



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APP. NUMBER 194 OF 2018.

DISHON MULINGE.....1<sup>ST</sup> APPLICANT

RONALD OTIENO.....2<sup>ND</sup> APPLICANT

MICHAEL MBANYA WATHIGO.....3<sup>RD</sup> APPLICANT

HUSSEIN SULEIMAN.....4<sup>TH</sup> APPLICANT

BRAYAN SHEM OWINO.....5<sup>TH</sup> APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....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

*(An application under Articles 3, 10, 19, 20, 22, 25, 27, 49(1)(a)(i), 49(1)(f)(i) and (h), 159, 244(c) and 259 of the Constitution of Kenya, Section 123 of the Criminal Procedure Code, the inherent powers of the Honorable court and all other enabling provisions of the law.)*

**RULING.**

1. The Applicants, through their advocate Mr. Osundwa Sakwa brought the present application by way of Notice of Motion under a Certificate of Urgency dated 7<sup>th</sup> May, 2015. The Application sought orders that; (i) pending the hearing and determination of the Application *inter partes* and/or pending any investigations, and/or pending the bringing of any intended charges against the Applicants they be admitted to anticipatory bail or bond, (ii) in the event they are required for questioning or investigations by the Respondents or for arraignment before a court of law they be questioned at the Criminal Investigations Headquarters, Mazingira House or such other Police Station in Nairobi County in the presence of their advocates and be arraigned before the Chief Magistrate's Court at Milimani or any other court in Nairobi County, (iii) that summons do issue to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to personally show cause in the event an order of this court is disobeyed in respect to the Applicants and (iv) that costs of the application be provided.

2. The Application was supported by an affidavit sworn by Michael Osundwa Sakwa, the advocate for the Applicants. In it he deposed that the Applicants had credible information to believe of their imminent capture and/or arrest by the Respondents and/or the Kenya Police in connection with an alleged disruption of the Nairobi Central Business District Association meeting on 30<sup>th</sup> April, 2018 at Boulevard Hotel, Nairobi. That the Respondents and the Kenya Police whom they control, were abusing and misusing the criminal justice system and the powers of arrest to intimidate the Applicants in order to achieve ulterior motives.

3. Counsel submitted that there was news reports regarding the Applicant's imminent arrest and he annexed excerpts of articles from Capital News (published 6<sup>th</sup> May, 2018), Star Newspaper (published 5<sup>th</sup> May, 2018), Daily Nation (published 7<sup>th</sup> May, 2018) and Standard Newspaper (published 7<sup>th</sup> May, 2018) which he deposed was evidence of the paramount intention of the Respondents not to uphold the law but to undermine and circumvent the due process of law and unlawfully administer extrajudicial injustice to the Applicants. It was further deposed that the powers of arrest by the Respondents and the Kenya Police are being abused and misused to oppress and intimidate the Applicants and to achieve extraneous purposes unconnected with upholding the law. Further, that the Applicants are apprehensive that their rights and freedom to security of the person is and will continue to be breached if the court does not safeguard their constitutional right to bail. That this apprehension is fueled by the Respondents' ill motives as evidenced in both print and electronic media by the offer of a bounty of Kshs. 2,500,000/- by one Robinson Thuku, through Central Police Boss to any person who would give crucial information leading to their

arrest. That the Applicants have already been branded goons, attackers, rapists, thieves, homosexuals, thugs, terrorists and wanted criminals and their photographs circulated on notices. He swore that the Applicants had been judged harshly in the court of public opinion at the behest of the Respondents whereas they are merely suspects who are yet to be charged in a court of law. That the Applicants were willing to submit themselves to a just and fair legal system/process in which their fundamental rights and freedoms would be respected and protected. Further that Article 49 of the Constitution made all offences bailable and they were therefore entitled to a release on bail.

