



Mohammed v Director of Criminal Investigations & another (Criminal Miscellaneous Application E476 of 2023) [2024] KEHC 5991 (KLR) (Crim) (9 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL MISCELLANEOUS APPLICATION E476 OF 2023**

LN MUTENDE, J

MAY 9, 2024

BETWEEN

ABDULLAHI ISAACK MOHAMMED APPLICANT

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

RULING

1. Abdullahi Isaack Mohammed, the Applicant, approached this court seeking to be admitted to anticipatory bail pending investigations and/or his arraignment.
2. The application is premised on the grounds that the 1st respondent officers have malicious intentions to arrest and detain the applicant without bringing charges against him. That he had received phone calls in the wee hours of the night from various police stations over a purported debt. He had also been called to record statements and honored over five summons but has been turned back with interrogation whenever he appears.
3. The applicant's feared arbitrary detention without bail is premised on some business transaction where they raised Ksh 17 M with his colleagues in the business community at Eastleigh to purchase gold from a dealer named Hoibo Abdi. That the dealer claimed to have easy access to gold in Tanzania.
4. The dealer procured 4 kgs of gold and delivered it as promised save that on testing, it was found to be fake melted lead. This turned out to be a gold scam which was reported at Eldoret police station following a complaint by a 3rd Party who alleged that he contributed through one of his six business partners. A case that is still under investigations.



5. That the applicant was interrogated at Gigiri Police Station and released on 100,000/= cash bail and directed to appear before Milimani court but when he went to Milimani law courts on 10/11/2023 he was not arraigned. He also recorded statements but has not been charged to date.
6. The applicant contends that he is not privy to any agreement with the complainant who is a 3rd party. That the 3rd party and others are using the police to extort money from him over an alleged debt he is also a complainant.
7. The application is opposed, the 1st respondent filed an affidavit deposed by No 241xxx Corporal Amina Abdi who is tasked with investigating the matter in issue. She depones that the complaint relates to a case by Nasra Abdullahi Yussuf which was reported at DCI Head The Judiciary of Kenya Doc Identity:28538241402880xxxxxxxxxxxxxxxx Tracking Number: xxxxx52024 2/3 office at Nairobi over claim that the complainant lent the applicant Ksh 2.8 Million but the he only paid Ksh. 300,000/= of the amount.
8. That she recorded statements of the two on 21/11/2023 and 29/11/2023 and the file is still open for further evidence. That the statements received show a loan given to the applicant and partial payments and there is also a commitment executed by both parties.
9. That there is no malice or intention to arrest or charge him, he is also free on cash bail he was given at the 1st respondent's office at Gigiri pending investigations on a case of obtaining by false pretence. That the applicant has not given the cell numbers of the officers who are harassing him or the occurrence book number of the report on the gold scam, and, the applicant admits playing a role in collecting the 17 million shillings.
10. I have duly considered the application, affidavits in support and opposition and submissions. Article 165(4) gives this court original jurisdiction to determine questions of violation of fundamental rights and freedom and to further give such orders in the interest of justice and in protection of an aggrieved parties rights.
11. Article 49 provides for the right of an arrested person to be released on bond. Where this is violated further rights that are affected are the applicant's freedom and/or right against arbitrary detention. Article 29 (a) and (b) of the Constitution of Kenya particularly provides that:

Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; b. detained without trial except under a state of emergency in which case the detention is subject to Article 58;
12. Anticipatory bail is granted to counter the State action that is done in breach of a citizen's right. In the case of W'Njuguna -vs- Republic (2004) eKLR the court held that orders interfering with police power should be based on sound constitutional principle, that such orders are granted only:

“...when there are circumstances of serious breaches of a citizen's rights by an organ of the state which is supposed to protect the same.”
13. The burden of proof is on the applicant, his grounds must be compelling and not based on speculations and mere averments.
14. The Judiciary Bail and Bond Policy Guidelines grant the court discretion pursuant to the law governing anticipatory bail, providing that:

“The High Court may grant anticipatory bail, that is, bail pending arrest, provided the applicant demonstrates that his or her right to liberty is likely to be compromised or



breached unlawfully by an organ of the State that is supposed to protect this right. Further, the applicant must demonstrate that the apprehension of arrest is real and not imagined or speculative.”

15. In the case of *Mandiki Luyeye -vs- Republic* (2015) eKLR, the court held that such an order cannot issue where an applicant labours under apprehension founded on unsubstantiated claims. The fear of breach of fundamental right must demonstrate the breach by acts and facts constituting the alleged breach”.
16. The *Judiciary Bail and Bond Policy Guidelines* provide that:

“The High Court may grant anticipatory bail, that is, bail pending arrest, provided the applicant demonstrates that his or her right to liberty is likely to be compromised or breached unlawfully by The Judiciary of Kenya Doc Identity: 28538241402880xxxxxxxxxxxxxxxx Tracking Number: xxxxx52024 3/3 an organ of the State that is supposed to protect this right. Further, the applicant must demonstrate that the apprehension of arrest is real and not imagined or speculative.”
17. The applicant’s threat of arrest dates back to December 2023 when he first moved this court, this was probably at a point of heightened anxiety over interrogations by the DCI between 22/11/2023 and 29/11/23. He also admits in his affidavit that he was summoned during this period.
18. There is no proof that the interrogations and statements recorded at DCI Gigiri relate to the alleged gold scam and fraud by Hoibo Abdi. The averments in his affidavit are unsupported. The relationship between the gold scam incident which happened at Eastleigh Jam Street and a report of the same at Eldoret Police Station makes his case doubtful and incredible.
19. What is evident from the DCI’s records as per annexures attached is that the applicant was interrogated over claims of obtaining by false pretence and that due process was followed. The applicant was released on police cash bail at the time he was approaching this court.
20. The 1st respondent’s duty to investigate crime is informed by law and is discharged in the interest of the public as long as they follow due process. There are timelines for investigations and all that is required is that the applicant must be arraigned within 24 hours once he is arrested in accordance with the law. The decision to be charged has not been reached, therefore the contention that he has never been arraigned does not apply at this stage. This court cannot supervise the actions or compel the respondent to act.
21. Further the applicant’s concern seems to be constant investigations and interrogations. He has not proved the alleged multiplicity of investigation by many Police Stations, the alleged summons from various Station within Nairobi have not been attached.
22. Even if he attached, the law is that anticipatory bail is not meant to prevent investigations but see that it is done within the law and the applicant is not tortured or detained without cause.
23. In the case of *Republic -vs- Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others*, the court held that anticipatory bail ought not to be granted to prohibit investigations. In *Richard Mahkanu -vs- Republic* [2014] eKLR and *Kevin Okore Otieno vs Republic* (2013) eKLR the court added that orders for anticipatory bail or bond must not be sought with the intention of pre-empting the outcome of investigations.
24. Notably, the applicant is not in the country therefore does not deserve the equitable orders sought in the application. For reasons given, the application fails and is dismissed.



24. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT
NAIROBI, THIS 9TH DAY OF MAY, 2024.**

L. N. MUTENDE

JUDGE

