



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 186 OF 2018.

BERNARD MASIGA AYIENGA.....APPLICANT.

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT.

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

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT.

RULING.

1. The Applicant brought the present application by way of a Notice of Motion dated 4th May, 2018. The application was brought under Articles 22, 25, 28, 29, 47(2), 49(1), 159(2), 165 and 244(c) of the Constitution, the inherent jurisdiction of the Court and all enabling provisions of the law. The main prayer is that he be granted reasonable bail terms pending investigations and or charge by the Respondents and that the anticipatory bail be by executing a personal bond.

2. The application is premised on grounds that the Applicant had been called upon to record a statement by the 3rd Respondent at their headquarter and that later on 27th April, 2018 he was detained for three hours at the Jomo Kenyatta International Airport, hereafter JKIA while traveling to Uganda. Further, that on his way back into the country on 29th April, 2018 he was again detained and was only released after his wife executed a personal bond of Kshs. 1,000,000/-. That he was never informed of the reasons for his detention. That upon his release his passport and identification documents were confiscated and he had to collect them the following day at the Immigration Headquarters where they were released without reasons for his detention being disclosed to him. That the whole ordeal had caused him mental anguish and torture for which he is apprehensive that he might be arrested for reasons unknown to him. That a failure to grant the prayers sought means that he stood to be extremely prejudiced as he would suffer mental, psychological, physical and bodily harm at an unstoppable continuous rate. Finally, that it was in the interest of justice to grant the orders prayed for.

3. The application is supported by an affidavit sworn by the Applicant on 4th May, 2108 in which he reiterated the grounds on which the application is premised. He added that on his detention a second time whilst returning from Uganda, the Immigration Department informed him that it required authorization from the Criminal Investigations Department before releasing him. After an hour they (himself and the family) were released after his wife executed a personal bond for a sum of Kshs. 1,000,000/-. He deposes that pursuant to the bond he had to avail himself to the Immigration Headquarters the following day for further action and to collect his documents. He confirmed that the documents were released to him but no

reason for the detention was given.

4. The Applicant further deposes that bail is warranted because he is of poor health. He states that he suffers from a heart condition for which he underwent a surgery and which negatively affected his blood pressure. That he now is on blood pressure and blood thinning drugs on a permanent basis. He states that if he is detained in custody, his health would be compromised. That it is his belief that he cannot get the specialized medical care required if his heart condition flares up while in custody.

5. The Applicant deposes that he was willing to present himself to the police if required to assist in the investigations and when called upon. He adds that the Respondents would suffer no prejudice if the orders sought were granted. Furthermore, the grant of the orders serves the interest of justice. He annexed to the application a wedding invitation to Uganda, bond certificate, excerpts of his passport and various medical reports to mitigate his case.

6. In opposing the application, the Respondents filed a Replying Affidavit sworn by No. 236117 IP Paul Waweru attached to the Financial Investigation Unit of the Directorate of Criminal Investigations. He confirmed that his office was indeed investigating a complaint regarding procurement fraud perpetrated by the staff at the National Youth Service leading to a loss of Kshs. 10 billion in the financial year 2015-2016. He confirms that various witnesses have recorded statements on the scam including the Applicant who is the Senior Chief Financial Officer at National Youth Service. That since the subject matter under investigation involved financial matters it was imperative to investigate the Applicant who was in control of the finances of the National Youth Service.

7. He deposed that when the police summoned the Applicant to the DCI offices, he was made aware of the matter under investigation before he could record his statement. That the Applicant was also privy to the investigations as letters requesting documents had been dispatched to the Director General of the National Youth Service.

8. He swore that the Respondents were not involved in the detention of the Applicant and his family that took place on 29th April, 2018 at JKIA and that none of them authorized the alleged flagging of the Applicant's passport as asserted by the Applicant. That this might have been a normal security procedure by the Immigration Department. That nonetheless a two-hour delay could not be deemed to be unreasonable and/or prejudicial given that the Applicant was allowed to travel to Uganda and return to Kenya.

9. He deposed that the 3rd Respondent's officers were still undertaking their investigations in the course of which they had neither interfered nor harassed any of the persons they were investigating. That it was only fair to allow the Respondents conduct the due investigations within their mandate.

10. With respect to the Applicant's medical condition, IP Waweru states that the medical documents given by the Applicant do not disclose any life threatening condition since he was being treated as an out-patient with no history of prolonged or significant admission in hospital. That it was noteworthy that no medical documents were attached by the Applicants for the years 2016 to date. That the latest medical report was merely a laboratory test indicating that his glucose levels were normal.

11. In conclusion, IP Waweru deposed that the Applicant had not demonstrated that his constitutional rights had been violated to warrant the grant of anticipatory bail. In any case, the Applicant was entitled to his constitutional right to be produced in court within 24 hours and to be granted bail once charged.

