



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Crim Appli 301 of 2007

ABDI HAKIM ALSAFA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING ON REVISION

This matter came up before me by way of a Chamber Summons application dated 20th April, 2007, and brought by virtue of the provisions of ss.362, 364, 365, 366 and 367 of the Criminal Procedure Code (Cap.75). The applicant seeks orders as follows:

- (a) that, the orders made by the Principal Magistrate, *Ms. Lilian Motende* in Criminal Case No. 261 of 2006 on 22nd February, 2007, refusing the reinstatement of the applicant's cash bail of Kshs.30,000/= and the consequent new variation of the additional bail term from a cash bail of Kshs.30,000/= to a cash bail of Kshs.60,000/=, be set aside;
- (b) that, the Court do revise the orders given by the Principal Magistrate, *Ms. Lilian Motende* on 22nd February, 2007 increasing the cash bail from the initial Kshs.30,000/= as ordered by the Chief Magistrate during plea-taking, to Kshs.60,000/=;
- (c) that, the Court do order reinstatement of the cash bail of Kshs.30,000/= initially forfeited to the State in Crim. Case No. 261 of 2006 in the Principal Magistrate's Court, and also order refund of the additional cash bail being the sum of Kshs.60,000/=.

The application is supported by the applicant's affidavit dated 20th April, 2007. The contentions of the applicant are as follows:

- (i) the trial Court erred in giving an order for forfeiture of cash bail by the applicant without first allowing the applicant to show cause why the sum of Kshs.30,000/= should not be forfeited;
- (ii) the trial Court erred in failing to reinstate the cash bail of Kshs.30,000/= previously forfeited when the appellant did not attend Court for reasons that were explained and considered by the learned Magistrate on 22nd February, 2007;
- (iii) the trial Magistrate erred in varying the bail terms by increasing the cash bail from Kshs.30,000/= to Kshs.60,000/= when the circumstances of the case did not warrant such variation;

(iv) the trial Magistrate, having been satisfied with the reasons and explanation given as to why the applicant could not attend Court for mention on 21st December, 2006 – and so she did not cancel the bond – could not then fail to reinstate the cash bail of Kshs.30,000/= initially deposited by the appellant; neither could she vary the fresh bail from Kshs.30,000/= to Kshs.60,000/= without any valid reason;

(v) the trial Magistrate erred by failing to give any explanation and/or reason as to the circumstances in which she arrived at the decision of not reinstating the appellant's cash bail of Kshs.30,000/=, but instead that of ordering a fresh cash deposit in the double amount of Kshs.60,000/=.

Although the proceedings of the trial Court were not placed before this Court, the application for the exercise of the Court's revision jurisdiction came along with an affidavit duly served upon the Attorney-General. No contest to the deponed facts has come forth; and in these circumstances I will consider those facts not to be untrue.

The applicant, who is the accused in Criminal Case No. 261 of 2006, avers that since the trial started, she has not failed to attend Court when trial has been scheduled to proceed – save for 21st December, 2006 when, “due to an oversight, confusion, error and/or mistake,” she failed to be in Court for a mention. Consequently a warrant of arrest was issued against her. Only when she attended Court on 22nd February, 2007 did the applicant realise that 21st December, 2006 had also been given as a mention date. When she came to City Court No.1, the original forum of trial, on 22nd February, 2007 she found that this Court had relocated to High Court Building No.5. When the applicant went to High Court Building, No. 5 she found a warrant of arrest awaiting her. The applicant got a reprieve, with the cancellation of the warrant of arrest, after her advocate explained the confusion to the Court, and after the applicant apologised. However, the applicant's cash bail which was already forfeited, was not restored, even after the applicant's advocate asked for its restoration. Moreover, the learned Magistrate now ordered a fresh cash bail of Kshs.60,000/=.

The facts of this matter are straightforward. When the learned Magistrate cancelled the arrest warrant which she had issued earlier, she was accepting as valid the applicant's explanation of her failure to be in Court for the mention of the case on 21st December, 2006. If the learned Magistrate accepted the applicant's explanation, then there would be no justification for not reinstating the original bail terms, under which the sum of Kshs.30,000/= had already been paid. More emphatically, there would be no justification for ordering the applicant to pay a fresh deposit of Kshs.60,000/= to secure his release on bail.

I will, therefore, order as follows:

1. The applicant's original payment of Kshs.30,000/= to secure his release on bail, is hereby reinstated; and it is on that basis that the applicant shall enjoy his personal liberty during the pendency of the trial.
2. The order of the trial Court imposing new bail terms, and requiring the deposit by the applicant of Kshs.60,000/=: is hereby quashed.
3. The new deposit of Kshs.60,000/= already paid by the applicant shall forthwith be refunded to him.

Orders accordingly.

DATED and DELIVERED at Nairobi this 11th day of June, 2007.

J.B. OJWANG

JUDGE