



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.304 OF 2016**

**MICHAEL ROTICH.....APPLICANT**

***VERSUS***

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Michael Rotich was the Team Manager of the sports team that Kenya sent to the 2016 Rio Summer Olympics in Brazil. On 8<sup>th</sup> August 2016, the Applicant was deported from Rio De Janeiro on allegation that he had been involved in subverting the doping procedure of athletes. On arrival at Jomo Kenyatta International Airport in Nairobi, Kenya on 9<sup>th</sup> August 2016, the Applicant was arrested by the police. He was detained by the police pending investigations. On 10<sup>th</sup> August 2016 PC Kirimi Muguna, a police officer attached to the Anti-Narcotic Unit at the Directorate of Criminal Investigations Headquarters swore an affidavit in support of an application filed by the prosecution before the Chief Magistrate's Court at Milimani. The application was said to be predicated under **Article 49(1)(f), (g) & (h) of the Constitution**. It sought to have the Applicant detained for a period of twenty-eight (28) days to enable the police conclude its investigations. In the said affidavit, the investigating officer deponed, *inter alia*, that the Anti-doping Agency of Kenya had received critical information from the Sunday Times Newspaper based in the United Kingdom to the effect that the Applicant was involved in doping of athletes, or that he had given certain undertakings, in lieu of financial consideration, to subvert the Anti-doping measures instituted by the International Association of Athletic Federations (IAAF) by leaking information of forthcoming random drug tests to the concerned athletes.

The investigating officer was concerned that due to the Applicant's involvement in athletics management for the past forty (40) years, he was likely to interfere with investigations. He therefore requested the magistrate's court to have the Applicant detained pending the conduct and the conclusion of investigations. He deponed that the Applicant, being influential in athletic circles, was likely to interfere with witnesses who are the subject of investigations. It was in that regard that the prosecution was of the view that since the investigations related to effort by the government to jealously guard the reputation Kenya, as a country, has over the years produced world-class athletes, it was imperative that the court acts in public interest in upholding the prosecution's request for the Applicant to be detained for the period stated to enable investigations to be conducted without undue interference.

It should be noted that at the time the prosecution made this application, the Applicant was brought before court in compliance with **Article 49(1)(f)(i) of the Constitution** that requires any arrested person to be brought to court within 24 hours of his arrest. It is also important to highlight the fact that the Applicant was not charged with any offence. Further, there is no holding charge. The prosecution was seeking the

order of detention of the Applicant before he is formally charged with a criminal offence. The Applicant opposed the application that was made by the prosecution before the magistrate's court. The Applicant stated that he had not been informed of the reason for his arrest, and further, the charge that was intended to be brought against him. He urged the court to take into account that he is an old man who was suffering from diabetes and high blood pressure. The Applicant, in essence, was saying that there was no reason why he should be detained while investigations of the commission of the alleged offence relating to doping in sports were ongoing.

In a Ruling delivered on the same day, the magistrate's court (CN Njagi – RM) allowed the application made by the prosecution. In the material part of the said Ruling, this is what the court said:

***“Indeed the issues canvassed are weighty and are matters touching on public interest. Both State and Counsel for the Respondent are amenable to the fact that doping needs to be investigated. These are serious matters that need time to be investigated; witness statements, evidence need to be recorded and produced. The Respondent has been noted to have been in the field track events for over 40 years. During this time he has interacted with the athletes and people in his field. This raises a concern as to his reach of potential witnesses involved in investigations. He has access to people in this field and thus may interfere with the potential witnesses involved in the investigations.”***

The Applicant was aggrieved by this decision and on 11<sup>th</sup> August 2016 moved to this court to have the decision revised. Mr. Lagat for the Applicant submitted that the magistrate's court erred when it ordered the Applicant to be detained for the inordinate period of 28 days while awaiting investigations to be completed by the police. He submitted that the Applicant was 68 years old and had a medical history of diabetes and hypertension. He asserted that the claim by the prosecution to the effect that the Applicant was likely to interfere with the prosecution witnesses was not supported by evidence. In any event, he argued that the potential witnesses were resident in the United Kingdom and therefore it was unlikely that he would interfere with them. He submitted that the identity of potential witnesses had not been availed to the Applicant and therefore he would not be in a position, even if he was minded, to interfere with the said witnesses. He challenged the decision of the magistrate's court to order his detention in circumstances where no charges had been brought against him. Learned counsel urged the court to order the release of the Applicant. The Applicant undertook to abide by any conditions that this court may impose to secure his release on bail pending further investigations by the police.

Mr. Ondimu for the State opposed the application. He submitted that there was an overwhelming possibility that the Applicant will interfere with witnesses. He urged the court to take into consideration the status of the Applicant and the likelihood that he has the capacity to influence the witnesses because he had, over time, closely interacted with athletes. He urged that the prosecution had laid sufficient compelling reasons under **Article 49(1)(h)** of the **Constitution** to have the Applicant denied bail. He relied on the Indian Supreme Court decision of **Neeru Yadav –Vs- State of U.P & Another Criminal Appeal No.2587 of 2014** in support of his submission. Regarding the submission advanced by the Applicant to the effect that he was ailing, and therefore cannot be remanded in custody, learned counsel for the State submitted that the Applicant had not established that the medical condition that he was suffering from could not be managed while he is in remand custody. He explained that the State had capacity to address any medical complaints raised by the Applicant while in remand custody. He explained that the investigations would be expeditiously conducted. The Applicant in the circumstances will not suffer any prejudice.