12. The Applicant filed a further affidavit on 21st May, 2018 in which he deposed that he had been dealing with Officers Muia and Gikandi which meant that IP Waweru who swore the replying affidavit was a stranger to the case. That he had been informed by his advocates that the 3rd Respondent keeps a record of fingerprints which meant that the police were more than capable of flagging an individual at any exit point in Kenya. He insisted that he was informed that the instructions directing his detention were issued by the 3rd Respondent. In that case, the burden lay with the 3rd Respondent to demonstrate that his

detention at the airport was a standard security procedure.

13. The Applicant also urged the court to take note that the Respondents are not medical practitioners who can make an analysis of the Applicant's health or medical history.

14. He went on to state that in the last few days there had been news articles carried in the newspapers on the NYS scandal and the 1st and 3rd Respondents confirmed that they would soon be making arrests. That his name had been adversely mentioned in the media reports for no apparent reason. He urged the court to grant him bail as the same would not prejudice the Respondents but would be in the interest of justice.

SUBMISSIONS

15. The application was canvassed before me on 21st May, 2018. Learned counsel, Mr. Nyamu represented the Applicant whilst learned State Counsel, Ms. Kimiri and Ms. Kahoro acted for the Respondents. The respective submissions revolved around that respective affidavits filed by the parties. I do not therefore find the need to duplicate what has been canvassed. Ms. Kimiri though emphasized that the Applicant had not met the threshold to warrant the grant of anticipatory bail. Ms. Kahoro on the other hand zeroed in on the fact that the Applicant's detention at the airport had everything to do with immigration issues. As such, the Director of Immigrations should have been enjoined in the proceedings so that he could shed light on the circumstances leading to the arrest and detention of the Applicant.

16. Mr. Nyamu relied on the cases of **Susan Mbinya Musyoka v. Inspector General of Police & another[2016] eKLR**, **Samuel Muciri W'Njuguna v. Republic[2004] eKLR** and **Angelina Mumbua Mutuku & another v. Inspector General of Police & another[2017] eKLR** in support of the application.

DETERMINATION.

17. The circumstances under which anticipatory bail will be granted as severally cited by courts of concurrent jurisdiction were set out by learned Rawal and Kimaru, JJ in **Samuel Muciri W'Njuguna v. Republic(Supra)** thus:

“When a person is constantly subjected to harassment or is in fear of being unjustifiably arrested, he has a right to recourse to the protection of the Constitution through the High Court where its enforcement is provided for by the Constitution. It would indeed be a tragedy, if the Constitution is not providing a remedy to a citizen whose fundamental rights have been breached... We are of the humble opinion that the right to anticipatory bail has to be called out when there are circumstances of serious breaches by an organ of the state of a citizen's fundamental right.

...

If the police have contravened or is likely to contravene the rights to liberty of a citizen for ulterior purposes, an anticipatory bail should be an appropriate order to be granted.”

18. This court in **Gladys Shollei v. Attorney General & 3 others(Supra)** held that:

“It is then salient that anticipatory bail is aimed at giving remedy for breach or infringement of fundamental constitutional rights in conformity with what the constitution envisages constitutes protection of fundamental rights and freedoms of a citizen.”

19. This application is premised on two distinct grounds, namely that the Applicant's rights and freedoms have already been breached by his detention at the airport and that his rights and freedoms were likely to be breached in future if he is detained, more so because he is of poor health.

20. With regard to the first limb, the Applicant submitted that on 27th April, 2018 while en route to

Entebbe, Uganda alongside his family he was detained at JKIA, first outside the Immigration office for two hours and then in a cell for an hour before being allowed to travel. That on his return to the country on 29th April, 2018 he was again detained for two hours and was only released after his wife executed a personal bond of Kshs. 1,000,000/- and after depositing his documents with the authorities. He was to receive the documents back the following day at the Immigration headquarters. He submitted that it was after returning to the airport that he was informed that the detention was informed by the fact that his passport had been flagged by the 3rd Respondent.

21. In response, the Respondents submitted that they had not flagged the Applicant's passport and were not involved in his detention. Further, that if the Applicant was detained it was in connection to security procedures at the airport and that this was purely the work of the Immigration department.

22. In view therefore, the court is more inclined to be persuaded that the detention of the Applicant at the airport was likely connected with an immigration issue. In that case, it was paramount that he enjoined the Director of Immigrations who would have had an opportunity to explain the circumstances of the detention. He or his representative would have offered clues as to what transpired at the airport.

23. An analysis of the Applicant's account of what transpired presents a contradiction on the circumstances leading to his detention. He submitted that he was detained for a total of five hours, being three hours on his way out of the country and two hours on the way back. That the three hour detention on the way out of the country consisted of two hours outside the Immigration office and one hour in the cells. He contradicts himself at paragraph 11 of the supporting affidavit by stating that after two hours he was informed that he could travel which flies in the face of his three hour detention narrative.

