



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL CASE NO. 710 OF 2002

SAMUEL MUCIRI W'NJUGUNA..... APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

This is a constitutional reference brought pursuant to the provisions of sections 70, 72, 76 and 84 (1) and (6) and 123 (8) of the Constitution of Kenya. The reference is further brought under the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, section 123 of the Criminal Procedure Code, the inherent jurisdiction of the High Court and all the enabling provisions of the law. The reference is supported by two affidavits sworn by the applicant Samuel Muciri W'Njuguna and Naomi Nyawira Njuguna. The applicant has sought various declarations from this Court. The remaining orders sought are as follows:

- (i) A declaration be made that the applicants fundamental rights and freedoms of the individual under sections 70, 72 and 76 of the Constitution have been contravened by the respondent herein, that is to say that,
 - (a) The applicants right to liberty, security of person and the protection of the law have been transgressed and or compromised by the respondent and
 - (b) The applicant has been subjected to unlawful and arbitrary search or entry of his premises/property by the respondent and that his right to privacy has been thereby grossly violated and or has been transgressed by the respondents.
 - (ii) A declaration that the remedy/grant and or relief of anticipatory bail and or bail pending arrest and charge is constitutionally provided for and that the same is lawfully available to persons under the provisions of chapter 5 of the Constitution of Kenya.
 - (iii) A declaration that the applicant has been deprived of the protection of the law by reason of the respondents failure and or neglect to charge in a court of law the persons implicated in the offences against the person and the property of the applicant.
 - (iv) Any further or other order, directions or writs this Honourable Court deems fit, just and appropriate to grant.
 - (v) Costs of this suit.

The grounds in support of the reference have been stated on the face of the application. The background to this reference is rather interesting. The applicant depones the affidavit in support of the reference that he is a small-scale tea farmer. He is also a spokesman for his fellow small-scale tea farmers at Mataara and Theta tea factories. The applicant also wears another hat. He is a politician. He unsuccessfully vied for the Gatundu North parliamentary seat in 1997 on a National Development Party of Kenya ticket. The applicant states that his championing of the small-scale tea farmers' cause and his exposition of corruption in and mismanagement of the small-scale tea industry has earned him enemies both within the tea industry and in the political front. The applicant gives an instance where he was arrested and held in police custody for a period of three days. This was on the 21st of June 2000.

He was subsequently arraigned before the Senior Principal Magistrate's Court in Criminal Case Number 2826 of 2000 but was acquitted under the provisions of section 210 Criminal Procedure Code. The applicant further states that he has severally been threatened to be killed by his said enemies. The problems facing the applicant seems to have taken a turn for the worse when the applicant befriended, one Teresia Nyaciuma Mukui (hereinafter referred to as the said lady). The applicant and the said lady are lovers. The said lady's children were not amused by the relationship between the applicant and their mother. The four sons of the said lady, have contrived to make the life of the applicant unbearable as long as the applicant remains in the said relationship. Two of the sons have connections with the police establishment. One son John Kimata is a police officer while the other Joseph Gititu Mukui