



Oloo v Director of Public Prosecution & 3 others (Miscellaneous Criminal Application E004 of 2024) [2024] KEHC 4836 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4836 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E004 OF 2024**

**RE ABURILI, J
APRIL 24, 2024**

BETWEEN

RUTH AWUOR OLOO APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

THE OCS TATTA POLICE STATION 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. Before me for determination is a Notice of Motion dated 1st day of January 2024 brought pursuant to Articles 3,10,19, 20, 22, 25,49,159 and 259 of the Constitution and Section 123 of the Criminal Procedure Code Cap 75 of the Laws of Kenya.
2. The applicant Ruth Awuor Oloo seeks the following substantive orders:
 - a. That the honorable court be pleased to grant the applicant anticipatory bail and or bond on such terms as the court shall deem fit for such time as the honourable court shall direct and or until such time a formal charge, if any, may be filed against her in a court of competent jurisdiction
 - b. That an order do issue stopping the OCS Ratta Police Station from arresting the applicant in connection with Maseno Criminal Case No. 156 of 2022 which was concluded and withdrawn under section 87(a) of the Criminal Procedure Code and or charging her before any court of law.
 - c. That the Costs of this application be provided for.



- d. Any further or other orders or directions the court considers appropriate in the circumstances.

The Applicants' Case

3. The application was premised on grounds on the face of the notice of motion and supported by the Applicants' affidavit that was sworn on 26th January, 2024 and the oral submissions made on 16th April, 2024.
4. According to the applicant, she was charged with the offence of causing grievous harm to the complainant who has bad blood with her and the case was later withdrawn under section 87(a) of the Criminal Procedure Code due to the failure of witnesses to attend court on numerous occasions and that after the case was withdrawn, the complainant threatened to settle scores with the applicant herein.
5. That the complainant is using the Police at Ratta Police Station to call and harass her with imminent arrest which threats are causing her mental anguish such that she is apprehensive of stepping outside her house and that they have visited her house severally such that she has had to lock herself inside the house.
6. That the applicant believes that the 1st Respondent has abdicated from carrying out his constitutional duties independently as stipulated in Article 245 of the Constitution.
7. That unless the orders sought are granted, the applicant stands to suffer heightened harassment and violations of her rights and freedoms guaranteed under the Constitution.
8. that she is ready to comply with any conditions of reasonable bail/ bond terms that this court may order.
9. The applicant has annexed the handwritten witness statements recorded with the police by witnesses in the withdrawn case as well as the charge sheet and a statement written on 27th November, 2021 by the complainant Carolyne Anyango Awech, withdrawing the case of grievous harm against the applicant herein on account that they had agreed to settle the matter amicably as a family.
10. The application was heard orally on 16/4/2024 with Ms Awuour arguing that her client was not objecting to being charged with the same offence but that she was receiving too much harassment from the Police from Ratta Police Station.
11. Opposing the application, Mr. Marete Principal Prosecution Counsel submitted that there is no bar to charging of the applicant as the charge was withdrawn under section 87(a) of the Criminal Procedure Code, that she had interfered with witnesses in that case leading to the withdrawal and that she had not demonstrated that any of her rights had been violated. That the applicant had not cooperated with the police and that she had not appeared in court whether virtually or physically.
12. The court then directed the applicant to appear today physically during the delivery of this ruling and she did appear physically.

Analysis And Determination

13. I have considered the application for anticipatory bail as argued orally. The questions I must answer is whether the application meet the threshold for grant of relief of anticipatory bail and secondly, whether the police should be stopped from arresting and charging the applicant the earlier charges having been withdrawn under section 87(a) of the Criminal Procedure Code.
14. Anticipatory bail is a direction issued by the court to release a person on bail, even before the person is arrested. In other jurisdictions, anticipatory bail is granted to a person who has been arrested by the



court. Anticipatory bail is, therefore, a special relief in criminal law. However, the core, character and scope of anticipatory bail may be problematic, requiring clear and careful stitching of the relief. In jurisdictions where anticipatory bail is practiced, it is expressly provided for, and its nature, core and effect is regulated in the statute and regulations or rules thereunder. For example, the Indian criminal law has a specific provision for anticipatory bail under Section 438(1) of the *Criminal Procedure Code*. It is also expressly provided that anticipatory bail in India is issued only by the Sessions Court and High Court. This kind of hemming of anticipatory bail becomes necessary due to the very nature of anticipatory bail to become potentially inhibitive of investigative mandate of the police and other investigative organs of the state.

