



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL REVISION NO. 7 OF 2013**

ANTHONY NJENGA MBUTI .....APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

*(From original conviction and sentence in Criminal Misc Case No. 5 of 2011 in the Chief Magistrate's Court at Kikuyu – C A Otieno (RM) on 3<sup>rd</sup> March 2011)*

**R U L I N G**

The applicant Anthony Njenga Mbuti was presented before the Senior Principal Magistrate's court at Kikuyu and required to execute a bond to keep peace following an affidavit sworn by Chief Inspector Stanley Riungu of Kikuyu police station.

On being sworn the said Chief Inspector gave evidence stating that he was investigating serious crimes including robberies, burglaries and organized crime activities. In the course of his investigations, he arrested the appellant and two others. He believed that the applicant was a threat to security and therefore he should be required to execute a bond to keep peace, notwithstanding the fact that this officer had not obtained enough evidence to sustain a conviction before the court.

The record before me shows that the applicant agreed to execute a bond to keep peace upon which the magistrate ordered that he executes a bond of Ksh. 50,000/- with a surety of like sum for two years.

There is now before me a plea by his learned counsel Ms Wamaitha Kimani to nullify the said proceedings because the statements were unsubstantiated and that the provisions upon which the applicant was ordered to execute the bond are unconstitutional and incompatible with Articles 29 and 49 of the Constitution.

The learned counsel for the applicant has cited two cases. One **Mwagona and 3 others – Vs – Republic** (1990) KLR page 1 and Criminal Misc Application No. 39 of 2010 **Jackton Mulaivu Malalo and Others – Vs – Republic** to support the applicant's case.

I have gone through the record before me leading to this application. It is true that the learned trial magistrate misdirected herself in the approach she took in cases of this nature. The provisions covering such proceedings are contained in Sections 43 – 54 of the Criminal Procedure Code. The first step is that the magistrate must be informed that a person is likely to commit a breach of peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of peace or disturb the public tranquillity. Upon that information, the magistrate shall examine the informant on oath and may require the person in respect of whom the information is laid to show cause why they should not be ordered to execute a bond with or without sureties for keeping the peace for such period not exceeding one year as

the magistrate may think fit.

The magistrate is then mandated to conduct an inquiry into the truth of the information presented by the informant. If there is any proof then, the subject shall be required to execute the bond.

I subscribe to the steps set out in the case of **Mwagona** cited herein above. Any breach of the procedural steps set out in the statute would render the proceedings a nullity.

In the instant case, the applicant did not meet the terms set out by the court and this led to his detention in remand prison for a period of 22 months. This was also in total breach of Section 58 (2) of the Criminal Procedure Code which required a magistrate to forward those proceedings to the High Court within a reasonable time in the event the applicant failed to meet those terms.

The submission that the provisions leading to the detention of the applicant are unconstitutional appears to hold some ground. This is because the applicant took the position of an arrested person and under Article 49 1(h), he was entitled to be released on bond or bail or reasonable conditions pending a charge or trial unless there were compelling reasons not to be released. The fact that he was a suspect involved in the alleged crimes was not a compelling reason to deny him his freedom.

The learned counsel for the Republic concedes this application and with respect I agree. Having said so, I declare that the proceedings leading to the execution of bond by the applicant were a nullity for breach of express provisions of the Criminal Procedure Code and the Constitution.

Accordingly, the same are hereby quashed in their entirety.

Orders accordingly.

**Dated and delivered at Nairobi this 11<sup>th</sup> Day of July 2013**

**A. MBOGHOLI MSAGHA**

**JUDGE**