



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA ATA KAKAMEGA**

**MISC. CRIMINAL APPLICATIONS NOS. 20, 21 AND 22 OF 2020**

**HENRY KASKON MWACHI.....1<sup>ST</sup> APPLICANT**

**ESTHER SARAH SHIRO.....2<sup>ND</sup> APPLICANT**

**JASON SAULO SHIRO.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applications for determination are dated 7<sup>th</sup> May 2020, and are premised on sections 2 and 123 (1)(2)(3) of the Criminal Procedure Code, Cap 75, Laws of Kenya, and Article 49(h) and 159(2)(d) of the Constitution of Kenya 2010. They seek for orders of anticipatory bond, and that the applicants appear before the Officer Commanding (OCS) the Malava Police Station for purposes of pursuing their complaint in Occurrence Book (OB) No. 37/11/03/22020, or for any investigations or enquiries that may be necessary. The grounds on which the applications are premised are set out on the face of the Motions, and in the supporting affidavits by the applicants.

2. The respondents did not file any replies to the applications.

3. The Motions were canvassed orally, on 11<sup>th</sup> June 2020. The applicants, through their advocate, submitted that the events giving rise to the applications were a confrontation over land. It was their submission that the applicants were blood relatives, with Esther Sarah Shiro being the daughter to Jason Saulo Shiro and a niece to Henry Kaskon Mwachi. One Luka Shiro, a brother of Esther Shiro, attacked their father, Jason Saulo Shiro. The other applicants tried to intervene, but the said Luka Shiro attacked them and overpowered them. He cut Henry Kaskon Mwachi on the head, an act that enraged the residents, who descended on him, and beat him until he lost consciousness. The said Lukas Shiro was taken to hospital. The applicants also sought medical care, and reported the incident to the police, at Malava Police Station, vide OB No. 37/11/03/2020. They submitted that since then the police have turned against them, and are treating them as the culprits instead of the victims, and they have since been making raids at their homes, which makes them to fear being arrested. They have since left their homes in fear of the arrest, and have brought the applications so that they can be free to stay at their homes. They have also expressed willingness to report to Malava Police Station, where they are ready to record statements on the issue. They aver that two of them are elderly and sickly, being seventy (70) and eighty (80) years of age, while the other applicant is fairly young, at thirty (30) years of age, and argue that their arrest could cause them great anguish and hardship.

4. The respondents, on their part, opposed the application, stating that the fears by the applicants were not justified. They submitted that once the applicants present themselves to the police, or are arrested, they will be presented before a court of law within twenty-four (24) hours, as required by law, and they will be at liberty to apply for bond before the trial court. They further submitted that the OCS can, also, upon their arrest, and after having them record their statements, have them released on what is popularly known as police bond. They further submitted that the police wanted to investigate the matter, and the applicants' presence at the police station would be purely to assist them with their investigations. They stated that being summoned to the police station was normal procedure in investigations, and that the same should not elicit fear amongst the public.

5. The right to bail is constitutional. Article 49(1)(h) of the Constitution of Kenya provides as follows:

*“An arrested person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”*

6. The courts have stated the terms under which a person may be granted anticipatory bail. In *Gladys Boss Shollei vs Attorney General & 3 others* [2015] eKLR, it was said that:

*“Anticipatory bail shall be granted only when an applicant demonstrates that his constitutional right has been violated or is likely to be violated. This is also in the footsteps of my brother Justice Mabeya in his ruling in the case of Richard Mahanu (Supra) where he stated as follows: -*

*“With regard to the issue of anticipatory bail, it is usually granted where there is alleged to be serious breaches of a state organ. In the case of W’Njuguna vs. Republic, Nairobi Miscellaneous 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.”*

*The case of Eric Mailu vs. Republic (Supra) also cited the W’Njuguna case emphasizing the circumstances under which anticipatory bail can issue which majorly are serious breach of a citizen’s rights by organs of state. In that respect I need not say more than is outlined in the said W’Njuguna case. It is then 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 freedom of a citizen. It cannot issue where an applicant labours under apprehension founded on rumours or unsubstantiated claims.”*

7. In *Peter Mutua Kanyi vs. Director of Public Prosecutions & 2 Others* [2019] eKLR, the court said:

*“23. In the case of Richard Makhanu vs Republic [2014] eKLR, the court held the firm view that orders for anticipatory bail or bond must not be sought with the intention of pre-empting the outcome of investigations a position that was also held in the case of Kevin Okore Otieno vs Republic (2013) eKLR Investigators must feel and be free to do their work without fear of having their authority and/or mandate stifled by courts merely because courts have power and authority to grant anticipatory bail when sought. The fact that a person feels inconvenienced by investigations is not sufficient reason for him to be granted anticipatory bail. Such an order should only be granted in the clearest of situations that point to a violation, infringement or threat or contravention of a person’s right under Article 49 of the Constitution of Kenya.*

*24. The Applicant herein had contended that the respondents had been harassing him with investigations for unspecified crimes and accordingly, having carefully considered the affidavit evidence, the Written Submissions and the case law that was relied upon by the parties herein, this court does not find any iota of evidence that the Applicant’s fundamental rights have been breached or denied or that there is a threat of them being infringed, contravened or violated. Investigations are known legal processes in our justice system and do not amount to infringement on the fundamental rights and freedoms to any person. The said processes must be allowed to run their course for proper administration of justice.*

*25. Should the Applicant’s rights under Article 49 and 50 of the Constitution of Kenya be infringed upon, denied or contravened, he has the liberty of seeking a review of this court’s decision. In this regard, this court comes to the firm conclusion that the application herein has not met the threshold for the granting of anticipatory bail to the Applicant herein as sought. In any case there is no evidence that the Applicant once arrested is not likely to be granted bond and if such occur he is at liberty to approach the court over the same.”*

