REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL REVISION NO. 208 OF 2020

SUDI OSCAR KIPCHUMBA.....APPLICANT

VERSUS

REPUBLIC (Through National Cohesion &

Integration Commission).....RESPONDENT

RULING

1. Sudi Oscar Kipchumba ("Applicant") is a Kenyan citizen. He presented himself to the Police on 13th September, 2020 after learning that the Police were looking for him and after the Police had "camped" outside his home the previous few hours. The Applicant's home is in Kapseret – where the Applicant also happens to be the area Member of Parliament (MP).

2. Upon his surrender at Langas Police Station in Uasin Gishu County, the Applicant was brought to Nakuru Central Police Station. The following day, he was presented before the Chief Magistrate, the Learned J.B. Kalo in ***Nakuru Misc. Crim. Application No. 330 of 2020: Republic v Sudi Oscar Kipchumba***. The Republic, through the National Cohesion & Integration Commission (NCIC) sought leave of the Court to detain the Applicant for fourteen (14) days to give it an opportunity to conclude investigations and bring charges against him.

3. In its Application in the Lower Court, the Republic stated that it is doing investigations with a view to bringing five charges against the Applicant as follows:

a. Hate speech contrary to section 13(1)(a) of the NCIC Act;

b. Assault of a Police Officer contrary to section 103(a) of the National Police Act.

c. Offensive Conduct contrary to section 94(1) of the Penal Code;

d. Unlawful possession of firearms and ammunition contrary to section 89(1) of the Penal Code; and

e. Resisting arrest contrary to section 103(a) of the National Police Service Act.

4. The Learned Magistrate heard both parties and reserved a ruling for 16th September, 2020. In his considered ruling, the Learned Magistrate held that the Republic had made out a case for the continued detention of the Applicant for a further period of seven days.

5. The Applicant believes that the decision by the Learned Magistrate is patently erroneous and amenable to revision or review by this Court pursuant to the provisions of Article 165(7) of the Constitution, sections 123(3), 362 and 364 of the Criminal Procedure Code. He has, therefore, filed the instant Application dated 17/09/2020 seeking the following prayers:

a) THAT this Application be certified urgent and service of this Application be dispensed with in the first instance.

b) THAT pending the hearing and determination of this Application inter partes, this Court be pleased to admit the Applicant herein, HON. SUDI OSCAR KIPCHUMBA, to bail/and or bond on such reasonable terms as the court shall deem fit.

c) THAT the honourable Court be pleased to call for and examined the record of Hon Magistrate in NAKURU MISC. CIVIL APPLICATION NO. 330 OF 2020 REPUBLIC VS HON. SUDI OSCAR KIPCHUMBA for the purposes of satisfying itself as to the correctness, legality and propriety of the orders of the Court issues on 16th September, 2020.

d) *Any other orders this Honorable Court may deem fit and just to grant*

6. The matter was placed before me under Certificate of Urgency yesterday (17/09/2020). Owing to the nature of the subject matter and its urgency, I directed the Applicant's lawyers to serve the DPP and return today for *inter partes* hearing. In doing so, I considered it critical that I hear from the State before making any substantive or consequential decision on the matter.

7. As directed, the parties appeared before me today for oral canvassing of the Application. I have carefully considered the oral representations of the parties' advocates, the constitutional and statutory authorities cited as well as the decisional law quoted. I have also considered the skeletal submissions filed by the Applicant's lawyers. I am grateful to all the Counsel who addressed the Court – Mr. Nelson Havi, Mr. Nathan Tororei and Mr. Hillary Sigei on behalf of the Applicant and Mr. Daniel Karuri for the ODPP. Each one of them was resplendent in their blend of erudition and brevity.

8. I should begin by dealing with a potentially dispositive procedural matter raised by Mr. Karuri for the DPP: that it was a misstep for the Applicant to have approached the Court by way of revision as opposed to preferring an appeal. He argued that the Applicant is not really advancing arguments about the regularity or illegality of the proceedings but is dissatisfied with the decision by the Learned Magistrate. They, therefore, ought to have appealed against it.

9. Mr. Havi's response was that a revision was the appropriate step since no charge has been preferred against the Applicant yet – and in any event, as the Supreme Court has recently reiterated in ***Joseph Lendrix Waswa v Republic [2020] eKLR***, interlocutory appeals in criminal matters ought to be deferred until the final determination of the criminal trial. This is a path not open to the Applicant given the nature of the Applicant, he argued.

