



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC. CRIMINAL APPLICATION NO. 136 OF 2016

SUSAN MBINYA MUSYOKAAPPLICANT

VERSUS

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

DIRECTORATE OF PUBLIC PROSECUTION2ND RESPONDENT

RULING OF THE COURT

Introduction

1. The application before the court is an *ex-parte* **Notice of Motion** dated and filed herein by the Applicant praying for the orders that ;

- a. This application be certified as urgent and heard *ex-parte* in the first instance.
- b. The Court be pleased to admit the applicant to reasonable bail terms pending investigations and or charge by the respondents.

2. The application is premised on the grounds set out therein and is supported by the affidavit of the applicant **Hon. Susan Mbinya Musyoka** sworn on **8th November, 2016**.

The application

3. The application is brought under **Article 47(2), 49(1), 244(c) 159(2)** of the **Constitution**.

4. The applicant is a Member of Parliament and the Women Representative of Machakos County.

5. The applicant is also a doctor by profession and states that as such Member of Parliament and as a doctor she is entitled to comment on any topical issues concerning the health of her constituents and the country at large.

6. The applicant's case is that she received a telephone call on the 3rd of November, 2016 from one **Jacinta Wesonga**, the Machakos County Police Commandant who summoned her to appear before the police, but who declined to disclose the reasons for her summons. The Applicant was unable to attend to

the summons on the grounds of prior official engagements. Subsequently there were further summons, some of which amounted to threats and intimidation of arrest and detention. However, the applicant's case is that she has at all material times expressed willingness and readiness to cooperate with the police notwithstanding the fact that she has not been formally informed of any offence or criminal act she might have committed. On Wednesday the 2nd of November, 2016, the Star Newspaper carried a story attributed to the applicant calling for swift action by the presidency to end corruption. The applicant alleges that the police now claim that the applicant's utterances amounted to treason. The Applicant's case is that the media has been awash with the statements attributed to the police which seem to take away the applicant's presumption of innocence and right to due process. In light of the above the applicant seeks an order of the court to be admitted to anticipatory bail on reasonable terms pending appearance before the police and or charge before a court of law. The applicant is apprehensive and suspects that the police is about to arrest her on the basis of trump up charges whose intention is to threaten her and to limit her participation in the current affairs of the country. That is why this application has become necessary.

Submission

7. The applicant was represented at the hearing of the application by many lawyers, but those on record were **Dr. John Khaminwa, SC** – the lead counsel, **Hon. Maanzo, Mr. J. Kimeu and Mr. Makundi**.

8. **Dr. Khaminwa**, the lead counsel, provided the historical and jurisprudential background to the application. Counsel delved into the history of this country, observing that the history of bail pending arrest in this country started with him when he made the application before then **Hon. Chief Justice Madan**, who granted the order upon an application by a politician on trump up charges. However, soon after the grant of that order Justice Madan lost his job. This, counsel submitted, showed the disdain with which the State viewed such orders. Counsel submitted that in those days of single party rule, politicians were victims of trump up charges which were meant to intimidate them so that they could not contest elections or, if they contested, they remained subservient to the ruling party and its oppressive state organs. Dr. Khaminwa submitted that the court in Kenya today must resist any attempt to be part of the regime used to intimidate politicians.

9. Dr. Khaminwa referred the court to a number of legal and judicial authorities, including a verse from "**The sovereignty of Law**" page 26 where it is stated that;

"The courts are ultimately the trustees of our democracy frameworks"

10. Counsel submitted that democracy can only thrive in a free environment where there are no threats or intimidation to politicians, and that State organs who control the coercive arms should be restrained when they purport to trump upon individual freedoms especially of politicians.

11. The applicant's legal team submitted that allegations are rife in the country of money having been lost in the Ministry of Health and that the fact is now a topical issue in this country. The applicant, as a doctor and legislator who is concerned with the health of the citizens is also concerned with the alleged misuse of funds and has called for the practice to stop, and urged the relevant state organs to take redemptive action. The police or the Criminal Investigation Department appears not to have taken kindly to the applicant's patriotic concerns, hence the clear threats of arrest and detention now directed at the applicant. The applicant's legal team also referred the court to the Criminal Procedure Code of India which provides that bail pending arrest is within inherent powers of a court. The courts, including Lower Courts, should not shy away from granting such orders.

