



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MOMBASA**

**Miscellaneous 119 of 2012**

**NANG MAGUI.....1<sup>ST</sup> APPELLANT**

**NTOGME BRUNO.....2<sup>ND</sup> APPELLANT**

**- V E R S U S -**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**RULING**

The applicants **NANG MAGUI** and **NTOGME BRUNO** have filed this Notice of Motion dated 8<sup>th</sup> August 2012 seeking for inter alia, order that:

1. The High Court pursuant to its supervisory jurisdiction over the subordinate Courts do call for the record of the proceedings and make such orders and give such directions appropriate to ensure the fair administration of justice in Criminal Case No. 175 of 2012 at the Chief Magistrate’s Court at Mombasa.
2. That the applicants be admitted to bail/bond on such terms as the court may deem appropriate.
3. That the matter be allocated to any other court of trial and disposal other than the Chief Magistrate’s and Senior Principal Magistrate’s Court, Mombasa.
4. That any other order that maybe deemed fit for the first and proper ends of justice.

The application is supported by the grounds on the face thereof and the supporting affidavit allegedly “jointly” sworn by both applicants dated 8<sup>th</sup> August 2012 plus the annexures thereto.

In a nutshell, the applicants state that bail is a Constitutional right. That, their bail/bond in the lower court was cancelled or denied in an unfair, opaque and arbitrary manner and without their being given a hearing. That a stranger and the prosecutor addressed the court in the absence of the applicants/the accused, then, the court was improperly constituted, and as a consequent, all the said proceedings thereof were unfair and detrimental to the administration of justice. The applicants further submitted that upon substitution of the charges, the court on its own motion cancelled the applicants bond. That, the act of cancellation of bond amounts to miscarriage of justice. The applicants counsel submitted that, earlier the applicants had been admitted to bond of Kshs. 1.5 m with a surety for a similar amount. He argued that those bail terms were excessive and harsh, and the applicants clients cannot afford. The applicants have sworn that, the 1<sup>st</sup> accused has three children and the 2<sup>nd</sup> accused has one child and all reside in Kenya. That, the 1<sup>st</sup> accused has a valid permit which has not expired, and, the 2<sup>nd</sup> accused has a passport. That, both have residential property and development in Kenya. The 2<sup>nd</sup> accused has a

residential home at Mtwapa, where his family resides, and that, the 1<sup>st</sup> accused has a property in Nairobi South C Estate valued at Kshs. 4.4. million where his family stays. As such they are not flight risk persons. In the supporting affidavit, they both deposed that they were born in Cameroon and stay in Kenya on a permit and visa. The applicants have provided documents supporting the ownership of property in Kenya. They pray their bail application be considered favourably.

The State was represented at the hearing of the application by Mr. Mureithi, the Learned State Counsel. He submitted that, although the proceedings of **18<sup>th</sup> June 2012** were improper because, they were conducted in the absence of accused, but the bail application is opposed. He told the court that, the court has a duty to ensure the accuseds will attend court upon release on bond. That the Constitutional right to bail under Article 49 (1) is not absolute. Thus if the court considers the accused will not turn up for trial, then, the accused can be denied bail. He further submitted that the passports given by the applicants are a subject of investigation. That the 1<sup>st</sup> applicant's passport has a two years' permit and that of the 2<sup>nd</sup> applicant was for one month only which has since expired. The State Counsel invited the Court to note that, should the applicants be convicted on the offences, they are facing herein, then, they stand to serve 3 years and 7 years respectively on the 1<sup>st</sup> and 2<sup>nd</sup> counts. That, in itself can be a cause to become a flight risk.

In final reply, the Counsel for the applicants, the Learned defence counsel, Mr. Opolu, submitted that, the passports in issue were investigated by the Immigration Department, and found to be genuine. That, the sentence the applicants will serve is immaterial, for the purpose of bail as even murder suspects are entitled to bail. I have considered the application, the prayers therein, the grounds on the fact of it, the affidavit in support and the annexures thereto the oral submissions by the Learned defence counsel Mr. Opolu, the authority cited, and the opposition raised to the bail application, by the State through the submissions of the Learned State Counsel Mr. Mureithi. For ease of understanding I shall condense the issues raised. I find that they are basically three issues;

1. The manner in which the proceedings were conducted in the criminal case no. 1757 of 2012 before the Chief Magistrate's Court, Mombasa.
2. The grant issue of bail or bond to the applicants, in particular, the terms granted to them earlier and the subsequent cancellation of the bond.
3. The issue of the transfer of the matter from Courts of the Chief Magistrate's and Senior Principal Magistrate's Court, to any other Court.

As regards the 1<sup>st</sup> issue, I have looked at the trial Court's record, of the **18<sup>th</sup> June 2012**. The proceedings reveal that the Court proceeded to hear the matter in the absence of the applicants. The coram shows that the court was composed of the trial Magistrate Hon.J. Gandani – SPM and the Prosecutor IP Suntu.

