**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CRIMINAL APPEAL NO. 20 OF 2017**

**ABRAHAM BRYAN PINYA …….…. APPELLANT**

**VERSUS**

**REPUBLIC ……..……ACCUSED**

***(An appeal from the Ruling and Order of the Chief Magistrate's Court at Ngong, (S.N. Mbungi) dated 2nd May 2017 in Criminal Case No 226 of 2016 (formerly Kibera Criminal Case No. 770 of 2016))***

**JUDGMENT**

1. This is an appeal against the trial court's order made on 2nd May, 2017, declining to lift the order for forfeiture of the cash bail deposited by the appellant in formerly criminal case No. 770 of 2016 at Kibera and now Ngong criminal case No 226 of 2016.

2. The appellant had been charged with the offence of stealing contrary to section 268(1) as read with section 275 of the Penal Code. Particulars were that on diverse dates between 17th day of March, 2014 and 20th March, 2017, at Chase Bank, Ongata Rongai Branch, in Ongata Rongai Town within Kajiado County, jointly with others not before court, he stole Kshs, 4,754,090, the property of Chase Bank Kenya Ltd.

3. The appellant pleaded not guilty to the charge and was released on a cash bail of Kshs, 500,000 which he raised. However, on 8th November 2016, the case was transferred to Ngong Law Courts and set for mentioned before that court on 30th November 2016, but the appellant did not attend court. The trial court issued a warrant of arrest. It later ordered forfeited of the cash bail to the state.

4. The appellant was aggrieved with that decision and lodged a memorandum of appeal dated 14th May, 2017 and raised the following grounds of appeal, namely:

> ***1. The criminal case against the appellant was mentioned severally at the Kibera Law Courts under Criminal Case No. 770 of 2016.***
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> ***2. That during the last court attendance the Honourale court set the hearing date for 30th November, 2016.***
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> ***3. That the appellant then learnt that the said criminal case had been transferred to Nairobi. That on the said hearing date the appellant presented himself at the Chief magistrate's court at Ngong only to be informed that the file was at Kebera.***
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> ***4. That the appellant rushed back to Kibera Law Courts where the matter was listed but the file was nowhere to be found. He went back to Ngong where the registry at the Chief Magistrate Court Ngong reiterated that they were not in possession of the file.***
>
> ***5. That the appellant later presented himself in person at the Ngong Chief Magistrate's Court where the Honourable Magistrate ruled that he had in fact no valid reason for his nonattendance in court and erred in law by forfeiting the cash bail and yet reasons given were valid.***
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> ***6. That the Honourable Magistrate erred by ruling that the cash bail of Kenya Shillings five hundred thousand only (Kshs500,000) should be forfeited for the appellant; s failure to attend court.***
>
> ***7. That the appellant was not given a chance by the trial court to mitigate before sentence was passed on him.***

5. The appellant prayed that his appeal be allowed, the order for forfeiture of the cash bail be reviewed and set aside.

6. During the hearing of this appeal, Mr. Nadida, learned counsel for the appellant, submitted that in making the impugned order, the trial court failed to consider the reasons for the appellant's failure to attend court. According to counsel, the case was initially at Kibera Law Courts but was transferred to Ngong Law Courts on 8th November, 2016 and the appellant was to appear at the Ngong Law Courts on 30th November, 2016.

7. He submitted that when the appellant went to Ngong Law courts, the file was not there. He had a mention date on 30th November, 2016 at Kibera Law Courts to confirm the status. Counsel submitted that on that day, 30th November 2016, the appellant went back to Kibera Law Courts but the court file was not at Kibera. He was advised to go to Ngong Law Courts, which he did on the same day but he was unable to trace his file. A warrant of arrest was issued on that day ,30th November, 2016.

8. Counsel further submitted that the court file was traced on 7th February, 2017 by the appellant's advocate and on that day, the appellant was in court and counsel requested for a mention date. He stated that the appellant's advocate wrote a letter to court on 17th February, 2017, and another letter on 24th April, 2017 requesting for mention dates. He contended that the appellant did not deliberately fail to attend court and that his advocate was following up the matter with the court. He argued that bail was meant to secure the appellant's attendance to court but not to punish him.

