



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CRIMINAL APPLICATION NO. 40 OF 2015

IN THE MATTER OF NKUBU SRM CASE NO. 1297 OF 2012

MOSES MURIITHI.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

By a Notice of Motion Application brought pursuant to the provisions of **Sections 362 and 364 (1) (b) of the Criminal Procedure Code CAP 75 of the Laws of Kenya**, the applicant has sought the following orders:

- 1. THAT the orders issued by the Hon. D. Ocharo (SRM) in Nkubu SRM Criminal Case No. 1297 of 2012 on 9th October 2015 and 13th October 2015 be set aside and the cash bail previously deposited by the applicant be reinstated.**
- 2. THAT the hearing of Nkubu SRM Criminal Case No. 1297 do proceed before another court other than before the Hon. D Ocharo (SRM).**

The said application is premised on the following grounds:

- 1. THAT the applicant is the accused in Nkubu SRM Criminal case No. 1297 of 2012.**
- 2. THAT when the matter came up for hearing on 9th October 2015 the accused was absent and the court issued a warrant of arrest and ordered the cash bail to be forfeited.**
- 3. THAT the applicant's explanation on the same on 9th October 2015 as to his absence and the application for review of the orders by his counsel were declined by the court.**
- 4. THAT on 13th October 2015 the court maintained its earlier orders but allowed the applicant to deposit a fresh cash bail of Kshs 25,000 as a condition for his release.**
- 5. THAT the applicant's explanation for his absence was reasonable and was made promptly.**
- 6. THAT the conduct of the trial court was irregular and unreasonably harsh.**

The applicant's case is that he is the accused in Nkubu SRM Criminal Case No. 1297 of 2012 and the matter was slated for defence hearing on 9th October 2015. That as the court was calling out matters, the applicant briefly walked out to make a phone call to his advocate to alert him that court sittings had commenced; that he made the call and immediately returned to the court room where he waited patiently to be called, only to hear the court clerk ask whether there was anyone who did not hear their name; that he immediately alerted the court that he had not heard his name and subsequently he was informed that the matter had been called in his absence and a warrant of arrest issued and the cash bail that he had deposited forfeited to the State. The applicant further contended that he made a frank explanation as to why he was absent in court but the trial court found the same to be unsatisfactory whereupon he was remanded in custody and asked to return to court on 13th October 2015, thus his advocate sought a review of the orders issued but the same was declined.

On 13th October 2015, the appellant was ordered to deposit a fresh cash bail of Kshs 25,000/= to secure his release without being given an opportunity to state anything thus provoking the instant application.

When this application came up for hearing on 26th October 2015, Mr. Mulochi, Learned State Counsel intimated to the court that having looked at the Notice of Motion and the authorities relied upon by the applicant he was leaving it to court to decide save for prayer 3 where the applicant is seeking an order for the case to proceed before another court other than Hon. Ocharo, stating that the applicant should make that prayer before that court first.

Mr. Muriithi, Counsel for the applicant on the other hand urged that with regard to prayer 3, the applicant had a feeling that the magistrate was harsh and there was likely to be a miscarriage of justice. He therefore urged the court to order that the case proceed before the other court at Nkubu.

Having carefully considered the submissions by the applicant and the authorities relied upon, it is not in dispute that on 9th October 2015, before the applicant's cash bail was forfeited to the State and a warrant of arrest issued against him, on learning of applicant's absence, the trial court in a short ruling stated as follows:

“warrant of arrest to issue and bail forfeited. It shall be the duty of the investigating officer one PC Juma of Gaiti police station to execute the warrant of arrest....”

From the above passage it is evident that the trial magistrate did not comply with the provisions of section 131 of the Criminal Procedure Code CAP 75 of the Laws of Kenya which deals with forfeiture of recognizance, the same provides as follows:

“131 (1) whenever it is proved to the satisfaction of a court by which recognizance under this Code has been taken, or, when the recognizance is for appearance before 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 immovable 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) ...

(5) ...

(6) ...”

In the instant case, it is evident that the order of forfeiture was made without giving the applicant an opportunity to show cause why the forfeiture should not be made. The said order of forfeiture was therefore irregular and unprocedural as it was made in blatant disregard to the provisions of **Section 131 of the Criminal Procedure Code CAP 75 of the Laws of Kenya** and the rules of natural justice, that one should not be condemned unheard. The court record shows that the forfeiture was made before 10.00 a.m. because at 10.00 a.m. when the applicant appeared, the court confirmed the forfeiture order. Even then the applicant was not allowed to address the court. The applicant’s Counsel then appeared before the court later at 11.15 a.m. and sought to have the order reviewed but the court declined. It is obvious that the applicant never intended to absent himself from the court and should have been allowed to give his explanation as is required by **Section 131 of CPC**. The court flouted the applicant’s rules of natural justice by failing to hear him before making such a drastic order affecting the applicant’s right to freedom. I agree with Lesiit J. in the case of **Dickson Kimathi v Rep Miscellaneous Application 10/2014** where she observed:

“No forfeiture can be legally made before giving an opportunity to the person who will be adversely affected by such order an opportunity to show cause why the forfeiture should not be made”

In this case, the order having been made contrary to **Section 131 of CPC** and in breach of rules of natural justice, I find it to be unprocedural and illegal.

As regards the prayer that the case be heard by any other magistrate other than Mr. Ocharo because of the adverse orders, ordinarily such an application for recusal should be first made before the trial court and I would have directed so. However, taking into account the fact that the applicant had not found favour with the court following the forfeiture of Cash Bail, the applicant may not be at ease being heard by the same court. Even though the magistrate may not have shown any evidence of bias or likelihood of bias, sometimes it may just be a question of perception or how a reasonable person would view the situation. For that reason, I will agree with the applicant to have another magistrate handle the case.

In the end, I find that the application has merit and is hereby allowed. I grant the following orders:

- 1. That the orders in CRC 1297/2012 made on 9/10/2012 and 13/10/2015 be and are hereby set aside;**
- 2. I direct that the cash bail that was forfeited be reinstated and applicant be released on the same cash bail;**
- 3. I also direct that CRC 1297/2012 be heard before the other court at Nkubu other than Mr. Ocharo, when it comes up for hearing on 10/12/2015.**

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF OCTOBER, 2015.

R.P.V. WENDOH

JUDGE

28/10/2015

PRESENT

Mr. Mulochi for State

Ms. Nelima Holding Brief for Mr. Muriithi for Appellant

Ibrahim/Peninah, Court Assistants