



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISC. CIVIL APPLICATION NO. 166 OF 2009**

**ATTORNEY**  
**GENERAL.....APPLICANT**  
**VERSUS**

**JUSTUS NGUMBAO CHARO.....1<sup>ST</sup>**  
**RESPONDENT**

**NELSON KATANA MASHA .....2<sup>ND</sup>**  
**RESPONDENT**

**RULING**

The two applicants herein are Warrant Officer 2. Justus Ngumbao Charo and Senior Private Nelson Katana Masha, employees of the Armed Forces of Kenya deployed at the Kenya Navy and working at the Kenya Navy Mtongwe Base. On the 10<sup>th</sup> December 2008 after being arrested were both arraigned before a Court Martial and charged jointly in Court Martial Case No. 5 (KNB Mtongwe) with eleven charges. They were both convicted on some of the charges after a full trial and were sentenced to serve imprisonment for 3 years each and dismissal from the Armed Forces of Kenya. The applicants were then transferred from custody at Mtongwe Navy Base Guard Room and placed in further custody at the Shimo La Tewa Maximum Security Prison to serve their respective custodial sentences. Immediately after the findings of the Court Martial were made the applicants instructed their Advocates to appeal against the conviction and sentences.

The Applicants claim that despite their advocates requesting to be supplied with copy of the proceedings of the Court Martial, to date they have not been so supplied with the same. That all attempts have been in vain.

As a result of the aforesaid the two applicants filed in the High Court their respective applications under the provisions of Constitution seeking inter alia the following orders:-

That pending the hearing and determination of this matter, the applicant be released from custody on such terms and conditions as this Honourable Court may deem just and reasonable.

Whether the provisions of Section 107 of the Armed Forces Act as read with Section 114(2) of the Armed Forces, Act enjoin the Commander of the Kenya Navy in mandatory terms to furnish the Applicant with a copy of the proceedings of the Court Martial No. 5 (KNB Mtongwe) on demand and if so, an order be made for the immediate release of the same to the Applicants.

Whether the failure or delay in furnishing the Applicants with a copy of the proceedings of Court

Martial Number 5 of 2008 (KNB – Mtongwe) is in contravention of Section 77(3) of the Constitution of Kenya and infringes on the Applicant's Constitutional rights to a fair hearing within a reasonable time.

Whether the incarceration of the Applicant at Shimo la Tewa Maximum Prison without being furnished with copies of the proceedings for purposes of appealing and without knowing whether the findings and sentences of the Court Martial case have been confirmed or not is an infringement of the Applicant's Constitutional rights against torture and inhuman treatment enshrined in Section (74), of the Constitution of Kenya.

Whether by drawing and signing a convening Order for a Court Martial as well as the Charge Sheet on the 5<sup>th</sup> December 2000 the Kenya Navy infringed the Applicant's rights securing the applicants protection of law as enshrined in Section 77 of the Constitution of Kenya.

What order should be made on the issue of costs.

The two Constitutional applications were finally consolidated and came before me on 27.1.2010. Mr. Gikandi Advocate appeared for Justus Ngumbao and held brief for Mr. Kenga Advocates for Nelson Katana Masha.

Mr. Ondari, held brief for Mr. Njoroge for the Attorney General. Upon some deliberations, the Court directed that the two applications be heard on 24.02.2010 on priority basis.

On the 24<sup>th</sup> February 2010, Mr. Gikandi and Mr. Kenga appeared in court for the two applicants. There was no appearance for the Attorney General.

Upon the representations from the two present counsel, I admitted the two applicants to bail and released them on bond of Kshs.20,000/- each with one surety respectively for like amount and in the alternative on cash bail for the same amounts.

I directed that the application on the other substantive matter be heard on 23.3.2010.

The Attorney General was aggrieved by the said Orders granting bail before the hearing of the substantive applications and filed the present application on 17<sup>th</sup> March 2010 under Certificate of Urgency by way of Notice of Motion. It sought inter alia, the following orders:-

“ (i) ...

**(ii) that pending the Inter partes hearing of this application the court be pleased to stay its orders of 24/2/2010 granting the Respondent's bail.**

**(iii) that pending the hearing of this application the court be pleased to order that the Respondents do present themselves to the court for committal back to prison to continue serving their sentence pending the determination of this application and the appeal that they have lodged against their conviction.**

**(iv) That the Order of the court made on 23/3/2010 granting the Respondents bail be vacated.**

**(v) that the costs of the application be provided for”.**

The application was made on the basis of the following grounds:-

(a) *That the Hon. Attorney General was not served with any hearing notice.*

(b) *That in any event the case was not listed among others for hearing on 24.2.2010.*

(c) *That both the Respondents' Counsel Mr. Gikandi and Mr. Kenga concealed material facts from the Court which facts would have militated against the granting of the orders of bail.*

