



Maina, Advocate v Director of Public Prosecutions & 2 others (Miscellaneous Criminal Application E021 of 2025) [2025] KEHC 10848 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CRIMINAL APPLICATION E021 OF 2025**

EM MURIITHI, J

JULY 24, 2025

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 28, 29,
31, 47, 48, 49, 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTION 123(3) AND SECTION 124 OF
THE CRIMINAL PROCEDURE CODE, CAP 75, LAWS OF KENYA**

BETWEEN

HON JANE NJERI MAINA, ADVOCATE APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

**DIRECTOR, DIRECTORATE OF CRIMINAL INVESTIGATIONS 3RD
RESPONDENT**

RULING

Introduction

1. By an originating Notice of Motion dated 10th July 2025 expressed to be brought under Articles 10, 19, 20, 21, 22, 23, 28, 29, 31, 47, 48, 49, 50, 157, 159, 165, 258 & 259 of the [Constitution](#) of Kenya 2010, and Sections 123[3] and 124 of the [Criminal Procedure Code](#) Cap. 75] the applicant anticipatory bail in specific terms as follows:

1. This Application be certified as extremely urgent, heard ex-parte on the first instance and service be dispensed with.



2. Pending the hearing and determination of this application inter-partes, the Applicant be admitted to anticipatory bail or bond at such reasonable terms and conditions that this Honourable Court may deem just and fit in the circumstance.
 3. Pending the hearing and determination of this Application, the Honourable Court do grant the Applicant anticipatory bail and/or bond on reasonable terms.
 4. Interim conservatory orders be issued restraining the Respondents, their agents or servants from arresting, harassing or detaining the Applicant without lawful cause.
 5. The Honourable Court do issue directions for the Applicant to present himself to any Police Station in the Republic of Kenya with counsel for purposes of assisting investigations without being placed in custody.
 6. Costs of this Application be in the cause.
2. The Application is supported by the annexed affidavit of Hon. Jane Njeri Maina, Advocate and the grounds set out in the application as follows:
1. The Applicant, Hon. Njeri Maina, is an Advocate of the High Court of Kenya and the elected Women Representative for Kirinyaga County, and is therefore entitled to the equal protection of the law, due process, and the full enjoyment of her fundamental rights and freedoms under the *Constitution* of Kenya, 2010.
 2. The Applicant is currently confined within the Kahawa Law Courts where she is attending court proceedings on behalf of clients and is unable to exit the court precincts due to the presence of unmarked Subaru vehicles stationed outside, reportedly operated by persons claiming to be officers from the Anti-Terrorism Police Unit [ATPU], who are awaiting to apprehend her without any formal warrant, summons, or prior notice of investigation.
 3. The Applicant is credibly informed and verily believes that her intended arrest is linked to the directive issued by the President on 9th July 2025, in which state agencies were instructed to apprehend individuals perceived to be dissenters, and to prefer terrorism-related charges against them, with no regard for the requirements of due process, legality, or fairness.
 4. The Applicant is being targeted solely for her professional conduct and public service, specifically for her role as legal counsel representing several youth and activists charged in connection with the peaceful nationwide protests of 25th June 2025. The arrest and possible detention are therefore arbitrary, punitive, and intended to intimidate her as an advocate and elected representative.
 5. The Respondents have not served the Applicant with any complaint, summons, or notice of investigation, and no formal charge or arrest warrant has been disclosed. Any such action will thus violate the principles of fair administrative action under Article 47 of the *Constitution* and the right to be promptly informed of the reasons for arrest under Article 49[1][a].
 6. The Applicant is justifiably apprehensive that the intended arrest is designed to embarrass, humiliate, and detain her over a weekend, thereby denying her timely access to court and legal redress, in further violation of her rights under Articles 29, 49 and 50 of the *Constitution*.
 7. The Applicant has a legitimate and well-founded fear of imminent arrest and detention without lawful justification, which presents a real and present danger to her liberty, dignity, and ability to carry out her constitutional and professional functions.