Then Court heard evidence from one Sandra Ndube, to the effect that the money involved in the case was hers, and that the accused/applicants hold forged passports. She was objecting to their being released on bond. As already stated, the accused were absent. The accused lawyer Mr. Gakuhi, who appeared for them on the 15<sup>th</sup> June 2012 was also not present. The Court, then ordered.

**“Above bond terms set aside for now.**

**Accused to deposit their passport in court for verification the immigration department first”.**

The State Counsel has conceded that the manner in which the proceedings of that day were taken was improper. I concur with the State Counsel's submissions on that issue. First and foremost, this is a criminal trial. Naturally all the proceedings are conducted in an open court and indeed before all the parties inclusive of the suspects. Section 194 of the criminal procedure code provides that

**“except as otherwise expressly provided, all evidence taken in a trial under this code shall be taken**

**in the presence of the accused, or, when his personal attendance has been dispensed within, in the presence of his advocate (if any)”**

Secondly, the rules of natural justice require that a man should not be condemned unheard. Thirdly Section 151 of the Criminal Procedure Code states that:

**“Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath”**

Thus, upon giving evidence on oath, the accused will have an opportunity to cross examine the witness as provided for under Section 150 Criminal Procedure Code. Thus, as regards the proceedings recorded herein the Court was not properly constituted. The accused were absent, the court clerk was not present, the witness was heard while unsworn and the decision to suspend the accused’s bond was thus unprocedural and improper. With due respect to the Court the proceedings of that day offends the provisions of the Criminal Procedure Code and are thus null and void.

I shall now move to the 2<sup>nd</sup> issued of bail or bond herein. I note from the record, the applicants were granted bail terms of Kshs. 1.5. m each with one surety of Kenyan nationality and in addition they were to deposit their passports in court. Subsequently on the 26<sup>th</sup> July, 2012 the charges against the appellant were substituted, the Court then denied the applicants bond on the ground that they were a flight risk as their passports were not authenticated. Article 49 (i) (h) of the Constitution of Kenya provides that an arrested person has the right:-

**to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons.”**

Secondly, the primary consideration before grant of bail is whether the accused will turn up for trial:

**Njehu Gatabaki –Vs- R HC CR. APP. 43 of 1993.**

In the first place, the applicants had been granted bail as aforesaid. Then the information received from Sandra Ndube was not investigated and/or authenticated. Thirdly, the prosecution undertook to verify the authenticity of the passports. A letter dated 23.7.2012 was received from the Director of Immigration Services indicating the status of the passports and the same led to the substitution of the charges. I also find that the reasons why the court concluded the accused would be a flight risk were not explained on the record.

Be it as it were, the Court in setting bond terms has to make sure the accused will attend trial. The applicants allege they have property in Kenya. None of the titles relating to the “real property” is in their names. Save for the birth certificates to show the 1<sup>st</sup> applicant has children who are resident in Kenya.

**BUT** I find no compelling reason advanced by the State to deny the applicants bond.

I, therefore order that, the initial bond terms they were granted be and are hereby reinstated.

For clarity they shall be released on

1. Bond of Kshs. 1.5m with one Kenyan surety of like amount.
2. They shall deposit their respective passports in court.
3. In addition, they shall report to the Investigating Officer once in a week during the pendency of the case, in this regard.
4. The case be heard on priority basis to relieve the applicants of prolonged fatigue of reporting, in case the trial takes too long.
5. The trial court be at liberty to deal with the applicants accordingly within the law if they breach the

bond terms.

The cry by the applicants that the bond terms they were granted is harsh is contradictory of their submission that, they own property of substantive value, and they have ready and willing sureties. I shall uphold bond terms as stated above. In fact, when they were granted the same in the first instance they did not plead for review.

I now come to the last issue, the transfer of the case to another trial magistrate. The State has no objection to the same. The prayer of transfer of the case should have been made before the respective trial courts before being presented to the High Court. That would have given the two judicial officers an opportunity to be heard on the issue.

In my considered opinion, the fear that the accused may not receive a fair trial before the Chief Magistrate or Senior Principal Magistrate is more of a perception than real. The fact that the Chief Magistrate made remarks on the day of the plea which the applicants were unhappy with and the fact that the Senior Principal Magistrate cancelled their bond cannot be deemed to mean they will not receive justice. Be it as it were, and purely in the interest of justice and expeditious trial I direct the case be re-allocated to any other Court of competent jurisdiction.

Thus, the application is allowed as outlined herein and in summation form:

1. Proceedings of 18<sup>th</sup> June 2012 are hereby declared improper.
2. Bond reinstated on terms herein.
3. Transfer of the case allowed as herein stated.

Orders accordingly.

Dated and delivered at Mombasa on this 10<sup>th</sup> September 2012.

**G. NZIOKA**  
**JUDGE**  
**10.9.2012**

Court – The ruling is delivered in an open court on this 10<sup>th</sup> day of September 2012 and at Mombasa.

In the presence of:-

Mr. Opulu for the applicants

Mr. Gioche for the State

Ms. Benta Court clerk

**G. NZIOKA**  
**JUDGE**  
**10.9.2012**