(d) *That no formal application was made for bail on 24/2/2010.*

(e) *That as per the court record the Orders of the court on 27/01/2010 were to the effect that the main application's be heard on 24/02/2010 and not that an application for bail be made on 24/02/2010.*

(f) *That no case law or statutory provisions were cited in aid of the oral application for bail so as to enable the court have and seize jurisdiction to order that the Respondents be released on bail.*

(g) *Even in the unlikely event that the former servicemen are entitled to bail after conviction by a court martial any application for bail should not have been made in these proceedings but in a competent appeal.*

(h) *That the Respondent's Counsel misled the court by stating that there was no replying affidavit that had been filed in reply to their application while indeed there are two replying affidavits and a preliminary objection to the respondent's application*

(i) *That two Respondent's counsel did not extract the order of the court but rather only made a copy of the ruling in procuring the Respondent's release.*

(j) *That the Respondents have apparently applied the short cut to bail by making an application within these civil proceedings which amount to an abuse of the court process instead of following the valid criminal law process established under the Criminal Procedure Code.*

(k) *The Applicant's main defence in these proceedings is that prior to their filing this application the*

court had determined similar issue within H.C. Misc. Application No. 587/2008 between the same parties and the matters herein, H.C. Petition No. 174/2009 and H.C Petition 166 of 2009 are Re Judicata.

- (l) That in addition the applicant's position herein is that the Appeal that has been filed does not lie.
- (m) That the matter has come up before this Honourable Court before different Judges on numerous occasions where similar applications for the release of the Respondents on bail were made and opposed by the Attorney General and also rejected by the Court.
- (n) That the only substantive prayer in both H.C. Misc.174 of 2009 and 166 of 2009 are prayers Nos 3,4, and 5 of the Originating Notice of Motion which are premised on the alleged delay of release of Court Martial proceedings to the Respondents herein. In his affidavit sworn on the 29<sup>th</sup> April 2009 Major Nishit Maru (then Captain Nishit Maru) has sworn that the proceedings in Court Martial Case No. 5 of 2008 – Mtongwe have been forwarded to the Registrar of the High Court and that the issue of delay is now settled.
- (o) That in 2009 the Respondents had made their Originating Motion under Certificate of Urgency and there was no need to renew an application for bail in the absence of the Honourable Attorney General without any Notice that such an application would be made before a different bench.
- (p) That having obtained orders that the originating Notice of Motion be heard on priority the Respondents have exposed their true attitude towards their own originating motions applications, that is of desire for further delay, in that they opted not to serve or call the Attorney General but caused the file to be brought into the court while the matter was not listed for hearing and failed to proceed but asked for bail.

The application was supported by an affidavit sworn on 17<sup>th</sup> March 2010 by Mr. Mwangi Njoroge, the Acting Senior Principal Litigation Counsel in the office of the Attorney General – setting out the factual issues in support of their case.

The application was opposed by the two Respondents who caused to be sworn and filed respective affidavits, one by Mr. Gikandi Ngibuini Advocate and one by Mr. Nelson Katana Masha.

I have considered the application, supporting affidavit and replying affidavits. I have also considered the submissions by counsel.

The record shows that on 27/01/10 Mr. Gikandi appeared for the Respondents in Court and Mr. Ondari, Senior Principal State Counsel, counsel appeared for the applicant in court. It was the first time that these matters came before me. The said Advocates recorded on Order by consent on the following terms:-

“.....

**I do hereby direct that the application herein and in Misc. Application No. 174 of 2009 be heard on priority basis. The two applications shall be heard on 24-02-2010 on priority basis.”**

On 24<sup>th</sup> February, 2010 Mr. Kenga and Mr. Gikandi appeared for the present Respondents in court. There was no appearance for the Attorney General's office. There was no explanation given to the court for their absence.

Mr. Kenga and Mr. Gikandi stated that they were ready to proceed as the date was taken by consent. They argued that the matter was urgent and that there was an apprehension that their clients would serve the entire sentences if the matter was not proceeded with and heard.

Mr. Gikandi then urged the court to admit Respondents on bail pending the hearing of the Constitutional reference/application. The record does not show that counsel pointed out and brought to the attention of the court that the matter was not listed. There was a possibility that if the court was informed it would have made a note of the said fact on record and decide whether to proceed with the matter or not. Be that as it may, it is my view that if a matter is not listed on the Cause List when the date had been mutually agreed upon and fixed by consent and in particular in court, then it cannot be assumed that the matter would not proceed only for the said reason. The Court Cause List is a tool to assist litigants, advocates and the public as to the matters that are scheduled/listed before the various courts. It is not necessarily exhaustive and does not take precedence over the Court Diary or that of the Judge or Magistrate presiding in a particular court. It is incumbent upon the counsel who take a date before or in court to attend court all the same despite a matter not being listed. It would be wrong as a matter of principle that this Cause List takes precedence to the Court Diary itself. It is appreciated that if the omission to list matter is genuine and has lead to any bona fide confusion or mistake, then the court would invoke its discretion and decide whether to adjourn a matter or not. It is not for counsel to absent themselves on the basis of non-listing particularly if a matter has been fixed in court by consent on orders

that it be heard on priority basis.