10. In ***R v Mark Lloyd Steveson [2016] eKLR*** I dealt with a variant of this question and held as follows:

> *In my view….[the Criminal Procedure Code provisions] do not, however, mean that a party which has a right of appeal cannot thereby invoke the Court's power to review a Magistrate's court's order or decision.*
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> *For clarification, it is important to state the trite position that the High Court will usually exercise its power to review or even exercise an appeal over an interlocutory matter before a magistrate's court only in exceptional circumstances. While difficult to determine with mathematical precision when the court will use this power, it is only be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), "grave injustice might otherwise result or where justice might not by other means be attained." As the authors correctly write, the Court will generally "hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below." Hence, the propriety of exercising revision power for interlocutory matters is decided on the facts of each case and with "due regard to the salutary general rule that appeals are not entertained piecemeal."*

11. In the present case, as the Applicant's counsel noted, there is no criminal trial yet. What is before the subordinate Court are "miscellaneous" proceedings where a ruling has been made to hold the Applicant in pre-charge detention. Both the terms of the Criminal Procedure Code as well as the radically liberalized revisionary powers of the High Court donated in Article 165 of the Constitution clearly permit the Applicant to approach this Court for revision as he did.

12. I will now turn to the substantive issue at hand. The singular question presented by this Application is whether in balancing the rights of the Applicant, the interests of justice and public order, peace and security, in the circumstances of this case, there are compelling reasons to warrant the continued pre-charge detention of the Applicant as the subordinate Court held.

13. In reaching the conclusion that such pre-charge detention is warranted, the Learned Magistrate reasoned as follows:

> ***….****[I]t was submitted on behalf of the Applicant [State] that the Respondent made certain utterances that the applicant says amount to hate speech, and which triggered demonstrations agains the Respondent and his release from custody at this particular moment will disturb public order, peace and security. The Court is invited to balance between pubic interest and the right of the respondent to be released on bond. In the peculiar circumstances of this case, the Court finds the public interest overrides the Respondent's right to be released on bond at this stage.*

14. A second reason the Court gives for the continued pre-charge detention of the Applicant is that the Applicant is likely to interfere with potential witnesses. The Learned Magistrate reasons thus:

> *The Respondent [Applicant here] is a Member of Parliament for Kapseret Constituency. It is clear from [the] commotion that occurred at the Respondent's home on the night of Friday, 12th September, 2020 when the Police attempted to arrest him that the Respondent is a person of immense influence and the likelihood of him interfering with witnesses is real. As was held in the case of Republic v Sebastian Miriti Samuel (2019) eKLR, if the accused can influence witnesses be it subtly or even through threats, it is a fact to be considered. The Respondent is likely to influence potential witnesses.*

15. The Applicant insists that the Court fundamentally misapprehended both the law and the facts in its analysis and findings. In particular, in both the documents he has filed before this Court as well as in the oral arguments of his advocates before me, the Applicant makes the following four points:

a. *First*, that the finding by the Honourable Court that it was in the public interest to detain the Applicant was an erroneous interpretation of the public interest matrix and inconsistent with the settled principles and thereby negates the fundamental rights,

freedoms and liberties as set forth under Article 29 of the Constitution. The Applicant argues that the Court's decision was not proportionate in balancing the rights and liberties of the Applicant against alleged public interest. The Applicant argues that our jurisprudence has now established that when individual liberties come into conflict with national security, it is the latter which must give way and not the other way round.

b. *Second*, that the Court breached the fair trial rights of the Applicant by stating merely on the basis of the State's affidavits, that the Applicant's utterances amount to hate speech.

c. *Third*, that it was an error for the Court to have held that the Applicant can be held in detention notwithstanding that there was no holding charge preferred against him. The Applicant argues that the Police have no authority in law to arrest and detain any person without sufficient grounds and without informing them of the reasons for his arrest as required under Article 49(1)(a) of the Constitution.

d. *Fourth*, that it was an error for the Court to conclude that the Applicant would interfere with unknown and undisclosed witnesses merely by the fact that the Applicant is a Member of Parliament for Kapseret Constituency and, therefore, influential. The Applicant argued, placing reliance on ***R v William Kipkorir Kipchirchir & Another [2018] eKLR*** and ***R v Dwight Sagaray & Others 2012 eKLR***, that "for the Prosecution to succeed in persuading the Court on this criteria (of interference), it must be place material before the Court which demonstrates actual or perceived interference" and that "just suspicions and fears harboured by the Prosecution" are not enough.

