

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.396 OF 2012

FERDINAND NDUNGU WAITITU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Ferdinand Ndungu Waititu was aggrieved by the decision of the trial magistrate in **Nairobi Chief Magistrate Court Criminal Case No.470 of 2012 Republic –Vs- Ferdinand Ndungu Waititu & Another**. This decision, made on 28th September 2012, resulted in the forfeiture of the cash bail paid by the Applicant. The trial magistrate forfeited the cash bail because the Applicant had allegedly failed to attend court when the case was earlier listed for hearing on 3rd May 2012. According to the Applicant, he did not deliberately fail to attend court on the specific dates. He explained that he had obtained an order from the High Court staying proceedings before the trial magistrate's court pending the hearing and determination of a constitutional reference that he had filed challenging the proceedings before the trial court. The Applicant stated that the trial magistrate erred when he ordered his cash bail forfeited yet he had not breached the terms that required his attendance before that court. Mr. Ondieki , learned Counsel for the Applicant reiterated the contents of the application in the oral submission that he made before court. He urged the court to reverse the order. Ms. Nyauncho for the State conceded to the application. She stated that the order issued by the High Court that stayed proceedings before the trial magistrate's court was still in force at the time the forfeiture order was made. In the premises therefore, she was not opposed to the application.

Under **Section 362** of the **Criminal Procedure Code**, this court has jurisdiction to call to this court any criminal proceedings before a magistrate's court with a view to ascertaining its correctness, legality or propriety. In the present application, the Applicant established to the satisfaction of this court that the order issued on 28th September 2012 by the trial magistrate forfeiting the cash bail paid by the Applicant to secure his release on bail was made in error since the Applicant had obtained orders from the **High Court in Petition No.149 of 2012** staying proceedings before that court pending the hearing and determination of the said constitutional petition. The order of the High Court staying proceedings before that court had not been set aside by the time the forfeiture order was made. It was still in force. Ms. Nyauncho for the State concedes to the application.

In the premises therefore, this court calls to this court the order made by the trial magistrate on 28th September 2012 and hereby sets it aside. The order of forfeiture of the sum of Kshs.100,000/- paid by the Applicant as cash bail is set aside. A further order is issued directing that the Applicant be refunded the sum of Kshs.100,000/- that was forfeited to the State. It is so ordered. The trial magistrate's court file is ordered returned to the said court for appropriate action.

DATED AT NAIROBI THIS 1ST DAY OF MARCH 2017

L. KIMARU

JUDGE