As far as this court is concerned the date was taken mutually and by consent. It was for Mr. Ondari to have told the court that he could not take a date on behalf of his colleague Mr. Njoroge who is in a different Department.

As far as this court was concerned one Senior State Counsel represented the other and Constitutional matters are neither of a purely criminal or civil nature. The issues of allocation of duties in the Attorney General's office in Constitutional cases is not a matter for the court to have any special knowledge. For these reasons, I disagree with the submissions by the applicants with regard to the non-listing of the applications on the court cause list of 24.2.2009. The dates was taken by consent and the hearing ordered on priority basis. The priority was based on the fact that the applications raised Constitutional issues including the liberty of the applicants therein. It was therefore the duty of Counsel to attend court and inquire whether the matter would proceed or not.

I do not accept that the Attorney General was to be served with a hearing notice. There was no concealment of material facts from the court by the Applicant's counsel with regard to the non-listing of the case on the cause list. It is possible counsel assumed that the court knew of the said fact which assumption they were entitled to make. Unfortunately due to the heavy work-load or inadvertence the court did not realize that the matter was not on the cause list but proceeded on the basis of its Diary and court record.

I think that on the substantive issues raised, the first and most crucial question of law that the application raises is whether this court had jurisdiction to release the applicants on grant bail pending the hearing of the main substantive prayers in the application i.e. furnishing of copy of proceedings of the Court Martial No. 5 (KNB Mtongwe) on demand and whether any failure or delay in furnishing the same is in contravention of Section 77(3) of the Constitution of Kenya and infringes on the applicant's Constitutional rights to a fair hearing within a reasonable time.

Upon consideration. I do find that it is common ground that the Applicants upon being convicted and sentenced by the Court Martial in the aforesaid case lodged appeals in the High Court against the said Conviction and sentences. For some reason the appeals were given the same reference number, namely, ***Criminal Appeal No. 34 of 2009*** although there are two distinct and separate Petitions of Appeal. It is a fact that there is or are pending Appeals in the High Court exercising its Criminal jurisdiction. They are still pending. This is irrespective of any belief now by the Applicants that the appeals have minimal chances of succeeding, if any since allegedly it was filed without leave of the court.

It is trite law that any bail application could only be entertained within the Appeals i.e. bail pending the appeal. The proceedings herein relate to alleged failure or delay in furnishing the Applicant with a copy of proceedings of Court Martial No. 5 of 2000 to enable them prepare their appeal, thereby leading to infringement of the Applicant's Constitutional rights to a fair hearing within a reasonable time.

It is only upon the determination of the said question or issue in favour of the Applicants that the court could in law consider whether the infringement or violation was of such magnitude and/or gravity for court to nullify the incarceration of the Applicants and release them irrespective of the conviction and sentence and the pending appeals or possible future appeals. Before that, with hindsight, it is clear and certain that there was a misapprehension and misconception of the law by this court which was actuated by the passionate and persuasive submissions of counsel and in the absence of the Attorney General in Court on the material day.

In any event, upon consideration of all the facts now, I think that it was inappropriate for this court to have heard the consolidated Originating Notice of Motion piece meal or by instalments. If the reason was that the Attorney General was absent in court, then the court had two options; either to proceed with the full hearing on its merits the absence of the Attorney General notwithstanding or to adjourn the entire application for hearing on another the date when the Attorney General would be present. It was irregular to deal with prayer 3 alone on bail without determination of the substitutive prayers 4, 5, 6 and 7.

It is my view that this court did not have the jurisdiction to grant bail pending the hearing of the Constitutional application herein considering the special facts and circumstances of the case. The question of bail pending hearing of any proceedings could only be dealt with in the Appeals which were already filed and pending or if withdrawn later or abandoned them in the appeals which may be filed upon the proceedings having been supplied.

In the light of the foregoing, I do hereby set aside and vacate the order of this court made on 24<sup>th</sup> March 2010 releasing the two applicants in the main application and respondents in the present application namely Justus Ngumbao Charo and Nelson Katana Masha on bail.

Accordingly, I do Order that the two aforesaid convicts be and are hereby committed back to prison at Shimo la Tewa to continue to serve their sentences pending the determination of the main application and the appeals that they have lodged against conviction and sentence.

The said two Respondents shall pay the costs of the Application herein to the Applicant, the Attorney General.

**Dated and delivered at Mombasa this 21<sup>st</sup> day of May 2010.**

**M. K. IBRAHIM**  
**J U D G E**

**Coram:**

Ibrahim, J

Court clerk – Kazungu

Mr. Gikandi – Advocates for the 1<sup>st</sup> Applicant

Mr. Gikandi for Mr. Kenga for the 2<sup>nd</sup> Applicant

Mr. Kamau holding brief for Mr. Mwangi Njoroge for the Respondent.