works with the Police Motor Vehicle Inspection Unit at Thika. He is also reputed to be a police reservist and has been issued with a gun. According to the applicant, the children of the said lady have exhibited open hostility towards him and his friend. He narrates an instance of 19th of July 2002 when his home was attacked by a gang of about fifty people. He depones that the said gang was led by Joseph Gititu Mukui and John Kimata Mukui who were positively identified by their mother. He states that he was assaulted and tied up with a rope and placed in a vehicle. He was threatened to be killed. His vehicle was damaged and items of furniture in the house were looted and other house goods were set on fire. He raised alarm when he was under attack. His neighbours came to his rescue. The invaders fled. He was able to free himself and escaped. The applicant states that he later learnt that the enraged local residents burnt down the house of Joseph Gititu Mukui after they had rescued the said lady who had been kidnapped and taken to the house which was later burnt. Three vehicles which were at the house of the said Joseph Gititu Mukui were set on fire. The applicant believed that the attack of the 19th of July 2002 was masterminded by the said sons of Teresia Nyaciuma Mukui who had earlier threatened him severally prior to the said incident. He further states that he recorded a statement with the police concerning the incident. On the 27th of July 2002 the applicant states that the police went to his residence at Karen and ransacked the same with a view of arresting the applicant. The applicant by the time had gone into hiding. The applicant was surprised by the zeal with which the police were aggressively seeking to subject him to harassment over the said arson incident whilst the real perpetrators of the attack were being left to go scot-free. The applicant's problems did not end there. He was arrested by the police at his home in Karen on the 29th of November 2002, taken to Thika Police Station and charged with the offence of arson. The charge was stated to have arisen from the arson incident of the 19th of July 2002. The applicant states that prior to the arraignment in court he had responded to the summons by the police when he was so required to appear before them. The applicant is of the view that his prosecution by the police was deliberately undertaken to undermine his credibility as a parliamentary candidate for Gatundu North Constituency. He was of the view that he lost the said elections because of this action by the police which negatively affected his prospects. The applicant further depones that he was acquitted of the charge of arson under the provisions of section 202 of the Criminal Procedure Code after the prosecution had attempted to have the case withdrawn on the 12th of February 2003. The applicant further states that even though, the police were aware of the real perpetrators of the crime against him, as evidenced by an exhaustive investigation undertaken by the Investigation Officer one G Rukaria, the Police have been lethargic or become outrightly disinterested in pursuing the said perpetrators. The applicant depones that his efforts to have justice done in respect of the violation of his freedom by the police has always been in vain. He states that he has severally been threatened and his life put in danger and in spite of pursuing legal recourse with the Attorney General, nothing has been done to protect the violation of his right to life and property. Instead he depones that the police has misused and abused its powers to harass him and arraign him severally in court on trumped up charges which ultimately fail to stand upto legal scrutiny. The applicant is of the view that since his said enemies have continually threatened him, he may end up facing a similar fate as of his brother, the late

