



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL REVISION NO. 2 OF 2019**

**FRANCIS NGARIUKI WAITHAKA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**A. Introduction**

1. This is a ruling for the application dated 29<sup>th</sup> August 2019 seeking for quashing and/or revision of the decision of the trial court in Embu Criminal Case No. 824 of 2017 being the order made on 18/06/2018 to the effect that the applicant forfeits Kshs. 100,000/= for failing to attend court.

2. It is the applicants' case that his advocate failed to inform court that his reason for failing to attend court was because he was ill and as such his advocate's mistake should not be visited on him. The applicant further states that there is a settlement agreement on record between himself and the complainant to settle the case. It is the applicant's case that if the forfeiture order is not reversed, he and his family will suffer financial loss.

3. The application for revision was opposed by the respondent on the ground that the trial court's decision was informed by the fact that the applicant either through his advocate or representative failed to avail medical documents to proof his illness and whilst the trial court proceeded to lift the warrant of arrest, it ordered the forfeiture of Kshs. 100,000/=.

**B. Analysis of the Law**

4. I have considered the application and submissions of counsel. The supervisory and revisionary powers of the High Court over subordinate courts are set out in the constitution under Article 165 and the Criminal Procedure Code in Section 362 as follows;

*“Article 165 (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice*

***362. Power of High Court to call for records***

*The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”*

5. The issue herein is whether the trial court acted within the law in ordering forfeiture of the cash bail given the facts of the matter. The deposit of cash bail is provided for under **Section 126 of the Criminal Procedure Code** which provides:

*“When a person may be required by a court or officer to execute a bond, with or without sureties, the court or officer may, except in the case of a bond for good behaviour, require him to deposit a sum of money to such amount as the court or officer may fix, or to deposit property, in lieu of executing a bond.”*

6. Section 131 Criminal Procedure Code provides as follows:

*“(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.”*

7. Under Section 131, the court has two options which are:

*(1) To call upon any person bound by a cognizance to pay the penalty thereof; or*

*(2) Call upon the person to show cause why the cognizance should not be paid.*

8. I have perused the proceedings of the learned magistrate and I note that the accused was released on cash bail as an alternative by the order of the court dated 4/09/2017. He was represented by an advocate on Mr. Kabathi who informed the court on 16/11/2017 that the complainant and the accused were desirous of promoting reconciliation under Section 176 of the Criminal Procedure Code.

9. The case was fixed for hearing on 4/06/2018 but the accused did not attend court. The advocate for the accused was also absent from court. The trial magistrate issued a warrant of arrest and forfeited the cash bail. The accused was later to attend court on 10/06/2018 and it seems the court made no orders on his appearance on that day.

10. It was on 18/06/2018 that one Mr. Njiru holding brief for the defence counsel informed the court that the accused was unwell. He appeared in court on 15/02/2018 with his advocate. The accused reported some progress on the settlement whereas he said that he had paid the complainant part of the debt.

11. The relevant proceedings are those of 4/06/2018 when the order for forfeiture of cash bail was made. I have perused the proceedings and those that followed when the accused appeared in court. I note that the accused was never accorded a chance to show cause why the cash bail should not be forfeited before the order complained A warrant that was in force was lifted due to the fact that he was unwell but the subject of the forfeiture was never addressed.

12. In this case, the order for forfeiture had been made in the absence of the accused. When he appeared in court he ought to have been accorded a chance to explain the reasons for his absence. If the court would find his explanation satisfactory, it had a duty to review the order.

13. This may have been due to an oversight by the court or just failure to comply with the law. The defence counsel was also to blame because he failed to raise the issue of forfeiture before the court.

14. It is my finding that the trial court failed to comply with Section 131 of the Criminal Procedure Code. I find that this is a suitable case for this court to invoke the provisions of Section 362 of the Criminal Procedure Code.

15. Consequently, I hereby order that the orders for forfeiture of cash bail made on 4/11/2017 be and are hereby set aside. The cash bail forfeited shall be refunded to the accused.

16. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Lokorio for Respondent**

**Applicant present**