



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
MISC. APP. CASE NO. 10 OF 2014

DICKSON KIMATHI.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The Applicant DICKSON KIMATHI has approached the court with a Notice of Motion dated 7th May, 2014. The application is brought under sections 362, 364, 365, 366 and 367 of the Criminal Procedure Code.
2. The Applicant seeks five (s) orders namely
 1. ...
 2. **That the orders made by the chief magistrate Mr. J. G. KINGORI in criminal case 1255 of 2012 on 22nd April 2014 refusing the reinstatement of the Applicant's cash bail Ksh. 100,000 be set aside.**
 3. **That the court do reverse the orders given by the chief magistrate Mr. J. G. Kingori in Criminal Case 1255 of 2012 on 22nd April 2014 ordering fresh cash bail.**
 4. **The court do order reinstatement of the cash bail 100,000 initially forfeited to the state in criminal case 1255 of 2012 in chief magistrate court and also refund of the additional cash bail being the sum of Ksh 100,000 .**
 5. **That this honourable courts do make any other order it deems fit in the circumstances.**
3. The application is premised on four grounds namely:
 - a. **The learned trial magistrate erred in giving an order for forfeiture of cash bail by the Applicant when indeed the appellant was sick despite producing the hospital documents in support of his illness.**
 - b. **The learned magistrate erred in failing to reinstate the cash bail of Ksh 100,000 when the appellant did not attend court for reason that were explained and considered by the learned trial magistrate and not opposed by the prosecution on 24.4.2014.**

- c. **The learned trial magistrate erred in law and facts in failing to consider that the appellant has never failed to appear before court since the year 2012.**
 - d. **The learned trial magistrate erred by failing to give any explanation and/or reason as the circumstances in which he arrived at a decision of not reinstating the appellant's cash bail but instead ordering a fresh cash bail.**
4. The application is supported by an affidavit of even date sworn by the Applicant. The gist of the affidavit is that the Applicant had attended court without fail since he was granted bail with 22nd April, 2014 when he fell ill. He has annexed documents to show he attended hospital on said date on account of illness. He deposes that he went to court next day but found court had gone out on a visit to Garbatula. He then went on 24th April, 2014 when he learned that his cash bail of Ksh 100,000 had been forfeited to the state.
 5. Mr. Kiogora Mugambi for the Applicant in his submission urged the court to set aside an order made by Maua Chief Magistrate's Court in Criminal Case No. 1255/1012. In that order the Chief Magistrate forfeited Ksh. 100,000 cash bail deposited by the Applicant.
 6. Mr. Kiogora also urged court to set aside an order of 22nd April, 2014 in which the same court ordered the Applicant to deposit fresh cash bail. He urged that by ordering Applicant to deposit fresh cash bail in order to go out on bond the learned trial magistrate had accepted to be in court. Mr. Kiogora urged the court to reinstate original cash bail and have it refunded to the Applicant.
 7. Mr. Mulochi represented the state in this application. The learned Prosecution Counsel opposed the application. He urged that the learned trial magistrate was in order in making his orders of forfeiture of bail. Mr. Mulochi submitted that Applicant was not being truthful when he said he had not failed to attend court before 22nd April, 2012 since on 13.2.2013 he failed to attend court.
 8. Mr. Mulochi urged that the medical document marked DK2 shows Applicant attended hospital on 23rd April, 2014 one day after he should have attended court. The learned Prosecution Counsel urged that there was an alteration on the date on the outpatient attendance card which raised issue of the authenticity of the medical documents
 9. I have considered the application by the Applicant. I have also considered the submissions by both counsels. I have also considered the proceedings of the lower court. I have perused the same as well.
 10. I will begin by giving a little background of the case relevant to this application as I glean from the annexed proceedings. The Applicant was arraigned before CM's court Maua on 20th April, 2012 after pleading not guilty the Applicant was granted bond of Ksh 300,000 or a cash bail of Ksh 100,000. Trial commenced on 20th November, 2012 and three witnesses heard. Case was adjourned to 12th February, 2013 for further hearing. There is no record for 12th February, 2013 instead on 13th February, 2013 accused is recorded to be absent and a warrant of arrest was issued same day at 12.30pm the warrant of arrest was cancelled when a accused appeared in court.
 11. On 22nd April, 2014 when case was scheduled for hearing the Applicant was not in court. On application by the prosecution, the learned trial magistrates **"issued a warrant of arrest against the accused/ Applicant"** and at the same time **"forfeited his cash bail."**
 12. The Applicant appeared in court again on 24th April, 2014. After Applicant explained through his counsel that he fell ill and went to hospital on 22nd April, 2014. He explained that he went to court on the next day after treatment only to find court away on official duty.
 13. The learned trial magistrate then made a short ruling to the following:

"Court: forfeiture process has already been completed. Accused may wish to appeal to the High Court. Accused had not been admitted to any hospital and opted to go to hospital and not come to court when he was apparently not in a serious condition.. I will lift the warrant of arrest and direct that in the meantime, he deposits another cash bail."
 14. The learned trial magistrate then proceeded to lift the warrant of arrest and direct Applicant deposits another cash bail. That order is what has prompted the application before this court.
 15. The sole issue for determination is whether the order of the learned trial magistrate on 24th April,

2014. I cannot do better than quote section 131 of the Criminal Procedure Code which sets out the procedure of forfeiture of recognizance and securities, and the factors the court must satisfy itself of before the order of forfeiture is made. That section 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)...”

16. I have included an excerpt of the learned magistrate's ruling in which the order of forfeiture order was confirmed and the earlier order when the forfeiture order was made. On 24th April when the learned trial magistrate made the forfeiture order the procedure set out under section 131 of the CPC was not followed.

17. No forfeiture can legally be 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 was made on the first day the Applicant failed to appear in court. He had not been given an opportunity to be heard. The order was made in contravention of section 131 of the CPC. It was also against the rule of natural justice. The order was clearly irregular, unprocedural and in the circumstances illegal.

18. The learned magistrate order requiring the Applicant to deposit fresh bail on grounds that the forfeited amount could not be refunded was equally unprocedural, harsh and equally irregular. The mere fact the learned trial magistrate was of the view the Applicant's bond could be renewed is proof he was satisfied with the Applicant's explanation of the reason he could not attend court as required. Had the learned trial magistrate followed the proper procedure, it could not have been necessary to make the order of forfeiture in the first place. Having made the irregular order, the court subjected the Applicant to double jeopardy. That approach of dealing with the issue of forfeiture cannot be allowed to continue.

19. I have come to the conclusion that the Applicant's application has merit and should be allowed. In the circumstances I allow the Applicants application and make the following finding and orders:

- 1. That the two orders of the court in Criminal Case Number 1255 of 2012, made on 22nd April, 2014 forfeiting cash bail; and on 24th April, 2014 calling for deposit of fresh cash bail were irregular, did not comply with the requisite procedural requirement and is therefore illegal.**
- 2. That the order made in Maua Criminal Case Number 1255 of 2012, on the 22nd day of April,**

- 2014 forfeiting the cash bail in the sum of Kshs 100,000/- be and is hereby set aside.
3. The said sum of Kshs 100,000/- be refunded to the depositor forthwith.

DATED SIGNED AND DELIVERED THIS 19TH DAY OF JUNE 2014

LESIIT J

JUDGE