



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO. 56 OF 2020.**

**GEORGE OTIENO AMOM.....1<sup>st</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. George Otieno Omom, the Applicant, was charged with the offence of stealing a motor vehicle in Kibera Chief Magistrate's Court **Criminal Case Number 2336 of 2014**. Having denied the charge, he was taken through trial and acquitted pursuant to provisions of **section 215** of the **Criminal Procedure Code (CPC)**.

2. On the 31<sup>st</sup> January, 2020, the Applicant approached this court by way of Notice of motion seeking orders as follows:-

*(a).....*

*b) This Honorable Court be pleased to review the Kibera Chief Magistrate's Order in Kibera Criminal Case Number 2336 of 2014(The Republic -vs- George Otieno Omom) for the release of the bail terms amount of Ksh. 200,000.00 which was denied to the law firm of S. J. Nyang & Company Advocates who were on record for the Accused therein on the basis that the court was already functus officio of the matter.*

*c) The honorable court be pleased to issue any order in the just dispensation of this application.*

*d) The cost of this application be provided for.*

3. The Application is based on the grounds that:-the Applicant was charged with the offence of stealing a motor vehicle contrary to section 268(1) as read together with section 278A in Kibera **Criminal Case Number 2336 of 2014(Republic vs George Otieno Omom)** when the court gave him a cash bail of Ksh.200,000.00 which he was assisted by Esther Akoth Odindo; the Applicant attended court faithfully and obediently except on one occasion due to sickness when the presiding magistrate issued a warrant of arrest but the same was later lifted; the Applicant was then left to continue attending court from outside custody of which he continued up to conclusion of the case where in he was acquitted under **section 215** of the CPC; It later happened that despite the magistrate having lifted the warrant of arrest and allowing the Applicant to proceed with the trial out on bond but the trial magistrate forgot to reinstate the cash bail of Ksh.200,000/-; if the orders sought are not granted then the cash bail may not be released to the disadvantage of the Applicant herein; and that, the Applicant will suffer irreparable loss and damage if the application is not allowed.

4. The application is supported by an affidavit sworn by Susan Nyang, counsel for the Applicant who reiterates what is stated in the grounds in support of the application and adds that although the warrant of arrest was lifted the trial magistrate forgot to reinstate the cash bail, a fact that was brought to his attention when he sought refund; as advised by a court assistant, he wrote a letter through his advocate seeking refund but the trial magistrate declined to make necessary orders as the court was functus officio. That the depositor has suffered and needs the cash bail to pay school fees for her children and the balance of legal fees to the advocates who represented the Applicant.

5. The application was canvassed by way of oral submissions that this court has carefully considered. Ms. Nyang for the Applicant urged that what transpired was an oversight on the part of the court which calls for the court's intervention and that the depositor had sworn an authority to have the money released to her law firm.

6. The State through learned Counsel Mr. Mutuma opposed the application. He argued that bail or bond terms are determined to secure

attendance of the court. That if the Applicant failed to appear in court the cash bail was forfeited, therefore, he should have moved the court then, seeking reinstatement of the same. That it is trite that when cash bail is forfeited, the matter proceeds while the accused is in custody, therefore, it was an oversight on the part of the Applicant not to seek reinstatement in the lower court.

7. **Section 362** of the CPC provides thus:-

***“...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...”***

8. **Section 364(1) (b) of the CPC** provides thus: -

***“... (1)***

***In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—***

***(b) in the case of any other order other than an order of acquittal, alter or reverse the order.....”***

8. It is trite that the purpose of bail is to ensure an accused person attends court and once the trial is over it is returned to the accused. Following arraignment of the Applicant on the 3<sup>rd</sup> day of June, 2014, he was released on cash bail of Ksh.200,000/- that was deposited by Esther Akoth Odongo on the 30<sup>th</sup> day of June,2014 per the receipt number 0364231.

9. During trial the Applicant was represented by Ms. Nyang. On the 15<sup>th</sup> November, 2016, the Applicant failed to turn up for trial, a warrant of arrest was issued and an order for forfeiture of cash bail was made. On the 14<sup>th</sup> December, 2016, the day scheduled for mention, he presented himself to court when an application for lifting of the warrant of arrest was made. It was explained that he was indisposed, medical documents were availed, and, the court being dissatisfied noted that it had seen some medical documents but argued that upon being released on bond the Applicant had a contact person and was represented by an advocate, persons who were obligated to notify the court of the Applicant's whereabouts but failed to do so.

10. Consequently, the trial court lifted the warrant of arrest on condition that the accused avails a person to sign a recognizance for his appearance. It is worth noting that at the outset the Applicant had been granted bond of Ksh. 2,000,000/- with a surety of a similar amount, prior to bail terms being varied. The court took note of the fact of the sum of the cash bail having been forfeited. He was granted time up to 12<sup>th</sup> January, 2016 to avail the surety for purposes of being interviewed.

11. Circumstances in which the Applicant continued to attend court if not in custody are not clear per the record. What is however clear is the fact that the cash bail deposited was forfeited on the 28<sup>th</sup> November,2016 and the order forfeiting it was not appealed. The court pronounced the order in the presence of the Applicant who was represented by counsel, indicated as Mr. Musyoki, therefore he cannot feign ignorance. He could have appealed or sought review of the order but he did not. The case was concluded three years later, and Hon.Ojoo who had taken over the matter erroneously made an order for refund of the cash bail to the depositor.

12. Considering what transpired, the only error apparent on record that should be corrected is the order by the court directing release of the cash bail, which I quash and set aside. In the premises, the application fails and is dismissed accordingly.

13. It is so ordered.

**Dated signed and delivered virtually at Nairobi this 25<sup>th</sup> day of February, 2021.**

**L. N. MUTENDE**

**JUDGE.**