



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(CORAM: OJWANG, J.)

CRIMINAL REVISION NO. 374 OF 2007

JOHN KAHORO NJOROGE..... APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An application for revision of an order of forfeiture of cash bail made by Kibera Principal Magistrate Mrs. Nzioka in Criminal Case No. 3479 of 2005 dated 19th April, 2006)

RULING ON REVISION

This application was brought under ss.362 and 364 of the Criminal Procedure Code (Cap.75) and by Chamber Summons dated 30th April, 2007. The application carries three prayers:

- i. that, this Court do call for and examine the record of the Kibera Principal Magistrate's Court in Criminal Case No. 3479 of 2005 (***Republic v. Mary Wambui Watene***);
- ii. that, on revision of the said Court record this Court do vacate the orders of 19th April 2006 for forfeiture of cash bail;
- iii. that, this Court do order that the said cash bail of Kshs.30,000/= be refunded to the applicant herein who had deposited the said money.

As supporting grounds, the applicant states that the impugned decision of the trial Court to order forfeiture of cash bail was irregular or illegal as the accused had not been called to show cause why the same should not be forfeited. The applicant states that the warrant of arrest issued against the accused, though later cancelled, was not accompanied with a refund of the cash-bail money which had been held, to the appellant. The appellant states that while the accused was allowed to be out on bond and the criminal case itself was later withdrawn, the applicant's cash bail was not ordered to be refunded. The applicant states that the non-refund to him of the said bail money has occasioned him suffering.

The evidentiary basis of this application is laid in the affidavit of **John Kahoro Njoroge**, the applicant – to which document is attached a copy of the charge sheet and the trial Court proceedings in respect of the said Kibera Court Criminal Case No. 3479 of 2005. These annexures validate the depositions in the affidavit, the main elements of which run as follows:

- a. that, **Mary Wambui Watene** (the accused) had been charged in Kibera Principal Magistrate's

Court in Criminal Case No. 3479 of 2005;

- b. that at the time of plea-taking the accused was granted bond, with one surety or Kshs.40,000/= cash bail; but this sum was later reduced to Kshs.30,000/=;
- c. that, the applicant as a friend of the accused, paid the required cash bail and was issued in his name with receipt No.B 383435 for Kshs.30,000/=;
- d. that, when on 19th April, 2006 the accused failed to be in Court as required, a warrant of arrest was issued against her;
- e. that, on the said 19th April, 2006, without an opportunity to show cause why the cash bail sum of Kshs.30,000/= should not be forfeited, the same was just forfeited;
- f. that, on 9th June, 2006 the accused presented herself in Court, and thereupon the warrant of arrest was cancelled;
- g. that, following the cancellation of the arrest warrant as aforesaid, the accused continued to be out on bond;
- h. that, subsequently the prosecution case against the accused was withdrawn at the instance of the complainant;
- i. that, despite the accused having remained on the same bond which had been cancelled at the time the cash bail of Kshs.30,000/= was forfeited, the order of forfeiture of that sum of money was not cancelled;
- j. that, since the learned Principal Magistrate has terminated the criminal case which had been brought against the accused, she may not be in a position to revise the forfeiture order which she had made on the 19th of April, 2006.

I have been able to read the relevant charge sheet and the proceedings as recorded by the learned Principal Magistrate in Criminal Case No. 3479 of 2005. This has enabled me to note the following critical points which must weigh significantly in the determination of this application. These points are as follows:

(i) the failure of the accused to turn up in Court on 19th April, 2006 was treated as a breach of the bond-and-bail terms, and consequently: (a) the bond terms were cancelled; (b) the cash-bail of Kshs.30,000/= (belonging to the applicant herein) was forfeited; (c) a warrant of arrest was issued against the accused;

(ii) the recorded proceedings show that on 9th June, 2006 the accused voluntarily presented herself before the learned Principal Magistrate – and apologised for having mixed up dates and as a result failed to be in Court on 19th April, 2006.

(iii) on 9th June, 2006 the Court appreciated the accused's mix-up on dates, forgave her, cancelled the warrant of arrest, and allowed her to be at liberty on the original bond terms;

(iv) the correct position in law, in the light of point (iii) above, would have been to formally validate the full bond terms, including cancellation of the forfeiture of the cash bail of Kshs.30,000/=;

(v) however, the Court either wrongly or inadvertently failed to cancel the forfeiture of the cash bail;

(vi) thereafter the course of proceedings remained regular, save for one irregularity – the non-cancellation of the cash-bail forfeiture; and such a state of affairs prevailed up to the end, when the learned Principal Magistrate ended the whole trial proceedings;

(vii) on 20th September, 2006 the complainant, one **Christopher Biwott** came before the trial Court and thus stated:

“I am the complainant herein. I want to withdraw this case. We have reconciled. No further claim against [the] accused....”

The accused thus responded:

“I am grateful”;

(viii) on that basis, on 20th September, 2006 the trial Court ended the criminal case, with these words on record:

“Parties reconciled. Matter terminated under section 176 of the Criminal Procedure Code [Cap.75].”

From the foregoing analysis of material points in this matter, it is beyond doubt, that the applicant’s paid-up cash bail of Kshs.30,000/= should not remain locked up in the scheme of a prosecution case which was properly terminated, just because the trial Court had rendered its final decision, and thus become *functus officio*.

I hereby allow the applicant’s Chamber Summons of 30th April, 2007, vacate the trial Court’s orders of 19th April, 2006 for forfeiture of the cash bail, and direct that the cash bail of Kshs.30,000/= shall forthwith be refunded to the applicant herein.

Orders accordingly.

DATED and DELIVERED at Nairobi this 10th day of May, 2007.

J.B. OJWANG

JUDGE