REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 269 OF 2005

JOHN NJOROGE …………...……………………..……. APPELLANT

-AND-

REPUBLIC……………..…..…………………………...RESPONDENT

(An appeal Against the orders of Senior Resident Magistrate Ms. Muchira dated 11th May, 2005 at the Kibera Law Courts, Traffic Case No. 1832 of 2005)

JUDGEMENT

John Njoroge, the appellant, had been charged with the driving offence known as *overlapping*, contrary to s.47(1) of the Traffic Act (Cap.403, Laws of Kenya

is not the merits of the charge — which is said to have involved a vehicle driver wrongfully leaving the authorised lane, careering on the left over the pavement, and overtaking vehicles lawfully driving on the authorised left-hand side of the road — which has come up for determination before this Court. What is before this Court is the issue of refund of paid-up *bail* money.

The petition of appeal, dated 23rd May, 2005 sets out the following grounds of appeal:

(i) the learned Magistrate erred in law and in fact, in seizing the cash bail deposited in Court when the mistake was that of the Court;

(ii) the learned Magistrate erred in failing to appreciate that the applicant was in the relevant Court provided for in the Cause List;

(iii) the learned Magistrate was too harsh, in the circumstances;

(iv) the learned Magistrate could have given the applicant a second chance.

He prayed that the orders dated 11th May, 2005 be quashed, and the amount paid as bail be refunded.

A mix-up in the scheduling of hearing had apparently occurred at the Court, as it emerges from the submissions of learned counsel ***Mr. Nyaberi,*** before the learned Magistrate:

"I informed the accused I would come for hearing on 27th April, 2005. Accused went to Court [No.] 2. When I arrived the warrant of arrest was already issued. I pray that the warrant of arrest be lifted and

cash bail reinstated. The accused came to Court [of his own volition]."

The response of the prosecutor was: "I leave it to the Court"; and the learned Magistrate then ordered and recorded as follows:

"***Position noted. Accused warned. Warrant of arrest lifted. The Court has pinned [on the notice board] a notice on where the accused's case should have been, in Court No. 4. The cash bail was forfeited and already receipted. I decline to allow its reinstatement. Right of appeal, 14 days."***

Learned counsel ***Mr. Getanda*** for the appellant, urged that the Court below had no basis for refusing to order a refund of the cash bail – as the warrant of arrest had been lifted. He urged that the mere fact of the cash bail having been receipted, was not a basis for refusing to order its refund. In the end, a different Court, on 11th October, 2005, discharged the accused under s.87(a) of the Criminal Procedure Code (Cap.75); and that Court ordered the refund of the cash bail.

The result is that there are now two conflicting decisions in two Courts of the same jurisdiction – on the question of bail refund or non-refund.

Learned State counsel ***Ms. Kagiri*** submitted that it was not true, that the learned Magistrate had no basis for declining to order a refund of the bail money; that the moment the appellant failed to appear in the right Court at the right time, the trial Magistrate had a right to order forfeiture of cash bail.

However, learned counsel noted that no reasons – other than the fact of the bail money having been receipted – had been given for forfeiture. On this account, learned counsel was in agreement with counsel for the appellant, that this appeal is one of merit.

It is clear the learned Magistrate, ***Ms. Muchira,*** ordered an act of *deprivation,* in the form of loss of bail money, to the appellant, without assigning any *reason* of a judicial kind. A central element in the protections of the law for persons, is the securing of those persons' rights to property and life-sustaining resources. The bail money which the learned Magistrate ordered to be forfeited, is one of such resources. It is a fundamental principle of law that before a public institution can deprive a private person of his resources in such a manner, satisfactory account must be rendered for the decision to deprive; and the authorising law and the public interest, will be a critical consideration in this regard.

The learned Magistrate, moreover, by urging bureaucratic acts – the receipting of the bail money – as the basis for declining to order refund, would have defaulted in the duty to exercise judicial discretion in a proper case. That justification for her decision, I would hold, is an invalid one in law.

By acknowledging that the accused had failed to be in the right Court as required, due to a mix-up as to the right Court-room, and by discharging the arrest warrant, the learned Magistrate had ruled out any discretion on her part to retain the bail money which had been paid by the appellant specifically as an insurance against his possible failure to be in Court, for the trial. In this case the appellant had not absconded the process of trial, and he indeed had been coming to Court, and kept returning for the conduct of his case. He continued to attend Court as required, up to the end when a different Magistrate discharged him, on 11th October, 2005 and ordered that the cash bail be refunded.

From these developments, it was clear that the decision to forfeit the cash bail was left hanging, without any legal basis.

This appeal, therefore, succeeds, and I hereby set aside the orders of the learned Senior Resident Magistrate made on 11th May, 2005, with the result that the cash bail is to be refunded as ordered by a different Court on 11th October, 2005.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 4th day of June, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Tabitha Wanjiku

For the Appellant: Mr. Getanda

For the Respondent: Mrs. Kagiri