

THE ATTORNEY GENERAL  
versus  
NADIA MAHOMED MAGIRA

HIGH COURT OF ZIMBABWE  
MWAYERA J  
HARARE, 15 JULY, 2013

*Mrs S. Fero*, for the appellant  
*D. Matimba*, for the respondent.

**Ruling Appeal Against Magistrate's Granting of Bail in Terms of The Criminal Procedure and Evidence Act [Cap 9:07].**

MWAYERA J: The appellant filed a notice of appeal on 01 July 2013 with the Registrar of the High court. The notice revealed intention to appeal against a magistrate's order of granting the respondent bail. The grant of appeal as given in the notice of appeal was that the learned magistrate misdirected himself in finding that the changed circumstances advanced by the appellant did not guarantee that she would stand trial. The changed circumstances must have been considered in light of the totality of the circumstances of the case. The brief history of the matter as shown on papers filed and oral submissions is that the appellant's first application for bail was dismissed on the main ground that the applicant a Mozambique national had no fixed abode and thus would not likely avail self for trial in the event of bail being granted.

A second application was made before the same magistrate based on changed circumstances. The applicant then had a letter from the Consular Attachee of the Mozambican Embassy in which the Embassy guaranteed that they would take full responsibility for Miss Nadia Mahomed Magira, a Mozambican to reside at 68 Second

Ruwa Avenue, Waterfalls, Harare, Zimbabwe. This would be for the duration of the Judicial process in the case of importing Eptedrine without an import permit from the Authority. To the letter was also attached an Affidavit by one Vasco Madeira Macandza, a Mozambican National employed at the Embassy of Mozambique who deposed to an affidavit that he was prepared to accommodate the applicant at 68 Ruwa, Avenue Waterfalls, Zimbabwe till the criminal case was finalized.

The magistrate then granted bail based on changed circumstances and it is this order that the appellant sought to appeal against by making a notice of appeal on 1 July 2013. It will be necessary to chronicle what transpired after the filing of the Notice of appeal. The record was placed on roll and on 3 July 2013 only the notice of appeal without the attachment of the record of proceeding from the magistrate was on file. In the bail session, counsel for appellant Mrs *Fero* was in attendance and there was no appearance for respondent. The counsel for appellant after explaining that they did not have the record attached and that they had not served the other party, that is the respondent who was not in attendance, advised the court that the appellant no longer wished to pursue the appeal and requested the matter to be struck off the roll. The court struck off the matter and endorsed on the result slip the appellant's wish that was spelt out "they no longer wished to pursue the appeal."

On 05 July 2013 following a letter to the attention of the Judge on 04 July 2013 requesting the matter to be enrolled since it was brought to the Registrar after all files had already been handed over, to the judge the court agreed to be addressed by both counsel for the appellant and the respondent at the end of the roll and in chambers.

It is this challenged appeal that the court is to make a determination on. The respondent raised in *limine* that the state's appeal was defective since on 03 July 2013 the state had advised the court that it was no longer proceeding with the appeal in case B629/2013. Secondly that the appeal was defective in that it was lodged after the expiry of the dies induce. The appeal against the magistrate's decision to grant bail is mounted in terms of section 121 of the Criminal Procedure and Evidence Act [*Cap 9:07*] and it is clear from the relevant section such an appeal has to be within 7 days of the decision.

The noting of such an appeal suspends the decision of the magistrate and the person shall remain in custody until an order to the contrary is given by determination of an appeal or withdrawal or abandonment of appeal on expiration of 7 days before appeal is noted.

Section 121 3(a) states:-

(a) If the Attorney General or his representative does not appeal in terms of subsection -

- (i) he notifies the judge or magistrate that he has decided not to pursue the appeal or
- (ii) the expiry of seven days which ever is sooner. On 01 July 2013 the state indicated it no longer wished to pursue the appeal and it followed the suspension of the bail granted by the magistrate on changed circumstances had been uplifted, thus there was no bar to the bail order being effected.

When the state sought to approach the court on 4 and 5 July it was already out of time and in any event it was approaching the court after the event. The appeal had been abandoned as at 01 July 2013 and the order by the magistrate court was operational as clearly pointed out in S121(3) a (i) notification of no wish to pursue appeal was sufficient indication for bail granted to be effected. In the premises it will not be necessary to go into the merits of whether there was a misdirection or not on the magistrate's decision in granting bail to the applicant and changed circumstances because as it stands there is no appeal properly before the court.

The appeal is dismissed as it was withdrawn on 01 July 2013. The magistrate's decision and order for bail as granted is to stand.