



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 580 OF 1981

DAHIR OMAR ABDALLAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the First Class District Magistrate’s Court, at Garissa)

JUDGMENT

On March 9, 1981, a district magistrate I at Garissa ordered the appellant

“to sign a bond to keep peace for a period of one year in case he makes a breach to forfeit a sum of Kshs 10,000.”

Such an order may be made by a magistrate of the first class. Section 43(1) of the Criminal Procedure Code provides as follows:

“43(1) 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 do 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 hereafter 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.”

The appellant has appealed from the district magistrate’s order on four grounds which were argued before us by Mr I Kapila. In his first ground of appeal Mr Kapila argued that the magistrate failed to comply with sections 43(1), 47(a) and 52 of the Criminal Procedure Code. As to section 43(1) he stated that the magistrate after putting the informant Inspector Ng’ang’a on oath, he did not examine the informant. The record shows that Inspector Ng’ang’a was sworn and he said:

“I am Inspector of Police and I am the officer-in-charge Garissa Police Station. Now I present the complaint against the subject whom is suspected to be likely to commit a breach of the peace. I therefore, call upon this court, acting on the facts of the complaint, bind over the accused person to keep peace for any length of time the court may wish.”

We are of the view that the informant said what he did in reply to examination by the magistrate. We can, therefore, not say that the magistrate did not examine the informant as required by section 43(1).

Mr Kapila also in this respect argued that the magistrate did not call upon the appellant to show cause why he should not be ordered to execute a bond, before he was required to do so. With respect, while it is desirable to ask the person against whom the complaint is laid to show cause, it is not mandatory for the magistrate to do so. The law, in fact, says he “may”. What is mandatory is examination of the informant on oath.

In this case, however, it is recorded:

“Court: Accused is called upon to show cause why he should not sign a bond to keep peace.”

We understood from Mr Kapila that the information was untrue and had there been an inquiry by the court into the truth thereof it would have been discovered that what Inspector Ng’ang’a had said in his affidavit in support of the request had been found earlier by the same court to be false information. Had there been an inquiry as to the truth of the information after calling upon the appellant to show cause he might have revealed this and no order would have been made against him. In our opinion the magistrate therefore erred in not complying with section 47(a). Section 47(a) provides as follows:

“47. When a magistrate acting under section 43 ... deems it necessary to require any person to show cause under such section he shall make an order in writing setting out -

(a) the substance of the information received ...”

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 inquires 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).

In ground 1, the magistrate did not fail to comply with section 43(1), but he failed to comply with sections 47(a) and 52(1) of the Criminal Procedure Code, and in the circumstances of this case it was necessary to inquire into the truth of the information and it cannot be said that that failure did not occasion the appellant injustice.

When making the order the magistrate is recorded as having said:

“Since the accused has no objection to signing the bond to keep peace I proceed on to give the order.”

This was rather misleading as it was not a consent order. The appellant had said that he would sign the order so long as the police did not harass him, so he signed under the duress of keeping off police harassment. Ground 2 of the appeal therefore succeeds.

In ground 3 the magistrate did not rely on hearsay, but unproved allegations, and information that had been proved in court to be false, if what Mr Kapila stated from the bar in district magistrate’s court Criminal Case No 800 of 1980, was true. As we did not have the opportunity of satisfying ourselves about Criminal Case No 800 of 1980 we are unable to say either way about ground 3 and our making no specific finding on that ground does not affect the consequences of this appeal. What we have said of ground 3 applies to ground 4.

We are satisfied that the order was erroneously made and the learned senior state counsel did not support it.

We would like to mention in conclusion that the person against whom the information is made is strictly

not accused of any offence so he is better referred to as “suspect” or “subject” rather than “accused’.

We allow the appeal and set aside the subordinate court’s order. Order accordingly.

Dated and Delivered at Nairobi this 3rd day of March 1982.

Z.R.CHESONI

A.M.COCKAR

JUDGE

JUDGE