



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL REVISION NO.219 OF 2007

AMOS MUTHINJA M'MUTUA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING ON REVISION

On 28th May, 2007 I made orders on revision in this matter, and directed that the full ruling, with the guiding reasons, would be delivered later.

The foundation of the revision cause is a letter by **Mr. A.M. Mugwuku** of M/s. A.M. Mugwuku & Co. Advocates dated 5th February, 2007. The said letter contains certain facts which deserve note, as they give reason for the orders made on 28th May, 2007. These facts are as follows:

- (i) The accused, in the Chief Magistrate's Court, Nairobi Criminal Case No.2127 of 2006 was released on a cash bail of Kshs.150,000/= on 30th November, 2006.
- (ii) The accused was required to attend Court for the mention of his case on 11th December, 2006. However, he was unable to attend, because he had travelled out of Nairobi, on duty.
- (iii) On the material day, 11th December, 2006 the accused's advocate personally attended Court, and explained to the learned Magistrate **Ms. L. Mutende** that he had been unable to contact the accused who was out in either Nakuru or Eldoret.
- (iv) Orders were made for further mention on 13th December, 2006, one day after Jamhuri Day – a national holiday.
- (v) The accused's advocate could not reach him to inform him of the mention day scheduled for 13th December, 2006.
- (vi) On 13th December, 2006 the accused's advocate personally attended Court for the scheduled mention; and he informed the Court of his predicament, and that the accused had no notice of the mention date as it had proved impossible to contact the accused.
- (vii) On 13th December, 2006 the learned Magistrate issued a warrant of arrest against the accused.

(viii) On that day, 13th December, 2006 the learned Magistrate also ordered forfeiture of the cash bail of Kshs.150,000/= deposited by the accused, notwithstanding the representations made by learned counsel.

(ix) The learned Magistrate ordered further mention on 27th December, 2006.

(x) The accused's advocate was unable to get in touch with him over the intervening Christmas break.

(xi) After the accused's advocates' firm reopened for the new year, on 10th January, 2007 he had to make working trips to the Courts of Mombasa, Kwale and Voi.

(xii) The accused's advocate was unable to contact the accused until 30th January, 2007, and it is then that he learned that the accused had been in lawful remand, after being arrested in Naivasha, and charged in Naivasha Court Criminal Case No. 3068/2006. The accused had not been able to meet the bond terms ordered by the Naivasha Chief Magistrate's Court.

(xiii) Hence, the accused's failure to attend Court in Nairobi, in respect of Criminal Case No. 2127 of 2006 was not deliberate. His being held in custody made it impossible for him to attend Court in Nairobi, or to be in touch with his advocate.

(xiv) Only on 27th December, 2006 was the accused able to regain his liberty from custody in Naivasha.

(xv) The Court file shows that the case in the Nairobi Court was mentioned on both 2nd January, 2007 and 16th January, 2007 – in the absence of counsel and/or the accused; and a further warrant of arrest was then issued; the cash bail deposited was ordered forfeited to the State, without any notice whatsoever to either the accused, or counsel.

(xvi) The warrant of arrest issued against the accused, and the order of forfeiture of the cash bail of Kshs.150,000/= have caused grave injustice to the accused, as he had no notice, and was not given an opportunity to explain his absence during the mention.

(xvii) The accused was in lawful custody during the dates of mention, and so he was unable to attend.

Learned counsel **Mr. Muriuki** appeared before me, in the presence of learned State Counsel **Mr. Makura**, to present the case for revision.

Mr. Muriuki submitted that his client had suffered prejudice, on account of the impugned orders, as contemplated in s.72(5) of the Constitution which protected an accused person's rights to bond or bail, during the pendency of trial. He urged that since the accused is charged with theft, contrary to s.275 of the Penal Code (Cap.63), he had a right to bail, as the offence was only punishable by sentence of three years' imprisonment. Learned counsel urged that the constitutional right to bail in certain circumstances, was well established, and its modalities were provided for in the Criminal Procedure Code (Cap.75) (s.126 in particular). S.131 of the same Code carries provisions regulating forfeiture of recognizance, and one of the conditions for the exercise of the power of forfeiture, by the Court, was the giving of *notice*, thus creating an opportunity for the accused to come and show cause. By s.132 of the Criminal Procedure Code, "all orders passed under s.131 by a Magistrate shall be appealable to and may be revised by the High Court."

Learned counsel urged that the learned Magistrate's orders be reversed, and the cash bail of Kshs.150,000/= paid on 30th November, 2006 be reinstated – as a basis for securing the accused's attendance in Court.

In a similar case, in **Patrick Simiyu v. Republic**, Crim. Revision No. 18 of 2007 this Court (**Makhandia, J**) had thus remarked:

“In criminal proceedings, ex parte orders have little or no place...Any orders likely to impact negatively on an accused person should as much as possible be made in his or her presence.”

The impugned orders, moreover, counsel urged, were all made during *mention* sessions. This, counsel urged, was inappropriate; and he invoked the Court of Appeal decision in **Penginepo Hassan Kuvua v. Republic**, Crim. App. No. 131 of 2004 in which a statement had been made on the status of *mention* sessions as a forum for the making of Court orders:

“...no one can seriously treat the mention of a case as being the same thing as the trial of the case.”

Counsel submitted that the learned Magistrate had misdirected herself, and in the process made illegal orders.

Learned counsel **Mr. Makura** was in agreement with the submissions made for the accused – that the forfeiture orders made by the learned Magistrate were irregular and unprocedural; and in particular as the Magistrate accorded the accused no **opportunity to be heard**.

Mr. Makura urged that the cash bail of Kshs.150,000/= be reinstated and retained as security for the accused’s attendance in Court.

It is common cause that the various orders which forfeited the accused’s bail payment, and had him confined in custody during the pendency of trial, had no judicial basis. Those orders were made during mere *mentions*, and in the *absence of the accused or his advocate*. Those orders were made in a *prejudicial* manner towards the accused, yet entirely without according him a *chance to be heard*. In this way, those orders were not founded on the judicial method of *hearing facts and circumstances*, from the person who was destined to be negatively affected; and the consequence has been great hardship to the accused who has had to remain in custody for what is aailable offence.

In these circumstance, the Court reaffirms its orders made on 28th May, 2007, namely:

- (1) The forfeiture of the accused’s cash bail of Kshs.150,000/= is quashed forthwith, and the said amount is restored as cash bail to secure the immediate release from custody of the accused.
- (2) The Subordinate Court’s order requiring a new cash bail of Kshs.200,000/= is set aside.
- (3) The accused shall forthwith be released from custody, subject to the condition that he shall attend Court regularly, during the conduct of the trial in Criminal Case No. 2127 of 2006.

DATED and DELIVERED at Nairobi this 13th day of June, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Applicant: Mr. Muriuki

For the Respondent: Mr. Makura