9. Learned counsel further argued that the procedure for forfeiting the appellant's cash bail was not followed. According to counsel, before ordering forfeiture, an accused should be given an opportunity to show cause why cash bail should not be forfeited as required by section 131 of Criminal Procedure Code. He contended that the appellant was not summoned to show cause; that the investigating officer knew his number but did not call him and that the appellant had not absconded. He argued that although the case was to be mentioned on 10 th May, 2017, the appellant had it brought forward to 28th April, 2017 as sign that he had not absconded. He urged the court to allow the appeal.

10. Mr. Meroka, learned Principal Prosecution counsel, opposed the appeal. He submitted that the appellant was aware that the case would be mentioned on 30th November, 2016 and even without his counsel, he should have attended court. Learned counsel submitted that the even if the state would have forgiven the appellant on his failure to attend court on 30th November, 2016, based on the interpretations that may be given regarding the order made on 8th November, 2016 for mention, the state did not apply for forfeiture on 30th November 2016 when the appellant failed to attend court.

11. According to counsel, the application was made on the 4th occasion when the appellant failed to attend court, that is; on 7th February, 2017 after several mentions on 30th November, 2016, 15th December, 2016 and 10th January, 2017.

12. Mr. Meroka argued that despite the order for forfeiture and the warrant of arrest being issued, the appellant took no action until 24th April, 2017 when they wrote to court requesting for a mention date. In learned counsel's view, the appellant's conduct was inexcusable. He also argued that since the appellant was the one who had deposited the cash bail, he did not require a notice to show cause. He urged the court to dismiss the appeal.

13. I have considered this appeal, submissions by counsel for the respective parties, perused the trial court's record and the impugned order. This being the a first appellate court, it is the duty of this court to reconsider, reassess and reanalyze the evidence on record and make its own conclusion giving reasons for it.

14. In ***Kiilu v Republic,*** [2005]1 KLR 174, the Court of Appeal held that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

15. This is not an appeal against a judgment, conviction and sentence. It is an interlocutory appeal against an order of forfeiture of cash bail posted by the appellant before the trial court to secure his release. It has been held that it is undesirable for parties to mount interlocutory appeals arising from interlocutory decisions which do not amount to a violation of fundamental rights and freedoms.

16. The Court of Appeal raised this concern in ***Thomas Patrick Gilbert Cholmondeley v Republic*** [2008] eKLR, thus:

> ***"In ordinary criminal trials, there is generally no interlocutory appeals allowed, for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; Muga Apondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal…[T]he fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused."***

17. The appellant in this appeal, was charged at the Kibera Law Courts and was granted cash bail of Kshs. 500,000 which he raised and was

therefore released. On 8th November, 2016, the Kibera court ordered the case to be transferred to Ngong law courts because the offence was committed within the jurisdiction of the Ngong court. The case was to be mentioned in the Ngong court on 30th November, 2016 but the appellant was not in court on that day.

18. He stated that he went to Ngong court but the file was not in Ngong. He argued that the Kibera court had also given a mention date at Kibera for 30th November, 2016 and that he also went to Kibera but he was told that the court file was not at Kibera. He was therefore advised to go to Ngong, but he did not get the file. Meanwhile, the court at Ngong mentioned the case on four occasions in the absence of the appellant and on 7th February, 2017, it ordered forfeiture of the cash bail. A warrant of arrest had been issued earlier on 30th November 2016.

19. I have carefully perused the trial court's record and the impugned order. The case was transferred on 8th November, 2016 to Ngong to be mentioned on 30th November 2016. The trial court's record does not show that the Kibera court had set the case for mention before it on that day. The prosecution simply applied to have the case transferred to Ngong and set 30th November, 2016 as the date for mention in Ngong.

20. According to the record, on 30th November 2016, the file was placed before the Ngong court; was mentioned but the appellant was absent. The trial court issued a warrant of arrest and set the matter for mention on 15th December, 2016, when again the appellant was absent. The court again set the matter for mention on 10th January 2017. As it turned out, the appellant was again absent and the matter was again set for mention on 7th February, 2017.

