



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MACHAKOS

(Coram: Odunga, J)

CRIMINAL REVISION NUMBER 6 OF 2020

JUSTUS KITUVA KIVINDYE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original proceedings in Mavoko Chief Magistrate's Criminal Case No. 69 of 2019)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JUSTUS KITUVA KIVINDYE.....ACCUSED

RULING ON REVISION

1. The Applicant herein is charged before the Chief Magistrate's Court in Mavoko in Criminal Case No. 69 of 2019 with the offence of obtaining credit contrary to section 316 of the *Penal Code*. On 25<sup>th</sup> January, 2019, he was released on a bond of KShs 2,000,000/- with surety of similar amount or cash bail of KShs 500,000.00.

2. Eventually the matter was fixed for 13<sup>th</sup> February, 2020. On the said date the applicant was absent and the State Counsel sought for warrant of arrest. Pursuant to the said application, warrant of arrest was issued against the applicant and the cash bail was directed forfeited to the State.

3. Section 131 of the *Criminal Procedure Code* provides as follows:

*131. (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.*

*(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.*

*(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, to 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.*

4. The said section provides the procedure to be followed before an order for forfeiture is made. That section was the subject of the case of **Abdiaziz Haji Mohammed vs. Republic [2007] eKLR** where **Ojwang, J** (as he then was) held as follows:

**“Section 131 of the Criminal Procedure Code (Cap.75) requires the Court to call upon an accused person to show cause, before bail is declared forfeit. It is common ground here, as is deponed [sic] by the applicant, that the said opportunity was not provided, before the applicant’s bail was forfeited. On this state of fact [sic], it is clear that justice requires that the Kshs.100,000/= bail which had been paid into Court by the applicant, be reinstated.”**

5. In the matter before the learned trial magistrate, the applicant was not called upon to show cause before the bail was declared forfeit. Having issued warrant of arrest, the issue of forfeiture ought to have awaited the appearance by the applicant to show cause before an order to that effect could be issued.

6. I therefore find that the proceedings leading to forfeiture were irregular. Accordingly, I set aside the said order and order that the bail which was posted by the applicant before the trial court be reinstated.

7. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 24<sup>th</sup> day of June, 2020.**

**G.V. ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Ngetich for the Respondent**

**CA Geoffrey**