



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CRIMINAL APPLICATION NO. 47 OF 2016

GEOFFREY NYANUSI MOGIRE.....APPLICANT

VERSUS

THE OFFICER COMMANDING GESONSO POLICE STATION.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion application dated 12th July 2016 brought pursuant to **Rule 4 of the Constitution of Kenya (Protection of Rights and fundamental Freedoms) Practice and Procedure Rules, 2013**. In the said application, the applicant seeks the following orders:-

a) Spent

b) The petitioner/applicant be allowed to record his statement with Kisii Police Station, with respect to the (alleged) criminal complaint, if any, made by one Hon. Mr. Zebedeo Opure the sitting member of Parliament for Bonchari Constituency, if deemed necessary, if and when required to do so by the 1st and/or the 2nd respondents.

c) The petitioner/applicant be arrested by this honourable court and be released on such bond and/or bail terms as are reasonable in the circumstances, and do submit himself to Kisii Police Station as may be lawfully and reasonably necessary, if and when required to do so by the 1st and/or the 2nd respondents.

d) Costs of this application be provided for.

2. The application is supported by the affidavit of the applicant, GEOFFREY NYANUSI MOGIRE sworn on 12th July, 2016 in which he depones that he is apprehensive that he could be arrested and ferried to Nairobi Parliament Police Station in relation to a complaint which one Hon. Zebedeo Opure, the sitting member of Parliament for Bonchari Constituency, had made to the said Police Station in regard to remarks the applicant made in a broadcast at Egesa FM Radio Station. The applicant states that the police have threatened to arrest him over the fair comments he made at the said Egesa Radio Station, and that if the arrest happens, he may be hauled or ferried to Parliament Police Station in Nairobi contrary to the provisions of **Section 52 of the National Police Service act Cap.84 Laws of Kenya**.

3. The applicant depones that there is a very high likelihood of him being arrested and carted off to Parliament Police Station an eventuality that would curtail his rights to freedom of movement, right not to be subjected to physical torture and fair administrative action as envisaged by Articles 39, 29 and 47 of

the Constitution respectively.

4. It is the applicant's case that he is a sickly and incapacitated man having been involved in a near-fatal road accident and thus, his imminent arrest and transportation all the way to Nairobi will greatly jeopardize his health.

5. The applicant depones that the complainant Hon. Zebedeo Opopo has previously instigated the arrest of one Wesley Onyinkwa under similar circumstances whereupon the said Wesley was hauled to Parliament Police Station by plain clothes Police Officers. It is on the basis of the arrest of the said Wesley that the applicant now fears that the threat to his liberty is real and that unless the court comes to his aid, he stands to suffer great prejudice in the event that the police actualize their threat to arrest him.

6. The applicant however states that he is not averse to appearing before the Police station at Kisumu, in whose jurisdiction the alleged offence is said to have been committed, for interrogation and possible recording of statements should there be need. The applicant is categorical that he is ready able and willing to fully cooperate with any state agency in any investigations that they may wish to carry out.

7. It is in view of his imminent and impending arrest that the applicant sought that the instant application be heard ex-parte and on a priority basis. I certified the case as urgent and ordered its immediate hearing.

Analysis and determination

8. Upon perusing the Notice of Motion application, the supporting affidavit, and upon hearing the oral submission of the applicants counsel, I note that the issues requiring determination are as follows.

a) Whether the applicant has established that his rights to freedom, fair administrative justice and freedom from physical torture are threatened.

b) Whether the court has powers to grant the orders sought.

9. The matter before me is an application for anticipatory bail.

10. The applicant has, through his sworn affidavit and annexures thereto demonstrated that the threat to have him arrested is not a matter of mere speculation but that the police have actually called him with information regarding his arrest which information he does not take lightly in view of the fact that another person, one Wisely Onyinkwa, was recently arrested and ferried to Nairobi under similar circumstances.

11. The applicant has also demonstrated, in his sworn affidavit, that he is currently incapacitated following injuries, he sustained in an accident and therefore an arrest and transportation to Nairobi may cause him great pain and inconvenience.

12. In view of the averments made by the applicant, I am satisfied that he has made out a case that his rights are under imminent threat.

13. The answer to the question of whether or not this court can grant anticipatory bail can be found in the Constitution.

14. **Article 165 (3) (b) of the Constitution** empowers this court to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.

15. **Article 23 of the Constitution** authorizes the court to hear and determine application for redress of a denial, violation or infringement, or threat to a right or fundamental freedom in the bill of rights.

16. **Article 49 (1) (h)** relates to the power of the court to release a person who has been arrested on bail or bond pending a charge or trial save for where there are compelling reasons for not to grant the release.

17. Under **Article 29 (a) (b) and (d)**, a person's right to freedom and security are not to be taken away arbitrarily or without a just cause.

18. Having found that the applicant has established that he is the verge of being arbitrarily arrested and ferried to Nairobi Parliament Police Station for an undisclosed offence, I find that the applicant has met the constitutional threshold set for grant of orders of anticipatory bail.

19. The fears expressed by the applicant are well founded and compounded by his current poor physical health.

20. In a nutshell and in light of the foregoing I allow prayers (b) and (c) of the Notice of Motion application dated 12th July 2016 and make orders as follows:

a) The applicant is hereby arrested by the court and is admitted to bail. He may be released on execution of his own personal bond of Kshs. 50,000/=.

b) The applicant is directed to report to Kisii Police Station or the 1st respondent herein within 3 days from today's date for purposes of recording a statement, should he be required to do so, regarding the alleged complaint made by Hon. Zebedeo Opore.

c) This case shall be mentioned before this court's Deputy Registrar on 27th July, 2016 for the purposes of closing the file.

21. It is so ordered.

Delivered, dated and signed in at Kisii on **14th day of July, 2016.**

W.A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Mr. Magara for Nyamurongi for the Applicant
- Omwoyo court clerk