**Mahmood v Republic**

**Division:** High Court of Tanzania at Dar Es Salaam

**Date of judgment:** 30 December 1972

**Case Number:** 106/1972 (100/74)

**Before:** Biron J

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*[1] Criminal Practice and Procedure – Irregularity – Bond discharged in absence of accused – Order*

*valid until set aside – Whether failure of justice occasioned – Criminal Procedure Code, s.* 346 (*T*)*.*

*[2] Criminal Practice and Procedure – Irregularity – Order – Whether any order of criminal court can*

*be null and void – Criminal Procedure Code, s.* 346 (*T*)*.*

**JUDGMENT**

**Biron J:** The petitioner is applying to this court in the exercise of its jurisdiction in revision to set aside an order of forfeiture made by the district court of Kilosa, forfeiting his bond in the sum of Shs. 3,000/- which he had executed as surety for the release on bail of an accused, who was charged with being one of the directors of Wafanya Biashara wa Kilosa Ltd. stealing Shs. 7,050/- the property of the Wafanya Biashara wa Kilosa Ltd. The facts of the case are not in dispute and can briefly be summarised as follows: The accused had made a number of appearances before the court commencing 21 April 1972, until 13 May 1972, when his application for bail was granted conditionally on his producing two sureties each in the sum of Shs. 3,000/-. The petitioner, together with another man, one Anthony Samwel, each executed a bond in the sum of Shs. 3,000/- as surety for the accused’s appearance before the court. In proceedings on 10 July 1972, when the accused failed to appear, and the prosecution applied for a warrant for his arrest, the petitioner, who was present, applied for the discharge of his bond. He is recorded as saying: “The accused is not traceable. Some time on 28 June 1972 he left home and informed 1st surety Anthony Samwel. I came to inform the police about accused’s disappearance. I do not know the whereabouts of 1st surety, Anthony Samwel and he is closely related to accused. I happen to be accused’s neighbour. I beg to be released as surety for accused.” The record then continues:

“*ORDER:*

Mahmood Mohamed is hereby released as accused’s surety.

Warrant of arrest to issue against accused.

Summons to show cause to issue to Anthony Samwel who is accused’s surety.

J. E. Munissi,

Resident Magistrate.”

The next entry in the court file is dated 21 July 1972, when the surety, Anthony Samwel was present and the record states: “*Court to surety:* You are required to show cause why you should not forfeit to the Republic the sum of Shs. 3,000/- you signed for in the bond as accused defaulted in making appearance to this Court on 10/7/72 and you also failed to report to court. 1*st surety – Anthony Samwel states:* I did not think accused would abscond. But I am informed that he has absconded to unknown place. But 2nd surety Mahmood Mohamed told me that accused might be in Dar es

Salaam.

I own a retail shop at Chanjur village. Accused is my brother.

J. E. Munissi,

Resident Magistrate.

*COURT:* The accused, who has absconded, is charged with stealing Shs. 7,050/- and the surety signed a bond of Shs. 3,000/- but has given no satisfactory reasons as to why he should not forfeit the money he signed for with bond. If he doubted the integrity of accused he should not have taken the trouble of binding himself as surety. Accused is his brother. He may have secured his bail in order to buy him out of this crime. Therefore this surety must forfeit to the Republic in the sum of Shs. 3,000/-. *ORDER:* Warrant of arrest against accused extended. Warrant of arrest to issue against 2nd surety Mahmood Mohamed. 1st surety, Anthony Samwel to forfeit to the Republic the sum of Shs. 3,000/- to be paid into court in two equal instalments of Shs. 1,500/-. The first instalment of Shs. 1,500/- to be paid to court by 10/8/72 and the

2nd instalment of Shs. 1,500/- to be paid by 30/8/72 in default distress to issue.

J. E. Munissi,

Resident Magistrate.”

The next entry is dated 31 July 1972 and reads:

“31.7.72.

Coram: J. E. Munissi, R.M.

Pros: Inspector Ramadhani.

Accused – absent.

2*nd Surety:* Mahmood Mohamed.

*COURT:* The accused has not been traced and you are his surety for the sum of Shs. 3,000/-. The 1st surety

Anthony informed the court that you travelled with accused to Dar. Could you explain to court why you

should not forfeit to the Republic the sum you signed for in the bond?

2*nd surety for accused: Mohamed states:*

I do not know the whereabouts of the accused. I have looked for him without success.

J. E. Munissi,

Resident Magistrate.

*ORDER:* The 2nd surety Mahmood Mohamed, is hereby ordered to forfeit to the Republic the sum of Shs.

3,000/- or distress to issue under section 131 of Cr. P. Code. He is given time to pay by 22/8/72. Warrant of

arrest against accused extended.

J. E. Munissi,

Resident Magistrate.”

It is from this order of forfeiture that the petitioner is now appealing.

In opposing the petition, the Director of Public Prosecutions, who appeared in person, submitted that the order of the court discharging the petitioner’s bond was a nullity, and although it was never set aside by any higher authority, the order being a nullity there was no need to have it set aside by a superior tribunal, as it was ipso facto null and void. Therefore the order forfeiting the petitioner’s bond was perfectly proper and should be upheld. The submission made by the Director raises two issues: one, whether the order discharging the petitioner’s bond was void and a nullity and, two, even if it was so, whether it did not require setting aside by a superior tribunal, but was ipso facto null and of no effect. The submission that the order releasing the petitioner’s surety was a nullity is based on s. 128 of the Criminal Procedure Code (Cap. 20) which reads: “128 (1) All or any of the sureties for the appearance and attendance of a person released on bail may at any time apply to a magistrate to discharge the bond either wholly or so far as it relates to the applicant or applicants. (2) On such application being made the magistrate shall issue his warrant of arrest directing that the person so released be brought before him. (3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the magistrate shall direct the bond to be discharged either wholly or so far as it relates to the applicant or applicants, and shall call upon such person to find other sufficient sureties, and if he fails to do so may commit him to prison.” The Director submits that as the accused was not present at the making of the order discharging the petitioner’s bond, such order was null and void, the wording of the section requiring the presence of the accused, being mandatory. In support of his submission that the order being a nullity, there was no requirement to have it set aside by a superior tribunal it being itself null and void, the Director cited a dictum of Lord Denning in the Privy Council case of *MacFoy v. United Africa Co.*, [1962] A.C. 152. Lord Denning, in his judgment, stated, at p. 160: “The defendant here sought to say, therefore, that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was *void* and not merely *voidable*. The distinction between the two has been repeatedly drawn. If an act is *void*, then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only *voidable*, then it is not automatically void. It is only an *irregularity* which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been made under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void.” The Director submits that the order made by the district court discharging the petitioner’s bond was likewise void, therefore a nullity and consequently did not require setting aside by a superior tribunal. Apart from the fact that the dictum of Lord Denning was obiter, as in that case the irregularity did not render the proceedings void, the irregular act was that of a layman in a civil case filing his plaint during the court vacation. That is a very far cry from an order of a court of competent jurisdiction, and made in criminal proceedings. I do not think that this dictum can in any way constitute any authority for the proposition that an order made by a court of competent jurisdiction in criminal proceedings, although irregular, can be regarded as ipso facto null and void, of no effect and can therefore be disregarded although not formally set aside by a superior tribunal. There are, however, cases much more to the point, which I now propose to review. The Indian Code of Criminal Procedure, on which our own Criminal Procedure Code is based, but thankfully not slavishly followed, devotes a whole chapter (Chapter XLV) containing no less than ten sections commencing from section 529 to 538 inclusive, on the consequences of irregular proceedings in criminal matters. And most of these sections contain