16. The State, on the other hand, supported the Learned Magistrates findings and conclusions insisting that it had persuaded the Court on the basis of the materials it placed before it that it was in the interests of public interest, security and order that the State is allowed to complete its investigations. Mr. Karuri argued that the State complied with Article 49(1)(g) and (h) of the Constitution because the State informed the Applicant the reasons for his continued detention which was that his immense influence in Kapseret would undermine efforts to record statements from potential witnesses.

17. Mr. Karuri argued that the State was still conducting investigations and that it was incumbent upon the Court to protect the integrity of the Criminal Justice System by ordering the continued detention of the Applicant until the investigations are complete since there is credible fear that he will undermine those investigations. Mr. Karuri submitted that the interest of justice demand the protection of the investigation process against probably hindrance by would be Accused Persons.

18. On the question why the State has not preferred a holding charge, Mr. Karuri argued that such a position would be untenable because such a charge would not be accurate in its particulars hence undermining the foundational principle of certainty of charges as provided in Article 134 of the Criminal Procedure Code.

19. Mr. Karuri, however, submitted that should the Court be persuaded to grant bail, then it should bind the Applicant, as he has pledged in his Supporting Affidavit, to keep the peace and not to make comments which might incite the public.

20. It is probably rhetorically symmetrical, linguistically aesthetic as well as structurally sound (for reasons which will emerge shortly) to begin with the Applicant's most strident argument: that the judicial imprimatur given to the action of the Police (and NCIC) to hold the Applicant in continued detention in the absence of a formal charge or holding charge is, *per se*, unconstitutional. The argument is that holding an arrested person beyond the 24-hour period prescribed in Article 49(1)(f) without charging them with an offence known to law is categorically violative of the Constitution.

21. My Senior Brother, Kimaru J. in ***Michael Rotich v Republic [2016] eKLR*** was of the opinion that a correct reading of Articles 29 and 49 of the Constitution yields the result proposed by the Applicant. The Learned Judge held thus:

> ***….****the recent trend where a person is arrested and arraigned in court within 24 hours specifically for the prosecution to seek extension of time to continue to detain such person, without any charge or holding charge being preferred against such person is unconstitutional. The police have no authority in law to arrest and detain any person without sufficient grounds. Those grounds can only be sufficient if the police have prima facie evidence which can enable such person to be charged with a disclosed offence. The fact that the prosecution has a prima facie evidence of a disclosed offence can be presented in court in form of a holding charge setting out the particular offence. Such holding charge will enable an accused person to know of the reason for his arrest as provided under Article 49(1)(a) of the Constitution. It will not do for the prosecution to present a person who has been arrested in court and seek his continued detention without a charge or a holding charge being lodged in court. It is unlawful for the police to seek to have a person who has been arrested to continue to remain in its custody without a formal charge being laid in court. If this trend continues, it would erode all the gains made in the advancement of human rights and fundamental freedoms as provided in the Bill of Rights since the Constitution was promulgated in August 2010. A person's right to liberty should be respected at all times unless there are legal reasons for such person to be deprived of his liberty. The police should only arrest a person when they have prima facie evidence that an offence has been disclosed which can result in such person being charged with a disclosed offence or a holding charge of the likely offence being presented in court. The police should do this because of only one reason: the Constitution says so*.

22. Article 49(1)(f) of the Constitution provides as follows:

> *An arrested person has the right to be brought before a court as soon as reasonably possible, but not later than –*
>
> *(i) twenty-four hours after being arrested;*

(ii) …

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing or to be released; and

(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.

