



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Misc Crim Appli 12 of 2006

**ZAKAYO KIMUTAI KIMETO
APPLICANT**

VERSUS

REPUBLIC RESPONDENT

RULING

Zakayo Kimutai Kimeto is a resident of Bureti District in the Rift Valley Province. During the year 2005, he sold a motor vehicle registration number KAE 861R which he had bought from Resma Commercial Agencies of Nakuru in April 2003. He has recently learnt from the purchaser that the vehicle was impounded by the Police at Eldoret. He went to the said station to establish why the vehicle was impounded, and though he did not meet any of the investigating officers, he however two similar vehicles bearing the registration number KAE 861 R. Two days after his visit to the station, he received a telephone call from the investigating officer, who requested him to report at the station. He has since received several threatening telephone calls.

Being apprehensive he has moved to this court and he seeks anticipatory bail, which application is opposed by the State.

Mr. Ng’eno, learned Counsel who urged the court to find in his client’s favour, cited the cases of Njoya & 6 others v. Attorney General [2004]1 KLR 261, and W’Njuguna v. R [2004] 1 KLR 520.

In reply, learned State Counsel Miss Oundo submitted that, the applicant who has shown by his own deposition that the police have a basis to investigate the matter, has not made any statements to police, and that in any event, the court can not take over the role of the investigating office. In her view, given the surrounding circumstances, the charge of handling stolen property would be tenable and the applicant would be able to obtain bond upon application, otherwise the application lacks in merit is the applicant can only move the court after his arrest, but not before then.

Section 123 of the Criminal Procedure Code, which this applicant relies on, stipulates that:

“(1) When a person, other than a person accused (underlining mine) of murder, treason, robbery with violence, attempted robbery with violence or any drug related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking

bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

(3) The High Court may in any case direct that an accused (underlining mine) person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”

It is clear from the above provisions of that anticipatory bail is not catered for in the Criminal Procedure Code. But Mr. Ngeno relies on section 84 of the Constitution, which provides for the enforcement of the protective provisions of the Constitution, and he urged the court to base its finding on the position that being the supreme law, the Constitution supersedes the Criminal Procedure Code, which is silent on the issue of anticipatory bail.

I have looked at Chapter V of the Constitution and especially sections 70 and 72 (1) (a) to (e) thereof.

Section 70 provides that:

“Whereas every person in Kenya is entitled to the

fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly

and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation”

There is however a proviso to the above in that the provisions of the aforementioned Chapter “*shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest*”.

Section 72 (1) (a) to (e) thereof provides that:

“No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases-

(a) in execution of the sentence or order of a court,

whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;

(b) in execution of the order of the High court or the Court of

appeal punishing him for contempt of that court or of another court or tribunal;

(c) in execution of the order of a court made to secure the

fulfillment of an obligation imposed on him by law;

(d) for the purpose of bringing him before a court in execution

of the order of a court;

(e) upon reasonable suspicion of his having committed, or being

about to commit, a criminal offence under the law of Kenya;”

I have taken the submissions of both counsel into account and having also considered the cited cases, I find that in the W’Njuguna’s case, the learned Judges held, and I am inclined to agree with them, that *“the right to anticipatory bail has to be called out where there are circumstances of serious breaches by an organ of the state of a citizen’s fundamental rightanticipatory bail can only be granted upon terms that are appropriate under the circumstances of each case”*.

It cannot be gainsaid that the constitution bestows upon every Kenyan citizen a right to liberty. It is however important for one who moves the court under the Bill of Rights, to demonstrate how his rights have been curtailed.

The applicant has made it very clear that he is apprehensive that the purchaser and the investigating officer are only interested in *“threatening, arresting, detaining and persecuting him”*.

The issue that comes to mind in this application is whether by carrying out investigations in a criminal matter, the police would be acting unconstitutionally. It is clear in my mind that the rights as envisaged under the Constitution have limitations in light of the proviso as contained Section 72 (1) and especially (e) thereof.

In as much as I subscribe to the fact that the Constitution is supreme, and bearing in mind the fact that the dominant issue is whether an applicants Constitutional rights have been infringed upon, and also that each case shall be decided on its circumstances, the issue that comes to mind is whether this court can thus seek to curtail the powers of the Police, where the applicant admits that he handled a motor vehicle which is suspected to have been stolen, which by itself would be a criminal offence under the laws of this country? I think not.

I am also of the view that this court cannot entertain the applicant who has not been able to demonstrate how his Constitutional rights have been infringed upon.

The upshot of this is that I find that the application lacks in merit. It is dismissed.

Dated and delivered at Eldoret this 27th day of April 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Miss Oundo for the State

Mr. Ngeno for the applicant