4. A Replying Affidavit sworn by No. 70568 CPL Francis Mwita was filed by the Respondents on 15<sup>th</sup> May, 2018. In it he submitted that he was the investigating officer pursuant to a report made at Central Police Station vide OB No. 78/30/04/2018 by one Timothy Muceru Muriuki. That the particulars of the complaint were that on 30<sup>th</sup> April, 2018 the complainant was violently accosted, attacked and ejected from Boulevard Hotel where he was about to address a press conference. That the Applicants were among the persons who carried out the acts complained of together with others he had already charged in Criminal Case No. 838 of 2018 at the Chief Magistrate's court at Milimani. That he established that the Applicants involvement in the nefarious affair through CCTV footage obtained from the security manager at Boulevard Hotel, data records from the mobile service provider, Safaricom and biodata on the National Identity Card holders. He deposed that he had tried to contact the Applicants to no avail and he believes that they might have gotten wind of the investigations and thus failed, neglected or refused to co-operate by presenting themselves to shed light on the allegations made against them. That he had therefore lodged the affidavit in opposition to the orders sought as investigations had linked the Applicants with the commission of the offence and the police intend to charge them with committing the offence of robbery with violence contrary to Section 296(2) of the Penal Code together with the other participants who had already been charged in Criminal Case 838 of 2018. Further, that the parties already charged had already taken plea and released on bail which was a clear indication that the Applicants rights were not likely to be infringed should they present themselves to the police. He concluded by deposing that the present application was an attempt to oust the powers of the police since investigations could not be termed as intended at endanger the rights of a citizen and therefore warrant an order for anticipatory bail.

5. The application was canvassed before *me* on 15<sup>th</sup> May, 2018 with Mr. Osundwa acting for the Applicants and Ms. Kimiri for the Respondents. In his oral submission Mr. Osundwa reiterated the bulk of his pleadings and submitted that the Applicants were ready to appear before the police. He acknowledged that some suspects had been charged in Milimani Chief Magistrate's Criminal Case No. 838 of 2018 and released on cash bail of Kshs. 200,000/-. He submitted that this case was however special as the police had placed a bounty of Kshs. 500,000/- to any person who offers information on the Applicants' whereabouts. That the Respondents had strict instructions to eliminate the Applicants which he argued was a special circumstance that warranted the grant of bail. He offered an undertaking to take the Applicants to court as instructed. He submitted that the replying affidavit was not an answer to the issues raised in the application and that the 3<sup>rd</sup> Applicant's wife was the subject of a raid and search by the police and she was forced to give information to the police.

6. Ms. Kimiri opposed the application and pointed out that the 5<sup>th</sup> Applicant had surrendered to the police and was before the magistrate for plea taking. She submitted that the Applicants were in hiding and that she had made overtures to the Applicants' counsel pertaining to the completion of the investigations by the police and that all that was left was the recording of their statements. She submitted that if they availed themselves to the police the statements would be recorded and the necessary action taken.

7. She pointed out that anticipatory bail will only issue where there is threat of a breach of a fundamental right or freedom. She submitted that the allegation that the Applicants will be eliminated was far-fetched as this could have occurred to the persons already charged including the 5<sup>th</sup> Applicant. She pointed out that given that investigations were complete once plea was taken the trial court could grant the Applicants bail. She submitted that the application was an abuse of the process of the court and should be dismissed.

8. In reply, Mr. Osundwa submitted that anticipatory bail is intended so that suspects are interrogated in an atmosphere devoid of threats on their lives or liberty. He pointed to the bounty that was placed on the Applicants lives as indicative of the danger that faced them. He submitted that granting the application would not prejudice the Respondents and that the Applicants would submit for interrogation. He submitted that there was no evidence placed before the court to indicate that the investigations were complete. He concluded that the Applicants had come to court with clean hands.

9. Counsel for the Applicant Mr. Osundwa relied on the following authorities; Susan Mbinya Musyoka vs Inspector General of Police & Another [2016] eKLR, David Tanui Lelei & Another vs Attorney General & 2 others [2008] eKLR, Joyce Akinyi vs Commissioner of Ppolice & A.G Misc. Criminal Application No. 51 of 2009 eKLR, Joseph Cherere Mwani vs Republic Misc. Criminal Application No. 553 of 2004 eKLR, Anglina Mumbua & Another vs Inspector Gernal of Police & Another [2017] eKLR and James Maina Wanjohi vs Republic & Others [2007] eKLR.

10. I have accordingly considered the application, the reply, the respective submissions and the cited authorities and I take the following view of the application. It is now settled law that anticipatory bail will only issue when an Applicant demonstrates that there is serious breach or threat of breach to his fundamental rights and freedoms by a State organ as enshrined in the Constitution. In the now widely cited case of W'Njuguna vs Republic [2004] 1KLR the court delivered itself as follows:

*While the right to anticipatory bail or bail pending arrest is not specifically provided for by statute, the same right is envisaged by Section 84(2) of the (old) Constitution... The right to anticipatory bail has to be called out when there are circumstances of serious breaches of a citizen's rights by an organ of the State which is supposed to protect them... 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 that person in connection with a commission of an offence... Judges of the High Court cannot become toothless watchdogs of the Constitution which they have sworn to defend... The Constitution itself has granted wide discretion to the High Court presumably to fill the gaps which the statute left out".*

