



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 2 OF 2016

HON. SENATOR JOHNSTONE MUTHAMA1ST PETITIONER
HON. JUNET MOHAMED.....2ND PETITIONER
HON. AISHA JUMWA.....3RD PETITIONER
HON. TIMOTHY BOSIRE.....4TH PETITIONER
FLORENCE MUTUA.....5TH PETITIONER
BABU OWINO6TH PETITIONER
HON. FERDINAND WAITITU.....7TH PETITIONER
HON. MOSES KURIA.....8TH PETITIONER
HON. KIMANI NGUNJIRI.....9TH PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATION DEPARTMENT.....2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

RULING

1. The Petitioners, save the 6th, are all members of Parliament. The 1st Petitioner is a Senator whilst all the others are members of the National Assembly.
2. They all face the prospect of being charged with the offence of incitement to violence. They have appeared in court before a trial magistrate. That was on 14th June 2016. They were however not charged with any offences. The purpose of the appearance was to ensure that the provisions of Article 49(f) of the

Constitution were observed. Following their court appearance the DPP applied to have all the Petitioners (save the 6th who did not make an appearance) still kept in detention. The trial magistrate agreed with the DPP notwithstanding the valiant attempts by the Petitioners' counsel to have the Petitioners released on bond or bail. The Petitioners are all scheduled to appear before the trial magistrate again on Friday 17th June 2016.

3. In the meantime, the Petitioners felt aggrieved. They stated that their continued detention was unwelcome and unnecessary. It violated their Constitutional rights. It was illegal. It was unwarranted. They were honourable members of Parliament and continued denial of their liberty was wrong. Quickly, they moved to court on 15th June 2016 and I heard their application to be released on bond or bail under Article 49 pending their being charged in court with the specific offences.

4. Having heard both the Petitioners counsel as well as the 3rd Respondent (" the DPP"), I was not satisfied that the application was merited and immediately dismissed the application. I awarded no costs. I however reserved my reasons to be relayed today, the 16th day of June 2016.

5. My view still stands. The application lacked in merit for reasons I state in subsequent paragraphs.

6. The application was predicated on a non-existence Petition. There was no formal Petition filed before the court. Not once did I hear any party refer to a Petition. Originally, it was not clear even as the Petitioners' counsel was arguing, whether the Petitioners were aggrieved by the Chief Magistrates decision to deny them bail and allow their continued detention or whether the Petitioners were before this court in a more original status to complain over a violation of their constitutional right to bail. I was however able to gather that there was a constitutional issue the Petitioners raised, after I reflected on Rule 10(3) & 10(4) of the Constitution of Kenya (Protection of Fundamental Freedoms and Rights) Practice and Procedure Rules 2013, which allows petitions to be commenced and admitted via the courts' epistolary jurisdiction.

7. If I understood all the Petitioners well, it was that they have been denied the Constitutional right to bail. Secondly, and which appeared to be the principal argument was that the Petitioners were being held incommunicado and without water or food. The Petitioners contended that there was a violation of their rights under Articles 49(1)(c) and 49(h).

8. Mr. James Orengo who led a team of ten advocates representing the 1st to 6th Petitioners was categorical that the court was dealing with the issue of liberty of individuals and that liberty of any person ought be limited only in exceptional circumstances. In these regard, counsel also appreciated that the right to bail could only be limited where there existed compelling reasons to curtail the same. In the instant case, there were no compelling reasons and the allegation that the Petitioners would interfere with witnesses was completely unfounded.

9. Looping in to Mr. Orengo's submissions, Mr. O. Omogeni S.C also appearing for the 1st to 6th Petitioners, stated that the allegation that the Petitioners would interfere with witnesses was misguided and lacked any proof. Then citing the case of **Republic vs. Danson Mgunya Criminal Case No. 26 of 2008 (unreported)**, Mr. Omogeni submitted that the paramount consideration was always whether the accused person would show up for trial. Reference was also made by counsel to the case of **Republic vs. Musili Dewrock Koome & another [2012] eKLR** for the proposition that interference with witnesses is a criminal offence and ought not be a consideration for denial of bail.