23. The Court in ***Michael Rotich Case***, while decrying the ubiquitous use of pre-charge detention ruled that the constitutional meaning of "to be informed of the reason for the detention continuing" can only be met with the presentation of a holding charge at the very minimum. There are good reasons for this purposeful reading of the Constitution. Why should the Police arrest a citizen if they do not even have a provisional view of the offence the citizen has committed? It would seem repugnant to the ethos of constitutional justification of the exercise of power and authority in which our Constitution is steeped in to encourage such practice even if not categorically unconstitutional textually. In many cases, such Police action would be, in context and effect, unconstitutional. This would be the case where the Police conduct reveals a pattern or desire to overreach or to deploy the Criminal Justice System in a manner which unnecessarily diminishes rather than aggrandizes personal liberty or autonomy of the Arrested individual.

24. So, even while accepting that the text of Article 49(1)(f) may, in certain circumstances and contexts, comprehend a situation where a person is presented before a Court without being formally charged and is, thereby, informed of the reasons for his continued detention through the State's Application to have him so held, the State must satisfy a double test:

a. *First*, the State must persuade the Court that it is acting in absolute good faith and that the continued detention of the individual without a charge being preferred whether provisional or otherwise is inevitable due to existing exceptional circumstances;

b. *Second*, the State must demonstrate that the continued detention of the individual without charge is the least restrictive action it can take in balancing the quadruple interests present in a potential criminal trial: the rights of the arrested individual; the public interest, order and security; the needs to preserve the integrity of the administration of justice; and the interests of victims of crime where appropriate. By virtue of Articles 21(1) and 259 of the Constitution, the Court must act to aggrandize not diminish the personal liberties of arrested individuals in line with the other three interests. Differently put, the State must demonstrate that there are compelling reasons to deny pre-charge bail while balancing all factors within the complex permutation presented by these quadruple interests and without reifying or essentializing any.

25. This framing of the test combines the four arguments the Applicant made into a single multi-prong weighted test. I will now apply it to the facts of the case.

26. Can it be said that the State here is acting in absolute good faith and that the continued detention of the Applicant without a charge being preferred whether provisional or otherwise is inevitable due to existing exceptional circumstances?

27. The State's preferred reasons for the continued detention which were accepted by the Learned Magistrate were two:

a. *First*, that the Applicant exercises great influence on members of the public by virtue of his being a Member of the Parliament and that, therefore, releasing him created a foreseeable risk that he will interfere with investigations.

b. *Second*, that given the charge he faces and given that there have been "demonstrations against the Applicant" his release from custody will disturb public order, peace and security.

28. Do these two reasons meet the high threshold in the double-test I synthesized above? I think they do not. I say so for at least four reasons.

29. *First*, the argument that the Applicant is likely to interfere with witnesses because he is a man of immense persuasion and influence seems eminently pretextual for at least two reasons:

a. <u>One</u>, looking at the offences the State says it hopes to charge the Applicant with, it appears to be a stretch on credulity to posit that any witness could be unduly influenced by the Applicant:

i. The critical elements of hate speech are provable not through individual witnesses who might come under the influence of the Applicant but by showing the ordinary import of the words uttered by the Applicant were calculated to incite members of the public.

ii. Assault on a Police Officer would be proved not by a member of the public who may be susceptible to wither under the influence of his MP during investigations but by the Police Officer who was allegedly assaulted.

iii. Unlawful possession of firearms and ammunition is proved, as the Learned Magistrate's ruling correctly held, through forensic, documentary and expert evidence.

iv. Resisting arrest is also provable through the factual evidence of the Police Officers who were present at the time of the attempted arrest.

v. It is unclear what the offense of "committing offensive conduct" would entail in the circumstances here but such generality and nebulousness of the allegations cannot be a ground for limiting constitutional rights of an Accused Person.

b. Two, the State made no efforts whatsoever to demonstrate which witnesses would be interfered with and how such interference would happen at the investigation stage given the offences contemplated. It is not enough to proclaim that an arrested person wields influence in his line of business, profession, trade or occupation. In order to restrict the person's right to be released on pre-charge bail, the State must credibly and specifically demonstrate the likelihood of such interference.

30. *Second*, the argument that the interests of public order, peace and security necessitate the pre-charge detention of the Applicant because his speech has led to "demonstrations against him" does not meet the high threshold of "compelling test" required by our Constitution. The reason given appears illogical when set against the granted remedy: hold the Applicant without charging him for seven days then release him. There is no indication how holding the Applicant for precisely seven days will dissipate the public order, peace and security risk his alleged utterance caused. I have noted that there is no allegation that the Applicant has threatened to make like utterances if they are, indeed, capable of inciting the public. In any event, the Applicant has demonstrated a willingness to abide by the condition not make any comments akin to the ones the State finds insalubrious and capable of inciting the public. What, then, is the logic of his continued detention? In short, the radical remedy prayed for and granted to the State (to hold the Applicant without charge for 7 more days) is not rationally related to the alleged risk.

