



**Komen v OCS Eldoret Central Police Station & another (Miscellaneous Criminal Application E005 of 2023) [2023] KEHC 18905 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18905 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CRIMINAL APPLICATION E005 OF 2023**

**JRA WANANDA, J**

**JUNE 16, 2023**

**BETWEEN**

**SELINA JEMATIA KOMEN ..... APPLICANT**

**AND**

**OCS ELDORET CENTRAL POLICE STATION ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant approached this Court vide the Notice of Motion dated January 16, 2023 and filed and filed on the same date seeking the following orders;
  - i Spent
  - ii That the application be granted anticipatory bail/bond pending arrest or charges.
  - iii That the respondent through their enforcing agents (police officers) be barred from arresting the applicant or holding her in custody pending the hearing and determination of this application.
  - iv That any other orders this Honourable Court deems fit in these circumstances.
2. The Application is filed through Messrs Mburu Okara & Co Advocates and is based on the grounds that the police officers are being misused to intimidate, oppress and harass the Applicant, the Applicant has already been charged in Court with an offence of obtaining goods by false pretence and issuing bad cheques contrary to Section 316A(a) vide Court file No E1823/2022 and E089/2023, the Applicant is entitled to the protection of the law as provided for in Articles 48, 49 and 50 of the Constitution of Kenya 2020, the Applicant is of ill-health and is on constant medical attention/treatment.



## **Applicants' Supporting Affidavit**

3. In her Supporting Affidavit, the Applicant deponed that on October 25, 2022 she was arrested by the police officers from Central police station, she was taken to Court where she was charged with the offence of obtaining goods by false pretences and issuing bad cheques vide Court file No E1823/2022, further, on January 12, 2023 the same police officers arrested her and charged her with the offence of issuing the same bad cheques vide Court file No E089 of 2023, she is now apprehensive that the police officers are planning on arresting and producing her in Court to charge her with a similar offence, in both files the complainant is the same and the offence is the same and therefore she does not understand why the police officers failed to charge her once and continue to produce piece meal evidence.
4. In opposition to the Application, one IP Naftali Muthui swore a Replying Affidavit in. He deponed that on September 29, 2021 at around 1637 hours Eldoret Police station received a report of obtaining goods by false pretences contrary to section 313 of the Penal Code, this concerned the fact that the complainant knew that he had been swindled by being made to supply farm inputs to the Applicant for return of payment of Kshs 3,247,230/-, one PC Jacktone Owala was tasked to investigate this report, on May 9, 2022 at around 1305 hrs the station received a report of issuance of bounced cheques, the report was booked in the occurrence book, one PC Cyrus Oriososa was tasked to investigate this report., the complainant reported that his company had been issued with cheques totalling to Kshs 2,500,000/- by the Applicant for supply of farm implements and fertilizer, the implements and fertiliser had been supplied to the Applicant on August 4, 2017 who undertook to pay for them but went underground, the complainant had filed a civil suit being Eldoret CMCC 644 of 2018 for recovery of the debt after the sum remained unpaid, the Applicant initiated talks aimed at resolving the matter out of Court, on May 13, 2022 she made partial payments to the complainant with 5 cheques, when the complainant went to cash the cheques, they were dishonoured for insufficient funds, the complainant then instituted the complaint over the issuance of bad cheques, after the conclusion of investigations, the file was forwarded to the ODPP who agreed with the recommendation that the Applicant be charged with the offence of issuing bad cheques contrary to section 316A(1)(a) as read with section 316(4) of the Penal Code, the Applicant was charged in Eldoret Chief Magistrate's Criminal Case no E089 of 2023, as part of his investigations he discovered that the Applicant had been charged in Eldoret Chief Magistrates' Criminal Case No E1823 of 2022 for the offence of obtaining goods by false pretences and issuing of bad cheques.
5. He deponed further that summoning of a person of interest to record a statement is permitted under section 52 of the National Police Service Act, since the matter was filed in Court, the Applicant has never been summoned for further interrogation on the subject matter of the investigations, she has never been re-summoned for further interrogation, apart from raising spurious allegations the Applicant has not adduced a single iota of evidence that she has been harassed, anticipatory bond cannot be issued when the subject matter has already been filed in Court, the Applicant was issued with cash bail in both matters, it is very likely she will be granted if there are any other investigations going on.

## **Analysis & Determination**

6. Upon considering the application and the responses thereto, I am of the view that the issue that emerges for determination is "whether the applicant should be granted anticipatory bail".
7. There is no express provision governing anticipatory bail under Kenyan legislation. However, the Constitution of Kenya provides for the following:
  - a Bail for arrested person under Article 49(1)(h)



- b Appropriate relief under Article 23(3) for breach of the Bill of Rights
8. Carrying out a comparative analysis, one finds that for instance, 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.
9. In Kenya, in the case of *Republic v Chief Magistrate Milimani & Another Ex parte Tusker Mattresses Ltd & 3 Others* [2013] eKLR, Odunga J, addressed himself on the standard required in evaluation of an application for anticipatory bail as follows:
- “However before going to the merits of the instant application, it is important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission of a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well as civil liability. The High Court ought not to interfere with the investigative powers conferred upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.”
10. Despite the absence of specific provisions on anticipatory bail, the remedy has been considered on several occasions. In these situations, 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”.
11. I have considered the Applicant’s case and it is my considered view that she has not proved that there has been any violation of her rights. Whereas she has been charged with a similar offence in two different cases, it is evident from the charge sheet that these offences arise from different transactions. Further, her apprehension that she will be arrested over the same offences remains just that, apprehension. There is no concrete evidence that the police intend to do so. As per the charge sheets, she was granted cash



bail. As stipulated under Article 49(1)(h) of the Constitution, she will still be eligible to be granted bail in the event that she is arrested again.

12. From the construction of the word ‘anticipatory bail’, it is deductible that the bail is to be granted in anticipation of an arrest. The Applicant has already been granted bail in the two matters and has not provided any evidence that there is an intention to arrest her unfairly. I stand guided by the decision of Mabeja J in the case of *Richard Makhanu v Republic* [2014] eKLR where he stated as follows.

“With regard to the issue on anticipatory bail, it is usually granted where there is alleged to be serious breaches by a state organ. In the case of *W’Njuguna v Republic*, Nairobi Misc Cr Case No 710 of 2002, [2004] 1 KLR 520, the Court held that anticipatory bail can be granted:

“...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.”

In view of the foregoing, while the Applicant has submitted that he is in imminent danger of being arrested, I am not persuaded that the Applicant has demonstrated the likelihood of any serious breach of his rights by the police to warrant the granting of the orders sought. Indeed, the Applicant is entitled to equal protection before the law under the Constitution, but the actions of the police in investigating the complaint lodged by the Applicant’s wife is a lawful step, and cannot be said to violate the Applicant’s rights.”

Under Article 245(4) of the Constitution, the police have a constitutional mandate to investigate offences and prefer charges. The process of trial starts with a complaint being made to the police, investigations, arrest and arraignment in Court. The suspect is formally charged and bail is considered. The Applicant has not explained why she should not be subjected through that process like every other suspect. My view is that the police are acting within their mandate. The Applicant has not satisfied me that her rights are being violated in any way.

### **Conclusion**

13. I therefore find that the Application is without merit, the Applicant has not demonstrated that any of her fundamental freedoms and rights are being infringed as to warrant the granting of anticipatory bail. I dismiss the Application

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023**

.....

**WANANDA J R ANURO**

**JUDGE**

