



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Petition 585 of 2006

**IN THE MATTER OF SECTION 84(1) & (2) OF THE CONSTITUTION OF KENYA
IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS SECURED AND GUARANTEED UNDER SECTIONS 70(a), 72,74,77 AND 82 OF
THE CONSTITUTION**

BETWEEN

JOSEPH MAINA KAMUNYA PETITIONER

and

THE HON. ATTORNEY GENERAL RESPONDENT

RULING

In this matter the Petitioner filed a petition dated 9th October 2005 on the same date seeking inter-alia an order that he be admitted to bail pending trial in Nairobi Chief Magistrate's Court Criminal Cases No 2574 of 2006 and 262 of 2006. The Petition is grounded on S 70(a) 72, 74, 77, 82 and 84 of the constitution.

By a Chamber application dated 17th October, 2006 and filed on 19th October, 2006 the Petitioner moved the court to have him discharged from prison custody on bail pending hearing and determination of the petition. This matter was referred to the Honourable the Chief Justice for appointment of a bench hence our appointment.

In the *Chief Magistrate's Court Criminal Case No 254 of 2006 Republic v John Maina Kamunya & another* the Petitioner is charged with two offences namely:

(a) being in possession of a firearm without a certificate contrary to S 4(1) as read together with section 4(3)(a) of the Fire Arm Act cap 114 of LOK and

(b) trafficking in Narcotic Drugs contrary to S 4(a) of the Narcotics Drugs and Psychotropic substances Control Act No. 4. He is charged with one Mr Joseph Kimani Rao who has been released on bond

In Nairobi *Chief Magistrates Criminal Case No. 262 of 2006 Republic v John Maina Kamunya and others* the petitioner is charged with other persons (over 30) persons for being present at and consenting to the administering of an unlawful oath contrary to section 6(a) (iv) of the Penal code. All the other persons jointly charged with the Petitioner have been released on bond pending the joint trial.

Upon his arraignment and charge on 14th February 2006, the Petitioner applied for bond pending trial before the Nairobi Chief Magistrate's Court who declined it by a ruling delivered on 1st March 2006 on the strength of an affidavit sworn by Chief Inspector Albert Arianda the investigating officer in the two cases lodged against the petitioner.

He subsequently filed an application in the High Court, for bail pending the hearing of an Appeal from ***Criminal Case No. 1254 of 2006***. The High Court by a ruling dated 22nd March 2006 declined bail for the same reasons as given by the lower court and in particular "that the desire to fail to honour the bond terms was real and the motivation to do so quite evident.

By yet another application for bail in respect of the two cases on 31st March 2006 the Petitioner filed another application before another judge of this High Court and the application was refused on the ground that no new facts in support of bail had been presented to the court and that the cases against the Petitioner had commenced in good time as required under S 72(5) of the Constitution.

The two cases are still pending but the prosecution has closed their cases in both matters and as submitted by Counsel for the Respondent during the hearing of this application for conservatory orders, the petitioner was at the point of commencing his defence. However, because of the number of the accused persons in ***Criminal Case 262 of 2006*** the matter was likely to take a long time to finalise perhaps 3 to 6 months or more.

It is against the above factual background that the application for conservatory orders was filed.

We have on our part given considerable thought to the matter and in particular the constitutional points touching on the right of bail as part of the right of liberty under s 72. We have also seriously focused on the fact that two courts namely the Chief Magistrate Court and the High Court have exercised concurrent jurisdiction and have in each case declined to grant bail. This Court is being asked to invoke the Original jurisdiction under S 84 of the Constitution on the ground that failure to grant bail threatens contravention or actual contravention of the right to liberty and a denial of the right to a fair trial under S 77 in that without liberty the Petitioners right to equality of arms has been denied that he is prejudiced in the preparation of his defence in both cases.

Because of the exercise of the concurrent jurisdiction as set out above and now the invocation of this court's original jurisdiction under S 84 we would like to avoid making findings that could prejudice the fair hearing of the petition itself at this preliminary stage. This should in the interest of consistency and justice be avoided by declining to grant any conservatory orders at this stage which we hereby do. Instead we direct that the Petition itself be fast tracked for hearing before us as under:

- (1) All the parties to file an exchange skeleton arguments with lists of authorities (all duly paginated and highlighted) within 30 days.
- (2) That the Petition be heard on 26th April 2006 at 10.30 am.

It is so ordered.

DATED and delivered at Nairobi this 21st March 2007.

J.G. NYAMU

JUDGE

R. WENDO

JUDGE