31. There is a second reason to worry about the acontextual and simplistic pitting of "public order, peace and security" against the personal liberty interests and autonomy of the Applicant. It is that the logic espoused by this simplistic pitting is a dangerous anti-liberty ethos which was rejected by the Constitution of Kenya, 2010. I clearly expressed this reasoning in ***Joseph Thiongo & 17 Others v Republic [2017] eKLR*** and it is sufficient to reproduce here at length the relevant paragraphs:

> *45. The Defence would be correct to argue that such a blunt response to the break down in law and order would be tantamount to sacrificing the rights of the Accused Persons in order to secure peace and security for the rest of society. Needless to say, our Constitution no longer countenances such an approach. Such was the approach to Law and Order that justified the authoring into our law books the infamous, Public Order and Security Act: the logic that it is necessary to simply detain some "dangerous" citizens in order to maintain law and order for the rest of the society. That logic has been substituted in our Constitution with the opposite logic: that every Accused Person is presumed innocent, and entitled to bail (and not to remain in remand) unless compelling reasons are shown.*
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> *46. The authority of the Court to deny bail where compelling reasons are shown can now not be invoked as a reason for the security apparatuses (and the State) to refuse to undertake their foremost duty to protect all citizens and maintain law and order in the society. Where the alleged sources of threat are known and the potential victims of the illicit activities known as here, it would be to reduce the State's monopoly of violence and duty to protect its citizens to a sacrilegious impotence to conclude that only the remanding of particular Accused Persons who are not themselves the alleged sources of threats is the method to protect the potential victims.*

32. Having reached here in my analysis, the result appears eminently tautological: the Application herein largely succeeds. There are no compelling reasons for the continued pre-charge detention of the Applicant. All the concerns raised by the State can be accommodated without the very radical measures sought and granted to the State to hold the Applicant pre-charge for eleven (11) days in the circumstances of this case. I must return to the words I stated in the ***Joseph Thiongo Case (supra)***:

> *I am obliged to observe that the pathway to peace and justice chosen by our Constitution is one that assumes that aggrandizing personal autonomy and liberties – especially in the context of a criminal trial – is one that ensures our optimum aggregate collective peace, security and justice more than the alternative path that limits individual liberties in order to safeguard these important values and outcomes. Ours is a Constitution that wisely assumes that peace, security and justice can be achieved in the context of Rule of Law. For this to happen, each of the actors in the Governance, Law, Order and Security Sector must play their rightful role in ensuring sustainable peace, prosperity and security*.

33. The disposition of the Application is as follows:

> **a. The Applicant, Sudi Oscar Kipchumba, shall be admitted to bail in the sum of Kshs. 500,000/- with respect to all the charges the State contemplates to bring against him as covered in the State's Application before the Lower Court. Alternatively, the Applicant shall be released on his personal recognisance of Kshs. 1 Million and one surety of similar sum. These bail/bond terms shall remain in effect and shall expire upon the formal charging of the Applicant with (a) disclosed offence(s). Upon such eventuality, the Trial Court will be at liberty to set its own bail/bond terms.**
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> **b. The Applicant shall not before a charging decision is made in his case and thereafter until the order is varied by the Trial Court, make any public utterances or comments akin to those he is alleged to have made which the State alleges are capable of inflaming public passions and hostilities among communities.**
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> **c. The Applicant shall desist from addressing any public rally before investigations into this case are complete and a**
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> **charging decision made.**
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> **d. The Applicant shall report to any Police Station as summoned by the Investigating Officer for purposes of completing investigations.**
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> **e. The State shall be at liberty to charge the Applicant with (a) disclosed offence(s) once investigations are complete and a charging decision made.**

f. Meanwhile, the Applicant shall not be arrested or detained by the Police. If a decision to charge him is made, he shall be summoned to present himself to Court to take plea

g. Each party will be at liberty to apply for any further orders.

34. Orders accordingly.

Dated at Nakuru this 18th day of September, 2020.

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JOEL NGUGI

JUDGE