



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

HCCR MISC 3 OF 2015

HON. MARTIN NYAGA WAMBORA.....APPELLANT

VERSUS

ATTORNEY GENERAL.....1st RESPONDENT

INSPECTOR GENERAL OF POLICE..... 2nd RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION..... 3rd RESPONDENT

RULING

INTRODUCTION

Hon Mr Martin Nyaga Wambora, the applicant, herein has filed this application under certificate of urgency. In support of his application, he has annexed a 20 paragraph affidavit together with his statement which he gave to the police (C.I.D) in May, 2014.

In his application, he sought that the application be heard *ex parte* and on a priority basis. According to him, he is likely to be arrested any time by the police on the basis of what he describes as mere speculation and conspiracy. This he says will culminate in the infringement of his constitutional rights and fundamental freedoms. I certified the matter as urgent and ordered that it be heard *ex-parte* in the afternoon, because of other matters that the court was handling in the morning session.

Factual Basis of the Application

The applicant states in his affidavit and in his notice of motion that he is the Governor of the Embu County. The affidavit shows that this matter arose out of the alleged kidnapping of the Embu County Assembly Speaker, Mr Justus Kariuki Mate. It is alleged in his affidavit that he is the one who hired one Joseph Nganga to kidnap the said speaker. It appears the investigations were done by the police which included the examination of the said Joseph Nganga regarding his mental status.

The first examination report prepared by Doctor Margaret Gachare found Joseph Nganga to be mentally unfit to plead. The second report prepared by Doctor Moses Wamukhana found him mentally fit to plead. The police seem to have acted on the second report and charged Joseph Nganga in the court of the Chief Magistrate in Nairobi in criminal case number 764 of 2014, which is still pending for hearing in that court.

In paragraph 12 of his affidavit, the applicant has stated that the police have decided to implicate him with the kidnapping of Mr Joseph Kariuki Mate and are threatening him with the arrest on the basis of an

unknown offence arising out of the kidnap and disappearance of the speaker. In a related matter, this Joseph Nganga is alleged to have declared publicly that he was hired by the applicant to execute the alleged kidnap after the applicant paid him Ksh 50,000/-.

The applicant in paragraph 16 of the affidavit has stated that he voluntarily recorded the statement with the police (Director of Criminal Investigations) in respect of the alleged kidnap of the Embu County assembly Speaker, which he has annexed to his application.

The applicant through his counsel Mr Ndewa has in support of his application pointed out to the relevant provisions of the constitution that are in his view applicable to this case. I now turn to the applicable law.

The Applicable Law

The applicant has made an application for anticipatory bail which in simple terms means that he be released on bail pending his arrest. I am of the view that the provisions of Article 165 (3) (b), 49 (1) (23) and 29 are the relevant provisions of the 2010 Kenya that govern this matter in issue.

Under article 49 (1) (h), the court is authorized to release a person who has been arrested on bail or bond pending a charge or trial unless there are compelling reasons not to be released. Furthermore, under Article 23 (1), the court is authorized to hear and determine applications that relate to a denial, violation or infringement of or a threat to a right or fundamental freedom in the bill of rights.

Finally, under Article 29 (a) (b) and (d), a persons right to freedom and security are not to be taken away arbitrarily or without just cause. Additionally, a person should not be subjected to torture in any manner whether physically or psychologically. And in Article 258, every person has a right to file court proceedings where the constitution has been contravened or is threatened with a contravened with a contravention.

Issues for Determination:

In view of the notice of motion, his supporting affidavit and submissions of counsel for the applicant, the following are the issues for determination:

1. Whether or not the right to freedom of the applicant is threatened or not,
2. Whether or not the court is authorized to grant anticipatory bail.

The answer to these issues turns on the evidence tendered by the applicant in his application and the provisions of the 2010 Constitution of Kenya.

In terms of Article 23 of the Constitution, the court is authorized to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the bill of rights. Among the rights that are guaranteed to every citizen including the applicant is the right to be free from arbitrary arrest. In terms of Article 165 (3) (b), the court is authorized to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.

Evaluation of the Evidence and the Law:

The evidence produced by applicant shows that he has cause to believe that he is about to be arrested for an undisclosed offence. He has therefore satisfied the constitutional threshold in terms of the evidence for the grant of the anticipatory bail. The provisions of Article 23 are wide enough to include the grant of anticipatory bail to the applicant.

Verdict and Disposal Order

In the light of the foregoing, the applicant is granted anticipatory bail on the following terms:

1. To obey the police summons as and when required
2. Not to interfere with any potential witness.
3. To attend court as and when required to do so.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this ...**15th** ...day of ...
January.....**2015**

In the presence of

Mr Ndegwa for the Applicant and in the absence of the Respondents.

Court clerk Mr Muriithi

J.M. BWONWONGA

JUDGE