



**Abdulatif & another v Inspector General of Police & 2 others (Miscellaneous Criminal Application E007 of 2023) [2023] KEHC 18143 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18143 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CRIMINAL APPLICATION E007 OF 2023  
RN NYAKUNDI, J  
JUNE 5, 2023**

**BETWEEN**

**IBRAHIM SIDIK ABDULATIF ..... 1<sup>ST</sup> APPLICANT**

**KURSUM IBRAHIM SIDIK ..... 2<sup>ND</sup> APPLICANT**

**AND**

**INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Coram: Before Hon. Justice R. Nyakundi**

Mr. Mugun for the State

Mr. Okemwa for the for the Applicant

1. The applicant approached this court *vide* a notice of motion dated January 30, 2023 seeking the following orders;
  1. Spent.
  2. That *ex parte* and pending the hearing and determination of this application this honourable court be pleased to grant the applicant herein anticipatory bail at such terms and conditions that this honourable court may deem just and fit in the circumstance.
  3. That *ex parte* and pending the hearing and determination of this application, the honourable court be and is hereby pleased to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, his servants, agents or any officer of the National Police Service or any other law enforcement officer from arresting



and prosecuting the 1<sup>st</sup> and 2<sup>nd</sup> applicants herein in relation to OB 27/2314/1022, case file no 838/106/2022, court file number E698/22.

4. That this honourable court be pleased to grant the applicant herein anticipatory bail at such terms and conditions that this honourable court may deem just and fit in the circumstance.
  5. That this honourable court be and is hereby pleased to restrain the 1<sup>st</sup> respondent, his servants, agents or any officer of the National Police Service or any other law enforcement officer from arresting the applicant herein in relation to OB 27/23 /4/2022, case file No 838/106/2022, court file number E698/22 .
  6. That this honourable court be pleased to grant an early hearing date for this application.
  7. That the honourable court do issue such further or other orders that in its discretion may deem fair and just in the circumstances.
  8. That costs be in the cause.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn by the applicants.

### **Applicants' Case**

3. The applicants contend that their families were ambushed harassed and violated by two individuals, namely; Omar Mohammed, Khalid Omar, Asif Umar and Tawiq Munir who caused them actual bodily harm. They reported the matter to Langas police stations and were issued with a p3 form. The suspects were then arraigned in court under police case number 838/106/2022. They deposed that as they waited for the matter to be heard in court they learned that they were being pursued over an alleged report that had been made by the accused persons against themselves, their son and witnesses. Further, that the police officers have made real threats to them for over 1 year now. On the November 21, 2022 some officers from the DCI laid an ambush and arrested their son Mahir Ibrahim as he was just closing up his shop and was rushed to Langas police station and later taken to court for plea taking in case number E2079/2022.
4. They stated that their son is out on cash bail and one witness of the incident has received unsigned bond to attend court separately with threats to withdraw as a witness. Further, that they have also received unsinged bond to attend court to give evidence in the matter. As a result of the aforementioned, they are under imminent threat of arrest and prosecuted yet have always been, ready and willing to cooperate with the 1st, 2nd & 3rd respondents.
5. They urged the court to grant them anticipatory bail, in the absence of which they will suffer grave injustice of monumental proportion.

### **Respondent's Case**

6. In response to the application, the 1<sup>st</sup> respondent filed a replying affidavit sworn by PC Emmanuel Rutto who stated that on or about the 23<sup>rd</sup> day of April 2022, the station received a report of assault causing actual bodily harm contrary to section 251 of the *Penal Code* which was received and booked *vide* OB No 27/23/04/2022.1 was tasked to investigate the matter. As part of his investigations, he recorded the statements of the complainant and the witnesses in order to establish whether the allegation had any truth to it. In the course of his investigations he found out that the applicants herein had previously reported a case of assault causing actual bodily harm. The complainant in the matter he was investigating, was the suspect in that case and he had been arrested and charged in Eldoret CMCC



E698/2022. In light of the two reports he forwarded the file to the 3<sup>rd</sup> respondent for purposes of making the decision to charge as they are constitutionally mandated.

7. He deposed that upon perusal of both files, the 3<sup>rd</sup> respondent directed that the applicants be charged with the offence of assault causing actual bodily harm. He then apprehended Mahir Ibrahim on November 21, 2022 who was one of his suspects in the matter he was investigating. Before he was presented to court for plea-taking, that suspect was released on police cash bail of Kshs 5,000 to attend court on November 22, 2023 for plea taking.
8. The respondent deposed that the applicant's co-accused was released on police bond and that should they be able to apprehend the applicant's, they too can be given police bond to secure their attendance in court. He urged that anticipatory bond is granted only in circumstances where there is a serious breach of a citizen's right or a serious breach of his fundamental human rights. He maintained that the applicants will be entitled to be released on cash bail if they are arrested.

### **Analysis & Determination**

9. Upon considering the application and the contents of the supporting affidavit, the following issues arise for determination;
  1. Whether the applicant should be granted anticipatory bail
  2. Whether the restraining orders against the respondents should issue

### **Whether the applicant should be granted anticipatory bail**

11. The Constitution of Kenya provides for;
  - a) Bail of arrested person under article 49(1)(h)
  - b) Appropriate relief under article 23(3) for breach of the bill of rights
12. Similarly, in India a common law jurisdiction upon which our Criminal Procedure Code is premised has a specific section 438 on anticipatory bail which states as follows;
  - (1) where any person has a reason to believe that he may be arrested on accusation of having committed a non bailable offence, he may apply to the High Court or to the court of session for a direction under this section that in the event of such arrest he shall be released on bail and the court may after taking into considerations, inter alia the following factors namely;
    - 1) The incident and gravity of the accusations
    - 2) The antecedents of the applicants including the facts as to whether he has previously undergone imprisonment or conviction by a court in respect of any cognizable offence
    - 3) The probability of the applicant to flee from justice and
    - 4) Where the accusation has been made with the object of injuring or humiliating the applicant by having him arrested, either reject the application forthwith or issue an interim order for grant of anticipatory bail.
13. In Kenya, there are no specific provisions on anticipatory bail. However, where the remedy has been considered, the courts have applied the threshold for an application for violation or threatened violation of rights under article 23 and 165(3) of the Constitution. Under article 29 of the Constitution, 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.



14. In the case of *Mandiki Luyeye v Republic* [2015] eKLR, the court held thus;

Similar sentiments were observed in the case of *Eric Mailu v Republic and 2 others* Misc Criminal Application No 24 of 2013 in which it was emphasized that anticipatory bail would only issue when there was serious breach of a citizen's rights by organs of the State.

15. Accordingly, it is salient that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental constitutional rights in conformity with what the *Constitution* envisages constitutes protection of fundamental rights and freedoms of a citizen. It 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. It follows that in order for a court to grant anticipatory bail, an applicant must prove that there is an infringement on constitutional rights. The applicants contend that the respondents have threatened to arrest them but there is no evidence of the same before this court. I have considered the facts of the two complaints and I find no justification for the claim that the arrest of their son is meant to influence them to withdraw the case.

17. The application is based on apprehension and therefore cannot meet the threshold for the orders for anticipatory bail to issue.

#### **Whether The Restraining Orders Against The Respondents Should Issue**

18. The applicant seeks orders restraining the Inspector General of Police, Directorate of Criminal Investigations and the Director of Public Prosecutions from arresting and prosecuting the applicant.

19. The mandate of the respondents is a constitutional mandate and therefore, due to the doctrine of separation of powers, the courts seldom interfere with said constitutional mandates. It is the constitutional duty of this court to go to the lengths and breadths of the *Constitution* to protect the rights and fundamental freedoms of Kenyans where need be, but it is always alive to its obligation to not to curtail the other organs of state from carrying out their constitutional duties. This is the delicate balancing act this court is expected to carry out every time while dealing with matters of this nature.

20. The justiciable issue in this application is well illustrated on the comparative case of *Nielson v Barker* (1982) 32 WIR P 254 in which Messiah J. observed as follows : “ What I am endeavouring to develop is the notion that it is a misconception to think that the *Constitution* is panacean in character, capacitated for the eventual solution of all legal problems . This process of magnification has led to attempts being made to fit a variety of rights into the framework of fundamental rights and freedoms.

21. As a constitutional democracy each citizen has a responsibility to contribute to the immense transformation to the rule of law. Therefore, the importance of the need to ensure and facilitate the National Police Service Ability to act efficiently effectively, and promptly on matters which are within their mandate. In the instant application, the court has not been told that administrative action affecting the applicant falls short of the following condition precedents. (a) Lack of adequate notice of the nature and purpose of the proposed investigation. (b) Lack of a reasonable opportunity to make representation in answer to the complaint filed with the police. (c) There was denial to obtain legal representation as provided for in article 50 (2) (h) of the *Constitution*. How the applicants has been deprived of their fundamental rights and freedoms is however not clear in the application. The indictment of an applicant does not contravene the right to liberty of freedom. It is of significance to note that the *Constitution* petitions/ applications that are frivolous, vexatious or contrived invocation of the constitutional redress is certainly frowned and repelled against by the same constitution. An



aggrieved party should consider the true nature of the fundamental rights and freedoms alleged contravened and whether having regard to the total circumstances of the case there exist some other remedy likely to redress the violations. I find the affidavit evidence wholly incompatible and incapable of a remedy under article 23 of the *Constitution*.

22. The upshot of it all the application for anticipatory bail fails at the door step of the mover. For this reason I find that the constitutional redress is premature and inappropriate. The same be dismissed with costs to the respondents.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 5TH DAY OF JUNE 2023**

**In the Presence of:**

Mr. Mugun for the state

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**R. NYAKUNDI**

**JUDGE**

