



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Miscellaneous Criminal Application 38 of 2012**

**JUSTINE BAGUNA MATALEMWA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant moved the court for protection from the police whom he has accused of harassing him in the course of their investigations into the offences of obtaining money by false pretences and forgery.

The applicant has alleged that upon being arrested in Nakuru, he was driven to Mombasa in the complainant's car in the company of a private investigator; that he was detained for four days before being granted bail by the police. Subsequently, he was charged in court whereupon he was once more granted bail by the court. That bail notwithstanding, he was detained in the court cells for several hours until his advocate intervened.

When he was presented before the magistrate on that day, the prosecutor withdrew the charges and court discharged him under **Section 87(a)** of the **Criminal Procedure Code**, ostensibly on the ground that the offences were committed in Mombasa. Upon being discharged he was re-arrested and driven to the CID offices, Nakuru.

At the CID offices, he was handed over to a police officer, the complainant and the private investigator who took him in the complainant's motor vehicle to Mombasa. He was detained at the Kilindini CID offices for 3 days until the DCIO and the PCIO intervened.

Because of these events, the applicant is now apprehensive that the police (say the CID) officers would continue to harass him and thereby violate his constitutional rights. No affidavit was filed on behalf of the respondent, but IP. Wanga on behalf of the DCIO, Nakuru, stated on oath that the charges were withdrawn from Nakuru because the complainant did not wish to pursue the matter in Nakuru; that the arrest and subsequent detention of the applicant was due to some misunderstanding regarding the applicant's bond.

From the foregoing, it is conceded that the applicant has been detained beyond the constitutionally permitted period; that non-police officers have been involved in the investigation of the alleged crime. It follows that the applicant fears are not without a basis, hence this application for anticipatory bail or as it is sometimes called, bail pending arrest. He is not guaranteed of his freedom of movement after his experience in the hands of the CID officers.

**Section 123(3)** of the **Criminal Procedure Code** (Cap 75) provides that:

**“123(3) The High Court may in any case direct that an accused person be admitted to bail or that**

**bail required by a subordinate court or police officer be reduced.”**

(Emphasis supplied)

This is the closest statutory provision to the remedy sought in this application. It may be argued that the terms “*accused person*” used in the section is wide enough to include “*a suspect*.”

The Constitution on the other hand makes detailed provisions in respect of rights of arrested persons. **Article 49(i)(f)(g) and (h)**, among others, enjoin the law enforcement agencies to ensure that an arrested person is brought before a court of law as soon as reasonably possible but not later than 24 hours from the time of arrest; that such a person ought to be released on bond or bail irrespective of the offence he is alleged to have committed. unless there are compelling reasons.

The practice in this area of the law is to accord protection to a suspect who fears that his rights may be violated in the period leading upto his arraignment before the trial court as an accused person. It is that interim period that is protected by the court so that his rights are secured pending any charges that may be brought against him. He asks for bail arrangement so that the police can comply with the law protecting his rights during investigations, before the charges are laid in court.

*Ex facie*, therefore, the police must be held to the law, even as the court allows them to conduct any genuine criminal investigations according to law. The right of an arrested person and the role of the police under **Article 245** of the **Constitution** must be balanced. For instance the court must strive never to stop the police from investigating a crime, unless it is satisfied that the investigations are not in good faith.

The matters complained of in this application relate to events of April, 2012. The police have assured the court that they do not intend to prefer charges against the applicant in Nakuru. The applicant has since April, 2012 (some 6 months) been enjoying the protection of the court. An order of anticipatory bail is not intended to provide lifelong immunity from arrest. It has served its purpose, save to remind the police that their action of detaining suspects beyond the constitutional period without any justification and the harassment of an arrested person at the behest of third parties is actionable.

The bail/bond granted to the applicant is spent as it has served its purpose. The applicant’s second prayer is seeking that the court determines where the applicant ought to be tried and further seeks that the court should order the offences allegedly committed in Nakuru to be tried at Nakuru. These are unattainable as the court has no powers to make such determination. The function of the court is limited to ensuring the rights of an arrested person are protected and that the police must act within the law.

The court has been assured by the police that the charges in Nakuru have been dropped and will not be pursued.

For these reasons, it is declared that the bail/bond granted in this matter be and is hereby discharged.

**Dated, Signed and Delivered at Nakuru this 5<sup>th</sup> October, 2012.**

**W. OUKO  
JUDGE**