24. The Applicant's credibility is also raised with regard to his assertion that he was not informed of the reason he recorded a statement at the 3rd Respondent's offices. It defeats logic that a party to an interview with the police, at which a statement is recorded, could not glimpse what the gist of the matter was. Further, his depositions appear absurd given the fact that the 3rd Respondent had summoned other senior officers at the State organization where he worked and letters requesting the release of certain documents had already been released to them.

25. In support of his submission that he was detained, the Applicant attached a wedding invitation, an email giving directions to the site of the wedding, the personal bond executed by his wife and excerpts of his passport. In as much as it is a cardinal principal in law that "**he who alleges must prove**", the wedding invitation and the email are not conclusive evidence of travel to Uganda. Curiously, while the excerpt of the passport shows exit and entry stamps by the Immigration officers at JKIA they are, oddly, not matched by similar entry and exit stamps from Immigration Unit Uganda. The entries on the passport from immigration Uganda are from November, 2017 and do not correspond with the current incident.

26. It is also noteworthy that the bond granted to the Applicant's wife was granted under Section 48(2) of the Kenya Citizenship and Immigration Act, 2011 which empowers an immigration officer to undertake investigatory duties and in so doing to exercise powers and immunities reserved for police officers. The arresting officer admitted the Applicant to bail which took the form of a personal bond executed by his wife. I add that the investigatory powers can only be conferred on an officer who is investigating offences under the Act. It is safe then to conclude that the Applicant was detained on account of immigration related offences and not the National Youth Service. This is further made clear by the fact that the Applicant was asked to report to the Department of Immigration and not the Directorate of Criminal Investigations that was in charge of the matter. That being the case, the court finds that the alleged detention in question was not proved to have taken place pursuant to orders from the 3rd Respondent.

27. The other limb of argument is that the Applicant should be admitted to anticipatory bail because he suffered from a serious heart condition that would be exacerbated by his probable arrest. He submitted that he was on a daily medical regiment, taking about six different pills daily and that he could not receive the specialized medical care he required if his heart condition was to flare up in custody. That he was of

the opinion that he could not access his medication or specialist when in custody. He urged the court to consider that the Respondents were not medical experts who would determine how seriously ill he was.

28. An analysis of the medical evidence adduced attests that the last medical report the Applicant submitted is dated 12th October, 2015 from Primecare Cardiology Associates. It shows that the Applicant did undergo an angioplasty and stenting in 2009. At the Clinic he was taken through a stress exercise test and it was found that “he did not experience any chest pains or dizziness”. There were “no ECG changes to suggest the presence of coronary artery disease” and no “arrhythmia was detected”. However, the Applicant was found to be suffering from hypertension, elevated serum cholesterol and excess body weight. While his assertion that he suffers from hypertension is true and that he is required to take blood thinners due to the angioplasty and stenting, the court would be hard pressed to find that the Applicant requires specialized care as hypertension can be managed during a short stint detention. Furthermore, he will be allowed to keep up with his drug regimen as provided under Section 15 of the Persons Deprived of Liberty Act.

29. It is trite to note that there was an earlier medical report by the same Primecare Clinic dated 15.10.2014. It suggested that the Applicant suffered Coronary artery disease post Angioplasty and Stenting in 2009. But progressively as seen in the report of 2015, the heart disease had been managed and controlled save for persistent hypertension.

30. It is suspect why the Applicant was unable to avail a current medical report, an issue his counsel evaded answering in court. He too admits in the further affidavit that he did not have a current medical report. This would be the only way by which the court would erase doubt in its mind that the Applicant truly suffers from a heart disease. The deliberate absence of such a report only vindicates the position of the 2015 medical report that the heart problem has been done away with. That said, since he is aware that he is being investigated, the cure to his apprehension that if detained his medical condition would worsen is to voluntarily surrender himself to the police for the needed interrogations. He should carry with him medication just in the event he is detained overnight if the police concluded there was need to charge him. Furthermore, if charged, he will be entitled to bail under Article 49 of the Constitution.

31. It is my humble view that this application has not met the threshold for grant of anticipatory bail. The Applicant has not demonstrated that any of his fundamental rights or freedoms have been breached or are under threat of being breached. I underscore the fact that investigations of a complaint of criminal nature following which a suspect is summoned to record a statement does not imply an infringement of a person’s fundamental rights and freedoms. The police would only cross the boundary if they do not observe a person’s fundamental rights and freedoms in the process of investigations as provided by the Constitution. Courts must jealously safeguard the sanctity of the Constitution. And where the sanctity of the Constitution is abused, no doubt courts must come to the aid of an individual. Conversely, applications for anticipatory bail must not be viewed as a conduit for crippling the due process of investigations as police must be accorded the space to carry out their duties without undue interference by the courts. It is for this reason that courts must act with restraint when a party fails to meet the threshold for grant of the bail. This case represents the latter position..

32. In sum, I find the application without merit and the same is hereby dismissed with no orders as to costs.

DATED and DELIVERED this 24th day of May, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr Nyamu for the Applicant.

2. *Miss Kimiri for the Respondents.*