

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL MISC. APPEAL NO E041 OF 2025**

IN THE MATTER OF ARTICLES 23,29,49,159 OF 165 OF THE  
CONSTITUTION OF KENYA, 2010, AND THE CRIMINAL PROCEDURE CODE  
BETWEEN

JOHN BARASA KAUSI-----  
APPLICANT

VERSUS

THE INSPECTOR GENERAL OF POLICE-----1<sup>ST</sup>  
RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION -----2<sup>ND</sup>  
RESPONDENT

THE ATTORNEY GENERAL -----3<sup>RD</sup>  
RESPONDENT

**RULING**

1. The applicant filed a notice of motion application dated 28<sup>th</sup> April 2025 seeking the following orders;

- a) That the Honorable court be pleased to certify this application as urgent and the same be heard.
- b) THAT the service of this application be dispensed with at the first instance.
- c) THAT pending the hearing and the determination of this Application inter parties, the Honorable court be pleased to issue an order releasing the applicant from police custody as ordered by the trial magistrate
- d) THAT, the Honorable Court be pleased to declare that the detention of the accused person in custody after being arrested, arraigned in court, and on being charged or not charged, amounts to detention without trial contrary to the provisions of Article 49 of the Constitution of Kenya 2010 and therefore the said practice is unconstitutional.
- e) THAT the Honorable court in exercise of its supervisory powers do direct the Chief Magistrates to grant the applicant bail after being charged as said court on such terms and conditions as the said court may deem fit and proper to impose.

- f) THAT the Honorable Court be pleased to issue conservatory orders restraining the respondents, their servants, agents, junior officers, or anybody acting on their instructions from arresting, harassing, or otherwise interfering with the freedom and security of the applicant
2. The applicant filed his grounds together with a supporting affidavit where he avers that he was arrested and taken to court in a civil matter, where it is suspected that he either impersonated an advocate of the High Court or masqueraded as one.
  3. He claims that he was supposed to take a plea on the same day, but he was sent to detention without trial by the trial magistrate.
  4. He stated that he was subjected to unfair treatment by the court and detained for no reason since he was not in contempt of court or charged or detained on a holding charge.
  5. He avers that his constitutional and fundamental rights and freedom were trampled upon when the trial court issued a warrant of arrest, which was executed by the OCS Kakamega police station.
  6. According to the applicant, this court has the jurisdiction to grant an appropriate order for relief, such as a declaration of rights, a conservatory order, injunctions, and a declaration of the invalidity of law and/ or order.
  7. The application was to be canvassed by way of written submissions. However, at the time of writing, the ruling only the applicant who had filed his submission.

### **SUBMISSIONS.**

8. The applicant filed his written submissions dated 16<sup>th</sup> May 2025, where he stated that the senior Resident Magistrate in Kakamega Chief Magistrate's court ordered his arrest in court on 15<sup>th</sup> April 2025 and directed the OCS Kakamega police station not to release him without leave of court.
9. He submitted that he was detained at Kakamega police station without bond and bail from 15<sup>th</sup> April 2025 until 13<sup>th</sup> May 2025 which he claims was contrary to Article 49 (f), (i), (ii) (g) where his constitutional and

fundamental rights and freedom were trampled upon since his rights as an arrested person were not adhered to.

10. He claims that the trial magistrate and the 2<sup>nd</sup> respondent concealed the dates of his arrest which was on 15<sup>th</sup> April 2025 instead the orders was delivered by the senior magistrate on 21<sup>st</sup> April 2025 and signed on 22<sup>nd</sup> April 2025 while the police charge sheet stated that he was arrested on 15<sup>th</sup> May 2025 and taken to court on 13<sup>th</sup> May 2025 and raises question of why he was taken to court and attached a charge sheet that was dated 13<sup>th</sup> May 2025.
11. He holds that this court had the responsibility to uphold the rule of law under article 159 (1) (2), (a), (b), (c), (d) and (e) and article 165 (3) (a),(b),(c) and (d) (i) and (ii).
12. He claims that he has confidence that this court, under article 23 (i), which states that the high court has jurisdiction in accordance with article 165 to hear and determine applications for redress of a denial, violation, or infringement of or threat to a right or fundamental freedom in the Bill of Rights.
13. He prays for an appropriate relief, including a declaration of rights, a conservatory order, and a declaration for invalidity of the orders made by the magistrate, claiming that he had suffered a lot in the police custody an order for the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents to compensate the days he was detained without trial for 28 days and costs.
14. The respondent did not file a response to the claim raised by the applicant.

### **ANALYSIS AND DETERMINATION**

15. The applicant avers that he was arrested on 15<sup>th</sup> April 2025 and detained until 13<sup>th</sup> May 2025 without being charged. He further alleges that the charge sheet presented by the respondents contained inconsistencies on the date of arrest and arraignment.
16. According to him, this prolonged detention without charge violated his fundamental rights under Article 49 of the Constitution of Kenya,

2010, which guarantees that an arrested person shall be presented to court within 24 hours of arrest or, if the period ends outside ordinary court hours, at the next available sitting of the court.