11. Similar sentiments were echoed in the case of Richard Makhanu vs Republic in Bungoma High Court Misc. Cr. Case No. 10 of 2015 in which the court observed that anticipatory bail should issue *"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"*. I also add as rightly submitted by counsel for the Applicants that a court would also grant anticipatory bail where it is demonstrated that investigations are likely to be carried out in circumstances and environment that is not devoid of threat to life. That is to say that if it is demonstrated that the appearance of a suspect before a police officer places his

life at risk, it becomes the obligation of the court to step in and protect the sanctity of his life. One means by which life may be protected is by granting anticipatory bail.

12. In the instant case, the Applicants have urged the court to grant the bail because they are apprehensive that their lives are in danger. This is founded on the ground that the police have offered a bounty of Kshs. 500,000/= to any person who is willing to give information on their whereabouts. As such, they believe that once arrested, the police are likely to execute them. In my humble view, this assertion is far from the truth and is premised on mere speculations. This is attested by the fact that some of the suspects with whom it was alleged they committed the offence alongside the Applicants have already been charged in Milimani Cr. Case No. 838 of 2018. In addition, on 15<sup>th</sup> May, 2018 the court was informed that the 5<sup>th</sup> Applicant had already surrendered himself to the police and had taken plea. This fact was confirmed by the investigating officer who was present in court. The same officer confirmed and indicated to the court that he was willing to escort the rest of the Applicants to take plea if they willingly surrendered before him.

13. It is also common sense that a bounty is not necessarily issued for purposes of executing a suspect. Instead, its sole purpose is to aid in faster investigations so that suspects are arrested without undue delay. I cannot therefore belabor to conclude that the Applicants' assertion that their lives are in danger is totally unfounded and based on mere speculations.

14. The Applicants have also urged for the grant of bail on account that investigations are not complete. Nothing can be further from this in that the DPP has confirmed that the file is complete, a fact that was reiterated by the investigating officer. Indeed, it was submitted by the Respondent that the only piece of investigation remaining was for the Applicants to record their statements and have them processed to appear before court to take plea. The court therefore finds that the Applicants are being unduly difficult by failing to present themselves before the investigating officer for purposes of processing them to appear before a court. And since they have stated that they are willing to cooperate with the police, they now are aware why they are required by the police and nothing stops them from doing the needful.

15. I have often stated that parties should not abuse the process of the courts in seeking anticipatory bail with a view to crippling the work of an independent body mandated to carry out its duties independently. In this respect, the police are charged with the duty of doing independent investigations without undue interference by the court or any other body. The court must act with restraint where it is demonstrated that an Applicant is merely coming to court with a view to hampering the smooth conduct of investigations.

16. However, I must add that where it is demonstrated that the police are clearly breaching a citizen's rights or freedom nothing shall stop the court from issuing anticipatory bail. The circumstances of this case unfortunately are a contrast. It has not been demonstrated that the police have breached the Applicants' right to their fundamental freedom or that there exists any threat to their fundamental rights and freedoms. This is an application therefore, that is unmerited.

17. With respect to the cited cases, in the **Susan Mbinya Musyoka case**, anticipatory bail was issued because the court found that there was no reason behind the summoning of the County Commandant. In **Joyce Akinyi, David Tanui Lelei & Anor** and **Joseph Cherere Mwangi** cases, bails were granted because courts were of the humble opinion that the matters were civil in nature. In **James Maina Wanjohi** case, bail was issued because evidence disclosed that no complainant had come up in the case and no charges had been preferred.

18. In the present case though, it is clear that the police have already framed charges against the Applicants as their matters will only be consolidated with Milimani Cr. Case No. 838 of 2018. There is already sufficient evidence as submitted by the Respondents that has found the Applicants culpable to enjoin them in the matter. I add that the arrest of the Applicants will not in any way prejudice them because the Constitution cushions a suspect against abuse of police powers and more so provides that a suspect cannot be held in police custody for more than 24 hours.

19. The totality of this application is that it lacks merit and the same is hereby dismissed with no orders to the cost.

**Dated and Delivered at Nairobi this 16<sup>th</sup> day of May, 2018.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

*1. M/s Ochieng h/b for Mr. Osundwa for the Applicant.*

*2. Miss Kimiri for the Respondent.*