8. The Applicant has not committed any offence and is not a flight risk. She remains willing and able to cooperate with any lawful investigations, and to present herself to any police station accompanied by her legal representatives, if required.
9. The actions of the Respondents, if not restrained, will cause irreparable injury to the Applicant, including public embarrassment, professional stigma, psychological trauma, and disruption of her constitutional mandate and responsibilities to the people of Kirinyaga County.
10. The jurisdiction of this Honourable Court is properly invoked under Articles 22, 23[1], and 165[3][b] & [d] of the Constitution, and Section 123[3] and 124 of the Criminal Procedure Code, to grant anticipatory bail or such other orders as are necessary to protect the Applicant's rights and prevent unlawful arrest and detention.
11. This application is urgent and deserving of immediate intervention by this Honourable Court to arrest the threatened violation of the Applicant's rights and to preserve the rule of law and constitutional order in the face of escalating state overreach and persecution of dissenting voices."

Applicant's case

3. The applicant set out the facts relied on in her Supporting Affidavit sworn on 10/7/2025 as follows:

“Supporting Affidavit

I, Hon. Jane Njeri Maina, Advocate, of P.O. Box 43331-00100, Nairobi, an adult male of sound mind, Do Hereby Make Oath and state as follows:

1. That I am the Applicant herein, an Advocate of the High Court of Kenya, and the duly elected Women Representative for Kirinyaga County, hence competent and duly authorized to swear this affidavit.
2. That I am currently physically confined within the precincts of Kahawa Law Courts, where I am representing clients in court, and unable to exit as multiple unmarked Subaru vehicles have been stationed outside the court gates. I am reliably informed and verily believe that these vehicles are operated by individuals claiming to be officers from the Anti-Terrorism Police Unit [ATPU] who intend to apprehend me without any lawful cause or prior summons. [See attached annexure JNM- 1 for a copy of the vehicles awaiting to arrest me].
3. That I have not been served with any complaint, summons, warrant of arrest, or notification of any intended investigation or charges against me, nor have I been made aware of any lawful basis for the looming threat of arrest.
4. That I am credibly informed and verily believe that my apprehended arrest is linked to a public directive issued by His Excellency the President of the Republic of Kenya on 9th July 2025, directing that all individuals perceived to be dissenters against government policies be arrested and prosecuted under terrorism laws.
5. That I am further informed and believe that I am specifically being targeted for my professional role as an advocate, having represented various persons



arrested in connection with the protests of 25th June 2025, which were convened by Kenyan youth in commemoration of the 2024 anti-Finance Bill protests and in objection to state brutality and economic misgovernance.

6. That my apprehension is well-founded, given the recent pattern of arrests and detentions of advocates, human rights defenders, and youth leaders under the pretext of terrorism charges, without adherence to the law or constitutional safeguards.
7. That the intended arrest is not based on any lawful investigation or genuine criminal complaint, but is calculated to punish, intimidate, and harass me as a vocal advocate and elected representative. I am further apprehensive that such arrest is deliberately timed to ensure my detention over a weekend to deny access to courts, counsel, and medical care.
8. That I am a law-abiding citizen who has no criminal record and is not a flight risk. I am ready and willing to cooperate with any lawful process or inquiry, including presenting myself to any police station in the company of my advocates.
9. That I verily believe that the imminent arrest and intended detention would violate my fundamental rights and freedoms, including my right to liberty under Article 29 of the Constitution.
10. That unless this Honourable Court intervenes urgently, I am at imminent risk of arbitrary arrest and unlawful detention which will cause me grave prejudice, harm my professional and public standing, and violate the Constitution.
11. That I swear this affidavit in support of the application filed herewith seeking anticipatory bail and/or conservatory orders to restrain the Respondents from arresting or detaining me arbitrarily and to enable me to present myself for any lawful process in accordance with the law.”

