



Kithenge & another v Director of Public Prosecutions & 3 others (Miscellaneous Criminal Application E005 of 2023) [2023] KEHC 21333 (KLR) (9 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CRIMINAL APPLICATION E005 OF 2023**

LM NJUGUNA, J

AUGUST 9, 2023

**N THE MATTER OF ARTICLES 10,22(1), 23, 25, 27, 28, 29(A), 47, 48, 50 AND 165 OF
THE CONSTITUTION OF KENYA 2010 AND THE CRIMINAL PROCEDURE CODE**

AND

IN THE MATTER OF THE LIBERTY, FREEDOM AND SECURITY OF PERSONS

BETWEEN

CHARLES NJERU KITHENGE 1ST APPLICANT

JOSPHAT NTHIGA NJERU 2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 3RD RESPONDENT

INDEPENDENT POLICE OVERSIGHT AUTHORITY 4TH RESPONDENT

RULING

1. The applicants filed notice of motion dated February 16, 2023 on the grounds appearing on its face and in the supporting affidavit of even date. The application was filed under certificate of urgency, seeking orders that:
 - a. Spent;
 - b. Spent;



- c. The honourable court be pleased to grant the applicants anticipatory bail/bond at such reasonable terms and conditions that this honourable court may deem just and fit in the circumstances;
 - d. The honourable court be pleased to issue conservatory orders restraining the respondents, their servants, agents, junior officers and/or any other person from effecting or arbitrarily arresting, charging or harassing or otherwise however interfering with the applicants without conducting investigations and according them an opportunity to be heard to wit issuing them with summons to appear at any offices to record statements(s) and aid in investigations if need be.
2. The applicants' case is that they are the chiefs of Nguthi and Kanyuambora locations respectively, which areas are in the same neighborhoods thus they work together often in combating illegal activities including selling of illicit brew and drugs. That their reports on these illegalities were always made to Kanyuambora Police Station with copies made to Director of Criminal Investigations, Siakago and Assistant County Commissioner Kanyuambora Division. That one of the suspected perpetrators of selling illicit brew has been observed interacting socially with the Officers Commanding Kanyuambora and Ishiara Police Posts. That the said suspect has on several occasions called the applicants telling them that they should know people. That the applicants have been intimidated by ACC, DCIO and OCS, Ishiara, who have threatened to deal with them and to show them how to operate within their mandate. That the applicants are aware that the illicit brew suspect working with the OCPP and OCS booked a report against the applicants which action has caused the applicants to be apprehensive that the OCPP and OCS intend to use the report to, inter alia, arrest the applicants with the intent of teaching them a lesson, thereby abusing their power.
 3. The application was contested by the 1st respondent who filed grounds of opposition arguing that the application does not meet the threshold for grant of anticipatory bail and conservatory orders.
 4. The court certified the matter as urgent and issued temporary orders. The parties were directed to file and exchange their written submissions. Only the 1st respondent complied.
 5. The 1st respondent in its submissions stated that the issue for determination is whether or not the applicants have met the threshold for grant of the relief of anticipatory bail and conservatory orders. In making its case on this, reliance was placed on the case of *Paul Ole Kuyana & another v Director of Public Prosecution & 2 others* [2021] eKLR where the court discussed circumstances under which this relief may be granted. They also relied on the case of *Republic v Chief Magistrate Milimani & another exparte Tusker mattresses Ltd & 3 others* (2013) eKLR where the court warned against granting this relief where to do so would curtail the powers of the police to carry out investigations. It was their case that the applicants had never been called to a police station on any allegations levelled against them, thus their apprehension is unfounded.
 6. Further, the 1st respondent reiterated the provisions of article 29 of the *Constitution* of Kenya 2010 and insisted that the applicants ought to demonstrate to the court that their rights and freedoms are at the risk of being violated if the relief is not granted. In addition, they relied on the case of *Mandiki Luyeye v Republic* [2015] eKLR to reaffirm their position on the unsubstantiated nature of the applicants' apprehension.
 7. In my view, for this court to determine whether or not the relief sought can be granted by this court, it is important to understand the circumstances under which the relief can be granted. To begin with,



it is noteworthy that besides the Constitution, there is no express legislation governing application of anticipatory bail. Article 29 of the Constitution of Kenya 2010 provides as follows:

“Every person has the right to freedom and security of the person, which includes the right not to be-

- a. deprived of freedom arbitrarily or without just cause;
- b. detained without trial except under a state of emergency in which case the detention is subject to Article 58;
- c. subjected to any form of violence from either public or private sources;
- d. subjected to torture in any manner, whether physical or psychological;
- e. subjected to corporal punishment in a cruel, inhuman or degrading manner.”