Councillor Maina W’Njuguna who was murdered after having his life similarly threatened. He alleges that reports to the police of the threat to his life were treated casually leading eventually to his brutal murder. It is with this background that the applicant previously sought to be granted bail pending arrest only to be advised by his counsel that the said remedy was not available in our laws. The applicant has now made this reference, to have this Constitutional Court determine the issues raised.

In his submissions before this Court, the applicant has argued that section 84(1) of the Constitution offers any litigant the alternative and direct access to the High Court where there is an allegation that his fundamental rights and freedoms as provided for under sections 77 to 83 of the Constitution have been contravened. The applicant submitted that the High Court has original and unlimited jurisdiction as provided for under section 60 of the Constitution. The applicant submitted that when an applicant makes an application under section 84 of the Constitution, the proceedings should be inquisitorial to the extent that in some instances witnesses can be called for the High Court to satisfy itself of the complaint made. The applicant further argued that an applicant need not prove that his fundamental rights have been violated; a threat of violation or a likely contravention of his fundamental rights and freedoms can be just cause for him to invoke the jurisdiction of the High Court under section 84 of the Constitution. The applicant submitted that the said jurisdiction of the Court under section 84 of the Constitution was wide and unlimited. The applicant was of the view that where a breach of fundamental rights and freedoms is anticipated, the High Court can grant orders to prevent or forestall the occurrence of the said event. The applicant submitted that the Bill of Rights as provided for in the Constitution is an important aspect of a civilized nation and the Courts should always strive to enforce them. The applicant further submitted that the Constitution gave a special and unique jurisdiction to the High Court to enforce the rights of a person to direct access to the High Court. The applicant further argued that this jurisdiction of the High Court and the right of an individual to have direct access to the High Court was so important that the right of such referral is recognised and specifically provided for under section 84 of the Constitution. The applicant further argued that the Bill of Rights would not be of any use, if the High Court did not enforce them. The applicant submitted that the High Court has been given wide discretion under section 84(1) of the Constitution to enable the High Court give orders in respect of breach of fundamental rights and freedoms as provided by the Bill of Rights irrespective of any consequences. In this regard, the applicant argues that anticipatory bail is envisaged in the Constitution. The applicant conceded that although the right to anticipatory bail was not specifically stated in the Constitution, the fact that it relates to an important aspect of the enforcement of the fundamental rights and freedoms, the High Court had jurisdiction to grant it. The applicant further conceded that the exercise of this fundamental right ought to be subject to the restriction as relates to the right of enjoyments of the said fundamental rights by others. The applicant was of the view that since his fundamental right to liberty as provided for under section 72 of the Constitution had been severally breached, he has a right to move to the High Court to seek and be granted anticipatory bail when his liberty and freedom was under threat. The applicant then referred to several instances where the law and the Courts have in effect anticipated that bail pending arrest could be granted. The applicant submitted that section 22 of the Police Act (chapter 84 of the Laws of Kenya) allows a police officer to grant bond or bail to a person to appear subsequently some other time without any charge being filed against him. He argues thus that if so, section 84 of the Constitution definitely visualizes anticipatory bail, in proper cases. The applicant referred the Court to instances where courts have enforced fundamental rights and freedoms of an individual. In *Stanley Munga Githunguri – versus- Republic* [1986] KLR 1, the High Court issued an order of prohibition even when the applicant had not asked for it when it was satisfied that the fundamental rights of the applicant had been breached under section 84 of the Constitution. In the said case the High Court found that the charging of the applicant was vexatious and an abuse of the due process of the Court. The Court further held that the conduct of the police and that of the prosecution was oppressive. In *Caroline Auma Owino – versus- Republic* Nairobi HC Misc Criminal Application No 952/2001 (unreported) the High Court quoting Archibold on *Criminal Pleading, Evidence and Practice* (37th Edition) held that there was no law prohibiting the Court from granting anticipatory bail. This decision was said to have been followed by the High Court in *Daniel Mwangi M’Kirimania –versusthe Attorney General* HC Misc Criminal Application No 998 of 2001 (unreported) where it was held that there was no law that prevented the High Court from granting anticipatory bail especially where good cause is shown. In *Samuel Murimi Karanja & others –versus- Republic* Nairobi HC Criminal Application No 412 of 2003 (unreported) the High Court made orders in form of declarations protecting the fundamental rights of an individual in an application filed under the

provisions of section 67(1) and 84(3) of the Constitution. The applicant submitted that courts of other jurisdictions, have held that where the arrest and prosecution of an individual was for extraneous purposes, the Court would issue prohibitory orders (See *Williams –versus- Spautz* 1992 Australian Law Reports 583). The applicant urged this Court to consider that the example of the experience in India to be appropriate in this case. The applicant submitted that prior to the change of the law in India, the Courts equivalent to the High Court in Kenya, granted anticipatory bail even though anticipatory bail was not specifically provided for in their laws. The applicant has argued that the Courts in India have been at the forefront of the enforcement of human rights (See *The Code of Criminal Procedure, 1973* (Sarkars Commentary at page 238). The applicant further argued that when the Court issued anticipatory bail, the hands of the police in seeking to enforce the law were not tied. Anticipatory bail is always granted with conditions. The applicant relied on the order made by the then Chief Justice who granted him anticipatory bail in this case on the 9th of August 2002 with further order that the applicant was to appear before the police. The applicant submitted that the Bills of Rights should be upheld to reflect the reality of Kenya as a democratic society. The applicant urged the Court to look into the spirit of constitution like courts in other jurisdictions where the protection of the rights of an individual was held to be more important. The applicant submitted that if the fundamental rights of only one individual are not protected by the Court, the society will then be much poorer.

