



No. 55/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL MISCELLANEOUS APPLICATION NO. 76 OF 2013

WILLIAM NDOLO NDETEI.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE OFFICER INCHARGE

MAKUENI POLICE STATION.2ND RESPONDENT

RULING

1. The application herein is for anticipatory bail pending arrest. It is based on grounds that following a complaint lodged by one **John Munyoki Musau** to the police one **Deon Kyenze Ndetei** was arrested and charged in Makueni Court with the offence of malicious damage to property contrary to a section 339 (1) of the Penal Code. The charge sheet drawn by the police had the name of the applicant as a co-accused to the said **Deon Nyenze Ndetei**.
2. The matter was placed before the court. The prosecutor applied for warrant of arrest to issue against the applicant for jumping bail in another case. On 17th May, 2012 the prosecution applied for withdrawal of the charge against the applicant under section 87(a) of the Criminal Procedure Code. No Orders were however issued by the court. The applicant got word that the police had conspired to arrest him hence this application.
3. The application is supported by an affidavit sworn by the applicant where he depones that having not been interrogated by the police he was under no obligation to appear in court. He averred that his advocate had informed him that the court had not made any ruling in his regard. He suspected that the complainant in the matter had penetrated both the prosecution and court by creating an impression that he had jumped bail. This in his opinion was in breach of his constitutional right. He therefore sought protection of the court.
4. This is a matter where the State Counsel did not appear in court to respond to the application. When the application came up for hearing on the 28th May, 2013 **Mr. Kasyoka** then holding brief for **Mr. Matata** for the applicant sought an adjournment with an intention of having time to access the file in the lower court. When the application came up on 18th June, 2013, **Mr. Matata** said all documents he was to rely on were on record. He insisted on proceeding with the matter.
5. Annexure "WNNP" to the affidavit in support of the application is a copy of a charge sheet from Makueni Principal Magistrate's Court Criminal Case No. 502/2011. The accuseds are **Deon Kyenze Ndetei** and **William Ndolo Ndeti** who is the applicant herein. The charge is malicious damage to property contrary to section 339(1) of the Penal Code. It is indicated an application for summons for the 2nd accused was to be made.

6. Without a copy of proceedings that were made in the subordinate court, what has been stated in the affidavit cannot be established.
7. The applicant had a duty of demonstrating that there were special events or reasons that made him believe he was to be arrested following trumped up charges which would result into an infringement of his constitutional rights.
8. He has alleged that an application was made by the prosecution to have the charge against him withdrawn under section 87(a) of the Criminal Procedure Code. This would mean that he would be arrested at any time. Further, he stated that no orders were made by the court. This means that there is no warrant of arrest against him.
9. The applicant claims he got word that police officers had conspired to apprehend him. It was important that he reveals his source of information. This was mere conjecture. There is no evidence to establish the allegations.
10. The only evidence this court can rely on is annexure "WNNP" which is a copy of a charge sheet establishing the fact that an application was to be made for summons requiring attendance to issue for him to appear in court to answer a charge of malicious damage to property contrary to section 339(1) of the Penal Code. Summons being issued means he is not supposed to be arrested. He ought to make himself available to respond to the charge. He has no reason to imagine that he will be arrested.
11. In the premises, the applicant has failed to demonstrate that his fundamental rights are likely to be in any danger of being breached. The application lacks merit. It is therefore dismissed.

DATED, SIGNED and DELIVERED at MACHAKOS this 21ST day of JUNE, 2013.

L.N. MUTENDE

JUDGE