



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 106 OF 2020

SIMON MWANIKI.....1ST APPLICANT

LUCY NJERI.....2ND APPLICANT

GEORGE KANYUA.....3RD APPLICANT

VERSUS

DPP.....1ST RESPONDENT

DCIO.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

RULING

1. The application before me is the Notice of Motion dated 1st September 2020. It seeks orders;

1. THAT this application be certified as urgent and service thereof be dispensed with in the first instance.

2. THAT the honourable court be pleased to grant the applicant anticipatory bail pending arrest, investigation or charge on such terms the court may deem fit to impose.

3. THAT this Honourable Court be pleased to issue a conservatory order restraining the Respondents, their Servants, Agents, junior officers and/or anybody from effecting and/or anybody from arresting, harassing and or otherwise however interfering with the Applicants herein pending the hearing and determination of this application in the matters related to GILANIS SUPERMARKET LIMITED & M AND N ENTERPRISES.

4. THAT the costs of this application be provided for.

5. THAT this court be pleased to make further orders as it may deem fit and expedient.

It is brought under **Article 2, 3, 10, 19, 20, 21, 22, 23, 28, 29 and 159 of the Constitution, Section 123 (1) of the Civil Procedure Code Cap 75 Laws of Kenya and all enabling provisions of the Law.**

2. It is supported by the separate affidavits of the applicants of the 1st and 3rd sworn on 1st September 2020, for the 2nd undated.

3. The delay in determination of the matter was caused by the fact that the ODPP had been served but the 2nd and 3rd respondents had not been served.

4. The ODPP filed Grounds of Opposition on 9th November 2020, the 2nd and 3rd respondents did not file any responses despite service.

5. The applicants through their counsel Elizabeth Wangari & Co. Advocates filed written submissions on 1st December 2020. It is when the court was writing its Ruling that it became evident that the 2nd and 3rd Respondents had not been served.

6. The only issue for determination is whether this is a case that warrants the issuance of anticipatory bail.

7. The applicant's position is that 1st and 2nd applicants carry on business in the name of M & N Enterprises and have had business with Gilanis Supermarket Limited (Gilanis) since 2015. That in their trade they obtain goods from Gilanis on credit and pay for them periodically, however due to the Covid 19 Pandemic the 1st and 2nd applicants have fallen back on repayments and they admit that M & N Enterprises owes Gilanis money for goods supplied.

8. That on 28th August 2020 the head of security from Gilanis invaded M & N premises in the company of police officers with a view of arresting the 1st and 2nd applicants. On failing to find them they arrested their two employees namely Clarine Wangui and Sarah Wanjiru Njuguna and their son the 3rd applicant, who was a University student at the material time.

9. That the two were released on police bond of Kshs. 20,000/= and the 3rd applicant was released on cash bail Kshs. 10,000/=. The two (2) employees were directed to report at police station on 31st August 2020 and their bonds were extended to 14th September 2020. For the 3rd respondent, upon reporting on 31st August 2020 as required he was directed to report on 4th September 2020, a Friday.

10. According to the 1st and 2nd applicants these arrests were meant for them, because their son and two (2) employees were continuously harassed by the police while in the police custody to reveal their whereabouts. They are apprehensive that the reason their son, 3rd applicant was required at the police station on a Friday was so as to harass him further on the whereabouts of the 1st and 2nd applicants.

11. That being apprehensive of their arrest by the police, the two of them had fled their home, and brought this application because the respondents were likely to violate their fundamental rights and freedoms enshrined under the Constitution, detain them in circumstances which disclose a civil case as opposed to a criminal offence.

12. The 3rd respondent annexed documents to show that he was a student at Kenyatta University and was not connected to the business.

