



**Musa v Republic (Criminal Miscellaneous Application E053 of 2024)  
[2024] KEHC 13726 (KLR) (Crim) (4 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13726 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL MISCELLANEOUS APPLICATION E053 OF 2024  
LN MUTENDE, J  
NOVEMBER 4, 2024**

**BETWEEN**

**HUSSEIN YUSSUF MUSA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**Court rejects anticipatory bail application on grounds that it was founded on unsubstantiated claims**

*The applicant sought anticipatory bail, claiming police officers were threatening him with arrest without justifiable cause. He alleged harassment through phone calls from private numbers, causing fear and disruption to his life and business. The court held that anticipatory bail was a special relief granted where a real and demonstrable threat to liberty existed. Since the allegations were unsubstantiated and denied by the respondent, the application was dismissed.*

Reported by John Ribia

***Criminal Law*** – bail – anticipatory bail – conditions in which anticipatory bail could issue - whether anticipatory bail could issue where one allegedly faced threatening phone calls from police officers.

**Brief facts**

The applicant sought anticipatory bail pending arrest or charge on such terms as the court deemed fit to impose. The applicant contended he was being sought by police officers at Eastleigh North Police Station led by the Deputy Officer Commanding the Police Station (OCS) without a reasonable cause. The applicant averred that he feared imminent arrest without justifiable cause hence he could not live peacefully at his home or carry on his business and that in breach of his rights the police had continued to threaten and intimidate him by calling him on the phone using private numbers.

There was evidence of a letter requesting for review of a criminal case to be preferred against the applicant, on grounds of malicious prosecution, addressed to the Office of Directorate of Public Prosecutions, Makadara Law Courts. There was however no response to the letter and/or proof of receipt.

The respondent had vehemently denied the allegations.



## **Issues**

Whether anticipatory bail could issue where one allegedly faced threatening phone calls from police officers.

## **Held**

1. The nascency of granting an anticipatory bail to a person who believed his rights were likely to be breached by being falsely arrested was enshrined in the Constitution which granted the High Court the discretion to grant the order as long as the applicant demonstrated that his liberty was likely to be imperilled. That was a special relief in criminal law.
2. Conditions for granting bail would include the applicant making himself available for purposes of being interrogated when required by the police/investigation officers. At the outset the applicant was granted anticipatory bail on interim basis. It had not been alleged that the police had acted in an attempt to interfere with the applicant's liberty. 7 months later, the applicant had not been arrested and the respondent had denied that there was an intention to have the applicant arrested.
3. Statutes in Kenya did not define anticipatory bail which was considered a special relief as it was not specifically provided for. Anticipatory would however mean an anticipated act. If something was likely to happen then it would be the case. Bail was granted following arrest so as to safeguard an individual's arrest who was presumed innocent until proven otherwise.
4. Anticipatory bail would only issue when there was serious breach of a citizen's rights by organs of state. Anticipatory bail was aimed at giving remedy for breach of infringement of fundamental constitutional rights in conformity with what the Constitution envisaged constituted protection of fundamental rights and freedoms of a citizen. It could not issue where an applicant laboured under apprehension founded on unsubstantiated claims. The fear of breach to fundamental right must be real and demonstrable. An applicant must demonstrate the breach by acts and facts constituting the alleged breach.
5. The allegations put forth were denied, and, no action had been taken by the respondent that would call for protection of the applicant fundamental rights. It would be flippant to issue orders sought.

*Application dismissed.*

## **Citations**

### **Cases**

1. Mailu, Eric v Republic and 2 others (Miscellaneous Criminal Application 24 of 2013; [2013] KEHC 4634 (KLR)) — Explained

### **Statutes**

1. Constitution of Kenya — In general — Cited

### **Advocates**

None mentioned

## **RULING**

1. Hussein Yussuf Musa, the applicant, approached the Court seeking anticipatory bail pending arrest or charge on such terms as the court may deem fit to impose.
2. The substratum of the application is that the applicant is being sought by police officers at Eastleigh North Police Station led by the Deputy Officer Commanding the Police Station (OCS) without a reasonable cause. That the applicant fears imminent arrest without justifiable cause hence he cannot live peacefully at his home or carry on his business.
3. That in breach of his rights the police have continued to threaten and intimidate him by calling him on the phone using private numbers.



