



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL REVISION NO. 49 OF 2020

FLORENCE MUTHONI KAMAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being Revision from order of 18th February and 3rd March 2020 of

Hon. C.K. Kisiangani (SRM) in Ruiru MCCR No. 1322 of 2019)

R U L I N G

1. The application by Notice of motion dated 13th March 2020 is filed by **Florence Muthoni Kamau** (hereinafter the applicant) the same is brought under the provision of Article 49(1) (h) 50(1) of the Constitution, Sections 131, 132 and 362 of the Criminal Procedure Code (Cap 75). By it the Applicant seeks the following orders:

1. **THAT** this application be certified as urgent and be heard ex-parte in the instance.
2. **THAT** this Honourable Court be pleased to recall file number MCCR 1322 of 2019 Republic of Kenya v Florence Muthoni Kamau for Revision.
3. **THAT** this Honourable Court be pleased to vacate and/or set aside the orders issued by Honourable C.K. Kisiangani (SRM) on 3rd March, 2020 and 18th February, 2020 ordering for the forfeiture of cash bail.
4. **THAT** this Honourable Court be pleased to vacate and/or set aside the orders issued by Honourable C.K. Kisiangani (SRM) on 3rd March, 2020 dismissing the application by Counsel for reinstatement of the cash bail forfeited.
5. **THAT** this Honourable Court be pleased to revise the order issued by Honourable C.K. Kisiangani (SRM) ordering fresh cash bail be deposited by the applicant.
6. **THAT** this Honourable Court be pleased to order reinstatement of the cash bail initially forfeited and a refund of the additional cash bail deposited on 3rd March, 2020.
7. **THAT** this Honourable Court do make any order it deems fit in the circumstances.

2. The application was not opposed by the Director of Public Prosecution.

BACKGROUND

3. The applicant is facing a criminal charge before the Ruiru Senior Principal Magistrate's Court, being Criminal Case No.1322 of 2019. On 4th October 2019 the trial court granted the Applicant cash bail of KShs.70,000. The case was adjourned thereafter severally and on 20th January 2020 it was fixed for hearing 18th February 2020. On that date the Applicant not having attended the trial court, that court ordered for warrant of arrest of the Applicant to issue and further ordered forfeiture of the cash bail.

4. The Applicant fixed a mention of that matter on 3rd March 2020 when the Applicant's Learned Counsel informed the trial court that Applicant failed to attend court on 18th February 2020 because the date was *mis-diarised*. The trial court proceeded to lift the warrant of

arrest against the Applicant and further ordered Applicant to be released on further cash bail of KShs.70,000. It is the orders of 18th February and 3rd March 2020 that the Applicant seeks that they be revised and be set aside. The Applicant deponed in her affidavit in support of the application that she was denied the right of being heard before her cash bail was ordered to be forfeited on 18th February 2020 and before an order was made for her to pay further cash bail on 3rd March 2020.

ANALYSIS AND DETERMINATION

5. Section 131 of Cap. 75 requires a court to make inquiry of the accused, and a surety if any, before making an order for forfeiture of cash bail. This is what Section 131 (1) and (2) of Cap. 75 provides:

1) Whenever it is proved to the satisfaction of a court by which a recognizance under this Code has been taken, or, when the recognizance is for appearance before a court, to the satisfaction of that court, that the recognizance has been forfeited, the court shall record the grounds of proof, and may call upon any person bound by the recognizance to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover it by issuing a warrant for the attachment and sale of the movable property belonging to that person, or his estate if he is dead.

6. It will be noted that the above section requires a court to request a party to show cause why cash bail should not be forfeited. This seems not to have been done by the trial court. The application of that Section was considered in the case **Peter Gitari Mwiandu v Republic [2017] eKLR**.

*“6. The trial court’s record indicates that the procedure of forfeiture under **Section 131 of Cap 75** was not followed. The trial court failed to ensure that Mwiandu was accorded the right to be heard. Mwiandu should have been served with a notice to show cause. It is only after the trial court had considered that cause shown by Mwiandu that the trial court could have ordered for forfeiture. This is what was stated in the case **ISAAC KIPLANGAT MUTAI – V- REPUBLIC [2013] eKLR**. Viz:*

“On the second issue, the order of forfeiture of the cash bail, it is the requirement of Section 131 of the Criminal Procedure Code that the court will first make an inquiry of the accused or his surety to show cause why his recognizance should not be forfeited. The order forfeiting his cash bail cannot therefore be made simultaneously with the order cancelling bail/bond.

The accused as well as the surety is required to be granted opportunity, to a hearing, to show cause why his bail/bond should not be forfeited to the state. Failure to do so in a grave breach of the rules of natural justice.”

7. That section was also considered in the case **Isaac Kiplangat v Republic**.

“On the second issue, the order of forfeiture of the cash bail, it is the requirement of Section 131 of the Criminal Procedure Code that the court will first make an inquiry of the accused or his surety to show cause why his recognizance should not be forfeited. The order forfeiting his cash bail cannot therefore be made simultaneously with the order cancelling the bail/bond. The accused as well as the surety is required to be granted opportunity, to a hearing, to show cause why his bail/bond should not be forfeited to the State. Failure to do so is a grave breach of the rules of natural justice.

I therefore set aside the orders of forfeiture without due process, of the cash bail of Ksh 100,000/= and the further order for Sh 150,000/= and sh 200,000/= surety as being manifestly unjust. I direct that the cash bail of shs 100,000/= paid by the accused be restored to the credit of the accused, and he be granted bail on the said basis of sh 100,000/= cash bail.”

8. From the above it is clear the trial court failed to give an opportunity to the Applicant to show cause before forfeiting her cash bail. That was in contravention of Section 131 of Cap. 75. That contravention will lead to the revision/setting of those orders because those orders were irregular.

9. In view of the above finding I make the following order in respect to Senior Principal Magistrate Court Ruiru **Criminal Case No.1322 of 2019**:

- (a) The order of 18th February 2020 for forfeiture of cash bail is hereby set aside and vacated.
- (b) The order of 3rd March 2020 requiring further cash bail to be provided by Florence Muthoni Kamau is set aside and vacated.
- (c) The bail terms pre 18th February 2020 are hereby restored.
- (d) Refund shall be made in respect to cash bail paid in compliance to the order of 3rd March 2020.

Orders Accordingly.

SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF FEBRUARY 2021.

MARY KASANGO

JUDGE

11th February 2021

Before Justice Mary Kasango

C/A - Kevin

Applicant – Florence Muthoni Kamau

For the Applicant – Ms Mwaura holding brief for Wathuta

For the Respondent (DPP) – Miss Kathambi

COURT

Ruling virtually delivered in their presence.

MARY KASANGO

JUDGE