

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT NAKAWA CENTRAL CIRCUIT**  
**CRIMINAL REVISION NO. 002 OF 2013**  
**(Arising from Luzira Criminal Case No. 365 of 2013)**

**NAMAKULA TRACY** :::  
**APPLICANT**

**V E R S U S**

**UGANDA** :::  
**RESPONDENT**

**BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA**

**RULING**

This is an application for revision of the orders of the Grade II Magistrate His Worship Kercan P. Prosper in Criminal Case No. 365 of 2013 where the Learned Magistrate ordered that Namakula Tracy, Surety to the Accused Luyinda Steven, be committed to Prison to serve a term of six months' imprisonment.

The Applicant Namakula Tracy brought this application by Notice of Motion under Articles 28 & 44 of the Constitution of the Republic of Uganda 1995; sections 17 (1) & (2) Judicature Act and Section 83 Magistrates' Court Act and it is for orders that;

- a) The decision or order of His Worship Kercan P. Prosper in Luzira Criminal Case No. 365 of 2013 be revised.
- b) The decision, Judgment, and orders of the trial Court be set aside.
- c) The Applicant be unconditionally released from Luzira Prison.
- d) And other consequential orders be provided.

The application is supported by the affidavit of Luyinda Steven.

The background of this Application is that Tindyebwa Emmanuel (A1) and Luyinda Steven (A2) were charged with the offence of theft contrary to sections 254 (1) and 261 Penal Code Act in Criminal Case No. 365 of 2013. Both Accused persons applied for and were released on bail. Namakula Tracy, the Applicant, herein was allowed to stand Surety for Luyinda Steven on a forfeiture of 10,000,000 UGX. (not cash) upon default. A2 was released by Court on a non-cash bond of UGX. 5,000,000/=. However, before the hearing of the Criminal Case could commence, Luyinda Steven failed to appear in Court on the 26<sup>th</sup> September 2013 for mention of the case on the health grounds. A discharge form from Rahna Central Clinic dated 25<sup>th</sup> September 2013 was accepted by the Magistrate and in effect, the Accused person's bail extended. Further, on the 24<sup>th</sup> October 2013, when the matter was adjourned for mention, A2 was absent but his Surety Namakula Tracy (Applicant) was present and informed Court that the Accused was unable to attend Court because he had travelled to Mbarara. She asked Court to set another date for hearing the matter. In his response, the trial Magistrate found that the reason given on behalf of the Accused for his failure to attend Court was insufficient.

The Learned trial Magistrate observed the provisions of Section 83 (1) (2) (3) (4) of the Magistrates Court Act and made an order that Namakula Tracy serves a term of six (6) months imprisonment or forfeits the sum of UGX. 10,000,000/=. A warrant was also issued against the Surety Namakula Tracy dated 24<sup>th</sup> October 2013 in which she was shown to have been charged with the offence of disobedience of lawful orders c/s 117 of the Penal Code Act and Section 83 (4) Magistrate Courts Act. She was committed to a term of six (6) months imprisonment or forfeit UGX. 10,000,000/= as Court bond.

## **SUBMISSIONS**

Learned Counsel for the Applicant, Mr. Sam Kyozeza submitted the procedure under which the Applicant was tried and convicted was faulty. He submitted that under Section 83 (1) of the Magistrates Courts Act, if

Court is satisfied that such recognisance has been forfeited, the grounds of proof should be recorded. Further that under Section 83 (2) of the Magistrates Court provides that once Court is satisfied that the recognisance should be forfeited, Court should then issue a warrant of attachment and sale of movable property. Mr. Kyozero also submitted that under Section 83 (4) of the Magistrates Courts Act if no property is sold, then the Surety should go to Court.

He argued that the record does not show that the Applicant was asked about her property but instead the Court sent her to Prison for six (6) months. Mr. Kyozero also submitted the Applicant was committed to Prison for the offence of disobedience of lawful orders yet she was not given a chance to defend herself for adduce evidence in respect of the offence.

He submitted further that the Prosecutor was not in Court and so the Trial Magistrate became the Prosecutor and Judge which is against Article 28 of the Constitution of Uganda.

In reply, the Learned Resident Senior State Attorney, Ms. Wakhooli Samalie submitted the Accused person has absconded five sittings and has never gone to Court to report or to attend hearings. She submitted that since the Accused did not comply with Court Order, he is not competent to swear an Affidavit. Further that the Applicant as a Surety was issued a warning to ensure appearance of the Accused and if not, be committed to prison.

Ms. Wakhooli submitted that it was true that the trial Magistrate did not follow the procedure by the letter but the punishment was not illegal since the Surety had failed in her duties. Further, that she had to forfeit the recognizance and was to be committed to prison.

Learned Counsel for the Respondent submitted that the Applicant's explanation as to why the Accused could not appear shows that they were conniving for the Accused to delay justice.

She prayed that the Surety forfeits UGX. 10,000,000/= before her release and orders that the imprisonment was proper. She also prayed that the Accused's bail be cancelled and he be remanded until his case in Luzira is heard.

In rejoinder, Mr. Kyozero submitted that the Applicant is a mother of two year old who is sickly and is suffering because of the continued detention of its mother.

I have listened to both Parties' submissions.

Luyinda Steven, All obtained bail on the 26<sup>th</sup> August 2013 before the Learned trial Magistrate. The case came up next for mention on 26<sup>th</sup> September 2013 but the Accused did not come to Court claiming that he was sick. Instead, he sent the Applicant (Surety) with the Medical Form from Rahma Central Clinic.

The case was fixed for 24<sup>th</sup> October 2013 when the Applicant appeared again and explained that the Accused person was in Mbarara and was not available. The Learned trial Magistrate then ordered that the Applicant should serve a term of six (6) months imprisonment or forfeit the sum of UGX. 10,000,000/= pursuant to section 83 (1), (2), (3) and (4) of the Magistrates' Courts Act. The Applicant failed to raise the above sum of money and was committed to Civil Prison.

I am in full agreement with both Counsel that the Learned trial Magistrate did not follow the procedure under section 83 of the Magistrates' Courts Act. The section provides that if sufficient cause is not shown; and penalty is not paid, the Court may proceed to recover the penalty by issuing a

warrant for the attachment and sale of the movable property belonging to such person.

And if the penalty is not paid and cannot be recovered by the attachment and sale, the person bound will be liable by order of the Court which issued the warrant, to imprisonment for a period not exceeding six months.

I am in full agreement with both Counsel that the proper procedure under the section was not followed. There is nothing on record that a warrant of attachment and sale of movable property was issued on the Applicant's property. Neither is there anything to show that inquiries were made about the property.

It was also not proper procedure for the trial Magistrate to indicate that the Applicant had been convicted with the offence of disobedience of lawful orders.

In the circumstances, the Applicant was wrongfully committed to Civil Prison. Moreover as rightly stated by Learned Counsel for the Applicant, she was condemned unheard for the offence of disobedience of unlawful orders.

In my opinion however, given that the Accused person had failed to comply with Court orders to appear, the trial Magistrate did not mete out an illegal punishment since the Surety (Applicant) had failed in her duties.

Having considered the circumstances, the order of His Worship Kercan P. Prosper committing the Applicant to Civil Prison is hereby set aside.

The Accused person's bail is cancelled and he is remanded to Luzira Prison until his case is heard.

The Applicant is thereby free to go.

Signed:.....

**Hon. Lady Justice Elizabeth Ibanda Nahamya**

**J U D G E**

22<sup>nd</sup> November 2013