



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL REVISION NO.50 OF 2017

ALFRED WANGAI MUNDIA.....1ST APPELLANT

MERCY NKATHA KARIMI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In the Kiambu Chief Magistrate’s Court Criminal Case No. 1769 of 2014, five people were charged with two counts of conspiracy to defraud contrary to section 317 of the Penal Code and transacting on foreign exchange business without authority contrary to section 33A(1) and section 33A(2) of the Central Bank of Kenya Act. The five are: Alfred Wangai Mundia (1st Accused); Mercy Nkatha Kirimi (2nd Accused); Richard Nzioki Mutinda (3rd Accused); Margaret Njoki Wanjiku (4th Accused); and John Okwoba Manyange (5th Accused). After their arraignment, the Learned Trial Magistrate admitted all the Accused Persons to cash bail of Kshs. 200,000/- each.

2. On or about 05/06/2014, one Isaac Mwangi Muriu appeared before the Accountant at the Kiambu Law Courts armed with a Customer Transaction Voucher from KCB Bank evidencing payment of Kshs. 600,000/- in to the Judiciary Account No. 1138388963 on 05/06/2014 with respect to Criminal Case No. 1769 of 2014. He represented that the payment was for cash bail for Richard Nzioki Mutinda (3rd Accused); Margaret Njoki Wanjiku (4th Accused); and John Okwoba Manyange (5th Accused).

3. The Transaction Voucher showed that the party who deposited the amount into the account was “Mary Wangari Njunge.” It also clearly showed that the deposit was with respect to Criminal Case No. 1769 of 2014. However, it was Isaac Mwangi Muriu who showed up with the deposit slip (Customer Transaction Voucher). The Accountant at Kiambu Law Courts, Mr. Sheddy Mamati issued a deposit receipt to “Isaac Mwangi Muriu”, apparently at Isaac’s instance.

4. Later on, the Prosecution applied to withdraw the case under section 87(a) of the Criminal Procedure Code. The Application was allowed with the consequence that the Court ordered for a refund of cash bail to the depositors. That simple order raised the very unusual situation where there were two depositors claiming that the cash bail be deposited to them and set in motion intense legal battle which has culminated with the present Application.

5. The Respondent, Mary Wangari Njunge, wrote to the Court on 23/01/2017 attaching the relevant documents requesting that the cash bail be refunded to her instead of Isaac Mwangi Muriu whose name appeared in the Court deposit slip.

6. The Respondent, Mary Wangari Njunge, appeared before the Learned Trial Magistrate on 24/01/2017 for a hearing on the question who should be refunded the bail deposit. Isaac Mwangi Muriu did not show up. During the hearing, it emerged from the Accountant, Sheddy Mamati that he had telephonically spoken with Isaac Mwangi Muriu and informed him to avail before the Court and/or to swear an affidavit on the issue. The Accountant was speaking in response to questions put him by the Court which were transcribed onto the Court record. At the conclusion of the hearing, the Learned Trial Magistrate ordered that the cash deposit be refunded to Mary Wangari Njunge. That order was made on 27/01/2017. She did this after satisfying herself that Isaac Mwangi Muriu had been duly informed of the date but had chosen not to show up in Court. Further, the Learned Trial Magistrate interrogated (her word) the documents presented by Mary Wangari Njunge – including the documentation showing the money was withdrawn from Mary Njunge’s Account in Family Bank, Kikuyu Branch and deposited in the Judiciary Account of Kenya Commercial Bank to secure the release of the three Accused Persons – and came to a concluded that the cash bail to be refunded to Mary Njunge.

7. Isaac Mwangi Muriu responded with a Notice of Motion dated 30/01/2017. It has a single substantive prayer: that the Court does discharge forthwith the orders granted on 27/01/2017. The grounds upon which Isaac Mwangi Muriu sought to have the orders set aside were two-fold:

- a. First, that the orders were granted ex parte and without having given notice to Isaac Mwangi Muriu; and

b. Second, that the orders were granted due to material non-disclosure by Mary Wangari Njunge hence leading the Court to release the cash bail to a “stranger” rather than the “real” depositor who, Isaac Mwangi Muriu insisted, was him.

8. The Learned Trial Magistrate considered the Application dated 30/01/2017 and concluded as follows:

In the absence of any other documentary evidence to support the Applicant, Isaac Mwangi Muriu’s position vis-à-vis that of Mary Wangari Njunge on the refund of cash bail of Kshs. 600,00/-, it is this Court’s finding that Mary Wangari Njunge has placed before this Court incontrovertible evidence that she is indeed the true and rightful depositor of the subject amount of Kshs. 600,000/- deposited as cash bail for the 3rd, 4th and 5th Accused Persons herein.

