



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CONSTITUTIONAL PETITION NO. 16 OF 2018

JONATHAN KILONZO KISEE.....PETITIONER

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION.....3RD RESPONDENT

D.C.I. KITUI POLICE STATION.....4TH RESPONDENT

RULING

1. The Applicant approached this Court by way of Notice of Motion seeking orders thus:

- i. The Court be pleased to issue conservatory order prohibiting the Respondents from ordering, effecting, conducting DNA test examination carrying out and/or directing the arrest of the petitioner pending the hearing of this Application.
- ii. The Court be pleased to issue conservatory order prohibiting the Respondents from ordering, effecting, conducting DNA test examination carrying out and/or directing the arrest of the petitioner pending the hearing of the Petition.
- iii. The Honourable Court be pleased to grant an anticipatory bail to the Petitioner pending the arrest and charge before the Court of Law.
- iv. A day be appointed for the Petitioner to appear before the Criminal Investigations Department together with his Advocate to enable the police undertake the normal procedure of investigations without taking the Petitioner to custody.

2. The Application is based on grounds that: The Applicant was required to appear before the D.C.I. Office on the **4th May, 2018**, to be interrogated over the offence of **Defilement** of one **NM** who died in **2017**. That he was required to submit blood samples for DNA Test for that purpose. That he fell sick on the **11th September, 2018** but was threatened by arrest unless he complied.

3. Further, that the powers of arrest were being used by the police to harass, intimidate and oppress the Petitioner in the Course of his duty; that bail protects a person from punishment before trial thus secures the principle of presumption of innocence.

4. The Applicant swore an affidavit in support of the Application where he deposed *inter alia* that he is a Head Teacher, an employee of T.S.C. That he learnt that **NM**, a pupil at his previous school passed on due to premature pregnancy. That in **2017** he was summoned to **Nuu Police Post, Mwingi East** to record a statement where the person responsible for the pregnancy was **Kilunga Kilonzi**, a P.T.A. Teacher at the school. That prior to being transferred to his new school he was at **[particulars withheld] Primary School** where **NM** was a pupil. On **4th September, 2018** he was interrogated by **D.C.I. Kitui Office** and it was alleged that he was the one involved with the pupil per the allegations by **Kilinga Kilonzi** and that he was being threatened with arrest unless he submits blood sample for the DNA Test.

5. In response, the Prosecuting Counsel, **Mr. Mamba Vincent** swore a Replying Affidavit where he deposed that summons issued by the police to have the Applicant interrogated were in order. His rights as envisaged by the Bill of Rights were not violated in any way. That he was required to clear his name in connection with the minor pupil who died as a result of premature pregnancy, being a person under whom the exercise of power, discipline and control is vested in the child placed under his care.

6. It was submitted on behalf of the Applicant that the Applicant feared that his constitutional rights would be violated on the basis of being forced to surrender blood sample. That he was being interrogated in a case where the person defiled passed on in the year 2017 and her remains disposed. That being required to appear before the D.C.I., Kitui was meant to embarrass him, the intended investigations are not made in good faith.

7. This Court has been called upon to issue conservatory orders on interim basis pending hearing of the Petition. In the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (2014) eKLR** the Supreme Court stated that:

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicants’ case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”

8. In the case of **Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR** the Court stated that:

“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”

9. A prima facie case was defined in the case of **Mrao LTD vs. First American Bank of Kenya LTD & 2 Others (2003) eKLR** by the Court of Appeal as follows:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter ...

A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

10. This is a matter where the Applicant is being investigated by the 4th Respondent upon directions given the D.C.I. is mandated to investigate allegations against any individual. The 2nd Respondent (D.P.P.) on the other hand has the duty to institute any proceedings against any person in respect of any offence he may have committed (**See Article 157(6) of the Constitution**). However, in exercising such power there is need to avoid abuse of the legal process (**See Article 157(11) of the Constitution**).

11. The argument of the Applicant is that the allegations made are unfounded which should prompt this Court to grant him anticipatory bail and grant him a date when he should appear before the D.C.I. In the case of **Republic vs. Kenya Anti-Corruption Commission and 2 Others Exparte Wildlife Lodges Limited (2014) eKLR** the Court held that:

“The mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints made or brought to the attention of the 1st Respondent since the purpose of a criminal investigations conducted bona fide is to consider both incriminating and exculpatory material and not just to collect evidence on the basis of which a criminal charge may be laid.”

12. A Court of Law would not interfere with investigations because the individual suspected is apprehensive of being arrested and charged. The Court can only interfere with investigations if it is demonstrated that the purpose of investigations is to abuse due course of investigations.

13. The police are acting within their mandate. The Applicant has been summoned but not arrested. In case he is arrested and arraigned in Court his constitutional rights will not be violated. The Court of Law will ensure the trial is fair. In the premises the Applicant will not suffer any prejudice if the orders sought are not granted.

14. In the result, I decline to grant orders sought. The Application is therefore dismissed with no orders as to costs.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 2nd day of July, 2019.

L. N. MUTENDE

JUDGE