8. In *Shakeel Ahmed Khan & another vs. Republic & 5 others* [2019] eKLR, the court held:

*“9. In an application for bail pending arrest, the Court must consider whether circumstances exist that would occasion a serious breach of a citizen’s fundamental right by a state organ. This was the holding of Rawal, J. (as she then was) and Kimaru, J. in Samuel Muciri W’Njuguna v Republic [2004] eKLR:*

*“We are further of the humble opinion that the right to anticipatory bail has to be called out when there are circumstances of serious breaches by an organ of the state of a citizen’s fundamental right...The right to anticipatory bail will not give a person a right not to appear before the police or any authority who would wish to question a person in connection with the commission of an offence. In the circumstances therefore anticipatory bail can only be granted upon terms that are appropriate under the circumstances of each case. In granting anticipatory bail, the High Court would be exercising its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual.”*

*10. Article 165(3) of the Constitution clothes this Court with jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. An applicant must however demonstrate to the Court existence of circumstances that give rise to serious breaches of, or threat to, his fundamental rights. Only then will this Court exercise its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual. While considering this application for anticipatory bail, the Court must ask itself whether the Respondents have abused their powers to the detriment of the Applicants and whether the intervention of this Court in exercise of its supervisory powers is necessary to prevent the abuse.”*

9. In *Collins Muhia Mbatia & 5 Others vs. Inspector General of National Police Service & 2 Others* [2019] eKLR, the court remarked:

*“The law is now settled that anticipatory bail shall only issue if an Applicant demonstrates that his/her constitutional fundamental rights and freedoms have been violated. In the case of W’Njuguna V Republic, Nairobi HC Misc Case No. 710 of 2002 (2004) eKLR, 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.”

11. The holding was in the footsteps taken in the case of *Eric Mailu V Republic and 2 Others Nairobi Misc. Cr. Appl. No. 24 of 2013 (2013) eKLR* in which the court held that anticipatory bail can issue in cases of serious breach of a citizen’s right by a State organ. As this court held in the case of *Gladys Boss Shollei vs. Attorney general & 3 Others (2015) eKLR*:

“... it is then salient that anticipatory bail is aimed at giving remedy for breach or 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 rumours or unsubstantiated claims.”

12. Anticipatory bail should only be granted where an Applicant demonstrates with evidence that his/ her fundamental rights and freedoms have violated. An applicant cannot rely on misapprehension of this assertion when circumstances are such that the police are merely carrying out their duties of investigations.

13. In the present case, the Applicants argue that the police are harassing them with an intention of arresting them on account of the ongoing investigations of the complaint filed Mrs. Arsanaidar Kerubor who is a debtor to the 6th Applicant. The fact of the ongoing investigations is conceded to by both parties in the application. What is in issue is whether the police are acting outside their mandate through harassment of the Applicants thereby breaching their fundamental rights and freedoms.

14. As rightly stated by counsel for the Respondents, the police have a duty to conduct investigations of criminal nature once filed with them. They however have no mandate to go outside their powers in the process of executing their duties. They must conduct their duty strictly in accordance with the Constitution. In my honest view, the mere fact that the police visited the business premises of the 6th Applicant does not constitute a breach of fundamental rights and freedoms of the Applicants. It neither amounts to a harassment of the Applicants. What would be worrisome is if the visits are accompanied by physical harassment or intimidation to coerce the Applicants to act in a particular manner. This has not been alluded to therefore, dispelling fears that the police are harassing them.

15. I underscore the need to facilitate police conduct their duties without undue interference by courts. That explains why anticipatory bail should only issue in deserving cases so that courts are not seen to cripple a fundamental process of the criminal justice system which is investigations. At the same time, courts must not shy from guarding against arbitrary use of police powers in the interest of protecting the fundamental rights and freedoms of individuals as enshrined in the Constitution.

16. Since the Applicants have agreed to cooperate with the police, the police should only be courteous to summon them to the police station or DCI headquarters for purposes of either recording statements of charging them. This is made easier by the fact that they have a counsel on record who can accompany them for this purpose.”

10. From the above decisions, it is clear that anticipatory bail can be granted only when an applicant demonstrates that his constitutional right has been violated or is likely to be violated. In the instant suit, the applicants submit that they have fled their homes because of frequent raids by the police, who intend to arrest them and keep them in custody. At no point in their submissions and applications have they demonstrated that their constitutional rights have been violated or are about to be violated. It is clear that the applicants fled their homes, without knowing exactly what the police want with them. The respondents submit that Luka Shiro was assaulted, he is still in hospital. The police have a duty to investigate the matter. The matter is under investigations and the applicants are at the centre of it. The incident happened at their home, after the said Luka Shiro had himself assaulted them. They were together with Luka Shiro, the main players, with crucial information, that can assist the police in their investigations. As properly submitted by the respondents, if the applicants were to be arrested they would be arraigned in court, as required by the law, before the lapse of 24 hours, and would be afforded an opportunity to seek for bail or bond from the court. The police can also bail them out if need be. In any event, the mere fact that they are required at the police station does not mean that they will have to be arrested. The applicants have not demonstrated that the police are looking for them with a view to arresting and charging them in court with some offence. The applicants are merely apprehensive that they will be arrested.

11. I am not persuaded, in the circumstances, that the applications meet the required threshold for grant of anticipatory bail, and I hereby dismiss them.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 3<sup>RD</sup> DAY OF JULY 2020**

**W MUSYOKA**

**JUDGE**