Analysis

Constitutional Foundation for the application

12. The application before the court is one which attempts to prevent a citizen from contemplated loss of the citizen's fundamental rights and freedoms. In this case, the applicant alleges that the police are following her everywhere she goes, and have sent her messages which appear to threaten or intimidate

her. If that is correct, then the applicant is protected under **Chapter four** of the **Constitution of Kenya** which established the Bill of Rights and which guarantees rights and fundamental freedoms. **Article 47(2)** establishes the right to fair administrative action it states;

“If a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action, the person has the right to be given reasons for that action”

13. In the instant case it is clear that the rights being threatened are fundamental right and freedom of expression, freedom of conscience, freedom of thought and freedom of movement. The respondents in this matter are obligated by law to inform the applicant as to why they want to see her. Following the applicant everywhere could be a worse form of denying freedom of movement than actually arresting a person. It has however, not been established that the respondents are following the applicant with the intention to arrest her. However, what matters here is not what the respondent or the relevant State organ has done or intends to do, but rather what the applicant thinks the relevant State organ is about to do. Once a particular perception has been created in the mind of the applicant, the applicant’s rights begin to be diminished, and the applicant then has the right to move the court for the protection of those rights. In this instance, the applicant legally perceives that the police are intending to arrest and detain her. She now seeks bail before arrest. Under **Article 47(2)** the reasons for the administrative action need not be given by the police while the applicant is under arrest and custody. The applicant is entitled to be given the reasons why she is being sought by the police without fear of being arrested and detained.

14. Further, **Article 49(1) (h)** states that an arrested person has the right

(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.”

While **Article 244(c)** provides that the National Police Service shall

(c) “comply with constitutional standards of human rights and fundamental freedoms.”

15. The applicant’s case is further buttressed by the provisions of **Article 159(2) (c)** which demands of this court at all times to apply the law in a way that does not contravene the Bill of Rights.

16. That the current Constitution clearly protects the applicant from harassment by oppressive State Organs is not in doubt. However, the good news in that even under the old Constitution, this court has clearly asserted that its duty is to make such orders that enforce and secure the fundamental rights of an individual as provided under **Sections 70-83** of the **[old] Constitution**. In the case of **W’Njuguna v. Republic [2004] 1KLR** the court, in considering an application on bail under anticipatory bail or bail pending arrest, stated that;

“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”.

17. The above case refers to the [old] Constitution. The good news is that in the new Constitution there are no gaps to be filled. The law is complete in so far as it protects fundamental rights of individuals.

18. This brings me to the discourse by other courts, the magistrate’s court, that they have no jurisdiction in dealing with matters affecting fundamental rights or right to bail pending arrest. This ruling now puts to rest any such debate. Every court in Kenya is founded upon the Constitution of Kenya. This means that

in their everyday proceedings there will be need to interpret the Constitution in so far as the matter before the court is concerned. A magistrate's court has the inherent power to protect fundamental rights of parties appearing before that court. In terms of Criminal proceedings, it is true that most matters in which the citizen's rights will be threatened may find jurisdiction in the lower courts. A magistrate's court should not decline jurisdiction to hear and determine an application for anticipatory bail pending arrest.

19. In the upshot, this court is satisfied that the applicant has established a case for anticipatory bail pending arrest. This court issues orders as follows;

a. The applicant Hon. Susan Mbinya Musyoka is hereby admitted to anticipatory bail pending arrest, investigations, and or charges by the respondents in the following terms;

i. A personal bond of Shs. 20,000.

b. The applicant shall forthwith, or as soon as it is possible, be escorted by her counsel to the nearest police station so that the police may explain to the applicant the reasons for which the police want her, if at all.

c. The application and these orders shall be served upon the Respondents for inter-partes mention of the matter on 15th November, 2016.

Orders accordingly.

DATED AND DELIVERED AT MACHAKOS THIS 8TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

Dr. John Khaminwa, SC – the lead counsel, Hon. Maanzo, Mr. J. Kimeu and

Mr. Makundi for the applicant

Court Assistant – Mr. Munyao