

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL REVISION NO. 0002 of 2024)
(ARISING FROM KASANGATI CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO. 398 OF 2020 UGANDA-
VS- MUTEBI ZUBAIR)

MUKALAZI MOSES.....APPLICANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: HON. LADY JUSTICE ROSETTE COMFORT KANIA

Ruling

Background

This application is for revision of the orders of the Grade I Magistrate at Kasangati Chief Magistrate's Court in Criminal case No. 398 of 2020 where the learned trial Magistrate ordered that Mukalazi Moses, one of the sureties of Mutebi Zubair, the accused person in Kasangati Chief Magistrate's Court Criminal Case NO. 398 of 2020, forfeits UGX. 7,500,000/= as the bond that he executed or in default be committed to serve six months' in civil prison.

The application was brought under section 50(5) of the Criminal Procedure Code Act, section 17 of the Judicature Act Cap 13 and sections 83 (1)(3)(4) of the Magistrates Court Act for orders that;

- a) The orders of the trial magistrate be reversed and set aside.
- b) The applicant be released from civil prison.
- c) The entire record of the proceedings be revised.
- d) The applicant be discharged from his responsibility as surety.

Representation

The applicant was represented by Mr. Mwesiga Apollo while the respondent was represented by Ms. Hope Mutoni Senior State Attorney

Brief Facts

The background of this application is that Mutebi Zubair, the accused person applied for and was released on bail. Mukalazi Moses, the applicant, was one of the sureties for Mutebi Zubair. One of the terms of the

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release on bail was a non cash bond of UGX 7,500,000 (Uganda shillings seven million five hundred thousand only). The accused person did not attend his trial on a few occasions and on the 30th day of November 2023, the accused did not appear in court. Mr. Mukalazi and the other surety were in court and Mr. Mukalazi informed court that he had information from the father and wife of the accused person that the accused person had gone missing. Mr. Mukalazi tendered an SD reference number in court in support of that assertion. Prosecution prayed for an adjournment to enable the sureties produce the accused person at the next hearing. Prosecution also undertook to investigate the allegation that the accused person was missing. The matter was adjourned to 28th December 2023 to give the prosecution the opportunity to submit proof regarding the disappearance of the accused. In addition, the sureties were tasked to produce the accused person on that date or forfeit the bond.

On 28th December 2023, while Mr. Mukalazi appeared in court, the accused was not present and neither was the other surety. Prosecution informed court that the Ministry of Internal Affairs confirmed that the accused person exited the country on 14th November 2023. The prosecution contended that it was not true that the accused was missing. Mr. Mukalazi who was unrepresented informed court that he was unable to produce the accused since he did not know his whereabouts and the matter of his disappearance was brought to his attention by information he got from the accused person's relatives.

The learned trial Magistrate then ordered that since Mukalazi Moses informed court that he cannot produce the accused person, he forfeit UGX 7,500,000/= as the bond that he executed or in default serve (6) six months in civil prison. The warrant was issued on that same day, 28th December 2023 and Mr. Mukalazi was committed to civil prison.

The grounds for this application for revision are as follows; was

- (a) The order to commit the surety, Mukalazi Moses for failure to forfeit the bond was made without regard to the provisions of section 83 (1) (2) and (4) of the Magistrates Courts Act.
- (b) The trial magistrate did not call upon the surety to show cause why the aforementioned bond sum should not be paid as is the stipulated procedure under the aforementioned provisions of the Magistrate's Courts Act.

Issues

- (i) Whether the learned trial magistrate followed the procedure for committing a surety to civil prison.
- (ii) What are the appropriate orders in the circumstances.

Submissions of the Parties

Counsel for the applicant submitted that the learned trial magistrate did not follow the procedure laid out in the Magistrates Courts Act for committing a surety to civil prison for failure to pay the bonded sum. Counsel averred that under section 83 (1) of the Magistrates Court Act, if Court is satisfied that a recognizance under the Act has been forfeited, the grounds of proof should be recorded and Court may call upon any person bound by the recognizance to pay the penalty or to show cause why it should not be

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paid. Further that under section 83(2) of the Magistrates Court Act it is provided that once court is satisfied that the recognisance should be forfeited, court should then issue a warrant of attachment and sale of movable property. He added that section 83 (4) of the Magistrate's Courts Act provides that if such a penalty is not paid and cannot be recovered by the attachment and sale of property, the person so bound shall be liable by order of the court which issued the warrant to imprisonment to a period not exceeding six months.

In reply, the counsel for the respondent submitted that, the duties of sureties are to ensure that the accused person attends trial whenever needed to until the conclusion of the case. She stated that bail is an agreement between the sureties and court that the sureties will ensure the attendance of the accused person and that in the event that the sureties get information that the accused has a likelihood of leaving the country or avoiding trial, it is the surety's duty to inform court and the accused's bail is cancelled until he gets another surety. That in this instant case, the accused person and the sureties were well known to each other, the applicant did not inform court that the accused person was about to disappear but he came when the accused person had already disappeared.

She relied on section 83 of the Magistrates Court Act stating that the section is to the effect that where the property is known, it is the duty of the sureties to inform court of where his property is, it is not the duty of court to go looking for the surety's property. Therefore, the surety in this matter did not furnish court with information of where his property is and did not offer any explanation that he is going to pay the money.

The respondent further submitted that section 83 (4) of the Magistrate's Courts Act provides that if such a penalty is not paid and cannot be recovered by the attachment and sale of property, the person so bound shall be liable by order of the court which issued the warrant to imprisonment to a period not exceeding six months. She added that the applicant does not dispute the fact that the accused jumped bail and he does not dispute that he was a surety for the accused person. She submitted that the applicant still has the duty to forfeit the bond because coming up with this application is a ploy to defeat justice, the applicant entered into an agreement with court that he will produce the accused person whenever required and that if he fails, he forfeits the bond.

She cited the case of **Aganyira Albert-vs Uganda Criminal Miscellaneous Application No.0071 of 2013**, where it was stated that bail can be plainly defined as an agreement or recognisance between the accused and sureties and the court that the accused will pay a certain sum of money fixed by the court should he or she fail to attend the trial on a certain date. The court as a contacting party usually sets terms and conditions which accused persons and sureties have to comply with.

Counsel for the respondent prayed that court finds that the trial Magistrate acted within her powers and mandate when she committed the applicant to civil prison for having failed to forfeit the bond. She also prays that the applicant forfeits his bond and if he cannot, he continues to serve his six months in prison as provided for in section 83(4) of the Magistrates Court Act. She further submitted that the application is without merit and prayed that it be dismissed.



In rejoinder, counsel for the applicant submitted that he is not contesting the obligations of the sureties under the law, the contention is that the trial Magistrate never followed the law on forfeiture of recognisance by the sureties. What prosecution has explained as duties of the sureties should have been explained by court during the hearing mainly on 15th December 2020 when granting bail. The court neglected the procedural steps including,

- a). To issue summons to the sureties to come and explain why the accused person never appeared in court.
- b). To issue notice to show cause why they should not be detained in civil prison or forfeit their cognizance.

Counsel for the applicant submitted that the correct procedure is that upon issuance of the notice to show cause, the court will hear from the applicant on whether or not there is sufficient cause for the sureties to forfeit the bond. In chapter 9 of Justice Ssekana's book paragraph 9.17, he lays down the procedure for forfeiture of cognisance by the surety including;

- a). Inform the person against whom the breach is alleged exactly of the complaint against him
- b). hear and record evidence on oath in the usual way in support of the complaint if it is not unequivocally admitted
- c). give the person complained against an opportunity of giving evidence or making a statement explaining his conduct and of calling witnesses
- d). record the decision and reasons for that decision. This procedure was not complied with by the trial Magistrate before committing the applicant to civil prison and denied the applicant the right to a fair hearing.

Counsel further submitted that according to the record there are two sureties who are both answerable to court on the whereabouts of the accused person but court only dealt with one surety and did not hear from them, or give them the right to be heard and the right to get a lawyer of their choice.

Determination

The law

The Magistrates Court Act

Article 28 (1) in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

Article 44 (c) of the Constitution of the Republic of Uganda provides that , notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the right to fair hearing.

Section 80



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(1) All or any of the sureties for the appearance and attendance of a person released on bail may at any time apply to a magistrate to discharge the bond either wholly or so far as it relates to the applicant or applicants.

(2) On that application being made the magistrate shall issue a warrant of arrest directing that the person released be brought before him or her.

(3) On the appearance of that person pursuant to the warrant, or on his or her voluntary surrender, the magistrate shall direct the bond to be discharged either wholly or so far as it relates to the applicant or applicants, and shall call upon that person to find other sufficient sureties, and if he or she fails to do so may commit him or her to prison.

Section 83

(1) Whenever it is proved to the satisfaction of a magistrate's court a recognizance under this Act has been taken, or when the recognizance is for appearance before a court, to the satisfaction of that court, that such recognizance has been forfeited, the court shall record the grounds of the proof, and may call upon any person bound by the recognizance to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid the court may proceed to recover the penalty by issuing a warrant for the attachment and sale of the moveable property belonging to such person, or his or her estate if the person is dead.

(3) That warrant may be executed within the local limits of the jurisdiction of the court which issued it, and it shall authorize the attachment and sale of the moveable property belonging to such person within those limits, when endorsed by any magistrate within the local limits of whose jurisdiction the property is found.

(4) If such penalty is not paid and cannot be recovered by the attachment and sale, the person so bound shall by order of court which issued the warrant, to imprisonment for period not exceeding six months.