4. The applicant alleges to have been abducted by six(6) officers from the station using a pro-box vehicle who blindfolded him and took him to California and Shauri Moyo Police Stations where he was physically assaulted and later released on cash bail of Kshs 5,000/= after intervention of counsel and Community Elders.
5. That the genesis of the matter was a report that he made against a relative of the Deputy OCS of the Police Station, Eastleigh, who had sexually assaulted his (applicant's) sister-in-law, hence it is only fair and just to the relief sought granted.
6. In a response thereto No 241039 Inspector Abdi Ismail, the Deputy OCS Eastleigh North Police Station deposed an affidavit in reply of the allegations where he averred that no investigations are ongoing at the station touching on the applicant as alleged. He denied the allegations by the applicant that he was abducted. He denied the allegation that the applicant was granted a cash bail. He dismissed the Occurrence Book report annexures to the affidavit as a report made by Raha Mohamed Salah and not the applicant and dismissed the applicant as a liar.
7. The applicant through the firm of Kanyoko Lewis and Company Advocates filed submissions on the application which I have considered alongside affidavits in support and opposition of the application.
8. The nascency of granting an anticipatory bail to a person who believes his rights are to be breached by being falsely arrested is enshrined in the Constitution which grants the High Court the discretion to grant the order as long as the applicant demonstrates that his liberty is likely to be imperiled. This is a special relief in Criminal Law.
9. The applicant herein demonstrated that a complaint was filed by Raha Mohamed Salah against the Deputy OCS Eastleigh North Police Station who was stated to have abused power by purportedly protecting a sex pest. There is evidence of the complaint having been received by the National Police Service who through a letter dated November 15, 2023 confirmed having embarked upon investigating the matter.
10. Further, there is evidence of a letter dated January 8, 2024 written by EM Ndemo and Co Advocates requesting for review of a criminal case to be preferred against the applicant herein of Malicious Prosecution addressed to the Office of Directorate of Public Prosecutions, Makadara Law Courts. There is however no response to the letter and/or proof of receipt.
11. The respondent have vehemently denied the allegations. What is evident is the fact of no arrest having been made since the matter was filed in court on February 13, 2024.
12. The allegation herein is for a false accusation having been levelled against the applicant. That he has been threatened (indirectly) and pestered by unknown callers. This is an allegation without proof of a call data to demonstrate that the callers, if any,were police officers.
13. Conditions for granting bail would include the applicant making himself available for purposes of being interrogated when required by the Police/Investigation Officers. At the outset the applicant was granted anticipatory bail on interim basis. It has not been alleged that the Police have acted in an attempt to interfere with the applicant's liberty. Seven (7) months down the line the applicant has not been arrested and the respondent have vehemently denied that there is an intention to have the applicant arrested.
14. Statute in Kenya does not define anticipatory bail which is considered a special relief as it is not specifically provided for. Anticipatory would however mean an anticipated act. If something is likely to happen then it will be the case. Bail is granted following arrest so as to safeguard an individual's arrest who is presumed innocent until proven otherwise.



15. The question of grant of anticipatory bail has been considered by caselaw. In *Eric Mailu v Republic and 2 others* Nairobi Misc Cr Application No 24 of 2013 it was stated that: “anticipatory bail would only issue when there was serious breach of a citizen’s rights by organs of state. 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 to fundamental right must be real and demonstrable. An applicant must demonstrate the breach by acts and facts constituting the alleged breach.”
16. This is a unique case where allegations put forth are denied, and, no action has been taken by the respondent that would call for protection of the applicant fundamental rights. I will therefore be flippant to issue orders sought. In the premises, I decline to grant the relief sought..
17. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI,\* THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**L. N. MUTENDE**

**JUDGE**

