



105/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION CASE NO. 20 OF 2013

PATRICK KISILU MUTISYA.....1ST APPLICANT

JONATHAN MUSAU2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

CRIMINAL REVISION

1. This file was placed before me by the Deputy Registrar, Machakos, **Ms. Rose Makungu** following a letter dated 14th August, 2013 authored by the firm of **Mutinda Kimeu and Company**.
2. It seeks revision of an order made by **Honourable S. Gacheru**, Principal Magistrate forfeiting cash bail deposited by the accused in Criminal Case No. 1359/2011 on 3rd January, 2012.
3. The prayer sought is premised on grounds that criminal Case No. 1359/2011 was consolidated with Criminal Case No. 1366/2011. Bail terms that had been imposed in Criminal Case No. 1359/2011 were to apply in regard to Criminal Case No. 1366/11.

Jonathan Musau who had been charged in Criminal Case No. 1359/2011 that was withdrawn continued attending trial in criminal case No. 1366/2011. Consequently he was acquitted. He discovered that the cash bail had been forfeited to the State when he made a request for release of the same.

4. I have perused both files with a view of satisfying myself with the correctness of the order made pursuant to the provisions of Section 362 of the Criminal Procedure Code.
5. **Jonathan Musau Wambua** was charged with the offence of trespass upon private land contrary to Section 3(1) as read with Section 11 of the Trespass Act Cap 294, Laws of Kenya.

In Criminal Case No. 1359/2011 some pages are missing from the file but on the 27.9.2011 the accused appeared in court for mention.

6. On the 26/10/2011 when the case was scheduled for hearing the accused appeared in court. The case failed to proceed because the prosecution witnesses did not attend court.
7. On the 20/12/2011 the accused was not present. Thereafter the learned Magistrate made an order forfeiting the cash bail following the absence of the accused. No date is indicated. Consequently, the cash bail was forfeited to the state, per the payment voucher dated 16/1/2012.
8. A perusal of Criminal case No. 1366/2011 shows that initially, **Patrick Kisilu Mutisya** was

- charged with the offence of Trespass upon private land contrary to Section 3(1) as read with Section 11 of the Trespass Act.
9. On the 15/3/2012 the prosecution applied to withdraw a Criminal case captured as No.359/2011. The case was then consolidated with Criminal Case No. 1366/2011. The charge sheet presented was in the names of **Patrick Kisilu Mutisya** and **Jonathan Musau Wambua**. The charge was of trespass upon private land per the order of **Honourable Gesora**, the same bail terms were to apply. The case was heard and concluded on the 7/8/2013. The accused persons were acquitted.
 10. I wish to point out that it is not known when Criminal case No. 1359/2011 was placed before the **Honourable S. Gacheru** and how the order forfeiting the cash bail was made. This was an error that calls for intervention of this court. Following the irregularity apparent on the face of the record, I do quash and set aside the order made by the **Honourable S. Gacheru** on 20/12/2011 forfeiting the cash bail.
 11. Consequently, the cash bail deposited in respect of **Jonathan Musau** shall be refunded to the depositor.

DATED, SIGNED and DELIVERED at MACHAKOS this day 17th of OCTOBER, 2013.

L.N. MUTENDE

JUDGE