



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

Misc. Appli. 110 of 2006

CHACHA MWITA..... 1ST PETITIONER
AYUB SAVULA2ND PETITIONER
DENNIS ONYANGO 3RD PETITIONER
OKETCH KENDO.....4TH PETITIONER
OTSIENO NYAMWAYA.....5TH PETITIONER

V E R S U S

THE COMMISSIONER OF POLICE..... 1ST RESPONDENT
ATTORNEY GENERAL2ND RESPONDENT

R U L I N G

This Ruling relates to a Chamber Summons brought under a Certificate of Urgency both dated and filed on 1-03-2006, pursuant to the provisions of Sections 60, 70, 74, 77, 79 and 84 of the Constitution and Rules 20 and 21 of the Constitution of Kenya (**Protection of Fundamental Rights and Freedoms of the Individual**) **High Court Practice and Procedure Rules**, and Sections 3A of the Civil Procedure Act and enabling provisions of the law.

In support of the Certificate of Urgency, the Applicants/Petitioners plead that-

- (1) the Applicants/Petitioners are being unlawfully and maliciously detained by the 1st Respondent;**
- (2) the Applicants/Petitioners herein have been arrested and detained arbitrarily on an allegation of publishing alarming statements and have been denied Police Bond;**
- (3) the Petitioners have been detained for more than 48 hours contrary to law;**
- (4) the 1st Respondent has threatened to arrest and detain the 4th and 5th Applicants/Petitioners contrary to law;**
- (5) the Applicants/Petitioners are busy professionals and their continued detention has, and**

continues to occasion grievous loss to themselves and to their employer.

and for those reasons, the Applicants prayed that their application (**Chamber Summons**) be certified as urgent. I so certified the application.

The Applicants/Petitioners Chamber Summons application seeks the following prayers-

- (1) That due to urgency of the application service of the application be dispensed with in the first instance;**
- (2) That the Court do grant the 1st, 2nd and 3rd Petitioners bail pending arraignment in court or further action by the Police;**
- (3) that the court do grant bail pending arrest or anticipatory bail in relation to the 4th and 5th Petitioners herein;**
- (4) that the court do issue further or other orders as it may deem just;**
- (5) that costs be awarded to the Plaintiff.**

The Application was supported by the Affidavit of Nelly Matheka the Company Secretary and Legal Adviser of the Standard Media Group sworn and filed with the application on 1-03-2006. The application was based upon the following grounds-

- (1) The Respondents have purported (resorted) to the use of criminal law mechanisms to inhibit the Applicants' constitutionally secured freedom of expression and secure protection of the law;**
- (2) the 1st, 2nd and 3rd Applicants/Petitioners have been arrested and detained by the Police for purportedly publishing a story alleging a meeting which cannot amount to an alarming statement,**
- (3) the basis of the arrest of the Applicants herein is alleged misstatements, errors and inaccuracies arising from newspaper and/or press reports which misstatements, inaccuracies and errors would be within the province of civil wrongs and not within the ambit of criminal law.**
- (4) that a report alleging a meeting between two citizens of the Republic of Kenya whether factual or accurate cannot constitute a criminal offence;**
- (5) that the arrest and detention of the 1st, 2nd and 3rd Petitioners for expressions in a local Daily runs contrary to the Constitution of Kenya and are a clear and arbitrary infringement of the Freedom of the Press;**
- (6) On the assurance that the Petitioners would not be arrested, the Applicants voluntarily went to Central Police Station where they recorded statements relating to the matter but were thereafter detained;**
- (7) So far no one has lodged a complaint with the Police relating to the alleged publication;**
- (8) It appears that the arrest and detention of the 1st, 2nd and 3rd Applicants, and the threatened arrest of the 4th and 5th Applicants is actuated by malice and extraneous considerations not known to the Applicants.**

In his submissions, Mr. Otiendo Amollo, learned Counsel for the Applicants/Petitioners followed the above grounds, and the Supporting Affidavit of the said Nelly Matheka the Standard Media Group Company Secretary, and Legal Advisor, who stated on Oath that “ **I am thoroughly conversant with the facts of this case**” I have read her Affidavit and considered the grounds upon which the

Application/Petition herein is, and will be based.

In essence, for the Applicants to obtain the redress or relief they seek, it should be shown that the bond they seek is for an offence for which either the Petitioner 1st 2nd & 3rd are being detained, or for which the Petitioners 4th - 5th are being sought are bailable. If they are being sought for publishing an alarming report, or causing despondency among the citizenry, or a section thereof, such offences, if they be considered such, are not capital offences, and are ordinarily bailable.

