



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
HIGH COURT CRIMINAL REVISION NO. 207 OF 2013

KELVIN OKORE OTIENOAPPLICANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

1. In the applicant's Notice of Motion dated 24th July 2013 and brought under **Section 123**, of the **Criminal Procedure Code** and **Articles 47** and **49** of the **Constitution** of the Republic of Kenya, he prays for orders that the court admits him to bail pending arrest, or in the alternative releases him on his execution of a bond without sureties for his appearance. His application is supported by the annexed affidavit in which he depones that he has not committed any offence, that he has paid back monies advanced to him, and that the intention to arrest and charge him is malicious.
2. Mr. Omino, the learned counsel for the applicant submitted that the applicant and one Mrs. Offisi are in a business together, where they contribute funds to purchase and supply goods. That in the month of March of an undisclosed year the applicant was given Kshs.370,000/= by Mrs. Offisi. He also contributed some money and they purchased goods and made supplies to Corporate Talk Ltd and Masai Wilderness Conservational Trust.
3. That while waiting for payments for the said deliveries the said Mrs. Offisi has been visiting the applicant at his house with her husband, making noise and demanding for her monies. From his own resources he has paid her Kshs.200,000/= on different dates.
4. In his supporting affidavit the applicant depones that he gave the said Mrs. Offisi a cheque for the amount of Kshs.370,000/= to hold as security for the cash that she contributed but the said cheque did not bear the name of the payee. He also depones that Mrs. Offisi has reported the matter to the Pangani Police who have summoned the applicant with the intention of locking him up on an otherwise civil debt, hence this application.
5. In response, learned state counsel Mr. Kadebe contended that the applicant had demonstrated that the case emanated from a commercial transaction between himself and Mrs. Offisi but had however, not stated the conditions under which the cheque issued to Mrs. Offisi was to be encashed. Further, the applicant had not demonstrated that there was imminent danger of

violation of his rights by an organ of state.

6. Mr. Kadebe also urged that Pangani Police are mandated to carry out investigations and to prefer charges where there are violations, and cannot be prevented from carrying out their mandate. That in any case should he be arrested, he would be arraigned in court within 24 hours as required by the Constitution and therefore, his apprehension has been taken care of by the law. Mr. Kadebe urged that the applicant should present himself to the police and allow the police to conduct their investigations, and let due process follow.
7. Anticipatory bail is usually granted where there are serious breaches by a state organ, and from the supporting affidavit it has not been stated how the rights of the applicant under **Article 29(c)** of the **Constitution** have been violated. **Article 29(c)** of the **Constitution** which provides for the freedom of liberty is not absolute. It must be demonstrated that the applicant's rights to liberty have been violated by the police in this case.
8. There is no specific provision on grant of anticipatory bail to a person who is in fear of imminent arrest. **Article 49(1) (h)** of the **Constitution** provides that:

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

This Article envisages a situation where a person has already been arrested or has been arraigned in court after criminal charges are preferred.

9. The High Court however, has jurisdiction to determine this matter for reasons that the **Constitution of Kenya, 2010** in **Article 22(1)** affords every person the right:

“ ...to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

Further, under **Article 165** of the **Constitution** the High Court has jurisdiction 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.

10. The above provisions of the constitution allow for the granting of anticipatory bail, or bail pending arrest in fitting circumstances. The fitting circumstances would be such as those adverted to in the case of **W’Njuguna versus Republic, Nairobi Misc. Cr. Case No. 710 of 2002, [2004] 1 KLR 520**, where 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. “

11. Taking all matters in the case before me into consideration, while the Applicant has submitted that he is in imminent danger of being arrested, I am not persuaded that the Applicant has demonstrated the presence of serious breach of his rights by any organ of state which is supposed to protect these rights, to warrant the granting of anticipatory bail. Indeed the Applicant is entitled to equal protection before the law under the Constitution, but the actions of the police in investigating the complaint lodged by Mrs. Offisi is a lawful one, and cannot be said to violate his rights.
12. Furthermore, if the matters in question are still under investigation the outcome of those investigations cannot be pre-empted by the applicant or by this court. Should the investigations culminate in the arrest of the applicant, arrest and arraignment are known processes of our legal system and per se, do not amount to infringement on the fundamental rights and freedoms of the appellant. In any case he will be entitled to bail as provided by the Constitution. To my mind, the

apprehension by the Applicant does not meet the threshold of serious breach of his rights by a state organ.

13. In sum, the application before me is lacking in merit and is therefore dismissed in its entirety.

SIGNED DATED and DELIVERED in open court this 17th day of *September* 2013.

L. A. ACHODE

JUDGE