Response

4. The Respondents opposed the application by the Replying Affidavit of the Prosecution Counsel Vincent Mamba sworn on 16/7/2025 as follows:

“Replying Affidavit

I Mamba Vincent of P.O. Box 1224-10300 Kerugoyain the Republic of Kenya do hereby make oath and state as follows:

1. That I am a Prosecution Counsel in the Office of the Director of Public Prosecutions and one of the Counsels who has conduct of this matter hence competent to swear this affidavit.
2. That I have read the application dated 10th July 2025 filed by the applicant and her supporting affidavit.
3. That in response to paragraph two of supporting Affidavit, the same is denied in toto as the Applicant/ Advocate is currently not confined or unable to exit the Court premises as such the situation has since been spent.



4. That in response to paragraph three of the Applicant's/ Advocates supporting affidavit, the same is denied in toto as the Applicant/Advocate should demonstrate any present and imminent danger to her liberty.
5. That in response to paragraph four of the averment by the applicant/advocate should be put to strict proof thereof.
6. That in response to paragraph five of the applicant's/ Advocate supporting affidavit, the same is denied and should be treated as hearsay without concrete proof.
7. That the Applicant/Advocate should be put to strict proof to substantiate the averments of paragraph Six and Seven of the supporting affidavits.
8. That anticipatory bail should only issue if the applicant/Advocate is able to demonstrate that indeed there exist a clear, cogent, present and serious danger to her fundamental rights and this Court is fully persuaded that indeed there exist circumstances that places the applicant's rights in danger and/or infringements of fundamental right.
9. That the Applicant/Advocate must demonstrate to this Court that her fear of breach of her fundamental rights is firmly founded and grounded on substantiated claims that apprehension is real, present and imminent to warrant this Courts intervention.
10. That the Applicant/Advocate should satisfy this Court that the discretions given to 2nd 3rd and 1st Respondents to investigate and recommend prosecution.”

Submissions

5. In submissions before the Court, the Applicant's counsel referred to paragraph 2 of the supporting affidavit and photographs annexed to the affidavit to demonstrate that the applicant's vehicle had been surrounded and she had taken refuge inside the court room and the application was not based merely on fear but real threat of arrest.
6. The DPP's Counsel said there were no police investigations pending against the applicant and urged that the court must balance the rights of the applicant with the Police and DPP rights to investigate and prosecute crime, and that the applicant was not subject of investigations or threat of arrest but conceded the discretion of the Court.

Issue

7. The question before the Court is whether the court will grant anticipatory bail to the applicant on the circumstance of this case.

The principles of the grant of anticipatory bail

8. I respectfully agree with the decision of F. Gikonyo, J. in *Ololoso & another v Inspector General of Police & another* [Miscellaneous Criminal Application E003 of 2023] [2023] KEHC 25855 [KLR]



[22 November 2023] [Judgment], where after reviewing case law in Kenya and India, the learned Judge concluded on the facts before him as follows:

- “ 62. Accordingly, having carefully considered the affidavit evidence, the Written Submissions, and the case law that was relied upon by the parties herein, this court does not find any iota of evidence that the Applicants’ fundamental rights have been breached or denied or that there is a threat of them being infringed, contravened or violated. Investigations are legal processes aimed at fact-finding of the commission of a crime in our justice system and do not, per se amount to an infringement on the rights or fundamental freedoms of the person under investigation. As long as investigations are carried out in accordance with the law and rules, the processes thereto must be allowed to run their course for proper administration of justice.
63. The foregoing notwithstanding, the police granted the applicants bond. There is every indication that they have obeyed any summon before the investigators. Therefore, they need not arrest the applicants. If, they need to charge them, there are many less intrusive methods of procuring attendance in court such as summons to answer charges.”
9. The allusion to the language of Article 24 principle of the less restrictive means as a test for any lawful limitation of rights gives a qualification to the general posturing of the courts to allow for the full course of the law. If there exists “less restrictive means to achieve the purpose” or for dealing with a situation that method is to be preferred.
10. I have also respectfully noted the decision of Aburilli J. where the Court held as follows:
- “ 25. In the case of *Republic v Chief Magistrate Milimani & Another Ex parte Tusker Mattresses Ltd & 3 others* [Supra], Odunga J held that anticipatory bail ought not to be granted to prohibit investigations.
26. Further in the case of *Richard Makbanu v Republic* [2014] eKLR, the court held the firm view that orders for anticipatory bail or bond must not be sought with the intention of pre-empting the outcome of investigations- a position that was also held in the case of *Kevin Okore Otieno v Republic* [2013] eKLR.
27. Thus, any relief by whatever name called say, anticipatory bail, requires courts to ensure that interference with the functions of other bodies and institutions established by law; statute or the Constitution of Kenya, is only on cogent and robust reasons. Merely feeling inconvenienced by investigations is not sufficient reason for relief. Proof of violation, infringement or threat or contravention of a person’s right under the Constitution of Kenya is required.”
11. As entrenched in Article 19, the Rights and fundamental freedoms under the Bill of Rights are “an integral part of Kenya’s democratic state and the framework for social, economic and cultural policies [and] the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.”
12. It is clear that the High Court has jurisdiction under Article 22, 23 and 165 to make orders for the prevention, redress and enforcement of human rights and fundamental freedoms, and one of the orders that the court may give under the provision for appropriate relief is anticipatory bail to stop violation



