



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**MISC. CRIMINAL APPLICATION NO.57 OF 2018**

**MIGUNA MIGUNA.....APPLICANT**

**-VERSUS-**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**RULING**

On 2<sup>nd</sup> February 2018, the Applicant filed an originating notice of motion pursuant to **Articles 3, 10, 19, 20, 22, 25,27, 49(1)(a)(i), (f)(i) and (h), 159 and 259** of the **Constitution** and **Section 123** of the **Criminal Procedure Code** seeking several orders from this court, the most important of which was a prayer that the Applicant be released on bail or bond or be promptly taken to court to answer whatever charges that the Respondents may prefer against him. The Applicant further prayed that, notwithstanding any of the foregoing prayers, the court should admit to the Applicant to anticipatory bail pending his production before court. The application is supported by the annexed affidavit of Nelson Havi Andayi, the Advocate for the Applicant. In the affidavit, learned counsel expressed fear that the Applicant's life is in danger if the court did not issue an order to secure his freedom pending investigations that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were conducting or intended to conduct. It was deponed that the Applicant was apprehensive that he would be subjected to torture and physical abuse especially taking into consideration the manner in which the Applicant was forcefully arrested and his property destroyed. The Applicant was apprehensive that his rights and fundamental freedoms as enshrined in the **Constitution** would be contravened if the court did not act appropriately to secure the Applicant's freedom on anticipatory bail pending his arraignment before court to answer whatever charges that may be brought against him.

When the Applicant's counsel appeared before this court (Wakiaga J) under certificate of urgency, the court directed that the Applicant be released on anticipatory cash bail of Kshs.50,000/- pending his appearance before court on the hearing of application interpartes on 5<sup>th</sup> February 2018. The court ordered the Respondent to be served immediately. As a caveat, the court ordered that should the Respondents charge the Applicant with a known offence, then, the Applicant should be presented before court as soon as possible. Immediately upon the order was issued, a cash bail of Kshs.50,000/- was paid on behalf of the Applicant. From the evidence on record, it was evident that the Respondents were duly served on 2<sup>nd</sup> February 2018. However, the Applicant was not released from the police's custody.

When the matter was listed before this court on 5<sup>th</sup> February 2018, counsel for the Applicant expressed concern as to the Applicant's safety. It was feared that the Applicant may have been harmed taking into consideration the fact that neither his advocates nor family members had seen him since his arrest and detention by the police. From the submission made by learned counsel for the Applicant, it was apparent that the Applicant was kept incommunicado and was not able to communicate with his advocates. The whereabouts of the Applicant was unknown since the police were not willing to disclose where he was being detained. Mr. Mailanyi for the Director of Public Prosecutions was not able to shed any light as to the whereabouts of the Applicant. Indeed, Mr. Mailanyi told the court that he was unable to file any response to the application because the police were either unwilling or had refused to give him any assistance for which he was to make representation to court. This court was concerned that the Respondents appeared to be reluctant to comply with the order that was issued by this court. The court directed that the Applicant be released on anticipatory bail pending further investigations (if at all) or pending his arraignment before court for whatever charges that may be brought against him. This court also took into account the legitimate concerns raised by the Applicant's counsel in regard to the safety and welfare of the Applicant noting that no one had seen the Applicant since his arrest and detention by the police.

It was in light of the above facts that the court directed the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to appear personally before this court and show cause why they should not be punished for being in disobedience of the orders of this court. The main concern of this court was that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were required to produce the Applicant before this court so that he could be dealt with according to the law. Of course, this court was aware that were the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to present the Applicant before a court of law, then, the concerns of the Applicant's counsel would have been addressed in that the Applicant would no longer be in the custody of the police but under the custody of the court which is mandated by law to deal with the Applicant in accordance with the law. The court directed the Director of Public Prosecutions to serve the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to be present before the court today, 6<sup>th</sup> February 2018 at 9.00 a.m. with the Applicant.

When the court convened its session on 6<sup>th</sup> February 2018, it was informed by Mr. Mutuku, the Deputy Director of Public Prosecutions that the Applicant had been presented before the Kajiado Chief Magistrate's Court and had been charged with three (3) offences. The court was shown a draft charge sheet. The Applicant's counsel, specifically Dr. Khaminwa was not impressed by this turn of events. He objected to the decision made by the Respondents to charge the Applicant before the Kajiado Chief Magistrate's Court, an inferior court to this court, yet there was a pending order of this court that the Applicant be produced before this court for this court to deal with him in accordance with the law. He further submitted that the Respondents must abide by the order issued by this court that required the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to be personally present in court to produce the Applicant to be dealt with in accordance with the law. This court upon hearing the parties formed the view that it could not substantially deal with the issues raised herein if it was not confirmed that indeed the Applicant had been charged at the said court. It adjourned the matter to 12.00 noon when it was duly confirmed that indeed the Applicant had been presented before the Kajiado Chief Magistrate's Court and had been requested to take plea.