10. Mr. Harrison Kinyanjui, appearing for the 7th to 9th Respondents added his voice to the submissions by stating that the Petitioners were not seeking to stop the proceedings in Criminal Case no. 2169 of 2016 but were simply seeking to enforce their constitutional right to bail which they had been denied for no good reason. Counsel also stated that the Petitioners were not a flight risk at all.

11. In opposition to the application, Dr. Maingi for the Respondents contended that the court in the circumstances of the case did not have jurisdiction to entertain and determine an application for bail as

there was no appeal before the court but an application made under Section 123 of the Criminal Procedure Code (Cap 75). Dr. Maingi further contended that the Petitioners rights had not been infringed in any way.

12. Counsel concluded his submissions that each case should always be viewed on its own unique facts and further that there are always various considerations to be made as to whether or not bail should be granted. In the instant case, the conduct of the Petitioners threatened national security and there was need allow the due process take its course without any interference. Dr. Maingi cited the case of **Republic vs. Diana Suleiman Said & another Miscellaneous Criminal Appl. No. 55 of 2014 [2014]eKLR** in support of his submissions.

13. In a brief rejoinder, Mr. Orengo submitted that the court had jurisdiction pursuant to Article 165(3)(a) of the Constitution as the Petitioners were asking the court to determine whether their rights under Article 49(1) of the Constitution had been violated.

14. Foremost, I have little doubt if at all that the court has the necessary remit to entertain the instant application. A party who claims that its rights or fundamental freedoms as guaranteed by the Constitution have been violated are entitled to lodge the complaint before the court and in particular the High Court.

15. My view is that the High Court's supervisory powers need not be gainsaid. The Petitioners claim that they have been denied bail in an arbitrary manner and that their right under Article 49(1) (h) of the Constitution has been violated. I see no reason in the circumstances why such a party cannot directly approach the court, given especially the fact that the Petitioners are not yet "accused persons" who would fall under the purview of Section 123(3) of the Criminal Procedure Code (Cap 75).

16. I must next state that there is no controversy that the Petitioners as they appeared in court on 14th June 2016 were still only "arrested persons". They appeared pursuant to Article 49(1)(f) to be informed of the reason for their continued detention following the application made by the DPP for such continued detention. Certainly, the DPP was acting within the law in making the application. The Petitioners opposed the same to no avail. The Petitioners also sought bail to no avail.

17. There should again exist no controversy that the principles which guide the grant of bail to an accused person awaiting trial should basically be the same as those guiding the grant of bail to persons arrested but yet to be charged or yet to take a plea. Article 49(1)(h) of the Constitution states that both persons are entitled "*to be released on bond or bail, on reasonable conditions, pending a charge or trial unless there is compelling reasons not to be released*".

18. I do not subscribe to the view that "compelling reasons" can be catalogued and indexed with finality. Each case, instead ought always to be treated and considered on its own unique facts and circumstances. Noteworthy and critically so is that Article 49(2)(h) (right to bail or bond) is not absolute and the Constitution has itself provided the claw-back by allowing any compelling reason to peg it away.

19. However, the starting point is that the principal purpose of Article 49(1)(g) & (h), in my view, is that a person is not subject to arbitrary deprivation of liberty. Consequently, where there is an application for bail there is a fundamental presumption in favour of release. Such an application for all intents and purposes leads to a determination of civil rights to liberty and whether a person should be granted his prayers for bail or bond. One must however accept the fact that due to the constitutional claw-back under Article 49(1)(h) the outcome of a bail application may be that the arrested or accused person will be confined. In short, bail is not automatic.