Consequently, the Application herein is disallowed. Cash bail of Kshs. 600,000/- for 3rd-5th Accuseds (sic) be released to the depositor Mary Wangari Njunge.

9. The Applicant, Isaac Mwangi Muriu, is aggrieved by this decision. He has invoked the Court’s revisionary power to have it reviewed and reversed. His arguments are the same ones he raised in the Court below. Let me state the arguments as charitably as I can. Isaac Mwangi Muriu says that he works for Albert Wangai Mundia (1st Accused) and that he is the true depositor of the cash bail. The narrative is that Isaac Mwangi Muriu is the Personal Assistant of Albert Mundia. Albert Mundia says that he gave instructions to Isaac Mwangi Muriu to process bail for all the Accused Persons in the case. He further says that he directed Isaac Mwangi Muriu to collect the deposit slip from Mary Njunge and ensure that the 3rd, 4th and 5th Accused Persons were bailed out because the three were his employees. Albert Mundia filed a detailed affidavit in the Court below explaining that, in fact, the funds which Mary Njunge used to deposit in the Judiciary KCB Account were, in fact, his (Albert Mundia’s) funds. This was because, the narrative goes, Albert Mundia would, pursuant to a mutual agreement his company (VIP Portal) had with Mary Njunge, deposit money in Mary Njunge’s personal account. These funds, deposed Albert Mundia, would be to cater for the expenses relating to the operations of the Kikuyu Branch of the company. Albert Mundia’s affidavit then exhibited cheques and cheque books as well as Memorandum of Association of VIP Portal, Kikuyu Branch in a bid to show that, in fact, Mary Njunge owed him millions of shillings. In short, Isaac Mwangi Muriu’s claim is actually Albert Mundia’s: Albert Mundia claims the refund through Isaac Mwangi Muriu. They do not actually deny that it was Mary Wangari Njunge who deposited the amount in the Judiciary KCB Account. Their claim, instead, is that the money in Mary Wangari Njunge’s bank account was actually Albert Mundia’s.

10. That last strand in the Applicant’s argument bears repeating: the claim is that although he concedes that it is Mary Wangari Njunge who deposited Kshs. 600,000/- as cash bail for the 3rd – 5th Accused Persons, he says that, in fact, the money actually belongs to Albert Mundia who had deposited the sums there pursuant to some mutual agreement he had with Mary Wangari Njunge. Hence, in essence, the argument by Albert Mundia would be that pursuant to that mutual agreement, the Court should release the cash bail – not to the depositor who actually paid it into Court – but to him as the “original” owner of the funds.

11. It bears little analysis to see that the Learned Trial Magistrate was correct to reach the decision that she did to dismiss the Application dated 30/01/2017. The Learned Trial Magistrate was correct to resist the temptation to turn a simple application for refund of cash bail into a fully-fledged civil suit sounding in money had and received – for that is what the Applicant’s application sought to turn it into.

12. The legal position is fairly simple: cash bail is refunded to the person who deposited it. The question the Learned Trial Magistrate had to answer was who the depositor was. It was a simple inquiry – and the evidence is palpable that the Learned Trial Magistrate reached the correct conclusion: it was Mary Wangari Njunge who was the true depositor. It is true that a cash deposit slip was given to Isaac Mwangi Muriu. This is because he is the one that came bearing the Bank Voucher and followed up the case on behalf of the Accused Persons. However, the Bank Voucher is explicit that the deposit was made by Mary Wangari Njunge. If that was ever in doubt, the bank issued a letter dated 02/02/2017 confirming that the deposit was made by Mary Wangari Njunge. If one needed to trace the source of the case – Mary Wangari Njunge has provided it: Her Family Bank Account was debited with Kshs. 1 Million on the same day she deposited the cash bail in the Judiciary account at KCB.

13. It follows that Mary Wangari Njunge was the true depositor. Isaac Mwangi Muriu’s only hook is that he cash deposit slip issued by the Judiciary was given in his name. There is a perfectly logical explanation why that is so. There is a similarly perfect explanation why despite the name on the cash deposit slip the cash does not belong to him or his principal, Albert Mundia.

14. A Court exercising criminal jurisdiction is not expected to go behind the deposit to try and establish where the deposit money originally came from or whether it was part of a set off with a third party. If a party such as the litigant have a claim against a person that has paid money as cash bail, the correct avenue to collect the debt is not through a claim for cash bail deposited by that person. The correct avenue is through a civil claim.

15. **For these reasons, the Application dated 07/08/2017 has no merits. It is dismissed with costs.**

16. Orders accordingly.

Dated and delivered at Kiambu this 7th day of June, 2018.

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JOEL NGUGI

JUDGE