17. The right to liberty is jealously guarded in our Constitution, and detention beyond the stipulated period offends both the spirit and letter of the law. **In Albanus Mwasia Mutua v Republic [2006] eKLR**, the Court of Appeal emphatically held that unexplained and prolonged pre-arraignment detention is unconstitutional and renders subsequent proceedings a nullity. Similarly, in **Gerald Macharia Githuka v Republic [2008] eKLR**, the court stated that unlawful pre-charge detention undermines due process and the integrity of the criminal justice system.
18. The applicant also raises the issue that he was denied bail and bond during his detention. Article 49(1)(h) expressly provides that an arrested person has the right “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 **Republic v Danson Mgunya & Another [2010] eKLR**, the High Court underscored that the constitutional right to bail is immediate upon arrest, unless the State satisfies the court that there exist compelling reasons to deny such right. The applicant’s affidavit suggests that no such reasons were advanced.
19. However, on perusal of the record before me, I note that the applicant has not annexed certified proceedings or orders of the trial court to show whether the magistrate indeed denied him bail or gave lawful reasons for his continued detention.
20. In **Anarita Karimi Njeru v Republic [1979] eKLR**, the court held that where constitutional violations are alleged, the applicant must plead with reasonable precision the particulars of the alleged violation and the manner in which it occurred.
21. The Applicant further seeks conservatory orders to restrain the Respondents from arresting, harassing, or interfering with his freedom and security.

22. Conservatory orders are a constitutional remedy designed to preserve the status quo or prevent further violation of fundamental rights pending the determination of a substantive matter. Article 23(3) (c) of the Constitution empowers the High Court to grant such orders “*in any proceedings brought under Article 22,*” which provides for the enforcement of the Bill of Rights through constitutional petitions by persons alleging denial, violation, infringement, or threat to their rights.
23. Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (*the “Mutunga Rules”*), further clarifies that conservatory orders may be sought within a constitutional petition to secure the subject matter of a dispute involving alleged or threatened violations of fundamental rights.
24. The Applicant seeks conservatory orders restraining the Respondents from interfering with his freedom and security. However, the application is brought by way of a Notice of Motion within a criminal appeal, not a constitutional petition. This procedural choice raises a jurisdictional question, as conservatory orders are not freestanding remedies available in ordinary civil, criminal, or administrative proceedings.
25. In **Petition No. 203 of 2020 [2021] KEHC 123 (KLR), the High Court at Nairobi (Sichale, J.)** dismissed an application for conservatory orders where the applicant had not filed a constitutional petition under Article 22. The Court held: “*The purpose of granting a conservatory order is to prevent violation of rights... and preserve the subject matter pending the hearing and determination of a pending case or Petition. Article 23(3)(c) limits conservatory orders to proceedings brought under Article 22.*” The absence of a petition rendered the application incompetent.
26. Similarly, in *Petition No. 83 of 2019 [2019] KEHC 789 (KLR)* (Niggemann, J.), the High Court declined to issue conservatory orders in a miscellaneous application challenging a statutory action,

emphasizing that such relief requires a constitutional petition demonstrating prejudice from a violation or threatened violation of the Constitution, as per Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General [2011] eKLR.

27. The Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR** articulated the threshold for conservatory orders, requiring: (i) a prima facie case with a likelihood of success; (ii) real danger of prejudice from a constitutional violation; and (iii) public interest alignment. These criteria presuppose a constitutional petition, as the prejudice must stem from a rights violation under the Bill of Rights.

28. Allowing conservatory orders in this Notice of Motion would undermine the constitutional architecture and risk conflating criminal appeal processes with constitutional litigation. The Applicant must file a constitutional petition under Article 22 to invoke the Court's jurisdiction under Article 23(3)(c) for conservatory orders.

29. Having carefully considered the Applicant's Notice of Motion dated 28th April 2025, the written submissions, and the relevant legal authorities, I find that this Court lacks jurisdiction to issue conservatory orders in the present application. The relief sought, being a constitutional remedy under Article 23(3)(c), is only available in proceedings brought under Article 22 through a constitutional petition.

30. For the reasons above, the Court makes the following orders:

- a) That the Application is incompetent.
- b) The notice of motion dated 28<sup>th</sup> April, 2025 is hereby dismissed.
- c) No orders as to costs.
- d) Right of Appeal 14 days.

**DATED SIGNED, and DELIVERED in open court at KAKAMEGA THIS 30<sup>TH</sup> DAY OF SEPTEMBER , 2025.**

**S.N. MBUNGI**  
**JUDGE**

**In The Prescence of;**

CA: Angong'a

The Applicant present online.

Ms. Osoro for the 2<sup>nd</sup> Respondent, present.