13. The applicants annexed to their affidavits inter alia notices to compel attendance issued vide **Section 52(1) of the Police Service Act 2011** to both employees and 3rd applicant, which indicated the reason as, "**Issuing a bad/bouncing cheque.**"

14. The applicants rely on **Article 49 (i) (h) of the Constitution, Kipkerich Koskei vs DPP & 2 Others [2018] eKLR, Susan Mbinya Musyoka vs Inspector General of Police & Another [2010] eKLR** on reasonable apprehension & **W'Njuguna vs Republic [2004] eKLR** on circumstances under which anticipatory bail is to be issued, and its import, and the wide discretion that was given to the High Court by the **Section 82 of the retired Constitution.**

15. Counsel submitted that this court was vested with discretion to grant anticipatory bail to protect the applicant's fundamental rights and freedoms guaranteed under **Chapter 4 of the Constitution of Kenya 2010**, that the granting of the orders sought would not undermine the mandate of the respondents in their respective functions. That no compelling reasons had been issued to warrant the denial of the applicants of anticipatory bail on conditions the court would consider fit in the circumstances of the case.

16. The issue then is whether the applicants are entitled to the prayers sought.

17. **Article 49 of the Constitution** speaks on the Rights of Arrested Persons. **49(1)** states: ***An arrested person has the right;***

(h) to be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released."

18. It is very clear from the wording of **Article 49** that these rights accrue to a person who is already under arrest, an arrested person. The police officers upon arresting any person are required to comply with the provisions of this article; tell them why they have arrested him among others. In this case the three (3) persons who it is alleged were arrested, it is apparent from the annexed Notices that the reason given was for issuing a bad cheque. It can be seen on the notice to compel attendance, and it would appear that this is the reason why the police were looking for the other applicants. That besides at **Article 49(1) (f) if a person is arrested they are to be brought before a court within 24 hours of arrest unless the 24 hours fall outside the ordinary court hours.**

19. Hence in the event that the applicants were arrested the police the police were duty bound to either release them on bond, avail them in court within twenty four (24) hours, or seek the courts permission to hold them for longer.

20. The applicants also rely on **Article 28 (right to human dignity) and Article 29, (freedom and security of the person).**

28. Every person has inherent dignity and the right to have that dignity respected and protected

29. 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 during 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; or

(f) treated or punished in a cruel, inhuman or degrading manner.”

Key here is the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial.

21. From the facts placed before me it would appear that the police had reason to look for and arrest the 1st and 2nd respondents because there is an offence known as issuing a bad cheque under **Section 316 A of the Penal Code**, and while the facts of the complaint to the police are not before me it can be deduced from the affidavits of the 1st and 2nd respondents that they do owe Gilanis money for goods supplied and not paid for. It also appears that they issued bad cheques to Gilanis resulting in a complaint that led the creditor to bring the police to look for them.

22. **Section 193 of the Criminal Procedure Code** is clear, that;

“Criminal and Civil Proceedings can go on concurrently: the fact that any matter in issue is a criminal proceeding is also directly or substantially in any pending proceedings, shall not be a good ground for any stay, prohibition or delay in criminal proceedings.”

23. Clearly therefore the argument by the 1st and 2nd applicants that the set of facts herein disclose a civil case, and the attempts by police to arrest them amounted to harassment is untenable. If there is a criminal element in it, nothing would stop the respondents from proceeding to arrest the 1st and 2nd applicants and charge them with the said offence.

24. Hence, I find the authorities cited distinguishable.

25. **Section 52 of the National Police Service Act** allows a police officer to require any person, in writing, if they have reason to believe that person has information which may assist in investigation of an alleged offence, to appear before him at the police station. None of the applicants annexed the police bond or cash bail receipts to show that they had actually been arrested and had been released on bond or bail as alleged. The only thing that was annexed to the affidavits were the notices to compel attendance, and hence the claim of having been arrested and subsequently released on police and cash bail is not supported by any evidence, and what I have are the notices to compel attendance, which the police were legally allowed to issue.

26. Finally, I have put my mind to the authorities cited, and note that parties rely on **Article 49** for the anticipatory bail.