(5) The court may, at this discretion remit any portion of penalty mentioned and enforce payment in part only.

(6) Section 50 (5) of the same Act provides that;

Any person aggrieved by any finding, sentence or order made or imposed by a magistrate's court may petition the High Court to exercise its power of revision under this section; but no such petition shall be entertained where the petitioner could have appealed against the finding, sentence or order and has not appealed.

Section 17 (1) of the Judicature Act provides that the High Court shall exercise general powers of supervision over the Magistrate's Courts.

(2) With regard to its own procedures and those of the Magistrate's Courts, the High Court shall exercise its inherent powers:-

(a) To prevent abuse of process of the Court by curtailing delays of judgment including the power to limit and discontinue delayed prosecutions.

(b) To make orders for expeditious trial; and



(c) To ensure that substantive justice shall be administered without undue regard to technicalities.

Resolution of the issues

(a) Whether the applicant was lawfully committed to civil prison

From the court record, and as submitted by counsel for the applicant, the applicant first informed court on 30th November 2023 that the accused person was missing and tendered an S/D Ref vide SD 88/22/11/2023 indicating a missing person. The matter was then adjourned to 28th December 2023 to allow prosecution adduce evidence to prove that the accused person was in hiding to defeat prosecution. The sureties were directed to produce the accused person or forfeit the bond to the government of Uganda.

When the matter came up on 28th December, the accused person was absent. Consequently, the trial magistrate ordered that the applicant forfeits Ugx. 7,500,000 (seven million five hundred thousand shillings only) as the bond that he executed or in default, serve 6 (six) months civil imprisonment.

Upon the applicant informing the court on 30th November that the accused person was missing, justice demands that, the learned trial magistrate, should have brought to the attention of the applicant, who was unrepresented, the provisions of Section 80 (1) of the Magistrate's Court Act on discharge of sureties. And guided him on what to do in the event that he wished to be discharged as a surety. In the event that the applicant had stated that he wanted to be discharged as a surety, then the applicant should have been guided on how to apply to be discharged as a surety. Following which, as provided under section 80 (2) the trial magistrate would have issued a warrant of arrest and with the help of the international police the accused person would be arrested as a fugitive from justice and hauled before the court to answer for his crimes.

The record shows that when the matter came up on 28th December 2023, the learned trial magistrate stated that since the applicant informed court that he was unable to produce the accused person, who it was reported had fled the country, he was ordered to forfeit the bond of Ugx. 7,500,000 (seven million five hundred thousand shillings only) and in default serve 6 (six) months in civil prison. On the same day the applicant was arrested and imprisoned.

Article 28 (1) of the Constitution demands that in determining the obligations of the applicant as a surety, which is a civil obligation, the applicant was entitled to a fair hearing. This constitutional provision demands that in making determination of the obligations of the applicant, the decisions must be anchored on the procedure duly set out by the law, therein lies the fairness in this case.

The procedure for committing a surety to prison for failure to forfeit the bond is clearly set out in section 83 of the Magistrates Courts Act as follows;

Section 83 (1)- requires that the applicant should have been required to show proof that the recognizance for appearance before court has been forfeited which proof the court should have recorded and may call



upon any person bound by the penalty thereof, or to show cause why it should not be paid. In the interest of fairness, the applicant should have been given an opportunity to be heard as provided in this section.

Section 83 (2) provides that , if sufficient cause is not shown and the penalty is not paid, the court may proceed to recover the penalty by issuing a warrant for attachment and sale of the moveable property belonging to such person.

No where is it indicated on the lower court record that the court issued a warrant of attachment and sale of the applicant's moveable property. It appears that the learned trial magistrate was focused on committing the applicant to civil prison and accordingly dispensed with the procedural steps governing the committal of a surety to civil prison.

(4) If the penalty is not paid and cannot be recovered by the attachment and sale, the person so bound shall be liable, by order of court which issued the warrant, to imprisonment for a period not exceeding six months.

From the lower court record, there was no opportunity given for the attachment and sale of any moveable property of the applicant as the warrant was issued on 28th December 2023 and the applicant was imprisoned the same day.

In the case of *Namakula Tracy-vs- Uganda Criminal Revision NO. 002 of 2013*, where a surety was committed to civil prison without following the procedure laid out in Section 83 of the Magistrates Court Act, Hon Lady Justice Elizabeth Ibanda Nahamya, found that the applicant was wrongfully committed to civil prison and accordingly set her free.

Having determined that the procedural steps for committing a surety to civil prison for failure to forfeit the bond were not followed, I find that the applicant was unlawfully committed to civil prison.

(b) What are the appropriate orders in the circumstances.

In conclusion, having found that the applicant was irregularly committed to civil prison, I hereby order that the applicant be immediately released from civil prison.



Rosette Comfort Kania

Judge

15th February 2024