



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 5 OF 2018**

**PATRICK OWINO MUBWEKA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **PATRICK OWINO MUBWEKA**, the applicant herein has moved the court by way of notice of motion dated 23<sup>rd</sup> March, 2018 under section 123(1) of the Criminal Procedure Code and Article 49(1) (h) of the Constitution of Kenya, 2010. He is seeking orders as follows:-

a) That this court do issue an anticipatory bond pending arrest in favour of the applicant.

b) That the OCS Busia police Station be compelled to comply.

2. The application was supported by a sworn affidavit of the applicant who has contended that police officers from Busia Police Station have made enquiries in respect of arson and grievous harm. He has contended that there have been attempts to arrest him. This according to him, has caused fear and anguish to him. He has argued that this action is illegal. He therefore wants the court to grant him an anticipatory bond and issue an order stopping the OCS, Busia police station.

3. The office of the Director of Public Prosecutions, Busia was served but no response was filed. At the time of the hearing of the application, M/s Ngari, the learned counsel for the state, said they were not objecting to the application.

4. Section 123 (1) of the criminal Procedure Code provides as follows:

***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. [Emphasis added]***

This section presupposes three scenarios. One, is where such a person is under arrest or is being detained for an offence other than the offences mentioned under the above sub section; two, where he appears or is taken before court while being in custody of an officer; and three, where he has been formally charged with an offence.

5. In the instant case none of the above scenarios exist.

6. Article 49(1) (h) of the Constitution provides as follows:

***(1) 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.***

This constitutional provision is only available to a person who is arrested. Since the applicant herein is not under arrest, he can benefit from the provisions of this Article of the Constitution.

7. What is an anticipatory bond? Our Constitution or statutes have not provided for anticipatory bond/bail. Since it is not provided for in our statutes, we can seek the aid of the Indian Criminal Procedure Code for interpretation. The provisions concerning anticipatory bail/bond are found in their section 438 of CPC, 1973. The section provides:

***(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for direction under this section; and that court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.***

From this sub section, anticipatory bail/bond is an order for the release of a person prior to his arrest in the event of his arrest, where he anticipates that he may be arrested.

8. Though our Constitution and statutes have not provided for anticipatory bond, Courts have granted the same in some instances. Article 22(1) of the Constitution gives any person who may feel that his/her rights have been breached or threatened the right to approach the court for protection. The remedies to the breaches of rights or fundamental freedom in the Bill of Rights is provided for under Article 23 of the Constitution. However, the court must be vigilante not to be used to hamper the workings of other agencies in the justice sector. I fully associate myself with the sentiments expressed by Gikonyo J. in the case of **ABDI ABDULLAHI SOMO V BEN CHIKAMAI & 2 OTHERS [2016] eKLR** where he stated:

***The remedies permitted in Article 23 of and the Constitution as a whole are tailored toward addressing any infringement of right envisage in cases where parties seek for anticipatory bail and I believe those remedies should be applied for as provided, and should be granted on the standards set in the Constitution and the law. That would prevent anticipatory bail from becoming amorphous and rogue for lack of definite or identifiable scale of proof which may be ascribed to it. I say these things because of the absence of a statutory framework for anticipatory bail.***

9. Part VII of The National Police Service Act lays down the duties of the police to include investigations, prevention and detection of crime. It is not open to this court to direct how such duties ought to be performed. The court will only act where it is clear there is a breach or a threat to such a breach without regard to the laid down procedure. To act otherwise is to arrogate upon the court the duty to prefect other institutions.

10. The applicant herein has not demonstrated that he deserves the orders sought. The application is accordingly dismissed.

**DELIVERED and SIGNED at BUSIA this 19<sup>th</sup> day of April, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE.**