catalogues of the several proceedings dealt with. It is sufficient to set out but two sections, 530 and 531. S. 530 reads: “530. If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely: . . .” and there then follows a catalogue of no fewer than eighteen orders or acts, which it is not necessary to set out, and the section concludes with: “his proceedings shall be void.” S. 531 reads: “531. No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.” It should be added that the other sections also deal with irregularities, which have similar consequences to those set out in s. 531 and are not void like those in s. 530. In Chitaley and Rao’s commentary on the Criminal Procedure Code, 6th edn., it is stated in the comment on “Void” in s. 530, at p. 3652: “Proceedings which are void can be treated as a nullity though they have not been formally set aside (1). A contrary view has, however, been taken in the under mentioned decisions (2).” Under note (1) dealing with the authorities in support of the view that void proceedings need not be set aside but are ipso facto a nullity, the editors give two cases. The second case given in the note bearing no name but only a reference and a statement (“Commitment without jurisdiction is void and no reference to High Court is necessary to have it set aside”) is, to my disappointment unobtainable. At least it has been found impossible to trace it in the court library and all the cross-references, which have been perused, are just no authority for the proposition given in the note. The first case cited as the authority for the proposition, is that of *Queen Empress v. Husein Gaibu*, I.L.R. Bom. 1884, Vol. 8, 307. The headnote to that case reads: “Acquittal – Retrial – Interference of the High Court – The Code of Criminal Procedure Act X of 1882, secs. 403 and 530. “Where an offence is tried by a Court without jurisdiction, the proceedings are void under section 530 of the Code of Criminal Procedure Act X of 1882, and the offender, if acquitted, is liable to be retried under section 403. It is, therefore, not necessary for the High Court to upset the acquittal before the retrial can be had.” It is, I am afraid, necessary to set out the report in full, fortunately, it is short, as on my reading of the facts and the decision, the case does not really support the proposition set out in the headnote. To continue from the headnote set out, the report reads: “This was a reference, under section 438 of the Code of Criminal Procedure Act X of 1882, by A. Clarke-Jervoise, District Magistrate of Belgaum.” The facts of the case and the reasons for making the reference were stated as follows: In the month of August last the accused obtained from the complainant, one Salu kom Laxumana, a gold and a silver nose-ornament, a pair of ear ornaments, and a necklace of gold beads, valued together variously by complainant at Rs. 138, Rs. 177 and Rs. 95. The said ornaments were borrowed for a period of fifteen days for a ‘pat’ marriage ceremony. At the end of the said period complainant applied for the return of ornaments, but accused denied having received them. Some time after, complainant through some friends received back the nose and ear-ornaments. The necklace was not returned, but Rs. 45 were sent her as the value of it. It appears, further, that a receipt was prepared, purporting to have been passed by complainant, acknowledging that she had received the above ornaments and Rs. 45 as the value of the necklace. Complainant made a complaint to the chief constable, asserting that she passed no such receipt, and that the value of the necklace was about Rs. 138. After enquiry the chief constable sent the case for trial to the Second Class Magistrate as an offence under section 406, Indian Penal Code (criminal breach of trust). The Magistrate at the trial prepared a charge under section 417, Indian Penal Code (cheating), and acquitted the accused under section 258, Code of Criminal Procedure. 3. T he Magistrate after acquitting the accused ordered the property before the Court, consisting of gold and silver nose ornaments worth about Rs. 4, and the ear ornaments worth about Rs. 35, and the Rs. 45 to be given to the complainant. 4. C omplainant has petitioned me against the order of acquittal

