



**REPUBLIC OF KENYA**

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

**PETITION NO. 3 OF 2015**

**IN THE MATTER OF ARTICLE 10, 19, 20, 21, 22, 47, 50, 157, 160, 258 & 259 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS**

**AND**

**IN THE MATTER OF ETHICS & ANTI-CORRUPTION COMMISSION**

**BETWEEN**

**JAMES KATHURIMA.....1<sup>ST</sup> PETITIONER**

**ERICK KIPNGETICH.....2<sup>ND</sup> PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**ETHICS & ANTI-CORRUPTION COMMISSION.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. **James Kthurima** and **Erick Kipngetich**, Applicants herein approached this court by way of Notice of Motion dated **23<sup>rd</sup> January, 2015** seeking issuance of a conservatory order restraining the Respondents by themselves, their agents, officers or employees from interfering with the Petitioners rights in any manner whatsoever, from arresting or preferring charges against them pending hearing and determination of the petition filed herein.
2. The application is based on grounds that the Applicants were arrested on **23<sup>rd</sup> December, 2014** by people who later identified themselves as officers from **Ethics and Anti-corruption Commission** (2<sup>nd</sup> Respondent) in a most inhuman manner along **Machakos – Namanga Interchange Road**; they were taken to **Nairobi – Integrity Centre** where they were interrogated and made to record statements. They were coerced to sign an inventory stating that money was found on them but they refused and only signed the part that was true. They were summoned to the **Ethics and Anti-**

- corruption Commission** offices on the **26<sup>th</sup>** day of **January, 2015** but were not told charges to be preferred against them. They are apprehensive that the **2<sup>nd</sup>** Respondent will continue violating their fundamental rights and freedoms by forcing them to admit intended charges to enable the **1<sup>st</sup>** Respondent to charge them. Hence their prayer for bail or anticipatory bail pending intended arrest and arraignment in court.
3. The **1<sup>st</sup>** Applicant swore an affidavit in support of the application having been authorized by his co-applicant where he reiterated what is stated in the grounds upon which the application is based and added that the conduct of the officers who keep summoning them is upto no good. They are apprehensive that the **2<sup>nd</sup>** Respondent will continue to infringe on their constitutional rights having failed to disclose the nature of the offence they have committed.
  4. In a response thereto **Joseph Gikonyo** a Prosecution Counsel in the office of the **1<sup>st</sup>** Respondent deponed an affidavit where he averred that the **2<sup>nd</sup>** Respondent is mandated under **Article 252** of the **Constitution** to conduct investigations on its own initiative or on a complaint made by a member of public in regard to corruption. On completion of investigations the **2<sup>nd</sup>** Respondent forwards the file to the **1<sup>st</sup>** Respondent with a report and recommendation which are reviewed and direction as to prosecution of the suspect given.
  5. That the Applicants were arrested following complaints from members of public regarding their conduct of demanding for bribes from public service vehicles along **Machakos – Namanga Interchange**. Circumstances in which the Applicants were arrested did not infringe upon their constitutional rights. The petition is premature as the **1<sup>st</sup>** Respondent has not yet received the investigation file to evaluate and give directions, a decision that should be awaited.
  6. The **2<sup>nd</sup>** Respondent responded through **Patrick Mbijwe**, an Investigator appointed pursuant to the provisions of **Section 23** of the **Anti-corruption and Economic Crimes Act No. 3 of 2003** who deponed that following complaints received they initiated investigations by undertaking surveillance and they recorded the Applicants receiving bribes from motorists. On being notified of the reason of their arrest they fled but were restrained and arrested. On being searched they were found in possession of **Kshs. 13,850/=** and **Kshs. 10,150/=** respectively. Being public officers, soliciting for benefits was enriching themselves that amount to abuse of their office.
  7. Further, that the Applicants have failed to demonstrate that they are unlikely to receive fair treatment.
  8. In the course of investigation the Applicants' Supervisor **Mr. Derrick Nyagah**, the Division Traffic Enforcement Officer, Athi River was shown video clips of **24<sup>th</sup> December, 2014** where he identified the Applicants receiving bribes. The Applicants' culpability if any can only be determined by the criminal court.
  9. The Applicants deponed a Supplementary Affidavit in response to the reply filed by the Respondents where it was averred that they did not trigger events that led to public outcry as their duties as Traffic Officers were not limited to being stationed at the **Machakos – Namanga Interchange**. That carrying money while on duty is one's right. There must be a giver and taker in corruption cases but the giver has not been disclosed. What they are seeking is constitutional safeguard against the aggression of the **2<sup>nd</sup>** Respondent.
  10. The application was canvassed by way of written submissions that I have duly taken into consideration.
  11. This being a Constitutional Petition, the principle applicable for grant of the conservatory order would be as was stated in **Petition No. 16 of 2011, Nairobi – Centre of Rights Education and Awareness (CREAW) & 7 Others** where **Musinga J. (as he then was)** had this to say:

***“.....a party seeking a conservatory order only requires to demonstrate that a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of violation or threatened violation of the constitution.”***

12. It is averred by the Applicants that their rights as provided by the constitution were trampled upon by the Respondent. It is argued, further, that following the Applicants arrest they were not told the reasons of their arrest and were subjected to inhuman treatment and up to the time of approaching

- the court they had not been arraigned in court.
13. The Applicants approached the court pursuant to the provisions of **Article 22(1)** of the **Constitution** alleging that their constitutional rights were infringed.
  14. It is not in dispute that the Applicants, Police Officers who were assigned traffic duties along **Namanga – Machakos Interchange** were arrested by investigators from the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent being a Commission has the mandate to conduct investigations of matters raising suspicion of corrupt conduct or conduct of any person that is conducive to corruption on its own initiative of following a complaint raised by members of public (**See Article 252 of the Constitution**).
  15. The **Anti-corruption and Economic Crimes Act** empowers investigators duly appointed pursuant to **Section 23**, to carry out investigation on behalf of the 2<sup>nd</sup> Respondent. They have powers to arrest, charge and even detain suspects.
  16. It is a constitutional requirement for an arrested person to be informed promptly of reasons of the arrest (**See Article 49(1)(a)(i) of the Constitution**).
  17. It is alleged that the Applicants were not informed of reasons for their arrest. While considering such an issue in the case of **Hussein Khalid and 14 Others vs. Attorney General & 2 Others Lenaola J** had this to say:

*“.....whereas there is no evidence before me that the Petitioner were or were not read the above rights, the issue can properly be raised at the trial court and the arresting officer would be questioned on the issue.....”*

18. I am persuaded by the findings in the above case. Whether or not the officers were promptly informed of the reasons is a matter that can be established by a trial court where the person alleged to have contravened the constitutional requirement can be subjected to questioning.
19. It is averred further, that the arrest of the Applicants was caused in the most inhuman manner as they were forced onto the ground on their bellies when they had not attempted to resist arrest.
20. In **Republic vs. Minister for Home Affairs and Others exparte Sitamze (2008) EA 323 Nyamu J** stated thus:

*“..... Inhuman treatment is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”*

21. To establish if indeed the Applicants were subjected to inhuman treatment evidence would have to be adduced, and the purported perpetrator if possible be subjected to cross-examination.
22. It is stated that soon after the Applicants’ arrest they were taken to **Integrity Centre** where they were interrogated, made to record statements and thereafter released at **4.00 p.m.** At the point of approaching the court, according to **paragraph 16** of the affidavit in support of the application, they were aware of charges that were to be preferred against them. It is averred that the Applicants were captured on video receiving bribes.
23. The law is very clear, pursuant to investigations conducted by the 2<sup>nd</sup> Respondent, it is obligated to report the results to the 1<sup>st</sup> Respondent who directs it either to charge a suspect or not.

The Applicants were released without being placed in custody. Whether or not they will be prosecuted will be directed by the 1<sup>st</sup> Respondent.

24. It has been established that the Respondents have endeavoured to follow due process. Where investigations being carried out result into an opinion being formed to charge the Applicants, barring the Respondents from preferring charges against the Applicants will be perpetuating an illegality.
25. Consequently, the Applicants have not made out a *prima facie* with likelihood of success that warrants granting of a conservatory order.
26. In the result, the application is dismissed with costs to the Respondent.

**Dated at Kitui this 19<sup>th</sup> day of January, 2016.**

**L. N. MUTENDE**

**JUDGE**

**Dated, Signed and Delivered at Kitui this 17<sup>th</sup> day of February, 2016.**

**P. NYAMWEYA**

**JUDGE**