



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 27 OF 2008

DAVID MAINA KIBUIYAH.....APPELLANT

-VERSUS-

REPUBLIC.....ESPONDENT

RULING

The applicant herein was arraigned before a Resident Magistrate at the Central Law Courts, in connection with a charge of obtaining money by false pretences contrary to s.313 of the Penal Code (Cap. 63, Laws of Kenya). When the trial Court gave the hearing date of *3rd April, 2008* it also set an earlier *mention* date – *20th March, 2008*; and learned counsel **Mr. Maleche** has informed this Court, on the basis of depositions annexed to the application, that the said mention date was not verbally expressed in Court, and neither the applicant nor his counsel, thus, registered it in mind.

After plea-taking, the learned Magistrate released the applicant on a *cash-bail of Kshs.80,000/=*; and it was well understood that a hearing would take place on *3rd April, 2008*.

Counsel has informed the Court, on the basis of affidavit evidence, that it had not been possible for the applicant to be in Court for the mention, as only the hearing date was being remembered.

The said mention date had been recorded on the *cash-bail payment receipt*, which was *issued to a person not a party to this case*, to hold on behalf of the applicant; and the *recipient retained it* for some time before handing it over to the applicant.

Neither counsel nor the applicant, thus, for some time, knew of the mention date.

When the mention date came, the applicant was *not in Court*; and the learned Magistrate made two orders: one for a *warrant of arrest*; and the other *for forfeiture of cash bail* – and counsel had to come before the High Court asking this Court to exercise its supervisory powers under s.65(2) of the Constitution, as well as revision powers under ss.362 and 364 of the Criminal Procedure Code (Cap.75, Laws of Kenya).

The learned Magistrate was unable to accommodate the *factual explanations* quite properly given by learned counsel, and even when, on *3rd April, 2008* this Court thus ordered:

“Between this moment and the date of hearing this matter on 7th April, 2008 the applicant shall enjoy a free bond,”

he still went on to issue further orders.

This led to orders of this Court restating that the *orders of 3rd April, 2008* were extended, and the applicant would, pending the hearing which has taken place today, enjoy the said free bond.

On the basis of the statements on the face of the application before me; of the prayers therein; of the content of the supporting affidavit; of all the submissions of counsel recorded today, I have come to the decision that this Court must reverse the orders of the trial Court, in exercise of its supervision and revision jurisdiction, and I will now make specific orders as follows:

1. *The finding by the trial Court that the applicant wilfully omitted to attend Court during scheduled mention, is set aside and vacated.*
2. *The trial Court's order that the applicant forfeits his cash bail, in the sum of Kshs.80,000/=, is set aside and vacated.*
3. *The trial Court's order that the applicant is to be held in custody for 14 days, is set aside and vacated.*
4. *The applicant's cash bail of Kshs.80,000/= is hereby reinstated.*
5. *The applicant shall undergo his trial as may be scheduled by the trial Court from time to time, as he enjoys his cash-bail of Kshs.80,000/= on the basis of the original orders granting the same.*

DATED and **DELIVERED** at Nairobi this 14th day of April, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Maleche

For the Respondent: Mr. Makura