In reply, the respondent, submitted that under the Constitution the right of bail pending arrest (anticipatory bail) is not enshrined. The respondent argued that the reading of the entire Bill of Rights as provided for in chapter 5 of the Constitution shows that the right of anticipatory bail is not contained therein. The respondent argued that anticipatory bail was a legal right and not a fundamental right. The respondent argued that the example of India as given by the applicant in respect of anticipatory bail was inappropriate. The respondent submitted that under the Indian Criminal Procedure Code, section 438 specifically provided for the provisions related to bail pending arrest. The respondent further submitted that the High Court cannot grant anticipatory bail when the same has not been specifically provided for by the statutes. The respondent submitted that in the instances where the High Court has granted anticipatory bail, in the absence of a specific provision of the law, it did so erroneously. By granting anticipatory bail the High Court usurped the role of Parliament. The respondent argued that the role of the High Court was to interpret the Constitution in line with the existing laws. The respondent further argued that nowhere in the Criminal Procedure Code (chapter 75 Laws of Kenya) is a legal right to anticipatory bail is provided for. What is provided for is bail pending trial or bail pursuant to police investigations or bail pending appeal. The respondent further submitted that the police under the Police Act can give bond to an individual pending his appearance before court because it provided by statute. But, it is contended, on the other hand the Constitution and the Criminal Procedure Code envisage that a person must first be arrested and brought to court before he can be granted bail. The Respondent submitted that in India the provision of anticipatory bail was enacted after an amendment to cure the mischief where political oponents were using their influence to have rivals arrested and charged with non-bailable offences to get to prevent them from challenging them in political contests. Elaborating further this contention, it was submitted that fundamental right is a right which was expressly or impliedly guaranteed by the Constitution. A legal right was defined as a right which is provided for by the statute. We agree to those definitions.

The respondent argued that in so much as anticipatory bail was not provided for by the Criminal Procedure Code then the same cannot be granted. Neither can it be imported in the Constitution as the same was not a fundamental right. Moreover it shall infringe the principle of separation of powers deeply embedded in the Constitution. The respondent argued that the only bail that can be granted by the Courts and which is provided for by section 123 of the Criminal Procedure Code is bail after arrest and not before arrest. The respondent submitted that our High Court has ruled in various applications made before it that no provision for bail pending arrest existed in our laws. In *Peter Mwangi Kahutu –versus- Republic* Nairobi HC Criminal Revision No 9 of 1999 (unreported) that the legal right to anticipatory bail did not exist under the Criminal Procedure Code. Likewise in *James Ratiri K’Owade –versus- the Attorney General* Nairobi HC Misc Criminal Application No 852 of 2003. It was held that there existed no law that granted the High Court powers to grant bail pending arrest. In a recent decision by the High Court, it was held that such right of anticipatory bail did not exist in our laws. (See *Tito Musyoka –versus- Republic* HC Criminal Appeal No 143 of 2004). The respondent further argued that the decisions of the High Court where anticipatory bail was granted are distinguishable.

Churning from the above facts and submissions the issues that this Court is called upon to decide are:

(1) whether or not the actions of the respondent amount to the Applicants fundamental rights as provided by chapter 5 of the Constitution.

(2) Where the High Court under the provisions of section 84(3) of the Constitution is empowered to grant anticipatory bail.

(3) Whether or not the set of facts and circumstances of this case are eligible for the grant of anticipatory bail.

We have considered the arguments that were ably presented to us by Mr Orengo the learned counsel for the applicant and Mr Munda the learned Principal State Counsel appearing for the State which is the respondent in this case. Before we address the issues raised in this application, we wish to restate the jurisdiction of the High Court as provided by the Constitution. Section 60 (1) of the Constitution provides that:

“There shall be a High Court, which shall be a Superior Court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution.”

Section 84 of the Constitution provides that:

(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 purposes of enforcing or securing the enforcement of any of the provisions set in sections 70 to 83 (inclusive)

From the foregoing provisions it is evident that the High Court has powers to make such orders that shall enforce and secure the fundamental rights of an individual as provided for in sections 70 to 83 of the Constitution.

In the instant case, the applicant has stated facts which were not controverted, that the respondent through its police department and its prosecutions arm frustrated him in the enjoyment of his fundamental rights as relates to liberty and property. The applicant has further stated that his fundamental right to life has been breached by the respondent who have refused to take action against people whom the applicant has identified to have threatened his life. The applicant has further stated that he has severally been prosecuted for ulterior motives other than in pursuance to the enforcement of law and order. He states that he has been charged in Court for no other purpose than to frustrate and harass him. He further stated that in none of the cases which he was charged has he ever been found guilty of having broken any law. He has also related instances where the police have allegedly abused their powers and had him arrested and incarcerated in police custody. He gave an example where he was arrested in the year 2002 prior to the General Elections. He deponed that his arrest and subsequent incarceration in police custody irreparably hurt his chances of being elected as a member of parliament for Gatundu North. The applicant has stated

that he constantly lives in fear that he would be arrested by the police, even when there was no legal justification. The applicant thus submitted that in the event of the occurrence of such an eventuality, and his fundamental right to liberty having been threatened, he could not go to Court to protect his fundamental right to liberty because there was no provision in the law allowing the grant of anticipatory bail or bail pending arrest. The applicant was of the view that this situation was the antithesis of the fundamental guarantee to liberty as provided for by the Bill of Rights.

