



**Mohamed v Inspector General of the National Police Service & 2 others
(Petition E060 of 2021) [2021] KEHC 446 (KLR) (27 April 2021) (Judgment)**

Neutral citation: [2021] KEHC 446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E060 OF 2021
JM MATIVO, J
APRIL 27, 2021**

BETWEEN

AWEYS AHMED MOHAMED PETITIONER

AND

**INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

JUDGMENT

1. The Petitioner states that he has 4 active criminal cases against him in Mombasa and Malindi as listed in paragraph 5 of the Petition which are at various stages of trial before different Magistrate's courts in which the trial courts have imposed different conditions of bond/bail terms as a condition for releasing him.
2. He states that he has been consistently attending court as and when required but he has run out of securities or cash to deposit as security. He states that all the securities and cash he has deposited in court are sufficient to secure his release pending trial on any bailable charge against him in any court across the country. He avers that requiring him to provide further securities to secure his attendance at the trial while the court is still holding his other securities imposes upon him a harsh, severe and unreasonable conditions for bail and impedes on his right to access justice. He avers that he is not urging the court to stop police investigations against him or to address the merits of the criminal cases but he seeks anticipatory bail.
3. He prays for a declaration that requiring him to provide further securities to the court to secure his attendance at the trial while the same court is holding his other securities in the other cases imposes a harsh, severe and unreasonable conditions for bail upon him which impedes his right to accesses



justice in the cases listed at paragraph 5 of his Petition. He also prays for a declaration that the chief Magistrates Court in Mombasa and Malindi holds any/all his securities, so he is not required to deposit additional security as a condition for his release pending trial on any bailable charge against him in any court across the country.

4. Further, he prays for a conservatory order restraining the 1st Respondent and officers under his command from detaining him and or in any other way interfering with his right to liberty and or freedom of movement so long as the chief magistrate's court in Mombasa and Malindi holds any or all of his securities. He prays for any other or further just and expedient relief as the court may deem fit to grant. Lastly, he prays for costs.
5. The 1st and 3rd Respondent did not file any response or submissions. However, they relied on the submissions filed by the 2nd Respondent. The 2nd Respondent filed grounds of opposition dated 21st December 2021 sating that this court has no jurisdiction to entertain this matter, that the Petition is misconceived, un sustainable, and that the Petitioner has not proved breach of rights or breach of the Constitution.
6. In her submissions, the Petitioner's counsel cited *Daniel Kibet Mutai & 9 others v Attorney General*¹ in support of the proposition that the facts as presented in this Petition stand uncontroverted. She argued that the main purpose of granting bond is to ensure that an accused person attends trial and that unless there are grounds to suggest that he will abscond, the bond terms must be reasonable and affordable. She cited Article 22 of the *Constitution* in support of the submission that a person can approach the court citing threat of violation of constitutional rights. She posed the question whether it would be oppressive for the court to require that the Petitioner provides more securities when he has exhausted all that he has. She relied on *R v Big M Drug Mart Limited*² which underscored the need for a purposive interpretation of the Constitution and urged this court to adopt a generous interpretation to protect the Petitioner's rights because he has no more securities to offer. She also submitted that the Petitioner is not a flight risk.
7. The 2nd Respondent's counsel cited *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others*³ and *Anarita Karimi Njeru v Republic*⁴ and submitted that it does not suffice for the Petitioner to just state that his rights have been violated but he has a burden to demonstrate breach of rights. She also relied on *David Mathu Kimingi v SMEC International PTY Limited*⁵ in support of the holding that a Petition must raise issues touching on violation of the Constitution. Additionally, she cited *W'njuguna v Republic*⁶ and *Mandiki Luyeye v Republic*⁷ both of which held that anticipatory bail would be granted when there are circumstances of serious breaches of a citizen's rights by an organ of the state and argued that this has not been proved. She submitted that in granting anticipatory bail, a court must not be seen to be abusing its powers. Lastly, counsel cited *Kipoki Oreu Tasur v Inspector*

¹ [2019] e KLR.

² [1985] 1 SCR 295.

³ [2014] e KLR.

⁴ [1979] KLR 154.

⁵ [2021] e KLR.

⁶ [2004] e KLR.

⁷ [2015] e KLR.



*General of Police & 5 others*⁸ which held that the criminal justice system should be allowed to function as it should with no interference from courts except in the clearest circumstances in which violation of the fundamental rights facing trial is demonstrated.

8. In addressing the reliefs sought, it is useful to recall that the Petitioner admits that he is facing 4 criminal cases pending in different courts. From the nomenclature of the orders sought, the applicant is simply seeking Anticipatory bail. However, anticipatory bail is granted only where there is a threat of arrest and detention in violation of rights. A Petitioner must demonstrate he is under threat to be arrested and detained in breach of his rights. Anticipatory bail is not meant to be a shield against lawful confinement. There is nothing to show there is an impending illegal arrest and an illegal confinement. In fact, the question of bail should the Petitioner be arrested can be dealt with at the Police station or before the trial court or by the High Court on appeal or revision on a case to case basis.

9. The other important question is whether the Petition discloses a reasonable cause of action. Useful guidance can be borrowed from *Elizabeth v President Court of Appeal & Anor*⁹ in which the Court was invited to find whether the Petition disclosed a reasonable cause of action in a case where the Petitioner had petitioned the Constitutional Court for an alleged breach of his right to a fair hearing by the Court of Appeal. In coming to its determination the Court held as follows: -

“In *Bessin v Attorney-General* [1950] SLR 208 a decision of the Court of Appeal of Mauritius, sitting on appeal from a decision of the Supreme Court of Seychelles, it was held that any such inquiry must be limited to the allegations contained in the pleadings and that no extraneous evidence was admissible. Secondly, that only in plain and obvious cases should the court resort to the summary process of dismissing an action. In that particular case the court held it could not be said to be beyond doubt that no cause of action arose.”

10. The Court in *Elizabeth* also held that in order for the Petition to disclose a cause of action it must show that the Petitioner: (a) Enjoyed a Constitutional right; (b) The right has been violated or is under threat of being violated; and (c) The defendant is liable for the said violation. A cause of action would not be reasonably disclosed if any of the above-mentioned elements are absent or non-existent. To secure anticipatory bail, a Petitioner must demonstrate a real threat to be arrested and confined illegally. The fear that he cannot afford bail cannot suffice.

11. I agree with the following dicta in *Chokolingo v Attorney-General of Trinidad and Tobago*¹⁰, where Lord Bingham stated:

“It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the constitution be an effective instrument. But Lord Diplock’s salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected.”

12. Borrowing from the above dicta, if arrested and charged as the Petitioner seems to suggest, the trial court will be better placed to consider reasonable and affordable bail terms and if need be, the Petitioner

⁸ [2014] e KLR.

⁹ (SCA 2/2009) [2010] SCCC 2.

¹⁰ [1981] 1 WLR.



can approach the superior court. This court cannot at this stage determine reasonable bail terms in abstract or issue blanket orders which have the effect of shielding the Petitioner from undisclosed possible arrests. This Petition does not disclose any reasonable cause of action. The Petitioner is on fishing expedition. I dismiss the Petition with no orders as to costs.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF APRIL
2022**

JOHN M. MATIVO

JUDGE

