



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL MISC. APPLICATION NO. 11 OF 2018

STEPHEN MASINI KITHEKA.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

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

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

R U L I N G

1. By way of Notice of Motion dated the 13th day of February, 2018 the Applicant, **Stephen Masiki Kitheka** seeks to be admitted to anticipatory bail on reasonable terms pending appearance before the police and/or being charged before a Court of Law.
2. The application is supported by an affidavit deponed by the Applicant where he deposes that he is employed by the Kitui County Government as an Officer in Charge of Revenue; that on 7th February, 2018 a lorry fetching charcoal was torched by angry youths purporting to implement the County Governor's directive to ban charcoal and sand harvesting within the County; and suspected individuals among them **James Ngunu Mulwa** have been arrested and charged in **Embu Law Courts**. That he has received a call from one **Wycliff Oguk** who identified himself as a police officer and threatened to arrest him in connection with the alleged arson attack; Another person who identified himself as a CID Officer has frequented his place of work which is an intrusion that has created a negative impression that undermines his integrity as a Public Officer. That he is willing to co-operate with the police and help them with their investigations.
3. In response thereto, **Number 233419 Chief Inspector Charles Wasilwa** swore a replying affidavit where he deposed that investigations to establish the perpetrators of the crime of arson are ongoing and the matter is already in Court. That the alleged **Mr. Wycliff Oguk** is not an officer attached to his work station. He admitted the fact that the Applicant is a person of interest being sought to assist in investigations. That he should avail himself to the police station to record his statement.
4. The application has been brought pursuant to the provisions of **Section 84(1) and (2) of the Constitution of Kenya** which was repealed.
5. **Section 39 of the Criminal Procedure Code** provides thus:

“A magistrate may at any time arrest or direct the arrest in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.”

Section 123 and 124 of the Criminal Procedure Code provides thus:

“123. (1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any drug related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court

or police officer be reduced.

124. Before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer.”

Provisions of the law cited are in respect of a person who has been arraigned in Court having been charged. Such a person has a right to liberty, a right that cannot be interfered with unless there are compelling reasons.

6. In this matter it is averred that the Applicant is apprehensive that he may be arrested by the police who on the other hand confirm that he is required to help in investigations of a case where some individuals have been arraigned before a Court of Law to answer some charges. The question I must therefore pose is whether being investigated following an offence that has been committed is an infringement of a fundamental right? In the case of **W’Njuguna versus. Republic, Nairobi Misc. Criminal Case 710 of 2002 (2004) I KLR 520** the Court held that: When there are circumstances of serious breaches of a citizen’s rights by the organ of the state which is supposed to protect the same then an anticipatory bail can be granted.

7. The 1st Respondent herein as the Principal Legal Adviser of the Government is duty bound to uphold the Rule of Law. **(See Article 156 of the Constitution).**

The 2nd Respondent has the power to investigate any report made to him regarding a criminal conduct and proceed to arrest if there is sufficient evidence.

The 3rd Respondent has the power to investigate any information or allegation of any criminal conduct **(See Article 157(4) of the Constitution).**

8. A person who is being investigated can only complain and seek the Court’s protection if his fundamental rights or freedoms are being infringed. The Applicant herein is not accusing the Respondents for breaching his rights. He is apprehensive because the police are looking for him to record a statement.

In the case of **Kelvin Okore Otieno vs. Republic Nairobi High Court Criminal Revision No. 207 of 2013** it was stated that:

“... If the matters in question are still under investigation the outcome of those investigations cannot be pre-empted by the applicant or court. Should the investigations culminate in the arrest of the applicant, arrest and arraignment are known processes of our legal system and perse, do not amount to infringement on the fundamental rights and freedoms of the applicant in any case he will be entitled to bail as provided by the constitution. To my mind the apprehension by the applicant does not meet the threshold of serious breach of his rights by a state organ.”

9. From the response filed by the Investigating Officer in the matter under investigation, it is confirmed that the Applicant is required to record a statement. This is procedural therefore there is nothing to suggest that his rights shall be infringed.

10. In the premises I find the application lacking merit. Accordingly, it is dismissed in its entirety.

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 22nd day of February, 2018.

L. N. MUTENDE

JUDGE