The respondent on his part contends that the right to anticipatory bail or bail pending arrest is a legal right and not fundamental right. The respondent submitted that as anticipatory or bail pending arrest was not provided for by the statute, the same cannot be read in the Bill of Rights (chapter 5 of the Constitution) or in section 84(2) of the Constitution.

Before we can address the issue of anticipatory bail it is appropriate for this Court to set out the existing law as relates to granting of bail. Section 72(1) of the Constitution provides that no person shall be deprived of his personal liberty save as may be authorized by law. The instances in which a person may be deprived of his personal liberty has been enumerated. Of relevance to this reference is section 72(5) which provides that:

“If a person arrested or detained as mentioned in subsection 3(b) (i.e. upon reasonable suspicion of his having committed or being about to commit, a criminal offence) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for the proceedings preliminary to trial”

This section of the Constitution provides the grant of bail after arrest and not before arrest.

Section 123 of the Criminal Procedure Code provides that:

“1. when a person other than a person accused of murder, treason, robbery with violence attempted robbery with violence or drug related offences is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court and is prepared at anytime 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 the person be or not be admitted to bail or that the bail required by a Subordinate Court or police officer be reduced.”

This section only provides for situations where a person has been arrested either by the police or has been arraigned in Court after being charged with a criminal offence.

Section 356 and 357 of the Criminal Procedure Code deals with situations when a person has been convicted and has appealed pending the hearing and determination of the said appeal, the person may be granted bail pending the hearing of the appeal either by the Court which convicted him or by the High Court which he is appealing to.

Mr Munda, for the respondent has pointed out situations where the provisions of section 39 of the Criminal Procedure Code has been used by applicants to be granted what in effect amounts to bail pending arrest. What applicants have done is to appear before a magistrate and ask to be arrested and then released on bond. If they have feared that they face likely arrest by the police. The said sections as stated above do not specifically provide for situations where a person being in fear of imminent arrest goes to Court and seeks to be granted anticipatory bail.

Section 22 of the Police Act grants a police officer investigating an alleged offence powers to give bond to a person to procure his due attendance to Court.

In all these instances there is no specific provision for which a person in fear of imminent arrest can apply to the Court to grant him anticipatory bail. Perhaps with a view of remedying this anomaly when confronted with applications for bail pending arrest some Courts have applied the practices and procedures of the High Court of Justices in England as provided for by Section 3(3) of the Criminal Procedure Code. (See *Caroline Auma Owino –versus- Republic Nairobi HC Misc Criminal Application No 952/2001* (unreported) and *Daniel Mwangi M’Kirimania –versus- the Attorney-General Nairobi HC Misc Criminal Application No 998 of 2001* (unreported).

The submission by both parties in this suit that there is no specific provision for granting anticipatory bail is correct. The point of divergence is the interpretation of section 84(1) of the Constitution. The applicant is of the view that anticipatory bail is envisaged by the said section of the Constitution when the said section is read in conjunction with the Bill of Rights as provided by section 70 to 83 of the Constitution. The respondent on his part is of the view that since the statute has not provided for the same, the Courts cannot grant anticipatory bail. Neither can the right to the grant of anticipatory bail be read in section 84(1) of the Constitution. The respondent is of the view that parliament is the only place where the said law as relates to anticipatory bail can be granted.