21. The appellant has also argued that his advocate traced the file at Ngong on 7th February, 2017 but he did not explain why he did not attend court any of the other dates after 7th February, 2017 or ask the court to give him a mention date.

22. On that day, 7th February, 2017, the appellant was absent and the prosecutor applied for forfeiture of the cash bail. The court ordered forfeiture of the cash bail and set the matter for mention of 27th March 2017 but again, the appellant was absent. The court set the matter for mention on 10th May 2017.

23. All this time, there was no effort by the appellant to go to court for the mention of his case. The appellant did not even attempt to attach a copy of the cause list for Ngong court to show that his case was not listed on 30th November 2016. I have not traced anything on record to show that the Kibera court ordered the case to be mentioned in that court on 30th November 2016 or any other date. That could not have been the case since the Kibera court was not superintending Ngong court since they are courts of concurrent jurisdiction.

24. The appellant has also argued that his advocate wrote a letter to court on 17th February 2017 seeking to have the matter mentioned. There is no such letter on record and the appellant did not attach any. The only letter on record is dated 24th April 2017 and received by the court on 25th April 2017 requesting for a mention date. The matter was mentioned on 28th April 2017 when the application to lift the forfeiture order was made. It was disallowed on 2nd May 2017 prompting this appeal.

25. I have not seen anything on record to satisfy this court that the appellant acted responsibly for all that period up to 24th April when they first wrote to court. Simply put, there is no satisfactory explanation why the appellant made no effort to attend court or even address letters to court inquiring about his file, to enable this court place blame on the trial court regarding the impugned decision.

26. The appellant's counsel further argued that the appellant was not given a chance to show cause why his cash bail should not be forfeited. He relied on Section 131 of Criminal Procedure Code. The section 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.***
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> ***(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.***
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> ***(3) A warrant may be executed within the local limits of the jurisdiction of the court which issued it; and it shall authorize the attachment and sale of the movable property belonging to the person without those limits, when endorsed by a magistrate within the local limits of whose jurisdiction the property is found.***
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> ***(4) If the penalty is not paid and cannot be recovered by attachment and sale, the person so bound shall be liable, by order of the court which issued the warrant, imprisonment for a term not exceeding six months.***
>
> ***(5) The court may remit a portion of the penalty mentioned and enforce payment in part only.***
>
> ***(6) When a person who has furnished security is convicted of an offence the commission of which constitutes a breach of the conditions of his recognizance, a certified copy of the judgment of the court by which he was convicted may be used as evidence in proceedings under this section against his surety or sureties, and, if the certified copy is so used, the court shall presume that the offence was committed by him unless the contrary is proved."***

27. I do not find this section helpful to the appellant. As correctly submitted by Mr. Meroka, the appellant deposited cash bail unlike

cognizance or where someone stood surety for the appellant. That is where the section would have come in. However, in the appellant's case where he deposited cash bail there was no need for the notice to show cause.

28. The appellant has also argued that the investigating officer had his telephone number and should have called him which he did not do. I do not think that was the work of the investigating officer. The appellant undertook to attend court as that is the essence of bail. Having failed to do so for a period of over five months, the appellant cannot turn the burden of his failure to attend court on the investigating officer. This argument lacks legal foundation or even logic.

29. I have carefully considered the appeal submissions and perused the record. The application for forfeiture was made on 7th February 2017 on the four occasion the appellant failed to attend court. I am unable to blame the trial court in declining to set aside its order for forfeiture of the cash bail. The trial court did not cancel the appellant's bail and did not, therefore, violate his constitutional right to be released on bail.

30. In the premise, the inevitable conclusion I come to is that I find no merit in this appeal and I dismiss it.

31. Given the age of this case, the fact that his matter is already part heard, and in order to avoid further delay in according the appellant a speedy trial as required by the Constitution, I direct that the appellant do appear before the trial court at Ngong on 20th April 2020 for hearing as the trial court had scheduled it.

**Dated, Signed and Delivered at Kajiado this 28th Day of February 2020.**

**E. C. MWITA**

**JUDGE**