



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPS 538-541 OF 89**

**MWAGONA & 3 OTHERS.....PLAINTIFF**

**V**

**REPUBLIC .....DEFENDANT**

(From the original conviction and sentence of the Resident Magistrate's Court at Kilifi, PM Ndungu, Esq, RM in Criminal Case No 823 of 1989) Criminal Practice and Procedure – security for keeping the peace – steps that a magistrate has to take before making an order to execute a bond – requirement to hold an inquiry – nature of the inquiry – whether a person is required to sign a bond if he accepted to sign it before the inquiry - Criminal Procedure Code (cap 75) sections 43, 47, 52, 53..

The four appellants in this case appeared in court to show cause why they should not be bound over to keep peace. Each of them stated that he was ready to sign a bond to keep peace. The magistrate thereupon ordered each appellant to keep peace and not to cause any disturbance for a period of one year. Each appellant executed a bond of Kshs 10,000/-.

Two of the appellants were later interdicted because of the order to keep peace. They argued that the order to keep peace and to execute a bond was a nullity as the magistrate had not complied with the proper procedure.

Held:

1. Before making an order to execute a bond, a magistrate must hold an inquiry as provided in the Criminal Procedure Code (cap 75) section 52(2) as nearly as the manner in which trials in criminal cases are conducted.
2. Where an inquiry proves that the information upon which the action has been taken is true, the magistrate has to decide whether it is necessary for keeping peace that the accused person should be required to execute a bond.
3. The nature of an inquiry into the truth of the information upon which the action has been taken does not envisage the recording of a plea as there is no charge.
4. The person against whom the complaint is made should be given a chance to defend himself. Further, as there is no charge, a person is not required to execute a bond merely because he accepts to sign it before the magistrate has held a full inquiry and satisfied himself that the information upon which the action is taken is true.

Cases

No cases referred to.

Statutes

Criminal Procedure Code (cap 75) sections 43, 43(1), 47(a)-(c), 52, 52(1), 52(2), 53, 53(1)

**July 12, 1990, Githinji J delivered the following Judgment.**

Criminal appeals Nos 539/89, 540/89 and 541/89 have been consolidated with this appeal.

The four appellants appeared in court on the basis of an affidavit of CI Simon Mutua, OCS Kilifi Police Station, to show cause why they should not be bound over to keep peace.

The record shows that when the appellants appeared in court on 4/9/89, the charge was read over and explained and each appellant is recorded to have replied "It is true".

CI Simon Mutua then gave evidence on oath as PW 1. After his evidence the court asked the appellants to show cause why they should not be bound over. Each of them then stated that he was ready to sign a bond to keep peace. The learned magistrate thereupon ordered each appellant to keep peace and not to cause any disturbance for a period of one year and that each should execute a bond of shs 10,000/-. Each appellant executed the bond.

Daniel Mwagona one of the appellants is a Headmaster of a primary school while Gavana Ngoi is retired Assistant Chief. Jimmy Moses Muranga is a Deputy Headmaster of a primary school while Katana Dadi is a farmer.

I am now informed that the two headmasters have been interdicted because of the order to keep peace.

It is argued in this appeal that the order to keep peace and to execute a bond is a nullity because the provisions of S 43, 47, 52 and 53 of the Criminal Procedure Code were not complied with. Those sections read together show the procedure to be followed 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 in S 47(a) – 47(c) of CPC.
3. After the order as 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.

It seems clear that the magistrate must hold an inquiry conducted as provided in S 52(2) of CPR as nearly as the manner in conducting trials in criminal cases. It is also clear that it is after conducting the inquiry that the magistrate will come to the conclusion whether or not the information has been proved and if proved decide whether it is necessary for keeping peace that the person should be required to execute a bond.

The cardinal procedure of conducting criminal trials is that the person against whom the complaint is brought should be given a chance to defend himself. As there is no charge, the nature of the inquiry does

not envisage the recording of a plea. Further, as there is no charge, I think that the person cannot be required to execute the bond merely because he accepts to sign the bond and before the magistrate has held a full inquiry and satisfied himself that the information is true.

Upon scrutiny of the record, it is apparent that the learned magistrate did not comply with the procedures set out by the law and did not hold a full inquiry and satisfy himself that the information was true and also that it was necessary for keeping peace that appellants should execute bond.

The order to keep peace and to execute bond was made prematurely and is a nullity.

I allow the appeal of each appellant, quash the order to keep peace and not to cause disturbance and discharge the appellants from the bond.

I hope, however, that the appellants will pursue the complaint they have in accordance with the law.