



Ouko v Director of Public Prosecution & 2 others (Miscellaneous Criminal Application E036 of 2022) [2023] KEHC 1748 (KLR) (21 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E036 OF 2022**

JN KAMAU, J

FEBRUARY 21, 2023

BETWEEN

MAUREY ASEWE OUKO APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

DIRECTOR CRIMINAL INVESTIGATIONS, KAPSABET 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

RULING

Introduction

1. In his Notice of Motion application dated and filed on March 23, 2022, the Applicant herein sought orders that he be granted anticipatory bail, that the 2nd Respondent be summonsed for purposes of ascertaining why the said office intended to summon, interrogate, arrest and charge him relating to the transaction between him and Sammy Maina, Richard Maiyo Tuwei (“now deceased”)and Sigei Kenneth Kipngetich (hereinafter referred to as “purchasers”) in circumstances where the offence was committed within Kisumu County.
2. In his Affidavit that he swore on March 23, 2022 in support of his said application, he averred that persons who described themselves as agents and/or servants of the 2nd Respondent had summoned him to appear in its offices other than at Kapsabet in relation to deposits the Purchasers for the purchase of three (3) motor vehicles (hereinafter referred to as “the subject Motor Vehicles”) and had threatened to harm him. He was apprehensive that the said Summons from Kapsabet Police Station were made in bad faith as the transactions between him and the Purchasers were civil in nature. He added that the complaints ought to have been within Kisumu County based on several grounds amongst them that the said oral agreements were entered into at Kisumu.



3. He contended that he was a person with disability and that detaining him outside his locality was only made to harass and deny him his fundamental right to liberty. He asserted that he would be greatly inconvenienced in terms of mobility to and from Kapsabet Police Station from his usual place of abode. He asserted that the entities were not equipped for use by persons of disabilities.
4. He pointed out that he was willing to surrender and submit himself within the jurisdiction of this court and urged this court to allow his application as prayed.
5. In opposition to the said application, on May 17, 2022, Sgt Magóli, the Investigating Officer attached at the DCIO Kapsabet Nandi Central swore a Replying Affidavit. The same was filed on May 18, 2022.
6. He averred that the Purchasers lodged a complaint at their office that they had been conned by the Applicant herein. He stated that the said Purchasers informed him that the subject Motor Vehicles were to be delivered to them in Kapsabet or at another place that would be agreed upon within 2020 but the same were not availed. He asserted that the purchase monies were wired from Equity Bank, Kapsabet and hence the cause of action arose in Kapsabet conferring their office jurisdiction to handle the matter.
7. He contended that the Applicant was linked to the offence of obtaining money by false pretence and had therefore come to court with unclean hands. It was his assertion that the Applicant's main aim of the present application was to circumvent the ends of justice and get away with the Purchasers' rightful dues. He also stated that he was hiding behind the application for anticipatory bail which amounted to mischief.
8. It was his contention that once a complaint was lodged and investigations were underway, they had the obligation to summon a suspect for purposes of recording his statement. He stated that in the event the Applicant intended to settle this matter out of court, he was required to approach the Purchasers directly and arrive at a settlement. He was emphatic nothing stopped the parties from seeking redress through civil litigation but they were expected to keep them abreast of the progress.
9. The Respondents did not file any Written Submissions. On the other hand, the Applicant's Written Submissions erroneously titled "Respondent's Written Submissions" were dated September 22, 2022 and filed on September 26, 2023. The Ruling herein is therefore based on the aforesaid affidavit evidence and Written Submissions that both parties relied upon in their entirety.

Legal Analysis

10. The Applicant observed that there was no express provision for the granting of anticipatory bail but that the *Constitution of Kenya, 2010* provided for bail of arrested person under Article 49(1)(h) and that the appropriate reliefs for breach or threat of breach of the Bill of Rights could be found in Article 23(3) of the *Constitution of Kenya*.
11. He submitted that Article 29 of the *Constitution of Kenya* guaranteed a person the right not to be deprived of freedom arbitrarily or without just cause, detained without trial except during a state of emergency which detention was subject to Article 58 of the *Constitution of Kenya* and not to be subjected to any form of violence from either public or private sources.
12. He placed reliance on the case of *W'Njuguna vs Republic* [2004] eKLR and the case of *Kipkerich Koskei vs Director of Public Prosecutions & 2 others* [2018] eKLR where it was held that there were circumstances of serious breaches of a citizen's rights by an organ of the state that was supposed to protect the same.



13. He argued that the manner in which the investigations were done was restrictive to his rights and freedoms. He was categorical that the Respondents were obligated by law to inform him why they wanted to see him. He was categorical that his detention at Kapsabet Police Station was in contravention of Article 54 of the Constitution, Section 38 of the Persons with Disability Act which provides that a person with disability who is denied bail shall be held in facilities that are modified to the extent that they were compatible with his interests and Section 71 and 72 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
14. He averred that he was willing to co-operate with the police. He was adamant that he ought to be charged within Kisumu County, if at all, because of his disability, which was proof of harassment. He submitted that in defining what fear of arrest was, several courts had opined that it was not necessary that an applicant had to prove that he was being followed with intent to be arrested but that what mattered was what the applicant thought was relevant. In this regard, he placed reliance on the case of Susan Mbinya Musyoka vs Inspector General of Police & another [2016] eKLR where the court held the same opinion.
15. He stated that Article 24 (1) of the Constitution of Kenya provided for instances when liberties could be restricted. In this regard, he placed reliance on the case of Vijay Morjoria vs Harris Horn Junior & Another [2011] eKLR where it was held that if there were less restrictive means to achieve the purpose of limitation, then such restrictive means were to be applied.
16. Under Article 29 of the Constitution of Kenya, every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.
17. As the Applicant correctly observed, there are no specific provisions on anticipatory bail in Kenya. However, where the remedy has been considered, the courts have applied the threshold for an application for violation or threatened violation of rights under Article 23 and 165(3) of the Constitution of Kenya, 2010.
18. In dealing with an application of this nature, the court is under a duty to go to the lengths and breadths of the Constitution of Kenya to protect the rights and fundamental freedoms of persons where there is a violation and/or possible violation of constitutional rights that are guaranteed in the Constitution of Kenya.
19. Having said so, this court was alive to its obligation not to curtail the other organs of state from carrying out their constitutional mandate. Courts are therefore called upon to cut a delicate balance when considering whether or not to grant anticipatory bail.
20. In the case of Republic vs Chief Magistrate Milimani & Another Exparte Tusker Mattresses Limited & 3 others [2013] eKLR the court held that:-

“However, before going to the merits of the instant application it is important to note that what is sought to be prohibited is the continuation of investigation other than a criminal trial. The court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the court which may eventually be called upon to determine the issues hence the court ought not to make determinations which may affect the investigations or the yet to be conducted trial...., the High Court ought not to interfere with the investigative process conferred upon the police or the Director of Public Prosecutions unless cogent reasons are given for doing so.”
21. Articles 23, 29 and 258 of the Constitution of Kenya empower the court to hear and determine applications relating to denial, violation or infringement of or threat to a right or fundamental freedom



in the Bill of Rights. This was emphasised in the case of *Mandiku Luyeye vs Republic* [2015] eKLR and *W’Njuguna vs Republic* (*supra*) where it was held that anticipatory bail would only issue when there was serious breach of a citizen’s rights by organs of state, a position which this court fully associated itself with.

22. The issue for determination before this court was therefore whether or not the Applicant herein had demonstrated that his rights were under threat of infringement, violation or denial. He had contended that the Respondents had been harassing him and that the cause of action was within Kisumu County.
23. Notably, investigations are a mandate of the National Police Service (NPS). They are legal processes aimed at fact finding of commission of crime in our justice system and do not amount to infringement on the rights or fundamental freedoms of any person who is under investigations per se. As long as investigations are carried out in accordance with the law and rules, the processes thereto must be allowed to run their course for proper administration of justice. Proof of violation, infringement or threat or contravention of a person’s right under the *Constitution of Kenya* is required.
24. The Applicant could not know why he was required unless he presented himself to the 2nd Respondent herein. Merely feeling inconvenienced by investigations or apprehension that facilities at a police station were not equipped for use by persons with disability were not sufficient reasons for the relief to be granted.
25. It is important to point out that disability is not a ground not to be interrogated and charged in a region a person of disability does not hail from. There is no requirement in law that facilities must be modified to accommodate persons with disability, a disability which the Applicant did not disclose to this court.
26. Indeed, every citizen is equal before the law. For that reason, a person under disability cannot purport to demand for modification in police stations or police cells while being interrogated for an offence because that would amount to discrimination.
27. Notably, Article 27(4) of the *Constitution of Kenya* states:-

“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”
28. Be that as it may, this court found the Applicant’s argument of non-modification of the cells to the extent that was compatible with his interests was premature as he did not demonstrate how Kapsabet Police Station and its cells would violate his fundamental rights and yet he had not been denied bail as was anticipated in Section 38 of the *Persons with Disability Act* No 14 of 2003.
29. In the event his rights were violated, he was at liberty to seek protection of his rights at the appropriate time and in the appropriate proceedings. At this point, his apprehension of arrest and detention in an unmodified cell was merely speculative.
30. This court could also not purport to direct the Respondents on how to carry out investigations or where to institute criminal proceedings. Doing so was tantamount to infringing on their mandate that was well set out in the *Constitution of Kenya*. This court found and held that the circumstances in the case of *Susan Mbinya Musyoka vs Inspector General of Police & Another* (*supra*) were distinguishable from the facts of this case.
31. Accordingly, this court came to the firm conclusion that the court the fact that the 2nd Respondent summoned the Applicant did not amount to harassment by the Respondents and hence he did not



demonstrate that his fundamental rights had been breached or denied or that there was a threat of them being infringed, contravened and/or violated warranting protection from this court.

32. Going further, as has been stated hereinabove, this court noted that the Applicant was seeking to restrain the Respondents from carrying out their prosecutorial and investigative duties that had been donated to them by the Constitution of Kenya. In the event he was charged at Kapsabet Law Courts and it was determined that that court had no jurisdiction to handle the matter, the High Court had power to transfer the matter to Kisumu as provided in Section 81 of the Criminal Procedure Code 75 (Laws of Kenya). It states as follows:-

1. Whenever it is made to appear to the High Court—
 - a. that a fair and impartial trial cannot be had in any criminal Court subordinate thereto; or
 - b. that some question of law of unusual difficulty is likely to arise; or
 - c. that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or
 - d. that an order under this section will tend to the general convenience of the parties or witnesses; or
 - e. that such an order is expedient for the ends of justice or is required by any provision of this Code.

it may order—

- i. that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;
 - ii. that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;
 - iii. that an accused person be committed for trial to itself.
2. The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.
3. Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Director of Public Prosecutions, be supported by affidavit.
4. An accused person making any such application shall give to the Director of Public Prosecutions notice in writing of the application, together with a copy of the grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of notice and the hearing of the application.



5. When an accused person makes any such application, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.
33. It was evident that the Applicant would not suffer any prejudice if he was arraigned at Kapsabet Law Courts as he could apply for the transfer of the case to Kisumu County, if there was merit to do so

Disposition

34. For the foregoing reasons, the upshot of this court decision was that the Applicant's Notice of Motion Application dated and filed on March 23, 2022 was not merited and the same be and is hereby dismissed.
35. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2023

J. KAMAU
JUDGE

