



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CRIMINAL APPLICATION NO. E021 OF 2021

1. FARID AHMED SWALEH alias FARID AHMED SWALE

2. AMIR AHMED SWALEH.....PETITIONERS

VERSUS

1. INSPECTOR GENERAL OF POLICE

2. DIRECTOR OF CRIMINAL INVESTIGATIONS

3. OFFICER COMMANDING POLICE STATION CENTRAL POLICE

4. DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENTS

RULING

1. The Appellants Farid Ahmed Swaleh and Amir Ahmed Fared by a Notice of Motion dated 19th March 2021 sought to be granted leave to commence court proceedings on the grounds that their rights or fundamental freedom granted under the Bill of rights has been denied, violated or infringed or threatened;

§ That the applicants be granted anticipatory bail and/or bail before arrest or charging in court and or to pay reasonable bail/bond to appear in court, on a date to be ordered by the Court.

§ The applicants also sought that an order do issue that they be presented to court by their advocate.

2. The application was supported by the grounds on the face of the application and supporting affidavit shown by Husna Rashid Al-Naaman the wife of the 1st Applicant and the mother of the 2nd applicant. The deponent said her husband and son were out of the country in United Arabe Emirates where the 1st Applicant was undergoing treatment since November 2020.

3. She averred that the applicants in their absence and without their knowledge was charged in court with an offence arising out of complaint lodged by Abubakar Joho. The deponent sought for court protection for her husband upon return to the country as there is a warrant of arrest pending execution in court.

4. The Respondents opposed the application through Replying Affidavit shown on 26th March 2021 by Chief Inspector Adam Adikar Ibrahim in which he averred that he was the Investigating Officer in Mombasa Chief Magistrates Court CR. Case No. E126 of 2021 Republic vs Farid Ahmed Swaleh and Amir Ahmed Farid.

5. He averred that the applicants were charged on 27th January 2021 but they failed to attend court to take plea and warrants of arrest were issued. That when the applicants failed to attend court on 23rd February 2021 the matter was withdrawn under Section 87(2) Criminal Penal Code and warrants remained in force.

6. The investigating officer averred that the applicants were aware of investigations that led to their being charged as the 2nd applicant recorded a statement – Annexure AA 1. He further averred that the charge was preferred following Complaints made as per annexure AA1 2 and that even the 1st applicant went to Regional DCI Headquarter for purposes of recording a statement but declined to do so after interview and interrogation.

7. That 1st applicant was fully aware of intention to charge him by the time he left the county on 25/11/2020 and was thus fleeing from the country in an effort to evade arrest and charge. That the 2nd applicant went underground and he was being traced.

8. The Investigating Officer averred further that if the applicants are arrested they will be arraigned in court promptly within 24 hours as provided by the constitution. It was argued that right to bail does not give any one a right not to appear before police or any other authority who would wish to question them in connection with commission of an offence. That there is no reason why the applicants would fail and or neglect to submit themselves to court to answer charges.

9. It was contended that applicant's claims of harassment are unfounded and baseless as no threats have been made to the applicants. The application was canvassed by way of oral submission in open court.

10. I have considered the application and supporting affidavit as well as the Replying Affidavit by Respondents opposing the application and respective submissions and it is not shown that the applicants had been served with a notice to attend court for purposes of taking plea.

11. The Respondents were aware that the 1st Applicant had travelled out of the country by the time they lodged the charge sheet in Mombasa CMC CR. Case No. E126 of 2021. This court finds that the applicant's fears are therefore valid that the Respondents intend to execute a warrant of arrest which was issued when they failed to attend court and yet they had not been issued with a notice either to attend to the investigating officer or attend court.

12. From the averments of the deponent of the Replying Affidavit the Complainant had recorded a statement as well as 2nd appellant and there is no indication there is need of having applicants spend at the station merely for purpose of fulfilling the 24 hours constitutional provision. There must be a legal and a good reason why a person should be detained even for one minute at the police station.

13. In the circumstances the application to secure the freedoms of applicants is hereby allowed. The wife of the 1st applicant and mother to 2nd applicant is hereby ordered to file a written undertaking to the effect she will as company of the applicants advocate avail the applicants in court within the next 14 days to take plea for the offence for which they had been charged in CR. Case No. E126 of 2021.

14. The Investigating Officer Chief Inspector Adam Adikar Ibrahim is also ordered to prepare fresh charge sheet and lodge in court on 10th June 2021.

15. Regarding the 1st prayer seeking leave to commence court proceedings on the ground that rights or fundamental freedom granted under Bill of Rights has been denied, violated or infringed or threatened, no law provides for such procedure. The applicant is therefore at liberty to lodge constitutional petition without leave of the court.

16. Each party will bear their own costs of the application.

Dated, signed and delivered in open court at Mombasa this 27th day of **May, 2021.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE