



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION NO. E001 OF 2021

RONO ELIAKIM KIPCHIRCHIR.....1ST APPLICANT

JOSHUA KIPMOI TERER.....2ND APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

RULING

[1] The two applicants, **Rono Eliakim Kipchirchir** and **Joshua Kipmoi Terer**, approached the Court vide their Notice of Motion dated **4 January 2021**, praying for orders that the Court be pleased to admit the applicants to bail pending the institution of criminal proceedings or any charges that may be preferred against them. They also prayed that:

[a] the respondents through their enforcement agents, the Kenya Police Service and/or its officers, be barred from harassing, threatening and/or arresting or attempting to arrest or hold the applicants in custody pending the hearing and determination of this application and/or further orders of this Court; (spent)

[b] the applicants be bonded to attend court on a specified date or pending investigations, if any;

[c] the Court be pleased to make any further or other orders it deems fit and just under the circumstances so as to meet the interest of justice.

[2] The application is premised on the grounds that the 1st applicant is a teacher at Kokwet Secondary School, while the 2nd applicant is a businessman within Kapsabet Town in the Republic of Kenya and a friend to the 1st applicant; and that the 1st applicant has an assault case against the village elder by the name **Charles Kipyego** and his children in which the 2nd applicant is a witness; which case was reported at Mosoriot Police Station. It was further averred that, to arm-twist the 1st applicant to drop the assault case, the village elder, in collusion with the police as Mosoriot Police Station, variously arrested the two applicants on **21 December 2010** and **28 December 2020** for no apparent reason; only to release them without being booked or charged. That the village elder then informed them that they would be arrested early in the new year.

[3] Thus, the applicants are apprehensive that they would be arrested on Friday for undisclosed offence; and that the intended action is ill-motivated and intended to trample on his rights under **Article 49 and 50** of the **Constitution of Kenya**. They further averred that they are ready and willing to comply with any terms or conditions that the Court deems fit and just to impose; and that their application has been brought timeously and in good faith. The applicants jointly swore an affidavit on **5 January 2021** in support of the foregoing assertions, and on the basis thereof, **Mr. Tunoi**, learned counsel for the applicants, urged the Court to allow their application and grant the orders sought. He relied on **Patel Ravji Lalji & Another vs. DPP & 2 Others** [2020] eKLR to support his oral arguments.

[4] **Ms. Kegehi**, learned counsel for the State, opposed the application. She relied on the Replying Affidavit sworn on **25 January 2021** by **PC/W Christine Achieng**, wherein it was averred that the applicants are suspects in a case of gang rape that she is investigating and have been at large since **19 December 2020** when the incident occurred. She further averred that she has since arrested and charged one suspect in the matter; and that the case is pending before Kapsabet Law Courts as **CF S.O.E 100/2020**. Thus, while **PC/W Achieng** denied any knowledge of the assault case in which the village elder, **Charles Kipyego**, is a suspect, she conceded that the said village elder is a witness in the gang rape case.

[5] On the basis of the averments in the Replying Affidavit, **Ms. Kegehi** urged the Court to find that the instant application has not been brought in good faith, and therefore should be dismissed and the applicants ordered to present themselves at Mosoriot Police Station to assist with investigations in respect of the allegations of gang rape.

[6] There is no gainsaying that, in the exercise of its functions pursuant to **Article 165(3)(b)** of the **Constitution**, the High Court has powers to make such orders as are necessary in the interest of justice. Indeed, **Section 23(1)** of the **Constitution** is explicit that:

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

[7] Applications for anticipatory bail fall in the aforementioned category. Indeed, long before the promulgation of the **2010 Constitution**, it was plain that anticipatory bail is available as a means of forestalling threatened violation of the right to liberty. Thus, in **Samuel Muciri W’Njuguna vs. Republic** [2004] eKLR it was held that:

“...it cannot be said that an individual in the Kenya of today cannot be granted anticipatory bail or bail pending arrest when he is in fear that his fundamental rights as to liberty and freedom has been breached. The Constitution of Kenya guarantees that under the provisions of protection of fundamental rights.

The simple reading of provisions of section 84 (1) & (2) of the Constitution shall reveal that the High Court while hearing an application wherein contravention or likely (emphasis ours) contravention of provisions of sections 70 to 83 (fundamental rights), may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the above said sections.

If the police have contravened or is likely to contravene the rights of liberty of a citizen for ulterior purpose, an anticipatory bail should be an appropriate order to be granted.

[8] Nevertheless, mere allegation or apprehension of breach will not do. An applicant, in such case as this, must satisfy the Court that, viewed objectively, his apprehension is warranted. Accordingly, in **the Judiciary Bail and Bond Policy Guidelines**, it is suggested thus at **Paragraph 4.29:**

“The High Court may grant anticipatory bail, that is, bail pending arrest, provided the applicant demonstrates that his or her right to liberty is likely to be compromised or breached unlawfully by an organ of the state that is supposed to protect his right. Further, the applicant must demonstrate that the apprehension or arrest is “real and not imagined or speculative.”

[9] In the instant matter, the two applicants averred that they have twice been arrested and released without being informed of the reason for their arrest. They fear that their impending arrest is intended to thwart the prosecution of the village elder, one **Charles Kipyego**, for assault. They however failed to demonstrate that indeed there is an ongoing prosecution of the said village elder, or even that a complaint has been lodged by them against him. On its part, the ODPP has shown, vide the affidavit of **PC/W Christine Achieng**, that the two applicants are suspects in a case of gang rape in respect of which one suspect has already been charged. It is therefore obligatory for the two suspects to present themselves to the investigating officer at Mosoriot Police Station in connection with those ongoing investigations. Indeed, in **Samuel Muciri W’Njuguna vs. Republic** it was observed that:

The right to anticipatory bail will not give a person a right not to appear before the police or any authority who would wish to question a person in connection with the commission of an offence. In the circumstances therefore anticipatory bail can only be granted upon terms that are appropriate under the circumstances of each case. In granting anticipatory bail, the High Court would be exercising its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual.

[10] In the result, there being no indication that the respondents acted illegally or oppressively, it is my finding that the applicants have not made out a good case for anticipatory bail. It is accordingly ordered that they present themselves at Mosoriot Police Station during working hours on any day of the week; at any rate not later than **22 February 2021**, failing which the police shall be at liberty to look for and arrest them, if need be.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF FEBRUARY 2021

OLGA SEWE

JUDGE