



IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL MISCELLANEOUS CASE NO. 52 OF 2014

REPUBLICAPPLICANT

VERSUS

ISSA TIMAMMYRESPONDENT

RULING

By way of an application dated the 26th day of June, 2014 and which is expressed to be brought under article 49(i) (g) and h of the Constitution of Kenya the applicant who is the state seeks orders for the Respondent to be informed of the reasons for continued detention in police custody.

Secondly to grant the applicant at least fourteen (14) days for the police to complete investigations into the offence of murder and other serious offences and to be remanded at port police within Mombasa.

The grounds are that the Respondent is being investigated in connection with murder, forcible transfer of population and other terrorism related offences within Lamu County.

Further that there are intelligence reports that the crimes committed were planned and systematically executed and there is need to have sufficient time to inquire into.

That if granted bail the suspect is likely to interfere with investigations and he remains a serious threat to Witnesses.

This application is supported by the affidavit of **PC REUBEN MWANIKI** of Lamu West CID Divisional Headquarters who depones that he is investigating the mass killings of sixty five (65) people that happened on the 15th and 16th day of June, 2014 and that the Respondent is widely mentioned by potential Witnesses as having facilitated, organized, prepared or acted in cahoots with the persons who executed the heinous crimes.

Further the Respondent is subject of serious investigations into the crimes of murder, forcible transfer of population and malicious damage to property.

That the Suspect/Respondent is a man of means capable of interfering with investigations by;

(a) Fanning violence in the troubled area.

(b) Masterminding the identification and killing of potential Witnesses.

(c) Causing the displacement of inhabitants who were particularly targeted during the two incidents.

(d) Activating a wide network of criminal gangs with the sole aim of intimidating and instilling untold fear into potential Witnesses thereby dissuading them from co-operating with investigating agencies for fear of reprisal.

That if the Respondent is released from police custody he will engage directly or indirectly in instigating crimes of the nature stated above.

Further that the investigation bear the hallmarks of international organized crimes which investigations require methodical approach.

This application is opposed on the grounds that the applicant has contravened article 49 (1) of the Constitution which provides for the rights of an arrested person thus,

“An arrested person has the right

(a) to be informed promptly in a language that the person understands of

I. The reason for the arrest

II. The right to remain silent and the consequences of not remaining silent

(b) To remain silent

(c) To communicate with an Advocate, and other persons whose assistance is necessary.

(d) Not to be compelled to make any confession or admission that could be used in evidence against the person.

(e) To be held separately from persons who are serving a Sentence

(f) To be brought before a Court as soon as reasonably possible but not later than

I. Four hours after being arrested, or

II. If the twenty four hours could coincide ordinary Court hours or on a day that is not an ordinary Court day, the end of the next Court day.

(g) At the first Court appearance, to be charged or informed of the reason for the detention continuing, or to be released and

(h) To be released on bond or bail, or reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released”.

Leading Counsel for the Respondent Mr. Buti contends that the Respondent was not informed the reasons for his arrest, the circumstances of his arrest were not explained by the applicant. The Respondent has not been charged or informed the reasons for the continued detention. He exhorted the Court to take Judicial notice of the fact that the Respondent is the sitting Governor of Lamu. He has more than thirty (30) years of practice as an Advocate and is an officer of the Court and that he has been subjected to degrading treatment.

It is further submitted that the crimes the Respondent is alluded to have committed fall under the Rome Statute whose Court is based at Geneva and this Court has no jurisdiction.

The Supporting affidavit sworn by PC MWANIKI is faulted for not disclosing the source of information contained therein.

I have herein above enumerated the rights of an Accused person but those rights and the others included in the bill of rights under articles 19, 20, 21, 22 have to be in conformity with article 24(1) of the Constitution which provides,

“A right of fundamental freedom in the bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors including

(a) The nature of the right of fundamental freedom

(b) The importance of the purpose of the limitation.

(c) The nature and extent of the limitation.

(d) The need to ensure that the enforcement freedoms by any individual does not prejudice the rights and fundamental freedoms of others and the relation between the limitation and the purpose and whether there are less restrictive means to achieve the purpose”.

Counsel for the State Mr. Muteti has cited the case of *Kennedy –Vs- Mendoze Martinex* a Supreme Court authority of USA where that Court was confronted with the issue of deprivation of citizenship it was held,

“While it confirms citizen rights, plainly there are imperative obligation of citizenship. The powers of congress to require military service for the common defence are broad and far reaching, for while the constitution protects against invasions of individual rights, it is not a suicide pact”.

This line of thinking is in conformity with article 24(1) (d) of our Constitution,

“That the need to ensure that the enforcement of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others”.

The picture painted of the Respondent by the affidavit of PC MWANIKI is indeed a grim one. The averments contained therein if true are very serious in nature and may call for the denial of the Respondents right to liberty.

However, the main function of bail is to ensure the presence of the Accused at the trial. It is the main and utmost compelling reason for the grant or refusal of bond to an Accused or suspect.

Of all the grounds given, there is no allegation that the Respondent is a flight risk.

The argument that the Respondent will interfere with Witnesses can be countered by the fact that the State is at liberty to make an application under the Witness protection Act to have the potential Witnesses given the necessary protection under that Act.

The other issue of security on the ground, the State has the resources to ensure that security is maintained in the area in question and the whole country at large.

This Court has been asked to extend the time the Respondent has been in police custody to fourteen (14) days. I believe the investigating agencies have had enough time so far and are not limited in their investigations in the future.

The upshot of this is that I find no good reason to continue holding the Respondent in custody. He is admitted to a bond of Kshs. 20 million shillings with two sureties of similar amount or cash bail of Ksh. 5

million.

Being an officer of this Court, the Respondent is deemed to know the conditions of bond. There are allegations that he might be tempted to fan violence in the area. These are considerations that may lead to the cancellation of his bond. I have deliberately not tackled the issue of whether the rights of an Accused person under the Constitution were accorded to him because the application by the state did not touch on this issue. The Respondent is at liberty at an opportune time to bring up the issue in a Court of Law.

Ruling delivered, dated and signed this **30th** day of **June, 2014**.

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M. MUYA

JUDGE

30TH JUNE, 2014

In the presence of:-

Muteti, Mureithi and Kiprop for the State

Magolo, Balala, Abubakar and Abdalla for the Respondent

Wanyama holding brief for Council of Governors

Onyango for the Respondent

Nowrojee for the Accused

M. MUYA

JUDGE

Court: Mention 16th July, 2014.

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M. MUYA

JUDGE

30TH JUNE, 2014