



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL REVISION NO. 1 OF 2019

TITUS MWANGI GABUTHU.....APPLICANT

-VERSUS-

REPUBLIC.....PROSECUTOR

RULING

The applicant herein has requested this revision vide the letter dated 21st November 2018 and received in the Criminal Registry on the 14th January 2019.

The background to the application is that the applicant was charged with a traffic offence in **Nyeri CMCR case no 1288 of 2018 R vs Titus Gabuthu**. His matter was before court no. 5 presided over by Hon. M. Chesang SRM. He was out on a cash bail.

The record shows that on 15th November 2018 he was supposed to attend court before Hon. Chesang. He was absent when the matter was called out and the magistrate proceeded to issue a warrant of arrest.

On 20th November 2011, the accused person presented himself in court. According to the letter dated 23rd November 2018, written to the Chief Magistrate by the Hon. Chesang she was surprised when the prosecutor made an application on behalf of the accused to have the matter mentioned in court because ***“she (the prosecutor) is supposed to represent the state and not accused persons in court”***.

Nonetheless the magistrate proceeded to lift the warrant of arrest against the accused person because he had presented himself in court. However, she forfeited his cash bail because ***“he did not evidence (sic) to explain his whereabouts on 15th November 2018”***, She proceeded to add that

“ I decline to reinstate the said cash bail for two reasons. Firstly, I am functus officio in the matter and secondly, it will set a bad precedent whereby if an accused person wishes to have his cash bail reinstated all he has to do is draw a complaint. I wish to discourage such behaviour from litigants.”

It is against this ‘decision’ by the trial court that the applicant sought this revision.

The Revisionary powers of the High Court over subordinate courts are set out in the constitution and the Criminal Procedure Code

Article 165 (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate

to ensure the fair administration of justice

362. Power of High Court to call for records

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying 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.

The issue here is whether the trial court was right in forfeiting the cash bail? And whether it was functus officio after that.

The deposit of cash bail is provided for under s. 126 of the CPC which provides:

When a person may be required by a court or officer to execute a bond, with or without sureties, the court or officer may, except in the case of a bond for good behaviour, require him to deposit a sum of money to such amount as the court or officer may fix, or to deposit property, in lieu of executing a bond.

It is demonstrated by the cause list of 15th November 2018 the matter CR Case No.1288/2018 was not listed before Hon. Chesang. It was listed before Hon N. Kariuki SRM. That is the first obvious thing that Hon. Chesang ought to have noticed. That even though she may have had the file before her, it was not on the cause list. Can a litigant who was in one court yesterday doubt the cause list today that clearly indicates where his matter is to be heard today. It would be expecting too much of a litigant to begin questioning the cause list when it is there in black and white on the notice board. All he can do is go to the court the cause list directs him to. The record shows that this what the accused herein did. He went to court no. 5 and waited there until 4:00pm when the court was about to rise he drew attention to himself and told the court he had not heard his name. The court assistant confirmed this in writing. The Chief Magistrate herself upon receiving the applicant's complaint, confirmed from the in charge of the Criminal Registry that the matter had been listed before court no. 5 hence it was the mistake of the court and not that of the accused person that he was not seated in court no. 3 in time like all the others.

Hence if Hon. Chesang had been just a little diligent she would have noticed that her cause list had two matters listed for fresh hearing:

1.S/O 19/2018 R vs Jesse Gitonga Gache

2. CR 903/2018 R vs George Wambugu.

Neither of them was CR 1288/2018 which was listed before court no. 5 for Pre- trial. In those circumstances the accused person would not have been required to explain anything but to receive an apology from the court.

The applicant's complaint was not superfluous. It was merited in the circumstances and there was nothing in his conduct to be discouraged.

Hon. Chesang's insinuation in her letter that the applicant had 'dealings at the Criminal Registry' and that is why he was absent on the 15th November are clearly unwarranted. She had the duty to find out from the registry through her court assistant why a matter that was perhaps in her court diary was not in her cause list.

When the accused showed up on 20th November 2018, the court was rattled by the fact that it was the Prosecutor who raised the accused's concerns. Was there anything wrong with that? I do not think so. How many times do counsel standing on opposite side inform the court of an issue regarding the opposing side, like, my learned friend called me and is on the way, my learned friend has whispered to me he is not ready but let's wait for him to make the application. Being in an adversarial system does not mean we are at war. The state was supposed to execute the warrant of arrest. The accused presented himself. There was absolutely nothing wrong with the state telling the court that *the person we got a warrant of arrest for is here. He is requesting that the same be lifted and we have no objection because he has presented himself.* That is not acting for the accused person. It is being an officer of the court. Members of the public are our customers. It is up to us to improve our systems to make sure we serve them well. Lest we forget that's Pillar One of the Judiciary Transformation Framework.

The trial magistrate lifted the warrant of arrest then forfeited the cash bail.

It is clear from the circumstances of this case that the cash bail should never have been forfeited in the first place.

She declined to reinstate it because she was functus officio. But how come she did not raise the same reason while lifting her own order of the warrant of arrest against the accused person? There is no record of any inquiry on her part as to the whereabouts of the accused person in the proceedings. The trial magistrate was obligated to make that inquiry.

To state that she was functus officio with regard to the order to reinstate the cash bail was a misdirection on her part. The same court that makes orders to grant cash bail, can make orders to review the same, or set them aside or revoke them as she had done here and reinstate the same.

The order for forfeiture of the applicant's cash bail of Ksh.20,000/- deposited on 6th November and forfeited on 20th November 2018 is set aside and order to refund the same to the applicant to issue accordingly.

Dated, delivered and signed at Nyeri this 11th February 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Applicant:present

Mr. Magoma for state

Mumbua T Matheka

Judge

11/2/19