



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO. 414 OF 2015**

**DISHON PETER MULINGE.....APPLICANT**

**VERSUS**

**INSPECTOR GENERAL OF POLICE.....RESPONDENT**

**RULING**

By Chamber Summons dated 24<sup>th</sup> November, 2015, brought under Article 49, 50, 159 & 169 of the Constitution of Kenya, Sections 123 & 124 of the Criminal Procedure Code, Section 131 of the National Police Officers Service Act as read with Standing Orders and all other enabling provisions of the law, he Applicant prays for the following reliefs:

- a. **That he be granted anticipatory bail pending arrest for any bailable offence and/or bail pending return of summons.**
- b. **That a day be appointed for him to appear before court together with his counsel to enable him take formal procedure including charge and caution if necessary without necessarily being taken into custody.**
- c. **That a day be appointed by the Honourable court for him to appear in court for purposes of trial if criminal charges are preferred against him.**

The application is supported by the affidavit of the Applicant sworn on 24<sup>th</sup> November, 2015. It is deposed that on 24<sup>th</sup> November, 2015, his mechanic one Ken was arrested by two Police Officers named as Oscar and Chris for questioning on the whereabouts of the Applicant. Upon his release, the officers told him that they would execute the Applicant if they arrested him. The Applicant was also informed by one Reuben Ndolo, a former Member of Parliament that police visited his residence on 21<sup>st</sup> November, 2015 at Upperhill while heavily armed in three vehicles and sought to know the whereabouts of the Applicant. The said Reuben Ndolo was unaware of the whereabouts of the Applicant. Police left his residence but warned that they would execute him (Applicant) if they arrested him. Another friend of the Applicant one Brian Otiende was also on 22<sup>nd</sup> November, 2015, arrested and detained by a police Officer known as David and also questioned about the whereabouts of the Applicant. Similar threats were issued that should the police arrest the Applicant, they would execute him. A similar scenario was replicated with the arrest of one Rex Omollo. The Applicant is now apprehensive that his life was in danger and that is why he prays that he be given anticipatory bail so that he is not locked up in police custody even if any charges were to be preferred against him. He contends that the actions of the Respondent's officers not only amounts to harassment, but are in total violation of his right to a fair trial. Finally, the Applicant deposes that police officers have also been calling him on telephone and threatening to execute him if

they arrested him.

The application was canvassed before me on 22<sup>nd</sup> December, 2015. Learned counsel for the Applicant Mr. Onyango made oral submissions reiterating the deposition contained in the Supporting Affidavit to the application. In addition, he submitted that the Applicant was not opposed to being charged with any criminal offence or to any investigations being carried out against him. He was however apprehensive that his life would be compromised if he was locked up in police custody because he would be under the care of the same police officers who were threatening to kill him. He submitted that the constitution guarantees the right to life which this court must uphold.

Learned counsel for the Respondent, Miss. Wario opposed the application vide Grounds of Opposition dated 1<sup>st</sup> December, 2015. They are as follows:

1. **That both the application and supporting affidavit are bad in law and craving to be dismissed.**
2. **That the orders sought are unattainable in law and misconceived as the alleged harassment is by unknown persons.**
3. **The application lacks merit since the Applicant's rights have not been infringed by any public officer.**
4. **The application is an abuse of the court process calculated to defeat the investigation by the police as provided under the law**

In her oral submissions, she submitted that the application was based on hearsay evidence because material disclosures were not made by the Applicant. In particular, the Applicant failed to give specific identities of the police officers who were allegedly calling and threatening him with execution. For instance, their force numbers were not given and the Police Stations from which they came. Furthermore, the Applicant had not demonstrated that any of his Constitutional rights had been infringed or violated. This was so because police are obligated by law to conduct investigations and charge any person found culpable. Again, if the Applicant had been threatened with execution, the most prudent thing to do was to report at the nearest police station which he had not done. She submitted that the application was calculated at defeating investigations and the same ought to be dismissed.

I have considered the respective submissions and I take the following view of the application. Anticipatory bail shall be granted only when an Applicant demonstrates that his Constitutional right has been violated or is likely to be violated. See the case of **Richard Makhanu –vs- Republic, Bungoma High Court Miscellaneous Criminal Case No. 10 of 2015** in which a concurrent court held that:

*“with regard to the issue of anticipatory bail, it is usually granted where there is alleged to be serious breaches by a state organ. In the case of W’Njuguna vs Republic, Nairobi Miscellaneous Case No. 710 of 2002, (2004) 1 KLR 520 the court held that anticipatory bail can be granted:*

*“.. when there are circumstances of serious breaches of a citizen’s rights by an organ of the state which is supposed to protect the same.”*

Similar sentiments were observed in the case of **Eric Mailu vs Republic and 2 others Nairobi Misc. Cr. Application No. 24 of 2013** in which it was emphasized that anticipatory bail would only issue when there was serious breach of a citizen’s rights by organs of state. Accordingly, it is salient that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental Constitutional rights in conformity with what the Constitution envisages constitutes protection of fundamental rights and freedoms of a citizen. It cannot issue where an Applicant labours under apprehension founded on unsubstantiated claims. The fear of breach to fundamental right must be real and demonstrable. An Applicant must demonstrate the breach by acts and facts constituting the alleged breach.

In the present case, the Applicant contends that four of his friends have so far been arrested and detained for questioning on his whereabouts. Interestingly, despite the unclear identity of the police officers

involved, the Police Stations in which the persons were detained are undisclosed. It is trite that the National Police Service is created for amongst other purposes, to protect the lives of Kenya Citizens. That is why any person whose life is threatened must avail himself to the nearest Police Station or to any senior police officer for purposes of reporting the threat. Although the Applicant avers that he fears to report the threat to a police station, the reason he advances for not being confident with the police are not plausible. To start with, he admits that the police should investigate him and that he is ready to report to any police station for that purpose. He cannot then turn around and say that the same police officers who are threatening to execute him are the same officers who should investigate him. That statement of contradiction begs more questions than answers. Further, none of his friends who were allegedly interrogated have recorded statements alluding to the threats to life of the Applicant. None of them again has sworn an affidavit supporting the allegations that the life of the Applicant is in danger. From the circumstances of the background to this case, it is difficult to authenticate the identity of the alleged persons pursuing the Applicant as police officers. That is the more reason why the alleged threats should be reported to a police station. In my view, this application is based on unsubstantiated fears which this court cannot rely on in granting the orders sought.

It is trite that the police are obligated by law to conduct investigations of any complaint made to them. If the Applicant indeed fears that his life is in danger, he ought to be accompanied to the police station by his lawyer or relatives or persons known to him for purposes of ensuring that third parties are aware of his whereabouts. Furthermore, it is also proper for him to make a report with a senior police officer who may be more authoritative in protecting his interests. Let me emphasize that courts would send bad precedents if anticipatory bails are granted without founded reasons. This would greatly hamper the mandate of the of conducting investigations and would send the wrong signal to the criminal justice process. I say so bearing in mind that the arrest of a suspect serves the noble purposes of completing the process of investigations; for example, interrogation, recording of a statement and preparations to court such as taking of finger prints and drawing of charge sheets. In any case, the Constitution has provided for safeguards against arbitrary arrests and detentions of suspects and abuse of their fundamental rights and freedoms. First, no suspect can be detained for more than 24 hours before he is arraigned in a court of law. Secondly, if that provision is breached, an aggrieved party is at liberty to seek redress for the violation of his Constitutional rights and freedoms. In that respect, I am seized with the conviction that anticipatory bail should only issue where an Applicant clearly demonstrates breach of his fundamental rights and freedoms by a State organ. For the reasons aforesated, the Applicant has not demonstrated that the Respondent has breached or threatened to breach his fundamental rights and freedoms. Accordingly, this application lacks merit and the same is dismissed with no orders of costs.

**DATED and DELIVERED** this 8<sup>TH</sup> day of **DECEMBER**, 2015.

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Mr. Onyango for the Applicant.*
2. *M/s Njuguna Respondent.*