8. The court is also not completely blind on the subject as previous courts have spoken on the matter of anticipatory bail. I am guided by the case of Caroline Kuthie Karanja v Director Public Prosecutions & 2 others [2021] eKLR where the court held thus:

“In Kenya, there are no specific provisions on anticipatory bail save for the constitutional provisions under the Bill of Rights.

The Constitution of Kenya 2010 provides for;

- a. Bail of arrested person under article 49(1)(h)
- b. Appropriate relief under article 23(3) for breach of the Bill of Rights

In India a common law jurisdiction upon which our criminal procedure code is premised has a specific Section 438 on anticipatory bail which states as follows;

1. where any person has a reason to believe that he may be arrested on accusation of having committed a non bailable offence, he may apply to the High Court or to the court of session for a direction under this section that in the event of such arrest he shall be released on bail and the court may after taking into considerations, inter alia the following factors namely;
 1. The incident and gravity of the accusations
 2. The antecedents of the applicants including the facts as to whether he has previously undergone imprisonment or conviction by a court in respect of any cognizable offence
 3. The probability of the applicant to flee from justice and
 4. Where the accusation has been made with the object of injuring or humiliating the applicant by having him arrested, either reject the application forthwith or issue an interim order for grant of anticipatory bail.”

9. From the above citations, it is clear to me that the court ought to address the following issue:

- a. Whether or not the applicants’ apprehension is substantiated and is likely to end up with infringement of their fundamental rights if the relief is not granted.



10. The applicants stated that they have been threatened by the named state organs who are apparently working in cohorts with a suspect. In their supporting affidavit, they allege that the said suspect has in fact filed a report against them for alleged assault and has proceeded to procure a P3 form in support of his claim. The applicants also alleged that the officers from Ishiara Police Station are plotting to arbitrarily arrest them following this report on assault. The applicants have also expressed that they fear because the state organs in question have on several occasions verbalized their threats and intimidation saying something to the effect that the applicants should be shown how far they can go with their work.
11. I note that the threat of arbitrary arrest emanates from the applicants' line of work but could potentially deny them their fundamental rights under article 29 of the Constitution. However, it must be demonstrated that the impending violation is very likely to occur, or has been attempted before, or that the applicants have substantial proof that the respondents are indeed intending to act in violation of the fundamental rights. In the case of Henry Kaskon Mwachi & 2 others v Republic & another [2020] eKLR it was held:

“The courts have stated the terms under which a person may be granted anticipatory bail. In Gladys Boss Shollei v Attorney General & 3 others [2015] eKLR, it was said that: “Anticipatory bail shall be granted only when an applicant demonstrates that his constitutional right has been violated or is likely to be violated...”

In the same case, the court ended up denying this relief to parties who were merely fearing arrest and nothing else. The court in its determination went on to say:

“..As properly submitted by the respondents, if the applicants were to be arrested they would be arraigned in court, as required by the law, before the lapse of 24 hours, and would be afforded an opportunity to seek for bail or bond from the court. The police can also bail them out if need be. In any event, the mere fact that they are required at the police station does not mean that they will have to be arrested. The applicants have not demonstrated that the police are looking for them with a view to arresting and charging them in court with some offence. The applicants are merely apprehensive that they will be arrested. I am not persuaded, in the circumstances, that the applications meet the required threshold for grant of anticipatory bail, and I hereby dismiss them.”

12. The said apprehension is against state organs that are tasked with protecting the applicants' fundamental right. I am guided by the case of W'Njuguna v Republic (2004) eKLR where the court stated that such orders are granted only: -

“...when there are circumstances of serious breaches of a citizen's rights by an organ of the state which is supposed to protect the same.”

13. In granting this relief, the court is urged to apply it cautiously as stated in the case of Shakeel Ahmed Khan & another v Republic & 5 others [2019] eKLR the court held:

“...An applicant must however demonstrate to the court existence of circumstances that give rise to serious breaches of, or threat to, his fundamental rights. Only then will this court exercise its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual. While considering this application for anticipatory bail, the court must ask itself whether the respondents have abused their powers to the detriment of



the applicants and whether the intervention of this court in exercise of its supervisory powers is necessary to prevent the abuse.”

14. While noting the seriousness of the allegations in this application, I am not convinced that the applicants have demonstrated to this court that they are not merely afraid of being arrested and charged. In fact, I am of the view that even if the applicants are eventually arrested, the opportunity to apply for bail will still be available to them to explore.
15. In the upshot, I find that the application lacks merit and is hereby dismissed.
16. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF AUGUST, 2023.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondents

