



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS**

**CRIMINAL APPEAL 588 OF 2007**

**PROPRIETOR GROWERS CAFE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, growers Café, was charged in the Subordinate Court of the First Class Magistrate, City Hall, Nairobi, with selling manufactured, prepacked food contrary to Regulation 3 of the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) Regulations made under Chapter 254 of the Laws of Kenya. Appearing on behalf of the accused, the proprietor pleaded not guilty and was released on a bond of Kenya KShs. 200,000/= with a surety of similar amount or a cash bail of KShs. 100,000/=. Apparently the proprietor opted to deposit a cash bail. That was on or about the 3<sup>rd</sup> May, 2006. Before the matter could proceed to hearing, it was adjourned and mentioned severally. One such mention was slated for 8<sup>th</sup> January, 2007 when the appellant did not attend court. The court ordered that the cash bail be forfeited, which was done. The appellant moved to this court on appeal against the order of forfeiture.

At the hearing of the appeal, Mr. Kabaiku appeared for the appellant, Mr. Odede for the Respondent, while Mrs Kagiri appeared for the State as amicus curie. After hearing all the counsel, I find that a brief account of the events antecedent to the forfeiture will place the matter in its proper context.

After the plea was taken on 19<sup>th</sup> April, 2006, the case was fixed for hearing on 8<sup>th</sup> May, 2006, with a mention date on 3<sup>rd</sup> May 2006. On the mention date, the hearing date was confirmed. Unfortunately the hearing did not commence as the trial magistrate was away. Hearing was accordingly stood over to 14<sup>th</sup> June, 2006, with a mention on 8<sup>th</sup> June, 2006. After the mention, when all the parties attended, the matter came for hearing as scheduled but could not proceed as the prosecutor had a problem with his voice. The hearing was accordingly adjourned to 26<sup>th</sup> July, 2006. On that date, the prosecutor could not proceed since the witness, Catherine Mwangi, had fallen ill. Hearing was adjourned to 29<sup>th</sup> September, 2006.

On that hearing date, the prosecutor again applied for an adjournment as the witness herein was unwell. It was as if the prosecution evidence was going to be adduced by only one witness. The prosecution were, however, granted that adjournment as the last one, and the case was fixed for hearing on 10<sup>th</sup> November, 2006. On that hearing date, the prosecutor sought an adjournment on the ground that he was going to testify in another matter in the High Court. Mr. Kabaiku for the appellant opposed the application on the ground that the prosecution had been given a last adjournment, but the adjournment was nevertheless given and the case fixed for hearing on 8<sup>th</sup> December, 2006. However, it did not proceed on that day as the witness, Catherine Mwangi was away on maternity leave. The hearing was then adjourned to 28<sup>th</sup> February, 2007, with a mention on 8<sup>th</sup> January, 2007.

On that fateful date, the appellant was absent and the court ordered for a warrant of arrest to issue, and fixed the matter for mention on 8<sup>th</sup> February, 2007. On the latter date, the court ordered that the appellant's bail be forfeited, and directed that the matter be further mentioned on 8<sup>th</sup> March, 2007. It was this forfeiture which has brought about this appeal.

It will be noted that until that date, the appellant had religiously attended court without fail. It was a

pity, in the circumstances, that his cash bail was ordered to be forfeited even without as much as asking for an explanation as to why he failed to attend court on the material date. He could have fallen sick; he could have had an accident on the way, etc. The precipitous action taken by the court for the forfeiture of his bail would therefore appear to have been oppressive in the circumstances. The case of **NZIOKA v. REPUBLIC** [2004] e KLR is on all fours, identical to this one. In that case, Wendoh J. was faced with a similar situation in which the accused had been released on cash bail of KShs. 20,000/=. One day he arrived in court late and found that the prosecutor had applied for a warrant of arrest against him and applied for forfeiture of the cash bail. The court issued the warrant of arrest and ordered the cash bail to be forfeited to the State. When the applicant later attended court, an explanation was given as to why he was late and he was ordered to be released on fresh bond for KShs. 50,000/= with one surety. The applicant contended that the order of forfeiture of his cash bail was unprocedural and offended Section 131 of the Criminal Procedure Code.

In the above case, the court observed, as I hereby do, that Section 131 of the Criminal Procedure Code is very clear that the court has to record the grounds of proof as to why recognizance should be forfeited and call upon the person to show cause why it should not be paid. But in the instant matter, the court just ordered forfeiture of cash bail even without waiting to hear the reasons for the appellant's absence. The appellant was therefore condemned unheard, which offends not only the spirit of Section 131 (1) of the Criminal Procedure Code, but also the rules of natural justice.

It is also noteworthy that under Section 131 (5) of the Criminal Procedure Code, the court has a discretion to remit a portion of the penalty mentioned and enforce payment in part only. But it can resort to any of those options only after giving the appellant a hearing and this was not done.

For the above reasons, I find that the appellant's cash bail was unprocedurally ordered to be forfeited. The order for forfeiture was therefore as invalid as it was unprocedural. The appeal is accordingly allowed and the order for forfeiture is hereby set aside and the cash bail ordered to be reinstated and/or be refunded to the appellant.

Dated and delivered at Nairobi this 17<sup>th</sup> day of September 2009.

**L. NJAGI**

**JUDGE**

In the presence of :-