



REPUBLIC OF KENYA

High Court at Machakos

Criminal Revision 3 of 2013

REPUBLIC APPLICANT

VERSUS

WAMBUA KITIVI RESPONDENT

(Being an appeal from the decision of the Principal Magistrate H. Nyakweba delivered on 30/08/2012 in Kilungu Criminal Case No. 123 of 2012)

RULING ON REVISION

The office of the Director of Public Prosecutions through the prosecution counsel, **Mr Mukofu Naylor** invited the High Court vide letter dated 23/1/12 to exercise its powers of revision with a view of revising and subsequently setting aside the orders issued by the Principal Magistrate on 28th August 2012 in **Kilungu P.M’s Cr. Case No. 123 of 2012**. It was contended that the court had charged and convicted the OCS under **section 131** of the **Penal Code** without affording him the opportunity to defend himself or otherwise respond to the charge of contempt of court.

A perusal of the lower court record revealed that the contempt charges arose from the proceedings of the 16th of August 2012. The court stated that it had received a complaint from the **D.O. Kilungu** that the accused person in the lower court case had not been taken to the **Makueni G.K. Prison** as ordered in the Committal Warrant issued on 6th of August 2012 by the court. The **OCS Kilome** was therefore summoned to explain the matter. The **OCS Kilome** was present in court on 28th of August 2012 and he explained that he did not escort the accused to G.K. Prison in **Makueni** as per the said warrant due to scarcity of resources. He said that he normally did the escort once a week. The accused therein was first brought to court on 6th August 2012 and a production order was issued for 16th August 2012. The OCS therefore saw it wise to retain him at the station until that date.

According to the court the OCS should have returned to court and requested for a variation of the orders once the OCS saw it impossible to comply with the same. The court proceeded to convict the OCS for contempt of court under **Section 131** of the **Criminal Procedure Code**.

Under **section 362** of the **Criminal Procedure Code**, the High Court can examine the record of the criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed and as to the regularity of any proceedings before such subordinate court.

The trial magistrate punished the OCS under the provisions of **section 131** of the **Penal Code** which provides as follows:-

“Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or any person acting a misdemeanor and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of the disobedience, to imprisonment for two years.”

To convict a person under the said offence, a charge must be framed in the terms of that provision and the accused asked to plead to the same. No charge was framed and the OCS was not asked to plead to any such charge. The trial magistrate was therefore wrong in dealing with the OCS in a summary manner and making orders for the OCS to pay a fine of Kshs.15,000/= or in default to serve three months imprisonment.

In arriving to the decision herein, I have taken cognizance of the fact that the alleged acts of contempt did not happen before the eyes of the court. Consequently, the orders of the trial magistrate for the OCS to pay a fine of Kshs.15,000/= in default to serve three months imprisonment are hereby set aside. Any money paid by the OCS as the fine should be refunded. Orders accordingly.

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B. THURANIRA JADEN
JUDGE

Dated and delivered at Machakos this 18th day of March 2013.

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B. THURANIRA JADEN
JUDGE