



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI(MILIMANI COMMERCIAL COURTS)
MISC CRIMINAL APPLI 555 OF 2004

VICTOR KYALO MUTUA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

The Applicant **VICTOR KYALO MUTUA** filed this Chamber Summons dated 15th September 2004 through **MASEKI & CO. Advocates**. It is brought under **Section 123** of the **Criminal Procedure Code, Chapter 5** of the **Constitution of Kenya** and **Rule 3 (1) and (2)** of the High Court (Practice) Rules. The Applicant seeks in pertinent –

- 1) That the Applicant be admitted to Bail/Bond on his personal bond pending his arrest and charge in an alleged theft of money from Com Twenty one Limited.
- 2) That the Attorney General be served with is Application and order herein to appear in court with parties on such a date as this court may determine to take a date when the Applicant may be presented to a police station for formalities before his appearance before a Mom court under Bond herein granted.
- 3) That the Director CIP the Provincial CP Cost and any other police officer who purports to act contrary to these orders be served with Penal Code together with a copy of these orders.

The grounds of making the Application and also supporting this Application on the face of the Application were stated as –

1. The Complainant in collusion with the Police has harassed the Applicant and other employees of the Complainant Company by forcing them to admit criminal responsibility under torture and by threatening them with handguns.
2. Although the Complainant co-operates a Branch in Mombasa and the matters giving rise to the alleged theft arose in Mombasa and notwithstanding that the witnesses to the alleged theft work and reside within the local jurisdiction, the Complainant and the Police have arrested one of their Mombasa employees, taken them to Nairobi, tortured him and preferred charges against him in Nairobi, Chief Magistrate’s Court **Criminal Case No. 2128 of 2004.**
3. The Applicant is apprehensive that the same fate will befall him unless this Honourable Court protects his Constitutional rights to bond/bail.

In his address in support of the Applicant, **MASEKI**, learned counsel for the Applicant/subject submitted that this case was closely related to another one where a colleague of the Applicant was arrested in Mombasa. That he was brought to Nairobi and charged. That in fact, the Applicant had also been arrested together with his colleague but that he managed to escape to make this Application before the court. **MASEKI** submitted that due to the manner in which his colleague was handled by the Police, the Applicant was apprehensive that he may suffer the same consequences.

KAIGAI, learned counsel for the Respondent opposed the Application. He submitted that the matter cited and annexed to this Application was never heard on its merits. That the Applicant had not demonstrated that he deserved the orders sought and so should not be granted. **KAIGAI** submitted that bond, even though is available, should only be granted in the clearest of cases. He submitted that the Police should not be stopped from performing their duties. That the Applicant is a fugitive running away from investigation into a bailable offence. That this Application should be rejected.

It seems to me that both parties to this Application are not in dispute that this court has powers to grant anticipatory bail or bail pending arrest. No issue has been raised to suggest that the court lacks jurisdiction to entertain and allow the Application. What the parties did not do is to submit on whether or not anticipatory bail should be granted to the Applicant. **MASEKI** for the Applicant has submitted that bail should be granted as sought. The main ground he has argued is that due to harassment suffered by the Applicant's colleague at the hands of the Police while investigating a similar matter, the Applicant is apprehensive that he too may suffer the same consequences. **KAIGAI** was not impressed by the grounds for this Application and has in effect submitted that the Applicant did not demonstrate that he deserved bail as sought.

Anticipatory bail or bail pending arrest can only be granted where good cause is shown. **Section 84 (1)** of the Constitution provides: -

“(1) subject to subsection (6), if a person alleges that any of the provisions of Sections 70 to 83 (conclusive) 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.”

The provisions of this section clearly gives any person the right to access the High Court for redress. The person accessing the court will do so in three conditions as cited in this section, that is where he comes to the High Court for redress on his own behalf: -

Where the provisions of sections 70 to 83 of the constitution: -

a) has been contravened

b) is being contravened

c) is likely to be contravened

Section 70 to 83 of the Constitution deal with Protection of Fundamental Rights and Freedoms of the Individual. The Applicant has not pin pointed any specific fundamental right or freedom to say that the Police have, are or may contravene. He just generally asked for bond to avoid “**suffering**” like his colleague. What I understand the Applicant to be saying is that because his colleague at work “**suffered**” at the hands of the Police he too is likely to suffer.

With due respect to the Applicant and his counsel, there is no demonstration of the alleged suffering of the Applicant's colleague. All the Applicant has done is to annex the said colleague's Application for anticipatory bail, his Application and his Affidavit in support of the said Application. In the Applicant's Affidavit, he has not deposed to any incidents or encounters with the Police to support his apprehension that he may “**suffer**”.

An Application for anticipatory bail should in my considered view be supported by actual as opposed to imaginary threats, fears or apprehensions. In this case, the Applicant appears to be paranoid or to have Police phobia. The mere fact his colleague suffered is not good enough to convince this court that he too will suffer. There must be some demonstration, in the context of this case, of what suffering the colleague suffered, and a demonstration, based on cogent proof, that he is likely to suffer.

Arrest in the cause of investigations of a Police case cannot be classified as suffering otherwise the Police Force would have to be wound up as being irrelevant or unwanted in our system. There must be some proof that the Applicant's rights have been or are being or are likely to be violated based on some action by the Police. In this case, all the Police are alleged to have done was to arrest another and the Appellant in Mombasa and to bring them to Nairobi where the Applicant says '**he escaped**' from the Police in order to make this Application. In my considered view he has not alleged any violation of his fundamental rights or freedom at the hands of the Police. Neither is there any good cause shown that the Police are likely to do so.

From the facts set out before me in the Applicant's own Affidavit, he received threats from one **MWENJA**, an Accountant in his employer's company. Those threats are not alleged to have come from the Police neither is it alleged that the Police influenced them in any way. It would be a fallacy to grant this Application. The effect would be to say that the Police should not arrest persons for purposes of investigating complaints made to them. From the facts before me, I am fully satisfied that the Police act in arresting the Applicant was not motivated by extraneous purposes or matters, neither was it meant to harass the Applicant or subject him to unjustified arrest in abuse of the Police powers. I do not find that the Applicant's rights and freedoms have, or are likely, or are being contravened in any way. I find the Application lacks in merit and so dismiss it accordingly. I am guided by **Misc. Criminal Case No. 710 of 2002**, a Constitutional Reference between **SAMUEL MUCIRI M'NJUGUNE** – Applicant and **THE REPUBLIC** – The Respondent.

Dated at Nairobi this 6th October 2004.

LESIT

JUDGE

Read, signed and delivered in the presence of;

LESIT

JUDGE