



Case Number:	Criminal (Revision) Case 25 of 1990
Date Delivered:	16 Aug 1990
Case Class:	Criminal
Court:	High Court at Mombasa
Case Action:	Ruling
Judge:	Erastus Mwaniki Githinji
Citation:	Republic v Mohamed [1990] eKLR
Advocates:	-
Case Summary:	<p style="text-align: center;">Republic v Mohamed</p> <p style="text-align: center;">High Court, at Mombasa August 16, 1990</p> <p style="text-align: center;">Githinji J</p> <p style="text-align: center;">Criminal (Revision) Case No 25 of 1990</p> <p style="text-align: center;">(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)</p> <p>Criminal Practice and Procedure – revision – where a court exercises revisionary jurisdiction – whether such a court can fault a lower court’s finding of fact which has not been appealed from.</p> <p>Witness – non-attendance - penalty for non-attendance by a witness – consequence for a witness who defaults in paying a fine by attachment – whether a lower court has jurisdiction to levy a sentence of a fine in the first instance – whether a court can commit a witness to jail if he defaults in paying a fine by attachment – section 149 of the Criminal Procedure Code (cap 75).</p>

A witness was summoned to appear before the Resident Magistrate to give evidence. The witness did not appear and the magistrate issued a warrant of arrest. When brought to court the witness explained that he had attended on the requisite day and that he had been waiting outside the court.

The court concluded that the witness was not telling the truth and found that he failed to attend court without just cause. The witness was sent to jail for 14 days.

The witness' brother stated in a letter that the witness attended court on the material day and waited in the corridor of the magistrate's chambers not knowing that the magistrate was sitting in court.

Held:

1. Where a lower court makes a finding of fact which is not appealed, against it is difficult for a court exercising revisionary jurisdiction to fault the lower court on such a finding of fact.
2. Under section 149 of the Criminal Procedure Code (cap 75) the penalty for non-attendance by a witness is a fine which should be levied by attachment.
3. In default of recovery of a fine by attachment under section 149 of the Criminal Procedure Code (cap 75), the court has power to commit the witness to civil jail.
4. Where a fine which has been imposed cannot be recovered by attachment, a lower court has no jurisdiction under section 149 of the Criminal Procedure Code (cap 75) to commit the witness to prison. The witness can only be committed to civil jail. The sentence was therefore illegal.

Sentence set aside.

Cases

No cases referred to.

Statutes

	Criminal Procedure Code (cap 75) sections 149, 149(4)
Court Division:	Criminal
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	-
Case Outcome:	Sentence set aside
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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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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