The Petitioners seek redress under Section 84 (1) of the Constitution which says-

“84 (1) Subject to subsection (6) if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him/or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction-

(a) to hear and determine an application made by a person in pursuance of subsection (1);

(b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3); and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Section 70 to 83 inclusive.”

The 1st, 2nd and 3rd Petitioners herein plead that their constitutional rights to life, security of the person and the protection of the law (**Section 70 of the Constitution**) have been violated. The 4th and 5th Petitioners have reasonable apprehension that their right to security of the person and the protection of the law, is being threatened. They fear that once they give themselves up to the Police (**as they are being sought**) they will suffer the same fate of unlawful detention as their colleagues, the 1st, 2nd and 3rd Petitioners.

The relevant other law in this matter is the Criminal Procedure Code (**Chapter 75, Laws of Kenya**). Section 36 thereof provides as follows:-

36. When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence, the officer in charge of the Police Station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty four hours after he has been so taken into custody, inquire into the case, and unless the offence appears to be of a serious nature, release the person on his executing a bond with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable.

***Provided* that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.”**

37. Officers in charge of Police Stations shall report to the nearest magistrate the cases of all persons arrested without warrant within the limits of their respective stations, whether those persons have been admitted to bail or not”

It is clear from the grounds and Supporting Affidavit and submissions of Counsel that the 1st, 2nd and 3rd Petitioners have been in custody in excess of the twenty-four (24) hours prescribed by Section 36 of the

Criminal Procedure Code and for all that period they have neither been taken to any subordinate court, nor have they been offered bond, and are still in custody. This is clearly a violation of the said Section 36 and 37 of the Criminal Procedure Code and in terms of Section 70 of the Constitution, a violation of the constitutional right to life, liberty, security of the person and protection of the law. It is no wonder that the 4th and 5th Petitioners, also seek “**anticipatory bail**” or “**bail pending arrest**”. They are reasonably apprehensive that they will be subjected to the same or worse treatment.

In these circumstances, the Petitioners have demonstrated to the satisfaction of this Court that the freedom and liberty of the 1st, 2nd and 3rd Petitioners has, as provided for under the Constitution, been severely compromised and breached. It is also very likely that the liberty and freedom of the 4th and 5th Petitioners will be equally severed and curtailed once they give themselves to the not so gentle probing of the Respondents and in particular the 1st Respondent’s agents.

It has been said that there is no provision in law for the grant of “**anticipatory**” or “**bail pending arrest**”. This is indeed correct so far as the provisions of the Criminal Procedure Code are concerned. Not so the Constitution which under Section 84 (2) gives the High Court an original jurisdiction to hear and determine any application alleging contravention, or likely contravention of the fundamental rights and freedoms of the individual under Section 84 (1) of the Constitution. The right to grant such redress is derived from the Constitution and not any other law. The said Section 84 (2) empowers the court to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Sections 70-83 inclusive of the Constitution.

Section 84 (6) of the Constitution empowers the Chief Justice to make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section.

By rule 20 of the Constitution of Kenya (**Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual**) **High Court Practice and Procedure Rules**, a Judge before whom a Petition under rule 12 is presented may hear and determine an application for conservatory or interim orders.

In making these orders, I am keenly aware that the freedom of the “**Fourth Estate**” or the **Press** is like other freedoms, coupled with an onerous responsibility. All other freedoms are subject to the rights and sensibilities of others. No right is ever absolute. In a competitive political environment, the Press has the unenviable duty to ensure that the information it churns out must be correct, and as far as possible, what it publishes does not unnecessarily offend, and cause either disaffection or disharmony among either competing classes or the citizenry at large.

With that caution in mind, and being satisfied that the fundamental rights and freedoms to liberty and secure protection of the law of the Applicants have been severely curtailed and compromised and breached, and being aware now that the 1st, 2nd and 3rd Petitioners have 2.00 p.m today according to the information from the Petitioners Counsel (Mr. Otiende Amollo, been granted Bail, by the subordinate Court, and have no need of the orders herein, the 4th and 5th Petitioners/Applicants deserve anticipatory bail, and the same is granted to them on the following terms-

(1) That the 4th and 5th Petitioners/Applicants are hereby admitted to bail for all bailable offences under the law in the sum of Kshs.50,000/= with one surety of the like sum of Kenya Shillings fifty thousand only.

(2) That the 4th and 5th Petitioners/Applicants do present themselves to the Respondents or their servants or agents with or without Counsel within (7) days from the date of executing the bond.

(3) In default of any paragraphs (1-2 inclusive) above, the bail granted herein shall lapse.

It is so ordered.

Dated and delivered at Nairobi this 2nd day of March,
2006.

ANYARA EMUKULE

JUDGE.