



**Waweru v Republic (Miscellaneous Criminal Application
E018 of 2023) [2023] KEHC 21156 (KLR) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CRIMINAL APPLICATION E018 OF 2023**

**PM MULWA, J
AUGUST 3, 2023**

BETWEEN

MARY WANJIRU WAWERU ACCUSED

AND

REPUBLIC RESPONDENT

RULING

1. The court has been called upon to determine the application dated April 4, 2023, brought under article 49(1)(h) of the *Constitution*, sections 1, 362 and 364 of the *Criminal Procedure Code*. It seeks orders of setting aside or reversing the orders issued on November 9, 2021, by Hon Grace Omondo (PM) in Kiambu Criminal Case No 1760 of 2019 and/or in the alternative an order for reinstatement of the cash bail initially forfeited and a refund of the cash bail deposited on November 10, 2019.
2. The grounds of the application are that the applicant was released on a cash bail of Kshs 100,000/=, and subsequently on May 17, 2022 she was acquitted of the offence under section 215 of the *Criminal Procedure Code*. She failed to attend court and the cash bail was forfeited and she was admitted to fresh cash bail of Kshs 20,000/=. The trial court has failed to reinstate the previous bail terms and the applicant suffered tremendous financial loss owing to the economic constraints that hit the country.
3. The application is supported by the applicant's affidavit sworn on April 4, 2023, the averments mirror the grounds of the application.
4. At the hearing of the application on June 20, 2023, Mr Muriuki the state/prosecution counsel informed the court the respondent will not be responding to the application which was basically an administrative matter and left it to the discretion of the court.
5. Section 362 of the *Criminal Procedure Code* provides thus: - "...The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy itself as to the



correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court...”

6. Further Section 364(1) (b) thereof provides thus: -

“ ... (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(b) in the case of any other order other than an order of acquittal, alter or reverse the order...”

7. In *Republic vs James Kiarie Mutungei* [2017] eKLR the court in re-stating the above provisions of the *CPC* observed that: - “...It can be deduced from this evaluation that the jurisdiction on revision will be invoked where there is a decision by a subordinate court, the decision is not subject to appeal, and the grounds of revision must exist against the decision being challenged by the subordinate court. The interference under section 362 by this court on revision can only be justified if the impugned decision is grossly erroneous, to justness, appropriateness and suitability to trial. The trial magistrate has not complied with the provisions of the law, the findings made and the decision reached failed to take into account the evidence that there was a misdirection of facts on the face of the record, the parties in the case were not heard or allowed to present the case before the decision or the decision being contested by the aggrieved party was arbitrary amounting to an abuse of the court process.”

8. Before this court proceeds to determine the substance of the application it is important to note that the applicant refers to orders issued on November 9, 2021 but a glance over the trial court record, the proceedings recorded show that the matter proceeded for hearing with the prosecution witness 3, the applicant was present in court and the court did not pronounce itself on the issue of forfeiture of cash bail. The court notes the challenged orders were made on February 2, 2021.

9. I will now move to the issues raised in the application. The applicant was charged with the offence of trafficking in narcotic drugs contrary to section 4 as read with Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act*. The particulars were that on November 5, 2019 at Kanunga Village in Kiamba Sub-County Kiambu county, she was found trafficking in Bhang by storage in her house to wit 2 kgs with a street value of 20,000/=.

10. She was arraigned in court for plea taking on November 6, 2019 and she pleaded not guilty. She was granted bond of Kshs 200,000/= with a surety of a similar amount or an alternative of a cash bail of Kshs 100,000/=. And the matter was set down for hearing.

11. The court record shows the applicant paid a cash bail of Kshs 100,000/=. When Covid -19 hit the country and there was a major scale-down on all court operations. Two (2) witnesses had already testified.

12. From the trial court record, I note the accused was absent on several occasions being; June 29, 2020, July 28, 2020, February 2, 2021 and March 29, 2021.

13. On February 2, 2021, the prosecution counsel Ms Hellen successfully sought warrant of arrest against the applicant and forfeiture of the cash bail for failure to attend court.

14. Subsequently when the applicant attended court on August 30, 2021, the trial court lifted the warrant of arrest but admitted the applicant on a fresh cash bail of Kshs 20,000/=. The trial magistrate opined and I quote “Since the accused cash bail was already forfeited she will be admitted to cash bail of Kshs 20,000/=”



15. This court is of the considered view that when the applicant adduced the reasons for non-attendance in court as the confusion of the mentioned date, the trial court accepted the reason as reasonable and proceeded to lift the warrant of arrest. There was no justification by the trial magistrate administering new bail terms for the applicant and directing that the applicant be released on a cash bail of Kshs 20,000/= . The Trial magistrate did not call upon the applicant to show cause why the cash bail paid should not be forfeited.
16. The provisions of Section 131 (1) (2) of the *Criminal Procedure Code* provide the procedure the courts should undertake before forfeiture of the cash bail:
 - "1) Whenever it is proved to the satisfaction of a court by which a recognizance under this Code has been taken, or, when the recognizance is for appearance before a court, to the satisfaction of that court, that the recognizance has been forfeited, the court shall record the grounds of proof and may call upon any person bound by the recognizance to pay the penalty thereof or to show cause why it should not be paid.
 - (2) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover it by issuing a warrant for the attachment and sale of the movable property belonging to that person, or his estate if he is dead."
17. The above section stipulates the court should be satisfied that sufficient cause has been shown as to why the cash bail should not be forfeited.
18. From the record it is clear the trial magistrate did not give sufficient time to the applicant to show cause why the cash bail should not have been forfeited. The trial magistrate went ahead to forfeit the cash bail on the instant of the prosecution. I find that the action by the learned trial magistrate was in contravention of Section 131 *Criminal Procedure Code*.
19. This court further notes the applicant was on May 17, 2022 found not guilty and acquitted after the trial court found "the prosecution evidence was not tight enough to sustain a conviction." The trial court however did not pronounce itself on the refund of the cash bail paid by the applicant. This court will therefore be minded to make an order that the cash bail be refunded to the applicant.
20. It is my finding that the orders of the trial court of February 2, 2021 forfeiting the cash bail were improper. The application dated April 4, 2023 is merited.
21. Given the above findings, this court makes the following final orders:
 - a. The trial court orders of February 2, 2021 for the forfeiture of cash bail be and are hereby set aside.
 - b. The orders of August 30, 2021 requiring the applicant to be admitted on fresh bail terms of Kshs 20,000/= be and are hereby vacated or set aside.
 - c. There be a refund of the cash bail paid by the applicant.
- 22 Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3RD DAY OF AUGUST 2023.

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P.M. MULWA



JUDGE

In the presence of:

Duale – court assistant

N/A for the applicant

Mr. Muriuki for the state/respondent

