bench Divisional Court for leave to apply for *certiorari*. This was refused and she applied to the Court of Appeal who gave leave, proceeded to hear her case and quashed the order of the justices on the grounds that they failed to consider the culpability of Mrs Green as they ought to have done and with respect to her means took into consideration property belonging to her husband which they ought not to have done.

Lord Denning MR pointed out that whereas at Common Law person who gave a recognizance for performance of a condition which was not fulfilled automatically forfeited the sum secured by his bond, by section 96(1) of the Magistrates Court Act, 1952, the justices were given a discretion and the court was enabled to do what the justice of the case required. He then posed the question "By what principles are the justices to be guided?"

"They ought" he thought "to consider to what extent the surety was at fault. If he or she connived at the disappearance of the accused man, or aided it or abetted it, it would be proper to forfeit the whole of the sum. If he or she was wanting in due diligence to secure his appearance, it might be proper to forfeit the whole or a substantial part of it, depending on the degree of fault. If he or she was guilty of no want of diligence and used every effort to secure the appearance of the accused man, it might be proper to remit it entirely."

In a later case *Regina v Horseferry Road Stipendiary Magistrate ex parte Pearson* [1976] 1 WLR 511 Lord Widery CJ said with reference to the foregoing passage:-

> "I find it difficult, with all respect to Lord Denning M.R. entirely to follow the passage that I have read because the forfeiture of recognizance is in no way a penalty imposed on the surety for misconduct. I do not doubt that the magistrate, before forfeiting the recognizance, must consider among other things the conduct of the surety and see whether it is open to criticism or not. But one must, I think, start all these problems on the footing that the surety has seriously entered into a serious obligation and ought to pay the amount which he or she has promised unless there are circumstances in the case, either relating to her means or her culpability which make it fair and just to pay a smaller sum."

The first consideration I agree with respect is that each of the sureties has seriously entered into an obligation to ensure the attendance of the accused person and has undertaken to forfeit the full amount of his bond in the event of default. There need be no collusion or want of diligence on the part of a surety before a court can order the whole amount to be forfeited. If a surety desires the court to exercise its discretion to remit the whole or part of the amount he has undertaken to pay he must persuade that court that by his efforts he deserves such remission, or that his means are such that forfeiture of the whole

amount would be unjust.

Mr Mulwa cited a passage at Page 2009 (para 1333c) of *Mitra's Indian Code of Criminal Procedure* (12th edition) to the effect that in the absence of any responsibility for the disappearance of an accused forfeiture of the whole amount of a surety's bond is improper. I should prefer to say following the English authorities that on their circumstances it might be proper to order at least partial remission.

With regard to the extent to which the sureties were to blame the learned Chief Magistrate said he accepted their statements that they had not contributed to the accused's disappearance which had occurred despite their efforts. He found that they did not aid or abet the accused's disappearance. He enquired into the extent of their culpability and he exonerated them. No inference that the Chief Magistrate considered forfeiture to be mandatory or punitive can be drawn from his ruling. The Chief Magistrate observed that the sureties were lawyers and that Mr Mulwa was a Member of Parliament. They therefore knew the implications and consequences of their bonds. They were likewise aware of Tanzania's "well-known hospitality for fugitive offenders from Kenya." The Chief Magistrate went on to refer to the acceptance by that country of Kenya Air Force personnel who fled Kenya after the attempted coup on August 1, 1982. This occurred on the day following that on which the bonds were signed by the appellants. It is a matter of public knowledge that it is by no means difficult for accused persons on bail to abscond to Tanzania. That is a factor calling for special diligence on the part of sureties. The events of August 1, 1982 should perhaps have reinforced the need for deligence.

"These instances" the learned Chief Magistrate said "impel the court to take the matter of bail and bond seriously and to forcefully convey to the potential sureties that they take on an onerous obligation when they enter into recognizances for anyone facing a trial for a criminal offence."

It was thus with reference not to the conduct of the appellants that these instances were mentioned but to the obligations of sureties generally and the duty of the court to enforce such obligations. These matters were neither irrelevant nor extraneous. They were not improperly taken into account by Chief Magistrate in the exercise of his discretion.

Although he did not specifically refer to them the learned Chief Magistrate stated that he had considered the authorities cited by the sureties advocates and it is clear from an examination of his ruling that this is so.

Dated and delivered at Nairobi this 18th day of January , 1983.

A.H. SIMPSON

CHIEF JUSTICE