



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT MISC CRIMINAL APPL. NO. E213 OF 2020

CHRIS PHILLIP OBUREAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

INTRODUCTION

1. The applicant herein CHRIS PHILLIP OBURE was arrested on 22/8/2020 and booked at Kilimani Police Station vide OB. NO. 04/22/08/2020 as per the affidavit sworn by SGT. BASHIR BOYA on 24/8/2020 in Kibera Misc. Criminal Application No. 469/2020 the subject of this Ruling. He was thereafter presented to court where the Respondent sought a court order that the same be detained for 14 days to enable the DCI Kilimani to complete investigations in an alleged case of murder contrary to Section 203 as read with Section 204 of the Penal Code.

2. In the said affidavit the deponent gave the following reasons as regards the Applicant to warrant his detention.

a) The Respondents were arrested following a report of shooting incident that happened at Galana Suites within Kilimani Area on 21/8/2020 involving the deceased named Kevin Ombati Omwenga.

b) That the 1st Respondent to that application led officers at Senten Plaza where a firearm loaded with thirteen (13) rounds of ammunition was recovered at GLO Jet offices and kept as exhibit in this matter.

c) That the said firearm belongs to the 2nd Respondent (Applicant before me) who is a licenced firearm holder and it became a mystery how the first Respondent came to access the said firearm.

d) That the continued detention of the Respondent is immensely necessary for furtherance and finalizing of the investigations, the release could further lead to interference with the investigations.

e) That the investigating officer is yet to record statements from the key witnesses, taking finger prints, photo profiling, taking the Respondents for DNA sampling for analysis by the Government chemist, taking the Respondents for mental assessment, taking the firearm to the ballistic expert to obtain record of the firearm from the central firearm bureau among others.

3. The said application was opposed by the Applicant through his Advocate who submitted before the Lower Court that the same was arrested after he presented himself to the police after hearing of the incidence and had fully cooperated with them with no intention of interfering with witnesses and that the only mention of the Applicant was that he was the owner of the firearm which was allegedly used.

4. The trial court having analysed the submissions and the law together with two High Court decisions that is **MICHAEL ROTICH v REPUBLIC [2016]eKLR** Kimaru J, and **BETTY JEMUTAI KIMEIYWA v REPUBLIC [2018] eKLR** Muriithi J, came to the conclusion as regards the applicant herein states as follows:-

“The second Respondent points out that his link with this case is limited to the firearm which he lawfully held. That the police have not taken statements from key witnesses is material while the Respondent show clean hands to this court, the temptation to interfere with potential witnesses cannot be wished away. The police have done their cardinal duty to present the Respondent to court within the required time.

The circumstances of this case are clear that the police need more time if no sufficient evidence is gathered, the respondents will be discharged. In the upshot, I find that the applicant has made out a case for the detention of the Respondent.”

APPLICATION

5. It is this ruling that led to the Application herein brought under Articles 19, 20, 21, 29, 25, 29, 49, 50, 159 & 259 of the Constitution and Section 364(1)(b) of the Criminal Procedure Code in which the Applicant sought orders that the Honourable court be pleased to vary, alter, review and or revise order of the Court issued on 25/8/2020 directing that the Applicant be held in custody for additional period of 12 days and that the court be pleased to order the release of the same on reasonable bail or bond terms or any other terms as the court may deem fit and appropriate.

6. The application was supported by the Affidavit of the Applicant wherein he stated the factual basis of this matter and or relevance to this application being that on 22nd August, 2020 he received a call from the Senten Plaza Security office with information that an employee of GLO Jet International Ltd where he is team leader of Africa region and Kenya office was involved in an incidence that required his attention. He promptly and voluntarily presented himself to DCI offices at 7.45 a.m. and was led into custody.

7. He stated further that the Respondent has had sufficient time to conduct any investigations and therefore there was no lawful compelling reasons for holding him further in custody as the orders made were made without any legal and constitutional basis and in total disregard to his constitutional rights.

8. The application was opposed by the State through a Replying Affidavit sworn by SGT. BASHIR BOYA the Investigating Officer in the complaint where he deponed that the firearm the subject of the investigation belongs to the Applicant who is a licenced firearm holder and that the continued detention of the applicant is immensely necessary for the furtherance and finalizing of the investigations and his release could further lead to interference with the investigations.

SUBMISSIONS

9. At the hearing herein, Mrs. Oduor appearing with Prof. P.L.O Lumumba and Ms Aluda submitted that the application was for Review of the order of the Lower Court on the basis that the reasons for the grant of the said order by the Lower Court being that the Applicant had the potential of interfering with witnesses was not supported by facts and as such failed to meet the constitutional threshold. It was submitted that the right of the applicant to liberty under Article 29 should not be taken lightly and further that under Article 49(1)(h) the applicant had a right to be released on bail unless there were compelling reasons as stated in the case of **REPUBLIC v ZACHARIA OKOTH OBADO & 2 OTHERS [2018]eKLR**. It was further submitted that the Respondent did not discharge their duty as required to enable the court deny the applicant his constitutional right as was stated in **REPUBLIC v ROBERT ZIPPOR NZILI [2018]eKLR**.

10. It was submitted that being a continuing investigation, it was upon the Respondent to use less restrictive means not to curtail the rights of the applicant as all the matters raised could still have been done while the Applicant was out of custody as was stated in the case of **BETTY JEMUTAI v REPUBLIC [2018]eKLR**.

11. Mr. Momanyi for the State opposed the Application and submitted that there was nothing to be reversed by the court as the said jurisdiction sought to be exercised judiciously so as to enable the magistrate to manage the matter which was placed before him to its own conclusion. It was only for the court to satisfy itself on the legality or propriety of the decision of the Magistrate and since the applicant was presented to court within the required period of time there was no error in the magistrate granting the prosecution time by holding the applicant for further investigations and that since the matter was set for mention, the application should be dismissed.

12. In a rejoinder MS odour submitted that the Application was based on Section 264(1)(b) and not Section 362 of the Criminal Procedure Code and urged the court to reverse the order for the detention of the applicant as there was no accused before the court.

DETERMINATION

13. I have had the advantage of reading the pleadings, the affidavits in support, the submissions made orally before me and the authorities in support thereof. I must point out from the start that Section 264 of the Criminal Procedure Code was repealed and therefore the application herein can only be premised under Section 364 and Article 165(6) of the Constitution which gives the High Court the supervisory jurisdiction over the subordinate courts and sub section (7) which empowers the High Court to call for the records of proceedings before any subordinate court and make any order or give any direction it considers appropriate to ensure fair administration of justice.

14. The court's powers of revision are limited to satisfying itself as to the correctness, legality or propriety of any findings, sentence, or order recorded or passed and as to the regularity of any proceeding of any such subordinate court and that as stated by this court in **GEORGE ALADWA OMWARO v REPUBLIC [2016]eKLR** in exercising supervisory jurisdiction under Article 165(6) of the Constitution the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court was based and can only upset an order which it considers erroneous, without jurisdiction and constitutes gross violation of the fair administration of justice.

15. The Applicant presented himself before the police which is not disputed and was locked up in custody. The Respondent thereafter moved to court for what is commonly known as extension of time to hold the Applicant allegedly under Article 49(1)(f) which provides that an arrested person has a right to be brought before court as soon as reasonably possible but not later than

i) Twenty-four hours after being arrested.

16. Article 49(1)(g) provides that at the first court appearance to be charged or informed of the reason for the detention continuing or to be released and (h) to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. This issue of pre-charge detention and extension of time was discussed by Kimaru J, in the case of **MICHAEL ROTICH v REPUBLIC [2016] eKLR** where the Judge explained it as follows: -

“The issue that has been brought to the fore in this application is the recent emerging trend where an individual is arrested by the police, brought to court, and before being charged, the prosecution requests for such individual to be placed under police custody for some time to enable the police complete their investigations before a formal charge is preferred against such individual. The right to liberty and freedom is a fundamental right that is inherent to every human being. Article 29 of the Constitution recognizes this fundamental right to freedom. It provides thus:

“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 course;

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c)”

.....

The Constitution has put in place safeguards in the Bill of Rights to protect the right to liberty. The right to liberty is sacrosanct and it is the fundamental freedom upon which other rights are enjoined. For instance, without the right to liberty one cannot enjoy the freedom of association, the right to privacy and the freedom of movement and residence.

