



**Jambia v Republic (Criminal Revision E139 of 2024)  
[2024] KEHC 4205 (KLR) (3 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4205 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL REVISION E139 OF 2024**

**G MUTAI, J  
APRIL 3, 2024**

**BETWEEN**

**HASSAN ATHUMAN JAMBIA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Before the court is a Notice of Motion dated 11<sup>th</sup> March 2024. *Vide* the said application, the Applicant seeks the following 6 orders: -
  1. Spent;
  2. That the court to call for the records and review the orders to place the Applicant in police custody for 30 days from 7<sup>th</sup> March 2024 and to be substituted with an admission to bond/ bail, or any other security, or to have the period reduced to only 7 days;
  3. That the court to call in the records and review the orders allowing the exploitation of the electronic gadgets allegedly confiscated from the alleged residence of the Applicant, and in the interim order stay of the orders until final determination of this application;
  4. That the communication between the Applicant and Counsel to remain privileged, and to be allowed to communicate in private and without the intrusion of the investigators during visitation at the Anti-Terrorism Police Unit offices or any other holding facility pending investigations;
  5. Any further orders that this honourable court may deem fit to grant in preserving and protecting the rights of the Applicant as an arrested person; and
  6. Each party to bear own costs.



2. The motion is premised on Articles 19, 20, 21, 22, 23, 24, 25, 31, 49, 50, 51, and 165 of the Constitution and Section 362 of the Criminal Procedure Code.
3. The Applicant contends that he was arrested on 6<sup>th</sup> February 2024 while in the company of his mother and younger sibling. He further contends that he was not informed of the reasons for his arrest, nor was the same communicated to his mother, who was present at the time of the arrest. Subsequently, a search was conducted at a place said to be the residence of the Applicant without prior notice of what the officers of the Directorate of Criminal Investigations were looking for, as a result of which some items were seized. On 7<sup>th</sup> March 2024, the Applicant was presented before the Chief Magistrate at Shanzu Law Court *vide* Misc Criminal Application No. E047 of 2024. The Directorate of Criminal Investigations officer sought: -
  1. To have the Applicant detained for 30 days to enable them to conclude investigations on the Applicant;
  2. To be allowed to forensically examine the electronic gadgets confiscated from the alleged home of the Applicant; and
  3. To be allowed to revisit the home of the Applicant so as to conduct further searches, “so as to cease any evidentiary materials and documents.”
4. The Applicant avers that prior to his arraignment in Shanzu Law Court, he was not informed of his Article 49 rights, specifically his right to remain silent, not to self-incriminate himself and to legal representation.
5. The Applicant states that his counsel, once his family appointed one for him, was not given ample opportunity to contest the application filed in Miscellaneous Criminal Application No. E047 of 2024 and that the court granted all the prayers sought without any reference and justification. The court is thus called upon to exercise its jurisdiction under Section 362 of the Criminal Procedure Code and to issue the orders sought.
6. The Motion was supported by the affidavit of Mr. Chacha Mwita. Mr. Mwita, learned counsel for the Applicant, deposed that he was denied an opportunity to communicate with his client in confidence or to do so sufficiently and that the safeguards afforded a suspect by section 33 of the Prevention of Terrorism Act for grant of detention orders under the said Act were not met.
7. The Applicant is aggrieved that despite opposing the said application, the Court, in a terse ruling, agreed with the Respondent and stated that, “I note that the main reason that the investigation officer seeks to detain the suspect is that he is believed to have communicated with ADF terrorist group. Indeed, Section 33 of the POCA allows a court to detain a suspect for a certain period to enable investigations to be conducted. Further, Article 49 of the Constitution requires that a suspect can only be denied bond when there are compelling reasons to deny him bond. I agree with the prosecution that the nature of the investigations to be done in this case, which will involve multiple countries as stated in the affidavit, will require the suspect to be detained in custody for a certain period of time.”
8. Although the Respondent was served with the instant Motion, neither it nor the Director of Public Prosecution, on its behalf, filed a Replying Affidavit or Grounds of Opposition in opposition to the said application. That notwithstanding, the court must nevertheless consider the application on its own merits and make an appropriate finding.



9. The Constitution of Kenya is a very progressive compact. The exercise of the coercive powers of the state is subordinated to the Constitution. the Constitution, in Article 49 (1) states that the arrested persons have inter alia right to: -
- a. Be Informed promptly in a language that the person understands of the: -
    - i. The reason for the arrest
    - ii. The right to remain silent;
    - iii. The consequence of not remaining silent;
  - b. To remain silent;
  - c. To communicate with an advocate or any other persons whose assistance is necessary; ...
  - f. To be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested.
10. The Constitution states clearly that every suspect is presumed innocent until the contrary is proven.
11. In the instant matter, the Applicant was arrested on 6th February 2024 at the offices of DCI/ATPU. It was only on 7th March 2024 that he was taken to court upon the filing by the Respondent of the application, which resulted in the impugned decision.
12. It would appear to this court that the respondent had ample opportunity to investigate the Applicant prior to his arrest on 6<sup>th</sup> February 2024 and also before the ruling delivered by the Court on 7<sup>th</sup> March 2024. It is reasonable to suppose that by the time he was arrested, the Respondent had a watertight case. This court is not convinced that the liberty of citizens is taken so lightly that the freedom and security of the person can be taken away whimsically and without justifiable cause.
13. Thus, I agree with what Kimaru J (as he then was) stated in the case of Michael Rotich versus Republic [2016] eKLR. In the said case, the learned Judge expressed himself as follows: -
- “... as stated earlier in this ruling, the Applicant has not been charged with the commission of any offence. In fact, it is not clear from the Affidavit sworn by the Investigating Officer what charges will be brought against the Applicant. The Applicant has not been informed of the charges he is likely to face since his arrest. In essence, the state wants to place the Applicant in custody to enable it to commence and complete its investigation ... The police have no authority in law to arrest and detain any person without sufficient grounds. Those grounds can only be sufficient if the police have prima facie evidence which can enable such a person to be charged with a disclosed offence.”
14. Although it is suggested that the Applicant will be charged under the Prevention of Terrorism Act, his constitutional rights under Articles 29, 48, 50 and 51 of the Constitution remain binding on the state.
15. The upshot of the foregoing is that this court finds merits in the application. Consequently, the court orders as follows: -
1. The Applicant be arraigned in Shanzu Court on 5<sup>th</sup> April 2024 and charged accordingly. In the event that the Respondent is unable to charge the Applicant, the Applicant be set free forthwith, unless otherwise lawfully held; and
  2. The Applicant’s rights under Article 48 of the Constitution shall be respected, and in particular, his right to communicate with his counsel in confidence shall not be infringed.



16. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 3<sup>RD</sup> DAY OF APRIL 2024**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Chacha Mwita for the Applicant;

Mr. Ngiri for the Respondent; and

Arthur- Court Assistant.