While it is true that the right to anticipatory bail or bail pending arrest is not specifically provided for by statute we are of the humble opinion that the right to anticipatory bail or bail pending arrest is envisaged by section 84(1) of the Constitution. The applicant’s ordeal at the hands of the police is an instance where a right to anticipatory bail accrues. When a person is constantly subjected to harassment or is in fear of being unjustifiably arrested, he has a right to recourse to the protection of the Constitution through the High Court where its enforcement is provided for by the Constitution. It would indeed be a tragedy, if the Constitution did not provide a remedy to a citizen whose fundamental rights have been breached. In the instance case, the applicant has had dreadful experiences at the hands of the police where he has been severally incarcerated for no apparent or justifiable reason. For the respondent to say that a person in such a situation should do nothing because there is no law providing for such a person to seek a remedy in Court will completely be the antithesis of the spirit of the Constitution which provides for the protection of fundamental rights and freedoms in the Bill of Rights. We are further of the humble opinion that the right to anticipatory bail has to be called out when there are circumstances of serious breaches by an organ of the state of a citizen’s fundamental right. Counsel for the applicant gave the example of India where the right to anticipatory bail was granted by the Courts even when the legislation in respect of the same did not exist. Later on parliament in India passed the law granting the right to anticipatory bail but only in respect of certain offences. In Kenya, if the High Court were to wait for parliament to legislate the right to anticipatory bail then the High Court would be shirking its responsibility as mandated by section 84(1) of the Constitution to enforce the protection of fundamental rights and freedoms as provided for by the Bill of Rights (chapter 5 of the Constitution). We would hasten to add that this right to anticipatory bail can only be granted by the High Court in the exercise of its jurisdiction under the provisions of section 84(1) of the Constitution. The right to anticipatory bail will not give a person a right not to appear before the police or any authority who would wish to question a person in connection with the commission of an offence. In the circumstances therefore anticipatory bail can only be granted upon terms that are appropriate under the circumstances of each case. In granting anticipatory bail, the High Court would be exercising its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual. In conclusion, we would like to restate what the Court declared in *Antony Ritho Mwangi & Anor –versus- The Attorney General Nairobi Criminal Application No 701 of 2001, 760 of 2001 and 631 of 2001* (unreported) at page 1:

“Our Constitution is the citadel where good governance under the rule of law by all the three organs of the State machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs namely the executive and the legislature. The judiciary though seems to be omnipotent, it is not so, as is obligated to subserve and uphold the spirit and the majesty of the Constitution and the rule of law.”

It is our humble opinion that it cannot be said that an individual in the Kenya of today cannot be granted anticipatory bail or bail pending arrest when he is in fear that his fundamental rights as to liberty and freedom has been breached. The Constitution of Kenya guarantees that under the provisions of protection of fundamental rights.

The simple reading of provisions of section 84 (1) & (2) of the Constitution shall reveal that the High Court while hearing an application wherein contravention or likely (emphasis ours) contravention of provisions of sections 70 to 83 (fundamental rights), 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 the above said sections.

If the police have contravened or is likely to contravene the rights of liberty of a citizen for ulterior purpose, an anticipatory bail should be an appropriate order to be granted.

In the present case, we agree with the applicant that his rights of liberty have been breached and the applicant has reasonable apprehension that it is likely to be violated by the police authorities.

When the statute is silent, this Court cannot become a toothless watchdog of the Constitution which we have sworn to defend. Furthermore, the Constitution itself has granted wide discretion to the High Court presumably to fill in gaps which the statute have left. This in our humble view is not usurping the powers of parliament or to violate the sacrosanct separation of powers

Having so decided the declaratory orders that we make are as follows:

(1) The applicants fundamental rights and freedoms of the individual under section 70, 72 and 76 of the Constitution have been contravened by the respondent herein, that is to say,

(a) The applicant's right to liberty, security of person and the protection of the law have been transgressed and compromised by the respondent.

(b) It is hereby declared that the remedy/grant and or relief of anticipatory bail or bail pending arrest and charge is constitutionally provided for and that the same is lawfully available to persons under the provisions of section 84(1) of the Constitution of Kenya and chapter 5 of the Constitution of Kenya.

The costs of this application is granted to the applicant.

Before we conclude our ruling, we would like to state that we are indebted to the counsel who appeared before us for their well researched submissions and references that undoubtly made the hearing and conclusion of this reference a worthwhile experience.

Dated and Delivered at Nairobi this 17th day of May 2004.

K.H.RAWAL

L.KIMARU

JUDGE

AG. JUDGE