5. T he errors in the Magistrate’s proceedings are: 1st – That, if the circumstances are as stated, there was no ground for charging the accused with the offence of cheating, as accused is not shown to have had any intention of deceiving complainant when he borrowed the ornaments. 2nd – That, if the magistrate considered the offence to be one of cheating, he had no authority to try the case, as the cheating was accompanied by delivery of property, and the offence would fall under section 420, Indian Penal Code, and be beyond the Second Class Magistrate’s jurisdiction. *I understand, therefore, that the magistrate has tried and acquitted the accused of an offence which it was not within his jurisdiction to try, and that, therefore, his proceedings being illegal they must be quashed, and the accused be put on trial for such offence as he appears to have committed, viz*., *that entered in the charge sheet under section* 406, *Indian Penal Code.* 6. W hether there is, or is not, a reasonable prospect of the accused being convicted, the complainant appears to be entitled to have her complaint legally tried; and the trial held was without jurisdiction. No one appeared in the High Court on behalf of the accused or the Crown. Per curiam. – If the magistrate who acquitted the accused had no jurisdiction, his proceedings are simply void under section 530 of the Code of Criminal Procedure. There is nothing, therefore, to prevent a trial by a competent court under section 403 of the Code. There is, accordingly, no reason for the interference of the High Court. It will be noted that the sole basis for the proposition in the headnote was the dictum made at the end, per curiam. With respect, apart from the fact that it is expressly stated in the paragraph I have italicised, that the magistrate’s proceedings being illegal *they must be quashed*, for reasons which will hereinafter appear, I would say that this dictum was per incuriam. I am by no means alone in criticising the proposition contained in the headnote to the case. It was criticised and not followed in the Calcutta case of *Rakhu Sarif v. Panchanon Mondal* A.I.R. 1937 Calcutta 256. The relevant part of the headnote to this case reads: “Criminal P.C. (1898), S. 530 *–* Order on appeal made without jurisdiction is void – Such order is nevertheless valid unless set aside by competent Court – It is not imperative on High Court to set aside such order. An order which is void for want of jurisdiction must nevertheless be regarded as valid unless set aside by a court of competent jurisdiction.” And it is stated in the judgment, at p. 257: “There can be no question in view of the provisions of s. 530, Criminal P.C., that the proceedings before the Sessions judge were void. But a further question that arises for consideration is whether, though void, they can be ignored entirely or whether they have to be set aside by this Court. Now, that matter was considered by the Chief Court of Rangoon in 6 Cr. L. J. 287. It was there held that an order which was void for want of jurisdiction must nevertheless be regarded as valid unless it is set aside by a Court of competent jurisdiction. I respectfully agree with that decision. It is only necessary to examine the present case upon the supposition that the learned Sessions Judge had allowed the appeal instead of dismissing it. It would be a most dangerous doctrine to hold that the District Magistrate would have been entitled to treat the decision of the Sessions Judge as a nullity and to proceed to levy the fine from the successful appellant. A further practical difficulty is that the question will always arise whether the order which is said to be void is really void or not; and it is certainly not for a Magistrate to say that an order of the Sessions Judge can be ignored altogether. In the course of the argument the learned Deputy Legal Remembrancer drew my attention to 8 Bom. 307. The learned Judges there were not dealing with the hearing of an appeal by a Court having no jurisdiction to hear it. They were dealing with the application of s. 403, Criminal P.C. The judgment is extremely short. The case was not argued and no reasons are given for the decision. The decision is that s. 403 had no application when an order of acquittal has been passed by a Court without jurisdiction. With great respect, speaking for myself, I should very much doubt whether that decision is correct; but it certainly does not apply to the actual facts of the present case. Now, in dealing with the present point, the learned Judges of the Chief Court of Lower Burma pointed out that it is not imperative on the High Court to set aside an order made on appeal without jurisdiction. With that opinion I also respectfully agree. Therefore, strictly speaking, before filing his appeal in the Court of the District Magistrate, the accused person Panchanon Mondal ought to first have applied to this Court to set aside the order of the Sessions Judge. It is to be noted that it is Panchanon himself who went to the wrong Court, and it might be that in the absence of a satisfactory explanation for his so doing this Court might refuse to interfere. Here again it would lead to mere waste of time if I were to order the District Magistrate to dismiss the appeal as incompetent and then leave it to Panchanon Mondal to apply to this Court to set aside the order of the Sessions Judge. In the present state of the matter it is, in my opinion, desirable that it should be finally settled. The order I make on this reference therefore is that I set aside the order of the Sessions Judge dismissing the appeal of Panchanon Mondal and direct the District Magistrate to hear his appeal and dispose of it in accordance with law.” This case was considered and followed in the Nagpur case of Mohammad *Hanif v. State of Madhya Pradesh*, 1951 A.I.R. Nagpur 185. It also criticised the Bombay case, *Queen Empress v. Hussein Gaibu*. The relevant part of the headnote reads: “(*b*) Criminal P.C. (1898), s. 530 – Order void for want of jurisdiction is nevertheless valid unless set aside by competent court. Anno.Cr.P.C., s. 530, N. 9 (Para. 4).” Para. 4 of the judgment referred to in the headnote reads: “(4) In so far as the conviction of the petitioner under cl. 5 (1) of the Ordinance is concerned it is pointed out by Shri Shareef, who appears for the petitioner, that it is wholly void under s. 530 (*q*), Criminal P.C., because though the offence is punishable with the imprisonment for one year the case against the petitioner was tried by summary procedure. In support of his contention, the learned counsel relies on a decision in *Queen Empress v. Hussein Gaibu*, 8 Bom. 307. In that case a person was tried of an offence without jurisdiction and acquitted, and the question was whether he could be retried in respect of the same offence without having the acquittal set aside. The Court held that the trial was wholly void under s. 530, Criminal P.C. and that it was not necessary for the High Court to upset the acquittal before a retrial could be had. This decision was considered in *Rakhu Sarif v. Panchanon Mondal*, I.L.R. (1937) 2 Cal. 116: A.I.R. (24) 1937 Cal. 256: and was disapproved. In that case it was held following the decision in *Emperor v. Yena*, 6 Cr. L. J. 287: (4 L.B.R. 49) that an order which is void for want of jurisdiction must nevertheless be regarded as valid unless it is set aside by a Court of competent jurisdiction. In the latter case it was observed as follows: ‘From a comparison of the language of s. 530 with that of s. 529, Criminal P.C., we think it may be inferred that the Legislature did not intend that a proceeding of a duly constituted Criminal Court, which is void for want of jurisdiction, should be treated as a nullity and disregarded, unless and until it is set aside by a Court of competent jurisdiction.’ With great respect to the learned Judges of the Bombay High Court, we think that the reason given by the Burma Court is indeed very weighty and that we would not be justified in ignoring the fact of the petitioner’s conviction, even though, *prima facie*, the offence was not triable by summary procedure. The proper course for the petitioner would have been to move this Court in its criminal revisional jurisdiction to have his conviction quashed. But he has not taken that course even up till now. At the moment, we are exercising our jurisdiction under a special provision in the Constitution, and it is not open to us while doing so to act or purport to act under the Criminal P.C. and quash the conviction here and now. On the other hand, we are bound to accept the fact of conviction as conclusive, whether or not any offence was actually committed by the petitioner and whether the trial held was or was not regular.” I could not agree more with the proposition that it would be dangerous to treat the order of a court of competent jurisdiction, particularly in a criminal matter, as a nullity and can therefore be disregarded. To my mind, if such a procedure were adopted, it would lead to chaos. To take an extreme example, if a subordinate court dealt with a case of manslaughter, over which it has no jurisdiction, and after conviction sentenced the accused person to imprisonment, would the prison officer, knowing that the court had no jurisdiction, and therefore the proceedings were a nullity, be justified in ignoring the conviction and sentence of the court, and in disregard of the commitment warrant, release the convicted person without further ado? To my mind, the answer to that can only be an unequivocal no. In our Criminal Procedure Code the provisions relating to irregularities are contained in but two sections: ss. 345 and 346. The former reads: “345. No finding, sentence or order of any criminal court shall be set aside merely on the ground that the inquiry, trial or other proceeding, in the course of which it was arrived at or passed, took place in a wrong region, district or other local area, unless it appears that such error has in fact occasioned a failure of justice.” It will be noted that this corresponds to s. 531 of the Indian Criminal Procedure Code above set out. S. 346, as amended by the Written Laws (Miscellaneous Amendments) Act 1970 reads: “346. ( 1) S ubject to the provisions hereinbefore contained, no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on an appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment, or in any inquiry or other proceedings under this Code: Provided that where on an appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable. (2) In determining whether any error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question as to whether an objection could and should have been raised at an earlier stage in the proceedings.” Giving the words of the section their plain and ordinary meaning, which is the cardinal rule of construction, I would say that that section provides an umbrella covering all irregularities in proceedings, that they can, in fact, should, be validated, unless it would occasion a failure of justice. It cannot therefore be said that under our Code there are any proceedings which are void and consequently a nullity. Therefore, in my view, and I have no hesitation in so holding, no order made by a competent court, however irregular, is void and consequently ipso facto a nullity. To recapitulate, in general, I would hold that no order made by a competent court is void and ipso facto a nullity and further, even if such order were void, it still would not be ipso facto a nullity, but would remain valid until avoided by a superior court, for, as I think, sufficiently demonstrated, even in cases where irregular proceedings which are expressly declared void by the Indian Criminal Procedure Code, the preponderant view of the Indian authorities is that although void, such orders remain valid until set aside by a court of superior jurisdiction. Applying the above principles to this instant case, the order made by the District Court in discharging the petitioner’s bond, although irregular, was perfectly valid and remained so unless and until set aside by this court. Therefore, the District Magistrate had no right or power to disregard it and order the forfeiture of the petitioner’s bond. It is now necessary to consider whether this order of the court forfeiting the petitioner’s bond, although the court was not competent to make it, as it had already discharged the bond, which order of discharge was still in force, not having been set aside by a superior court, can, and should be upheld. As I think, sufficiently demonstrated, under our Code, no order made by a competent court, however irregular, is ipso facto void and a nullity. Further, it could, and should, be upheld by a superior court provided that no failure of justice would be occasioned thereby, as laid down in s. 346 of the Criminal Procedure Code. The issue is thus narrowed down as to whether to uphold this order would occasion a failure of justice. To my mind, it well could, for if the petitioner’s bond had not been discharged, he would have had an incentive to try and find the accused person. As it was, the discharge of his bond lulled him into a feeling of security, that he need make no effort to try and find the accused. To uphold the magistrate’s order forfeiting the bond could, therefore, well occasion a failure of justice. Consequently, it would, in my view, be dangerous to uphold the order. Therefore, I consider myself constrained to set it aside. The petition is accordingly granted, and the order of the district court forfeiting the petitioner’s bond is set aside. If any money has in fact been paid by the petitioner under this Order, it is to be refunded to him.

*Order accordingly*.