

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS
APPELLATE SIDE
HIGH COURT CRIMINAL APPEAL 74 OF 2004

(From Original Conviction(s) and Sentence(s) in Criminal Case No 1038 of 2004 of the Senior Resident Magistrate's Court at Kangundo N. N. Njagi (Esq.) on 2/11/04)

BENJAMIN MUNYAO NZIOKA ::: APPELLANT
VERSUS
REPUBLIC ::: RESPONDENT
R U L I N G

Before me is an application for revision of the order of the Senior Resident Magistrate's Court Kangundo in Criminal Case 1038/04, where the applicant was charged with offence of theft Contrary to Section 275 of the Penal Code and in the alternative handling stolen property Contrary to Section 322 of the Penal Code. The application is brought under Sections 132 and 362 of the Criminal Procedure Code.

The applicant had been released on Cash Bail of 20,000/=. On 1/11/04 he arrived in court late and found that the prosecutor had applied for a Warrant of Arrest against him and asked for forfeiture of the Cash Bail. The court issued Warrant of Arrest and ordered the Cash Bail forfeited to the state. When the applicant attended the court on 2/11/04 an explanation was given as to why he was late and he was ordered to be released on fresh bond terms of 50,000/= with one surety. The applicant now contends that the order of forfeiture of his Cash Bail was unprocedural and offends provisions of Section 131 of the Criminal Procedure Code. In support of that contention, counsel cited the case of **ANTONY NSUBUGA versus UGANDA EALR 1968 11** where the court held that a mere statement by the prosecutor is not sufficient to satisfy the requirements of Section 130 (1) of the Criminal Procedure Code which is equivalent of Kenyan Section 131 of the Criminal Procedure Code and that evidence needed to be given on oath.

The state conceded the application on grounds that the applicant was not accorded a chance to explain. Section 131 (1) of the Criminal Procedure Code is very clear, that the court has to record the grounds of proof as to why the recognizance should be forfeited and call upon that person to show cause why it should not be paid. The prosecutor jumped the gun by applying for Warrant of Arrest and forfeiture of Cash Bail before summons were issued to the applicant to show cause why the Cash Bail could not be forfeited. The applicant was condemned unheard which I do agree is against the spirit of Section 131 (1) of the Criminal Procedure Code. In fact under Section 131 (5) of the Criminal Procedure Code the court has discretion to forfeit all cash bail or part of. But it can only do so after hearing the applicant. I agree with the holding the above cited case.

I do agree that the Cash Bail was forfeited unprocedurally and the court hereby revises the Senior Resident Magistrate's order of 20/9/04 ordering forfeiture of Cash Bail. That order is set aside and Cash bail be refunded to the depositor or the Cash Bail to continue to be used as security if the applicant so wishes.

Dated at Machakos this 16th day of December 2004
Read and delivered in the presence of
R.V. **WENDOHO**

JUDGE