Is this request lawful" Article 49(1)(a)(i) of the Constitution requires any arrested person to be promptly informed in a language that he understands the reasons for his arrest. In the present case, it was evident that the State contravened the Applicant's right to be informed of the reason of his arrest, particularly the charges that he is likely to face. Article 49(1)(f) of the Constitution provides thus:

“An arrested person has the right to be brought before a court as soon as reasonably possible, but not later than –

(i) twenty-four hours after being arrested;

(ii) ...

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

17. On the other hand, Justice Muriithi in the case of **BETTY JEMUTAI KIMEIYWA v REPUBLIC [2018]eKLR** was of this view:-

“7. The provision bringing the accused before the court within 24 hours is not an either or else position where the prosecution is validated or invalidated by such presentation. Article 49 (1) (g) and (h) itself gives four scenarios on presentation of an arrested person before the court, namely, that the arrested person may-

i. "be charged"

ii. "be informed of the reason for the detention continuing";

iii. "be released"; and

iv. "be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

So that upon being brought before the court, an arrested person may be charged; or he may be informed of the reasons for detention being continued say to facilitate completion of investigations or his presentation for assessment of fitness to plead before plea is taken; or he may be released if the court for example found no reasonable grounds for his continued detention; or he may be released on bond pending formal charge and or trial. The Constitution does not say that the police may only arrest a person when there is prima facie evidence of an offence. It must, of course, require a probable cause for an arrest but not prima facie case in its technical acceptance of evidence upon which a court may convict, if no evidence is given on behalf of an accused person. See Ramanlal Trambaklal Bhatt v. R [1957] EA 332, where it was held that a prima facie case is ‘one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence’. A police officer cannot be required to make a sort of judicial determination of existence of prima facie case. That is the province of the trial court at the stage of consideration whether a case to answer is established against the accused. A reasonable suspicion of commission of the offence based on the available evidence would suffice to give a probable cause for an arrest.

Conclusion

8. *There is no paradox or absurdity in the requirement of the 24 hour rule and the need for conclusive investigations into crime for the prosecution to obtain evidence to support the charge. The requirement is not calculated to defeat the Prosecution's ability to investigate and prosecute cases. The object of the 24 hour rule is to obviate prospects of extra-judicial, pre-trial detention by police authorities in contravention of the cardinal principles of the criminal process of fair trial and innocent-until-proven-guilty.*

9. *Of course, the circumstances in which a crime has been committed may require immediate arrest of the suspect to prevent further crime, to prevent her escape or to protect the evidence or witnesses, and the nature of a serious crime, such as murder, may reasonably require more time to investigate. In the face of the 24 hour rule/requirement, the prudent thing to do is to delay the arrest until the investigations are complete and all prosecution evidence has been collected, except where the suspect is a flight risk or likely to escape, or other risk to the successful prosecution of the offence such as interference with the evidence or witnesses exists.*

10. *The Police have the constitutional and statutory power under Articles 243-245 of the Constitution and section 58 of the National Police Service Act to arrest a person reasonably suspected of having committed a crime. Section 58 is in the following terms:*

"58. Power to arrest without a warrant

Subject to Article 49 of the Constitution, a police officer may without a warrant, arrest a person—

(a) who is accused by another person of committing an aggravated assault in any case in which the police officer believes upon reasonable ground that such assault has been committed;

(b) who obstructs a police officer while in the execution of duty, or who has escaped or attempts to escape from lawful custody;

(c) whom the police officer suspects on reasonable grounds of having committed a cognizable offence;

(d) who commits a breach of the peace in the presence of the police officer; (e) in whose possession is found anything which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing;

(f) whom the police officer suspects upon reasonable grounds of being a deserter from the armed forces or any other disciplined service;

(g) whom the police officer suspects upon reasonable grounds of having committed or being about to commit a felony; or

(h) whom the police officer has reasonable cause to believe a warrant of arrest has been issued."