That confirmation having been made, the issues for determination by this court are threefold: firstly, the effect of the orders that were issued by this court requiring that the Applicant be released on anticipatory bail on 2<sup>nd</sup> February 2018 and reiterated by this court on 5<sup>th</sup> February 2018. As regards this issue, it was submitted on behalf of the Applicant that since the Respondents had acted in blatant disregard of the orders of this court, then any charge or charges brought against the Applicant could not be sustained in view of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' contempt of the orders of this court. The Applicant further argued that this court had the mandate and jurisdiction donated by the **Constitution** that required it to uphold and protect the human rights, rights and fundamental freedoms of the Applicant. In essence, the Applicant was saying that this court should disregard whatever charges may be brought against him because the Applicant's rights and fundamental freedoms had been breached. In response to this submission, it was the Respondents' case that since the thrust of the Applicant's application was in the nature of *habeas corpus*, and since the Applicant had already been produced before court, then the application had been

spent. Whatever remedies that the Applicant was minded to seek, then, he ought to file a constitutional petition to invoke his rights and fundamental freedoms or file a civil suit for damages on account of breach of his constitutionally sanctioned rights and freedoms.

This court has carefully evaluated above arguments. It was clear to this court that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acted in clear breach of the orders of this court issued on 2<sup>nd</sup> February 2018 that required them to release the Applicant from their custody pending further orders of the court on 5<sup>th</sup> February 2018. It is not for the Respondents to interpret the legality or the veracity of the order issued by this court. It is not open for the Respondents to choose whether or not to comply with the orders issued by this court. As public officers, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are required to lead by example by obeying orders issued by the court. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cannot purport to enforce the law by breaking the law. They acted clearly in contempt of the orders of this court by detaining the Applicant in breach of the orders issued by this court.

This court was concerned that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents appeared not to appreciate the seriousness of their action in failing to comply with the orders of this court hence its decision to summon them to appear before this court. Eventually, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did produce the Applicant before a court of competent jurisdiction. In this court's considered opinion, the application achieved its objective of securing the production of the Applicant before a court of competent jurisdiction. The Applicant remedy for unlawful detention lies in filing an appropriate suit for damages for breach of his rights and fundamental freedoms. This court does not have jurisdiction to terminate criminal proceedings brought by institutions mandated by the **Constitution** to bring criminal charges before courts. This is the position that has judicial approval in the Court of Appeal cases of **Dennis Leska Loishiye –vs- Republic [2015] eKLR** and **John Kamau Mbugua –vs- Republic [2010] eKLR**. In **Nairobi HC Judicial Review Application No.78 of 2015 Republic –vs- Director of Public Prosecution & Another Ex-parte Chamanlal Vrajlal Kamani & 2 Others** Odunga J held at paragraph 143 of the Judgment in respect to a Judicial Review application dealing with more or less the same issues presented before this court:

***“The court in determining judicial review proceedings ought not to usurp the Constitutional and Statutory mandate of the Respondent and the interested party to investigate and undertake prosecution in the exercise of the discretion conferred upon them. It was in recognition of this fact that the House of Lords in Director of Public Prosecutions –vs- Humphreys [1976] 2 All ER 497 at 511 cautioned that:***

***“A Judge must keep out of the arena. He should not have or appear to have responsibility for the institution of a prosecution. The functions of prosecutors and of Judges must not be blurred. If a Judge has power to decline to hear a case because he does not think it should be brought, then, it soon may be thought that the cases he allows to proceed are cases brought within his consent or approval...If there is a power...to stop a prosecution on indictment in limine, it is in my view a power that should be exercised in the most exceptional circumstances.”***

As stated earlier in this Ruling, the thrust of the Applicant's application was to secure his production before a court of competent jurisdiction and thereafter to secure his freedom by being granted firstly, anticipatory bail pending his presentation before court, and secondly, bail pending his trial as provided under **Article 49(1)(h)** of the **Constitution**. The Applicant shall be at liberty to seek appropriate remedy in a constitutional petition or a suit for damages for breach of his rights and fundamental freedoms during the period that he was detained in breach of the orders of this court. In that regard, the Applicant must appear before the court that he has been charged, and if he wishes to challenge the jurisdiction of that court to try him, he is at liberty to file an appropriate application before the appropriate court.

The second issue for determination is what remedy should the court offer the Applicant now that he has been produced before a court of competent jurisdiction. This court is of the view that since this court had directed that the Applicant be released on anticipatory cash bail of Kshs.50,000/-, then, if he has not yet been charged, he shall so be released pending his appearance before the court that he has been charged. If

he has already been charged, then, the trial court shall consider his application for bail pending trial subject to the caveat that his cash bail shall not be more than Kshs.50,000/-.

The third issue for determination is whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents appearance before this court will be necessary now that the Applicant has been produced before a court of competent jurisdiction. In view of the sentiments expressed above by this court to the effect that the Applicant's right to sue the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondent for illegal detention has accrued, and in view of the fact that the Applicant has already been produced before a court of competent jurisdiction, it may not be appropriate for this court to require appearance of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents because it will not serve any useful purpose.

For the above reasons, the application shall be allowed in terms of the orders issued by this court in the foregoing paragraphs. It is so ordered.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2018**

**L. KIMARU**

**JUDGE**