



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 123 OF 2018.

ONER MEHMET IHSAN.....1ST APPLICANT

ONER ZEKERIYA.....2ND APPLICANT

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

INTERPOL.....3RD RESPONDENT

RULING.

1. Oner Mehmet Ihsan and Oner Zekeriya, hereafter the Applicants filed the present application by way of a Notice of Motion dated 16th March, 2018 in which they sought the following orders; that the court admits them to anticipatory bail pending arrest and charge under conditions as the court may set, that the Inspector General of Police, his subordinate officers and Interpol officers be prohibited from arbitrarily arresting them, that the Applicants be not deported from Kenya and lastly that the court grants any other orders as it deems expedient in the circumstances.

2. The Application was based on the grounds that; the Applicants were Turkish businessmen resident and investing in Kenya. That they had valid investor permits and were lawfully resident in Kenya and that their wives were also lawfully resident in Kenya. That their names were handed to INTERPOL by Turkish authorities for their affiliation to the political Hizmet and Gulen movements which they are not connected with, and that they were being currently sought by the Criminal Investigation Department in connection with the movements. Further that they were previously detained for more than 24 hours without being heard and were facing possible deportation. They concluded by stating that their arrest or detention was imminent and would be illegal.

3. Each applicant swore an affidavit in support of the application in which they restated the grounds on which the application is premised. Annexed as well were copies of their passports.

4. A Replying Affidavit dated 20th March, 2018 sworn by No. 43816 PC Michael Kilonzo of DCI headquarters, Nairobi Central Bureau-INTERPOL Nairobi was filed by the Respondents. In it the deponent deposes that on 7th February, 2018 he and PC Winnie Lelei were tasked with investigating the case after their office received a request from Interpol Ankara Turkey to arrest and extradite the Applicants. That pursuant to the request they traveled to Mombasa on 13th March, 2018 where they sought the assistance of the Anti-Terrorism Police Unit, herein ATPU, as the case involved an element of terrorism. That on the same day the Applicants were arrested and on 14th March, 2018 officers from ATPU, NCB INTERPOL Nairobi, National Intelligence Services and the DCIO Kilifi interviewed the Applicants to get the facts of the alleged offence and to make a decision regarding the matter. That they realized that the matter was politically-related in nature contrary to Article 3 of the Interpol Constitution which prohibits Interpol from undertaking any intervention or activities of a political, military, religious or racial in character. That they also noticed that Interpol Ankara had not published a red notice which is a requirement under the Interpol Constitution when alerting member countries of the request to arrest and repatriation of a fugitive. That they had also not received an extradition order from INTERPOL Ankara, Turkey. That it is only after receiving such request from Interpol Ankara that they shall trace the Applicants.

5. The application was canvassed before me on 20th March, 2018 with Mr. Noor representing the Applicants whilst Ms. Aluda represented the Respondent.

6. Mr. Noor submitted that the Applicants were arrested and held for two days where they were informed that they were involved in an

attempted coup in Turkey on 15th July, 2016. That police officers had been to the Applicants' place of work inquiring about them hence the Applicants fear that they would be arrested. They thus sought the court's protection and were ready to abide by any conditions set out by the court. He submitted that the Applicants were willing to subject themselves to the criminal justice system. That if the Applicants were sought for political reasons the extradition process should be followed and he urged the court to protect them by issuing of anticipatory bail. He relied on **Mohamed Aktar Kana v. Attorney General[2010] eKLR** to buttress the submission and to assert that the security apparatus and the executive should observe the rule of law.

7. Ms. Aluda opposed the application. She submitted that Kenya received a notice from Interpol on the Applicants and that both Interpol and Kenya regarded the matter as relating to terrorism. That the police together with ATPU arrested the Applicants for questioning which was within their duty. She submitted that it later emerged that the matter was political in nature at which point the Applicants were released. She submitted that Article 3 of the INTERPOL Constitution which protects the respondent from engaging in religious and political matters barred them from arresting the Applicants on these grounds. She submitted that accordingly, the respondents would initiate extradition proceedings when the time was ripe.

8. She submitted that anticipatory bail is not granted as a matter of course and that while alive to the ICCPR, the Universal Declaration of Human Rights and Article 2 of the Kenyan Constitution the Applicants must follow the law to the letter. She asserted that the Applicants would not be arrested.

9. In response Mr. Noor submitted that they came to court because after the Applicants were released other officers went to their work place and inquired on their whereabouts. That no prejudice will be occasioned if the court granted the orders sought.

10. After considering the parties submission it is clear that the Applicants were arrested on 13th March, 2018 for questioning and released on 14th March, 2018. According to Mr. Noor they were held for two days which was contrary to Article 49 of the Constitution and therefore a breach of their rights. It is also clear that all parties agree that the crux of the complaint against the Applicants was political in nature, a fact conceded to by PC Kilonzo.

11. Article 3 of the Constitution of ICPO-INTERPOL states that, “[i]t is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character.” Whereas PC Kilonzo states that the police have reached a conclusion that the matter was political he goes ahead and deposes that if a further request is received from Interpol Ankara-Turkey they shall trace and arrest the Applicants. An intention to arrest the Applicants notwithstanding the concession that the issues are political in nature seems contrary to Article 3 and the ICPO-INTERPOL General Assembly Resolution AGN/53/RES/7 of 1984 which lays out the procedure to be followed in relation to conflicting assessments by National Central Bureaus (NCBs) regarding whether an offence falls within Article 3 exception.

12. In my view then, it appears that the Kenyan police are bent on violating the Applicants' right to fundamental freedom. I re-affirm that anticipatory bail will issue in circumstances where an Applicant demonstrates that a State organ or individual has threatened to, or is in breach of, his fundamental rights and freedoms. The Applicants have met this threshold. They have illustrated that the 1st and 3rd Respondents have infringed their rights. This is a case that is thus merited for grant of the orders sought.

13. In the result, I admit both Applicants to anticipatory bail. They shall each execute a personal bond of Ksh. 50,000/ pending any appearance in court should the police be of the opinion that they require to be charged of a criminal offence.

DATED and DELIVERED this 11th day of April, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mwangi h/b for Noor for the Applicant.
2. M/s Sigei h/b for M/s Aluda for the Respondent.