



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CRIMINAL APPLICATION NO. E022 OF 2021

**IN THE MATTER OF: AN APPLICATION BY OMAR KAHINDI GONA, ELISHA KAHINDI GONA,
MARTIN KALAMA GONA, KATANA PATRICK AND SAMUEL NGOLO GONA FOR AN ORDER OF
ANTICIPATORY BAIL OR BAIL: BEFORE ARREST AND/OR CHARGE**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA NAD THE MATTR OF
CRIMINAL PROCEDURE CODE (CAP 75 OF LAWS OF KENYA) AND THE
PRINCIPLES OF NATURAL JUSITCE AND THE RULE OF LAW**

- 1. OMAR KAHINDI GONA**
- 2. ELISHA KAHINDI GONA**
- 3. MARTIN KALAMA GONA**
- 4. KATANA PATRICK**
- 5. SAMUEL NGOLO GONA.....APPLICANT**

VERSUS

- 1. DIRECTOR OF PUBLIC PROSECUTIONS**
- 2. ATTORNEY GENERAL.....RESPONDENT**

CORAM: Hon. Justice R. Nyakundi

Komora for the Appellant present

Mr Mwangi for the Director of Public Prosecutions

RULING

The applicants in this motion moved the Court pursuant to Article 32, 33, 35, 38, 39, 43, 47, 49 and 50 of the Constitution and Section 123 (3) of the Criminal Procedure Code seeking the following substantive Order; -

a) That the honourable Court do grant and admit the applicants to anticipatory bail pending a purported arrest and investigations by the National Police Service.

The applicants swore an affidavit in support of the circumstances and motivation of seeking the remedy of anticipatory bail filed in Court on 9th July, 2021. The Notice of Motion though served upon the Respondents remained unchallenged at the time of being considered at

interpartes stage.

Decision

This application is of fundamental importance for reasons that its underpinned under **Article 28 of the Constitution on the right to inherent dignity and the right to have that dignity respected and protected.** Further under Article 29 of the aforesaid 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.** It follows therefore that under the Supreme Law of the Republic it is wrong to deprive any citizen his or her freedom and to subject them to physical constraint in the police stations which in itself is incompatible with the principles of the constitution on rights and fundamental freedoms. As to the principle of legality of the arrest of the applicants in the instant case, no evidence has been availed by the police or corresponding investigating agency on the suspicion to effect arrest without a warrant. In absence of any rejoinder from the cited state agencies, there is an inference that the intended arrest albeit the good intention on their part is unlawful and arbitrary.

The nature and extent of arbitrary arrest was clearly defined in the **UN DOC G/AOR/A/49/40/VOL II P 181 communication No.458/1991). A.W.U. Mukong V Cameroon** in which the committee explained that; -

“Arbitrariness is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable. In the circumstance Remand in custody must further be necessary in all circumstances, for example to prevent flight, interference with evidence or the reoccurrence of crime.”

Proponents of the substantive right and proportionality test in effecting an arrest on deprivation of liberty within the meaning of our Article 28 and 29 of the Constitution the inter - American Court on Human rights held as follows; -

“With regard to Article 7 (2) & (3) of the American Convention Human Rights that; -Pursuant to the test of these provisions, no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law, (material aspect), and furthermore subject to strict adherence to the procedures objectively set forth in that law, (formal aspect). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by measures notice although classified as legal, could be deemed to be incompatible with the respect for fundamental rights of the individual because, among things, they are unreasonable, unforeseeable or lacking in proportionality.”

In the context of our jurisprudence this provision though of persuasive edifice conforms with the architecture of our Constitution. As this case shows from the pleaded facts is the outlining circumstances in which the police intend to initiate investigations on a matter pending before the Environment and Land Court. There is an overriding interest on the part of the applicants to have a resolution of the land dispute pending before the Courts which has a direct impact on the criminal investigations.

An area of difficulty that arises in our jurisdiction is the propensity for the National Police Service to deprive suspects and accused persons of their liberty before the conclusion of investigations to a criminal case. The Court must of necessity examine the relevant facts and circumstances of effecting an arrest of a suspect more so those done without warrants. Not only must the suspicion be objectively justified, but a cognizable offence must be suspected. It is not enough that suspicion is of some vague conduct.

Given the concerns expressed in this application on the use of arrest against the applicants, there is a surprising lack of information on the part of the respondents. Despite having been served with the application there is no minimal evidence why the police are going after the applicants with a possibility of effecting an arrest. The unjustifiable and unlawful use of arrest as a starting point to commence investigations to me in itself a violation of the fundamental rights to human dignity and liberty entrenched in our constitution. It is also a driver of many applications before our Courts for further detentions to gather inculpability evidence against the suspects. Having considered this matter as such, it seems proper in the event they require attendance of the applicants to notify their legal counsel Komora & Co. Advocates. The next legal line is that the legal counsel do notify the police of his postal address, mobile contact and email to further the due process of the Applicant in complying with summons requiring attendance from the National Police Service.

In consonant with the principles of governance and national values under Article 10 of the Constitution I entertain no doubt at all that there would be no prejudice nor injustice on the part of the Respondents to be in compliance with the Constitutional standards on the rights and fundamental freedoms in the bill of rights.

In the instant motion the applicants have demonstrated a prima facie case on well founded fear that their arrest is ill advised and likely to result in the pretrial detention without bail. In the result I concur with the request for granting of anticipatory bail of Kshs.100,000/= each without a surety.

It is so Ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF JULY, 2021

.....

R. NYAKUNDI

JUDGE

In the Presence of

1. Komora for the Applicants present

2. Mr Mwangi for the Director of Public Prosecutions

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