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ALFRED ADOLF SHIRIMA *v.* REPUBLIC

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HIGH COURT OF TANZANIA
AT ARUSHA
(Nchalla, J.)

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CRIMINAL APPEAL No. 36 OF 1993

(From the decision of the District Court of Rombo at Rombo, in Criminal Case No. 44 of 1991)

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Criminal Practice and Procedure – Bail – Forfeiture of bail bond – Trial court ordering forfeiture of bail bond without first ascertaining genuineness of the reasons given for the failure of the accused to attend court – Whether proper

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The appellant's father was the accused person in the district court. The appellant stood surety to secure his father's release on bail. While out on bail, the accused defaulted appearance in court one day but his surety, the appellant, attended and informed the court that the accused could not attend court because he was sick. Thereupon the trial court magistrate made an order forfeiting the surety bond executed by the appellant in the sum of Shs. 100,000/=. The appellant paid the amount and then appealed against the order of forfeiture.

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Held:

The trial court magistrate acted rashly and prejudicially in forfeiting the appellant's surety bond without first ascertaining whether the reason given for the accused's default of appearance was genuine or not. The magistrate ought to have adjourned the proceedings and required the accused to provide evidence of his being sick on the day of default. The order of forfeiture was, therefore, unlawful.

Appeal allowed

Mr. Maruma, for the Appellant

JUDGMENT

(Dated 23 May 1993)

Nchalla, J.: The appellant, one ALFRED ADOLF SHIRIMA, is the son of ADOLF NERINYO SHIRIMA, who was an accused person before Rombo District Court in original Criminal Case No.44 of 1991. During the proceedings in the said original criminal case, the appellant stood surety for his father, the accused, who was then released on bail. It then transpired that on 22/2/1991 the accused, who was still out on bail, defaulted his appearance to the court, but sent his son, the appellant, to inform the trial court that he (accused) was not able to come to court on account of sickness. The appellant truly went to the trial court and informed the trial magistrate in the court about his father's inability to come to court on that day because he was sick.

On hearing the report from the appellant about his father's inability to come to court due to sickness, the presiding magistrate acted with tampers and, indeed, rashly, whereby he immediately made an order forfeiting the surety bond which the appellant had executed in the sum of shs. 100,000/= on account of his father's bail. The trial magistrate made reference to irrelevant considerations to the effect that he had defaulted appearance simply because he had engaged an advocate who had written to the court asking for an adjournment of the same. The

trial magistrate did not act judiciously by adjourning the case and requiring the accused to produce evidence supporting his alleged sickness. The appellant duly paid the amount of shs. 100,000/= which was forfeited from his bond. He paid that amount vide ERV No.516629 of 23/2/1991. A Photostat copy of the said receipt was tendered at the hearing of this appeal, and the same was marked Exhibit P.I. The appellant was aggrieved by the forfeiture order of the trial court, hence this appeal.

Mr. Maruma, learned advocate, represented the appellant in this appeal. Mr. Maruma argued that the forfeiture order of the trial court was premature and, therefore, unlawful. Mr. Maruma submitted that it was incumbent for the trial magistrate in the circumstances to adjourn the proceedings till on a later date, and require the accused to produce evidence to support his sickness on 22/2/1991, when he defaulted his appearance. The trial magistrate acted rashly, without first ascertaining the truth or otherwise of accused's sickness on 22/2/1991. For if it was true that the accused was sick on 22/2/1991, and therefore could not come to court, then neither the accused now nor his surety, the appellant, would be held liable for the default. Consequently, the forfeiture of the appellant's bond would be unlawful. Mr. Maruma called upon this court to quash the said forfeiture order, and order the refund of the forfeited amount of shs. 100,000/= to the appellant.

I quite agree with and uphold Mr. Maruma's submissions that the trial magistrate acted rashly, and therefore prejudicially, in forfeiting the appellant's surety bond without first ascertaining whether or not the appellant's father's default on 22/2/1991 was genuine and justified or not. The trial magistrate ought to have adjourned the proceedings, and should have first required the accused to provide evidence of his sickness which disabled him to appear in court on 22/2/1991. It is only then if no evidence was available to support accused's sickness on 22/2/1991, that the trial court would have been entitled to forfeit both the accused's and appellant's bonds. Since the trial magistrate failed to comply with this just course, it is my finding that the order he made on 22/2/1991, forfeiting the amount of 100,000/= value of the bail bond which the appellant had

A executed to bail out his father, the accused, was rash, premature and prejudicial, hence unlawful. That order is hereby quashed and set aside. It is hereby ordered that the said amount of shs. 100,000/= which the appellant ALFRED ADOLF SHIRIMA paid to the court vide ERV
B No.516629 dated 23/2/1991 value of the forfeited bond, be refunded to him by the Judiciary Department forthwith.

It was on the foregoing reasons that I allowed this appeal on 20/5/1993.

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