This court has carefully considered the rival submission made by the parties to this application. 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) ....”*

Courts are under a constitutional duty to jealously protect this right to liberty and freedom. The right can only be curtailed in circumstances provided under the **Constitution** and **Statute**. In an Indian Supreme Court case cited by the State, **Neeru Yadav –Vs- State of U.P. & Another Criminal Appeal No.2587 of 2014**, the court held at Page 12:

*“...we are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bedrock of constitutional right and accentuated further on human rights principles. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilized society. It is a cardinal value on which the civilization rests. It cannot be allowed to be paralyzed and immobilized. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order.”*

In Kenya, Ibrahim J (as he then was) stated as follows in **Republic –Vs- Danson Mgunya & Another [2010] eKLR**:

*“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. I will never take liberty for granted and I know neither will Dr. Khaminwa having both experience in the meaning of detention without trial and solitary confinement at Kamiti Prison during the struggle for the Second Liberation. Dr. Khaminwa suffered even more and longer incarcerations. We must interpret the Constitution in enhancing the rights and freedoms granted and enshrined rather than in a manner that curtails them. Each case must be decided in its own circumstances touch and context.”*

It is clear that the issue for determination by this court relates to the enforcement of the rights and freedoms of the Applicant as contained in the Bill of Rights. **Article 21(1)** of the **Constitution** imposes the duty upon the State and all the State organs including the Judiciary **“to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.”**

In the **Institute of Social Accountability & Another –Vs- National Assembly & 4 Others [2015] eKLR** the court held that in interpreting the provisions of the **Constitution** touching on the Bill of Rights, the court should strive to promote its purpose. At paragraph 56 of the Judgment, the court had this to say:

*“First, this Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, and advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.”*

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.

In the present application, the Respondent moved to the magistrate's court seeking orders to have the Applicant detained for a period of twenty-eight (28) days while it investigates allegations of doping laid against the Applicant. This application was made 24 hours after the Applicant had been arrested and placed in custody by the police. As stated earlier in this Ruling, the Applicant has not been charged with the commission of any offence. In fact, it is not clear from the affidavit sworn by the investigating officer what charges will be brought against the Applicant. The Applicant has not been informed of the charges that he is likely to face since his arrest. In essence, the State wants to place the Applicant in custody to enable it commence and complete its investigations.

***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.”***

In compliance with Article 49(1)(f)(i) of the **Constitution**, the Applicant was brought before the court within 24 hours of his arrest. However, contrary to Article 49(g) of the **Constitution**, the Applicant was neither charged nor informed of the reasons for his continued detention. As stated earlier in this Ruling, the recent trend where a person is arrested and arraigned in court within 24 hours specifically for the prosecution to seek extension of time to continue to detain such person, without any charge or holding charge being preferred against such person is unconstitutional. The police have no authority in law to arrest and detain any person without sufficient grounds. Those grounds can only be sufficient if the police have *prima facie* evidence which can enable such person to be charged with a disclosed offence. The fact that the prosecution has a *prima facie* evidence of a disclosed offence can be presented in court in form of a holding charge setting out the particular offence. Such holding charge will enable an accused person to know of the reason for his arrest as provided under Article 49(1)(a) of the **Constitution**. It will not do for the prosecution to present a person who has been arrested in court and seek his continued detention without a charge or a holding charge being lodged in court. It is unlawful for the police to seek to have a person who has been arrested to continue to remain in its custody without a formal charge being laid in court. If this trend continues, it would erode all the gains made in the advancement of human rights and fundamental freedoms as provided in the Bill of Rights since the **Constitution** was promulgated in August 2010. A person's right to liberty should be respected at all times unless there are legal reasons for such person to be deprived of his liberty. The police should only arrest a person when they have *prima facie* evidence that an offence has been disclosed which can result in such person being charged with a disclosed offence or a holding charge of the likely offence being presented in court. The police should do this because of only one reason: the **Constitution** says so.

In the premises therefore, the arrest and arraignment of the Applicant before court without any charge being preferred against him breached his fundamental right to liberty and freedom as provided under Article 29(a) of the **Constitution** and the fundamental right to be promptly informed of the reasons for

his arrest as provided under **Article 49(1)(a)(i)** of the **Constitution**. It was for that reason that this court did on 12<sup>th</sup> August 2016 release the Applicant on bail on condition that he presents himself to the police on particular days to assist the police with investigations. This court is of the considered view that by now the police have concluded their investigations. The requirement that the Applicant presents himself to the police is therefore vacated. The police shall be at liberty to charge the Applicant with a disclosed offence if they have evidence. Meanwhile, the Applicant shall not be arrested or detained by the police. If a decision to charge him is made, he shall be summoned to present himself to court to take plea. It is so ordered.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2016**

**L. KIMARU**

**JUDGE**