20. The general norm is that those unlikely to surrender to custody or appear for trial and those likely to interfere with witnesses or obstruct the cause of justice are unlikely to be granted bail. Likewise those whose protection may be necessary or are possible repeat offenders may be denied bail. These principles have been generally applied by the courts and it is unnecessary for me to rehash them in detail. Indeed, the case law cited by both counsel as well as the DPP in the instant application captured the specific expositions. Again, it is important to point out that the catalogue is not closed.

21. The burden though will always be on the DPP to satisfy the court before whom the bail application is made that there are compelling reasons to deny the bail.

22. In the instant case, the bail sought before the Chief Magistrate was pending the arrested persons being charged. The Petitioners have through their application also urged me to grant them bail pending their formal arraignment in court to face charges.

23. The principles would be the same as those applicable to bail pending trial except that there is additional need to consider in the case of continued detention not just the reasons for the continued detention but the intended length of the additional detention period past the 24 hours provided for under Article 49(f)(i) of the Constitution.

24. The DPP sought four days. The DPP advanced two reasons. Firstly, that the Petitioners were likely to interfere with witnesses and secondly, that was the ground that there was need for additional time to finalize the investigations. The affidavit in support of the DPP's application was sworn by Gilbert Kitalia. It detailed the circumstances leading to the Petitioners arrest as well as the need for their continued detention. The DPP still argues that the reasons were valid and genuine and that they still are.

25. The magistrates' court agreed with the DPP but only to an extent. It granted the DPP not an additional four days but two working days and set the matter for 17th June 2016. The Chief Magistrates court's decision came under attack before me by the Petitioners' counsel who asked for the release of the Petitioners but was defended by the DPP, who in turn sought to have them Petitioners in custody. Both parties asked me to favour them with my discretion.

26. I would first point out that a decision on whether or not to grant bail, in my view, is not a matter of discretion which implies a choice between two or more equal and proper courses. It is a matter of judgement as to whether departure from the right to bail which is the norm is justified in any instance where it is opposed.

27. My considered judgement in this case leads me to conclude that bail was rightfully denied and the continued detention of the Petitioners correctly allowed given the totality of the circumstances and facts of the case. The limited time granted would also vindicate any decision to deny bail.

28. The circumstances are exceptional. The Petitioners face relatively serious crimes. They may not be a flight risk but certainly their influence in society is not to be ignored or gainsaid. A threat to witnesses and witness interference as well as intimidation is anything but new. Its axiomatic. It should however never be the sole determinant in an opposition to a bail application. It must always be taken in the context of each case. Herein, it is pretty clear that the Petitioners are accused of conduct which threatens the national fabric. The Petitioners, in their own way, have access to thousands of Kenyans. They are politicians, or so they are called. When they speak or walk, the thousands admire or follow them perhaps for all the wrong reasons. It would be more appropriate to have them confined as the DPP wraps up the process of formally charging them in court. The time for such confinement is also to be limited to help equalize the Petitioners' rights.

29. Balancing the Petitioners individual interests with those of the public at large, I am convinced that herein rests one instance where the individual interest has to temporarily take a back seat and let the public interest which is to ensure that the DPP is assisted in his endeavours to preserve the national fabric and cohesion to take the front seat. It is a small price (the sacrifice of liberty) that the Petitioners have to pay, but yet again it is the Constitution which permits that liberty to be taken away even if temporarily if there are compelling reasons.

30. My view is that there were compelling reasons to deny bail and authorize the continued detention of the Petitioners. It appears plain to me that in the circumstances of this case and given the nature of the charges the DPP intends to pursue it was desirable and still is desirable in the course of administration of justice and in the public interest to remand the Petitioners in custody for the limited time to enable all the appropriate reports and investigations to be finalised without even an appearance of interference. I would

not intervene by granting any bail. I deny the Petitioners their request.

31. Let the Petitioners appear before the trial magistrate on the scheduled date of 17th June 2016 and renew their bail applications.

32. The application still stands dismissed with no order as to costs.

Dated, Delivered and Signed at Nairobi this 16th day of June 2016

J.L. ONGUTO

JUDGE