



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL (REVISION) CASE NO 25 OF 1990

REPUBLIC.....APPLICANT

VERSUS

MOHAMED.....RESPONDENT

(From original conviction and sentence in Criminal Case No 496 of 1990 of the

Resident Magistrate's Court at Mombasa, G M Njuguna, Esq, RM)

RULING

A witness by the name S Pandya was summoned to appear before Resident Magistrate in the above Criminal Case on 14/8/90 to give evidence. According to the record of the court; the witness did not appear and the learned magistrate issued a warrant of arrest. The witness was brought to court under arrest on the following day – 15/8/90.

The witness explained that he attended court on 14/8/90 and was outside the court.

The court after inquiry concluded that the witness was not telling the truth and found that the witness failed to attend court without any just cause. The witness was sent to 14 days in jail.

This matter has been brought to my attention by a letter dated to-day from Mr BK Pandya who states that he is a younger brother of the witness who was committed.

In the letter he states that the witness and other witnesses had attended court on 14/8/90 and waited in the corridor of the magistrate's chambers not knowing that the magistrate was sitting in court.

The matters contained in the letter are hearsay. They are not on oath and the witness himself has not claimed to me that he in fact attended court.

The writer of the letter does not say that he was himself in court in company of the witness.

In any case, the learned magistrate after inquiry made a finding of fact that the witness did not attend the court. There is no appeal from that finding and it is difficult for a court exercising revisionary jurisdiction to fault the lower court on a finding of a fact.

I think my proper jurisdiction in an issue of this kind is the one given by section 149(4) of Criminal

Procedure Code – to remit or reduce a fine imposed by the lower court.

Under S 149 of the Criminal Procedure Code, the penalty for nonattendance by a witness is a fine not exceeding shs 400/- which fine should be levied by attachment. And in default of recovery of the fine by attachment, the court has power to commit the witness to civil jail for a maximum of 15 days.

So, the lower court had no jurisdiction to pass a sentence of a fine in the first instance. Moreover, even if the fine which should have been imposed could not be recovered by attachment, the lower court had no jurisdiction to commit the witness to prison but to civil jail. The sentence is illegal and is set aside and in substitution, the witness is fined shs 300/-.

Dated and Delivered at Mombasa this 16th August, 1990

E.M. GITHINJI

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JUDGE



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