



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL REVISION NO. 2 OF 2020

IBRAHIM WATUA NYONGESA.....APPLICANT

VERSUS

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

RULING

1. The file in Vihiga PMCTRC No. 218 of 2018 was referred to the High Court by the Principal Magistrate, for revision of the order made on 24th January 2019, by Hon. WK Cheruiyot, Resident Magistrate, that the cash bail deposited in the matter by a surety be released to the surety.
2. The background is that the accused person in Vihiga PMCTRC No. 218 of 2018 was due to take plea on 27th March 2018, but he did not attend court, and a warrant was issued for his arrest, and an order was made for forfeiture of his cash bail.
3. He showed up in court on 9th April 2018, and explained that he had not attended court on 27th March 2018 as he was bereaved, and had fallen sick thereafter. He then presented himself to the base commander. The court accepted his explanation, lifted the warrant for his arrest, and allowed him to take plea.
4. The charge was read to him, and he pleaded guilty to it. He was fined Kshs. 500.00, and remanded at Luanda Police Station to allow him to pay the fine, in default of which he was to be committed to prison.
5. On 12th April 2018, the accused person was again produced in court for the purpose of the reading of the facts to him. The facts were read to him and he confirmed them to be correct, and a plea of guilty was recorded. During mitigation, he made a statement which appeared to blame the other driver, and the court changed his plea to one of not guilty. He was given a cash bail of Kshs. 20, 000.00, and the matter was allocated a date for hearing.
6. On the date allocated for hearing, 6th June 2018, the accused person asked the court to read the charges afresh to him. The charges were read, and the accused pleaded guilty. The matter was then allocated a date for the reading of the facts, as the prosecutor did not have his file with him.
7. When the matter came up on 11th June 2018, for the reading of the facts, the accused person did not attend court, and a warrant was issued for his arrest. The warrant of arrest was not executed, and the matter was adjourned several times, with the warrants being extended on each occasion.
8. Eventually, the prosecution applied to withdraw the charge on 22nd August 2018, which plea was accepted by the court, and the charge was marked as withdrawn, under section 87(a) of the Criminal Procedure Code, Cap 75, Laws of Kenya. It was upon that withdrawal that the court followed up with the order of 24th January 2019, for the cash bail to be refunded to the surety,
9. The concern by the Principal Magistrate is that the refund of the cash bail to the surety could raise audit queries since the court had already ordered that the same be forfeited to the state.
10. The record before me shows that the only amount of money that was deposited in court was a sum of Kshs. 20, 000.00, which deposit was made on 12th April 2018, by Jackson Kipro Melly. That deposit was made subsequent to the order of 12th April 2018, for release of the accused person upon deposit of a cash bail of Kshs. 20, 000.00.
11. Subsequent to the order of 12th April 2018, and the deposit of the money in court the same day, no order was made, thereafter, for the forfeiture of that money to the state.

12. The forfeiture order that the Principal Magistrate has in mind, was made on 27th March 2018, and it had nothing to do with the deposit of Kshs. 20, 000.00, for by then the court had not yet made the order for the making of the said deposit of cash bail, and the said deposit had not been made, and the court was not holding any money in the matter which could be forfeited to the state.

13. The order of 27th March 2018 related to a deposit of Kshs. 10, 000.00, which had been made with the police, to secure attendance of the accused in court for taking plea. The said deposit had nothing to do with the court. The said amount of Kshs. 10, 000.00 is reflected in the charge sheet, and that was the money the subject of the order of 27th March 2018, and not the Kshs. 20, 000.00, which was the subject of the orders of 12th April 2018 and 24th January 2019.

14. Consequently, it is my holding that the order that Hon. WK Cheruiyot made, on 24th January 2019, was properly made, as it was not affected by nor the subject of the forfeiture order of 27th March 2018, and it followed upon the decision by the prosecution to discontinue the proceedings against the accused person. Following that discontinuance or termination of the traffic proceedings, there was no longer any basis for the court to continue holding the Kshs. 20, 000.00 cash bail deposit, paving way for its release to the person who had made it.

15. The revision cause herein is disposed of in those terms. Let the court file in respect of Vihiga PMCTRC No. 218 of 2018 be returned to the relevant registry for execution or implementation of the order of 24th January 2019. The revision cause file herein shall be closed.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF MAY, 2020

W. MUSYOKA

JUDGE