27. Anticipatory bail was really necessary in this country in the dark days when one could be arrested and detained for days and months without any reason and, without trial and sometimes for trumped up non bailable offences.

28. That changed with the promulgation of the **Constitution of Kenya 2010** through which we the people put in measures to bring to an end those dark days. The **Bill of Rights** at **Article 25** provides that certain fundamental rights and freedoms shall not be limited, **Article 28**, guarantees the right to human dignity and **Article 29**, freedom and security of person whereby everyone has the right not to be deprived of their freedoms arbitrarily or without just cause.

29. To achieve this the framers of our Constitution demarcated the lanes for law enforcers, giving them powers needed to carry out their jobs, while at the same time keeping them within the binding boundaries of the Constitution and the Bill of Rights. **Article 20** clearly speaks to this: It states:

Application of Bill of Rights

(1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom

To this end the respondents have clear mandates both constitutional and statutory.

30. Have these mandates been crossed? The evidence available before me does not lend itself to the alleged intended violations. It only indicates that the police had reason to look for and arrest the 1st and 2nd applicants for issuing bouncing cheques, a misdemeanour under the **Penal Code**. There is no evidence of malice or abuse of power as the action taken against the three was documented by the police. And in fact one year down the line there is nothing to show that the police had any malice as none of the applicants have been arrested as feared.

31. In concluding, let it be clear that it is the Constitutional duty of this court to go to the lengths and breadths of the Constitution to protect the rights and fundamental freedoms of Kenyans where need be, but is always alive to its obligation to not to curtail the other organs of state from carrying out their constitutional duties, a very delicate balance. This is the delicate balancing act this court is expected to carry out every time while dealing with matters of this nature. To that end I am in agreement with **Odunga J** in **Agnes Ngenesi Kinyua a.k.a Agnes Kinyua vs DPP & Another 2019 eKLR**.

64. In other words, the police and the prosecutors must not exercise their powers with a view to extracting revenge or maliciously. To effect an arrest of a citizen after hours on a Friday in order to avoid arraigning him in court till after he has spent a number of days in custody without any justification for doing so, in my respectful view, amounts to abuse of power. The practice that is ominously gaining ground in this country otherwise infamously known as “kamata kamata Friday arrests” whereby suspects are deliberately arrested on Fridays and kept in police custody over the weekend must not be permitted to take root. To do so, in my respectful view, amount to chipping away at the democratic gains achieved in this country since the promulgation of the Constitution of Kenya, 2010. It would in effect take the country back to the dark days when suspects faced frivolous capital charges aimed at unlawfully incarcerating them with a view to achieving extraneous objectives, thereby unjustifiably denying them of their liberty. The attempt to claw back at non-existent powers ought to be restricted at all costs by the courts which are the temples of justice in this country. As was held in Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 ([2008] 2 KLR (EP) 565:

“The High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system...In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend...In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.”

65. Hand in hand with this is the practice of arraigning suspects in court and applying for their incarceration for 14 days. In my view, it is only in exceptional circumstances where there is evidence preferably by way of sworn affidavit, that the liberty of a suspect ought to be denied on the ground that investigations are ongoing. Courts ought not to be used by investigating agencies as holding grounds for suspects while they are conducting investigations. Ordinarily suspects ought only to be brought to court after investigations are finalised in which event the only issues that can fall for determination are the conditions for release of the suspects.

32. Hence in the end the petition must fail.

33. The applicants need only present themselves to the police with their counsel. The alleged offence for which the police were looking for them is a misdemeanour and the OCS is empowered to grant them a police bond pending investigations or charge before court.

34. The petition is dismissed. Each party to bear its own costs

35. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA ZOOM THIS 30TH JUNE 2021.

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

Court Assistant Edna

Mr. Ouma for Mrs Mukira

Elizabeth Wangari

N/A for The Attorney General

Ms. Murunga for DPP

Office of the DPP

nakuru@dpp.go.ke