11. *The powers of arrest are expressly made subject to Article 49 of the Constitution regarding the rights of an arrested person and, therefore, upon arrest, the person may be dealt with in accordance with the provisions of Article 49 (1) (g) and (h) by charging, detention, release and release on bond as discussed above.*

13. *Accordingly, when the Prosecution presents a suspect for purposes of seeking her holding in custody to facilitate conclusion of the investigations, the Prosecution must demonstrate in their application to court that, in accordance with the Article 49 (1) (g) and (h) of the Constitution, there is justifiable reasons for continued detention of the arrested person and that there are compelling reasons for refusal of bail."*

18. I am persuaded by the ruling of Justice Muriithi and take a further view that in as much as the State has a right to investigate offences and to use all the necessary mechanisms at its disposal, the need to protect the rights of suspects or persons of interest and in particular the right to liberty or freedom must always be safeguarded and only limited as provided for under Article 24 of the Constitution, as less liberty does not necessarily mean proper and successful investigations. The role of investigations lies with the Executive and unless specifically provided for, the Constitution and statute the judiciary should play minimal role in assisting with investigations.

19. Where a person has been arrested, their continued pre-charge holding or detention may only be allowed when there are compelling reasons based on compelling evidence while balancing the right to liberty of individual against the need to secure evidence. To justify the holding of an arrested person before being charged, the constitutional threshold proved for under Article 49(h)(h) must be met otherwise his detention will amount to "the law of lawless."

20. As stated by Justice Muriithi above, the issue for the court's determination is whether the police presented to the trial court compelling reasons enough to enable him order the detention of the Applicant for the 14 days they sought and/or the 12 days that he granted? As submitted by Ms Oduor for the Applicant, the only reason advanced as regards the applicant, was that he was the licenced firearm holder in respect of the said gun which was at that time in the custody of the police. There was no evidence tendered before the court to show that

there was an attempt on the part of the Applicant to interfere with witnesses and/or that the applicant had control of the scene where they intended to retrieve the CCTV footage. There was no evidence that the records of the firearm fingerprints, photo profiling of the applicant could not be done while the same was out of custody.

21. The reason advanced by the Lower court to the effect that temptation to interfere with potential witnesses cannot be wished away, was not supported by any material evidence placed before him and the law is now very clear that on the issues of interference with witnesses, it must be shown that the accused is in such close family, filial or other relationship which creates an environment of control and influence of the witnesses by the accused person such as to interfere with the ability of the witnesses to give evidence. see **REPUBLIC v MUTUKU NYALITA [2015]eKLR**.

22. It was further stated by Korir, J in the case of **REPUBLIC v DWIGHT SAGARAY & OTHERS** High Court Criminal Case NO. 61 of 2012 Milimani that: -

“For the prosecution to succeed in persuading the court on the criteria (of interference) with witnesses it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses, direct or indirect incriminating commotion between the accused and witnesses, close familial relationship between the accused and the witnesses among other. At least some facts must be placed before the court otherwise it is asking the court to speculate.”

23. As stated in the case of **REPUBLIC v DANSON MGUNYA & ANOTHER [2010]eKLR** the ‘liberty is precious and no one’s liberty should be denied without lawful reasons and in accordance with the law, liberty should not be taken for granted’.

24. Having looked at the conduct of the Applicant, and the reasons advanced, I am satisfied that the Respondent did not present any compelling reasons, before the lower court to enable the same order for the detention of the applicant as all the matters stated therein could still have been done while the same is at liberty and therefore the order was made in error. It is not sufficient that the police had presented him in court within the required time but they were required to advance reasons as to why he should be held in custody. There was no evidence presented to the court that investigations could not be done by the police while the Applicant is out of custody.

25. Now that the period granted by the said court expires today, I hereby order that if the applicant is not charged and/or released on bond by either the Lower Court or the police, then the same shall be released upon executing a bond to the police of Kenya shillings five hundred thousand (Kshs.500,000/-) with one surety of similar amount to secure his attendance to the police if and when required. The same shall further report to the investigating officer in this matter after every 21 days until the same is either finally charged or discharged.

26. This order shall lapse if and when the applicant is charged in court with the offence being investigated herein and or discharged lawfully by the police and it is hereby ordered.

Dated, Signed and Delivered at Nairobi This 4th Day of September, 2020 Through Microsoft Teams.

.....

J. WAKIAGA

JUDGE

In the presence of: -

Mr. J. Aluda for the applicant

Mr. Momanyi for the Respondent

Court clerk Karwitha