- or threatened violation of a suspect's right in the criminal process of investigation and prosecution of crime.
13. In my view, the court must not lightly interfere with the investigative and prosecutorial powers of the police and the DPP. The violation to threat of violations must be demonstrated by clear evidence. As with all interference with rights Article 24 restriction is available subject to the availability of less restrictive means of achieving the desired object of the constitutional statutory organ or process.
 14. Article 29 of the Bill of Rights provides for right to freedom as follows:
 - “29. Freedom and security of the person.
Every person has the right to freedom and security of the person, which includes the right not to be—
 - a. deprived of freedom arbitrarily or without just cause;
 - b. detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
 - c. subjected to any form of violence from either public or private sources;
 - d. subjected to torture in any manner, whether physical or psychological;
 - e. subjected to corporal punishment; or
 - f. treated or punished in a cruel, inhuman or degrading manner.”
 15. Just cause for an arrest must mean not only the substantive reason for the arrest, say for reasonable suspicion of having committed a crime, but also a reason that makes it necessary to arrest as a procedure for enforcement of objects of investigation, prosecution and punishment of crime. As in the denial of the right bail under Article 49 [1] [h], it falls on the police and prosecution to demonstrate such a compelling reason.
 16. In my respectful view, the question of less intrusive methods of procuring attendance in court such as summons to answer charges give a pointer to the appropriate default pose for the Court. If we are a country governed by observance of Human Rights as ordained in Article 19 of the *Constitution*, the Court must abhor unnecessary arrests.
 17. These questions must engage the court of justice. Given that arrest involves undoubted measure of denial of liberty, among other human rights, should it lightly be invoked? Should process, however, lawful be invoked unnecessarily? Where summons may be sufficient, should arrest be effected merely because the police have power of arrest under the law? If the facts are that the applicant would present herself to the police for investigations and processing should the police arrest just because they can? Should not the police be held to account for their use of their restrictive powers by demonstration of cogent reasons for the need to place a person in custody and consequently limit their right to liberty?
 18. On first principles, an arrest has the primary purposes of:
 1. Preventing ongoing crime.
 2. Prevent absconding of flight risk suspects.
 3. Facilitate investigations without interference by the suspect.



4. Detention of the suspect for their own protection from public reprisal.

The DPP should show the need to arrest based on the one or other purposes.

19. Section 21 of the *Criminal Procedure Code* on arrest generally recognises the need to use the restrictive and intrusive powers of arrest on as necessary. However, section 90 of the Code also provides for use of Summons and a warrant of arrest with a Proviso that “a warrant shall not be issued in the first instance unless the complaint has been made upon oath either by the complainant or by a witness or witnesses.”

