

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.199 OF 2015

MOSES MUTWIRI GITAARI.....APPLICANT

VERSUS

REPUBLIC thro

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

KENYA COMMERCIAL BANK.....2NDRESPONDENT

RULING

The Applicant, Moses Mutwiri Gitaari is facing a charge before the magistrate's court of **stealing** contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code**. The particulars of the charge are that on diverse dates between 9th and 22nd May 2015 at Kenya Commercial Bank Card Centre along Moi Avenue in Nairobi, the Applicant together with others not before court stole Kshs.830,577/- the property of Kenya Commercial Bank. The Applicant pleaded not guilty to the charge. The charge is pending trial before the said court. On 19th August 2015, the Applicant applied to this court seeking reversal of the decision made by the trial court (Hon. Murigi Mrs – CM) dismissing the Applicant's application to unfreeze his accounts by the 2nd Respondent. The application was supported by grounds stated on the face of the application and by an affidavit sworn by the Applicant.

The application was filed under certificate of urgency. The court directed the Respondents to be served and file replying affidavits in answer to the Applicant's application. They were duly served. None of the Respondents filed the response to the application despite the court indulging them on several occasions to enable them file the requisite responses. This court did grant the Applicant's application seeking to unfreeze the accounts after it was satisfied that the Respondents had failed to file a response to the application despite being given several chances to do so. The court also noted that the 2nd Respondent had failed to attend court on the scheduled hearing dates. The court ordered the Applicant to be granted access to the said accounts after the freezing order was set aside.

Subsequent thereafter, upon being served with the order, the 2nd Respondent made an application before this court seeking to have the order setting aside the freezing order vacated. The 2nd Respondent pleaded with the court to give it a chance to explain its part of the story. It admitted that it had failed to file a response or attend court on the several times it was required to do so. However, the 2nd Respondent pleaded with the court to give it a hearing on account of the fact that the accounts in question that the Applicant sought to be unfrozen were used to perpetrate fraudulent transactions which were subject to a criminal case. The 2nd Respondent annexed documents to the affidavit in support of the application in a bid to prove that the Applicant had manipulated the Automated Teller Machine (ATM) so that it would indicate that he had made deposits into the subject accounts yet in actual fact he had not done so. It was on that note that the 2nd Respondent pleaded with the court to reverse the order of freezing the account. The 2nd Respondent reiterated that the actual sums in the accounts in question were Kshs.10,867/- and Kshs.7,583/- respectively and not the sum that the Applicant alleges that are in the account. In essence, the 2nd Respondent was urging the court to consider the merits of the application.

Applicant objected to the application seeking to set aside the unfreezing order. The Applicant reiterated that the 2nd Respondent had denied him access to his accounts which respectively contained the sums of Kshs.908,300/- and Kshs.10,867/-. The Applicant insisted that there was no justification whatsoever for the 2nd Respondent to freeze his account. He was of the view that the criminal charge was laid against him by the 2nd Respondent to enable it conceal the fact that it was unlawfully withholding the Applicant's property in the form of cash. The Applicant was not convinced by the reasons given by the 2nd Respondent for its failure to attend court despite being ordered to do so by the court. He urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties in support of their respective positions. It has also considered the pleadings filed by the parties in support of their respective cases. The issue for determination by this court is whether the 2nd Respondent made a case for this court to reverse the order that it had made unfreezing the two accounts held by the Applicant. As stated earlier in this Ruling, the 2nd Respondent was given several opportunities to present its case before this court but it failed to do so. This court was not persuaded by reasons given by the 2nd Respondent for its failure to attend court when it was served to do so on the several occasions that the application was set for hearing. This court therefore, found no merit with the 2nd Respondent's application seeking to vacate the unfreezing order on the grounds that it was indolent in failing to attend court when it was required to do so.

That would have been the end of the matter but for the fact that it appeared to the court that there is dispute regarding the amount in the accounts that have been unfrozen. Whereas the Applicant insists that one account has the sum of Kshs.908,300/-, the 2nd Respondent reiterates that the amount in the account is Kshs.7,583/-. It appeared as if the Applicant was seeking validation of his claim as to the contents

of the account. This court has no jurisdiction at this stage of the proceedings to give an order regarding the amounts in the accounts because that issue is pending before the trial court. The order issued by this court only deals with the unfreezing of the accounts and not in determining the guilt or otherwise of the Applicant in regard to the charge that he is facing before the trial court. The court with jurisdiction to determine those issues is the trial court. In the premises therefore, this court declined the invitation by the Applicant to make a determination in regard to what sums are in the accounts that have been unfrozen. That issue will be determined by the trial court.

It was for the above reasons that this court dismissed the 2nd Respondent's application. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2018

L. KIMARU

JUDGE