20. As observed in the Kenya Judiciary *Criminal Procedure Bench Book* 2018 at p. 9 -

“26. The rights of an arrested person reflect the fundamental principles that a person is innocent until proved guilty and a person has a right to dignity. There is a corresponding obligation on the police and the court to ensure that these rights are respected.”

21. In view of the presumption of innocence, the arrest cannot be targeted to punishment of a suspect before conviction. No matter the revulsion that the respondents may feel towards the applicant’s action of supporting by representing persons accused of various offences during the recent protests or of commission of any other offence, they are not entitled to arrest the suspect as a punishment, or in common parlance, to teach them a lesson for their criminal conduct.

22. I should respectfully agree with the Counsel for the DPP that the Court must balance the rights of the applicant suspect with the right [really mandate] of the police and prosecution to investigate and prosecute crime. But in doing so, the court must discharge its obligation under Article 21 [1] of the *Constitution* “to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights” and in so doing comply with the injunction of Article 20 [3] of the *Constitution* that “in applying a provision of the Bill of Rights, a court shall— [a] develop the law to the extent that it does not give effect to a right or fundamental freedom; and [b] adopt the interpretation that most favours the enforcement of a right or fundamental freedom”.

Facts of the case

23. It is not clear what the DPP sought from the applicant when it was retorted by Counsel in the Replying Affidavit that the applicant was put to strict proof. This was not a case of no evidence adduced. Once the applicant produced evidence of circumstances indicating an attempted arrest on the part of the Police, it would upon the police rebut such evidence or explain the circumstances in an innocuous manner with no adverse impact on the applicant’s rights against arbitrary arrest or show just cause for the attempted arrest.

24. The DPP says the threat of arrest is spent because the applicant is not now marooned at Kahawa Law Courts. The likelihood of arrest is a continuing threat unless it is expressly withdrawn. The applicant attached photographs of the vehicle surrounded by persons she allegedly were police officers who she feared were trying to arrest her to intimidate her for representing suspects arrested during the recent political protests in the country. It was incumbent upon the police who run the state investigative machinery to confirm in response if that be the truth that there was no pending or impending investigations and or arrest on the applicant.

25. On a balance of probability, which is the standard of proof, to which the applicant in the position of an accused person must be held, the court accepts that there was an attempt by the officer of the Anti-terrorism unit to arrest the applicant as alleged in the Supporting Affidavit sworn on 10/7/2025.



26. The Court has considered the circumstance of this case that the applicant is a Member of Parliament and an officer of this Court as advocate of the High Court who at the time of attempted arrest was in court representing her clients. It also ignites a disturbing spectre of an unacceptable interference with the third party constitutional right to legal representation by counsel for the applicant advocate's clients.
27. There is no possibility of the applicant failing to attend Court by summons, and such was considered to be the case, the Respondents would have asserted that position by discharging evidential burden by evidence that the applicant has previously absconded or failed to obey court summons.
28. At present, there is no compelling reason for refusal of anticipatory bail to the applicant and the same shall be granted upon terms, in recognition of her professional position as an advocate of this court and member of parliament, that she undertakes to attend court on such dates as she may properly be summoned by executing a personal bond to forfeit the sum of Kshs 100,000/- in the event of her failure to attend court as required.

Orders

29. Accordingly, for the reasons set out above, and in terms of the power of the Court under principally Articles 23, 29 and 165 of the *Constitution*, the Court grants the applicant an order for anticipatory bail restraining the Respondents from arresting the applicant pursuant to investigations on the matters subject of this application.
30. The applicant shall execute a personal bond of Kshs 100,000/- for her attendance before the trial court whenever required to do by summons or other order as appropriate.
31. The applicant shall, within thirty [30] days, by prior appointment, attend the Officer Commanding of Kerugoya Police Station or the Police Officer in-Charge, Kirinyaga DCI or Investigations Officer, as the case may be, responsible for the matter subject of this application, for purposes of any necessary statements and other investigations.
32. There shall be no order as to costs of the application.
33. File closed.

Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF JULY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Sakimpa and Mr. Munene for the Applicant.

Mr. Mamba for the DPP/Respondent.