15. A case is, therefore, made out that, prescription of the core, content and scope of anticipatory bail or whatever other order granted in that genre should be properly set out in law or in the jurisprudence creating or adopting it.
16. In Kenya, there is no express provision in law or the *Constitution* prescribing anticipatory bail. the *Constitution* of Kenya, 2010, provides for; (a) bail of arrested person under article 49(1)(h); and (b) appropriate reliefs under article 23(3) for breach or threat of breach of the Bill of Rights.
17. I am aware that arguments have been made that anticipatory bail could be and have been tailored and granted by the court as an appropriate relief under article 23(3) of the *Constitution*. Thus, anticipatory bail is a creature of judicial craft in Kenya- but as the order is granted by different courts so does the relief of anticipatory bail remain at large; increasing the danger of having a relief without specific genre, character, scope, core and content.
18. However, where anticipatory bail has been considered, courts have applied the threshold for an application for violation or threatened violation of right under Article 23 and 165(3) of the *Constitution*. As we engage with this phenomenon, I only find it instructive that the core of orders under Article 23 and 165(3) should be properly-fashioned as to be in accord with the *Constitution* of Kenya, 2010 as redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights should be ascertained.
19. Thus, care should be taken not to adopt an amorphous practice in the name of anticipatory bail which may be a less austere approach for redress for violation or threatened violation of the Bill of Rights and fundamental freedoms intended in the *Constitution*, and perhaps make it a toll to place unnecessary impediment upon constitutional function and mandate of other state organs.
20. In *Republic v Chief Magistrate Milimani & Another Ex parte Tusker Mattresses Ltd & 3 Others* [2013] eKLR Odunga J. appreciated this novel philosophy and the standard required in evaluation of applications for anticipatory bail when he stated as follows:

“However before going to the merits of the instant application it is important to note that what is sought to be prohibited is the continuation of investigation rather than a criminal trial. The Court must in such circumstances take care not to trespass into the jurisdiction of the investigators or the Court which may eventually be called upon to determine the issues hence the Court ought not to make determinations which may affect the investigations or the yet to be conducted trial. That this Court has power to quash impugned warrants cannot be doubted. However, it is upon the ex parte applicant to satisfy the Court that the discretion given to the police to investigate allegations of commission a criminal offence ought to be interfered with. It is not enough to simply inform the Court that the intended trial is bound to fail or that the complaints constitute both criminal offence as well as civil liability. The High Court ought not to interfere with the investigative powers conferred



upon the police or the Director of Public Prosecution unless cogent reasons are given for doing so.”

21. Applying the test, I will therefore treat this application as an application for redress for breach or threat of breach of Rights and fundamental freedom of the applicant.
22. Article 29 of the Constitution of Kenya provides as follows: -
 - “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 cause;
 - b. detained without trial except under a state of emergency in which case the detention is subject to Article 58;
 - c. subjected to any form of violence from either public or private sources;
 - d. subjected to torture in any manner, whether physical or psychological;
 - e. subjected to corporal punishment in a cruel, inhuman or degrading manner.”
23. The applicant has claimed violation and threatened violation of her right and fundamental freedom by the Police at Ratta Police Station. Orders that will impede criminal investigations should be on cogent and constitutionally-sound reasons. For instances as was stated in the case of W’Njuguna v Republic (2004) eKLR, such orders are granted only:

“...when there are circumstances of serious breaches of a citizen’s rights by an organ of the state which is supposed to protect the same.”
24. In Mandiki Luyeye v Republic [2015] eKLR, Ngenye J (as she then was) held as follows:-

“Similar sentiments were observed in the case of Eric Mailu v Republic and 2 others Nairobi Misc. Cr. Application No. 24 of 2013 in which it was emphasized that anticipatory bail would only issue when there was serious breach of a citizen’s rights by organs of state. Accordingly, it is salient that anticipatory bail is aimed at giving remedy for breach of infringement of fundamental Constitutional rights in conformity with what the Constitution envisages constitutes protection of fundamental rights and freedoms of a citizen. It cannot issue where an Applicant labours under apprehension founded on unsubstantiated claims. The fear of breach to fundamental right must be real and demonstrable. An Applicant must demonstrate the breach by acts and facts constituting the alleged breach.”
25. In the case of Republic v Chief Magistrate Milimani & Another Exparte Tusker Mattresses Ltd & 3 Others (Supra), Odunga J held that anticipatory bail ought not to be granted to prohibit investigations.
26. Further in the case of Richard Makhanu v Republic [2014] eKLR, the court held the firm view that orders for anticipatory bail or bond must not be sought with the intention of pre-empting the outcome of investigations- a position that was also held in the case of Kevin Okore Otieno v Republic (2013) eKLR.
27. Thus, any relief by whatever name called say, anticipatory bail, requires courts to ensure that interference with the functions of other bodies and institutions established by law; statute or the Constitution of Kenya, is only on cogent and robust reasons. Merely feeling inconvenienced



by investigations is not sufficient reason for relief. Proof of violation, infringement or threat or contravention of a person's right under the *Constitution* of Kenya is required.

28. The Applicant herein deposes that the Respondents had been harassing her with arrest and causing her mental anguish over a withdrawn charge of grievous harm where, from her annexures, even the victim of the offence had written a letter withdrawing the complaint She has annexed copies of witness statement and the fact that she was already charged in a court of law means that investigations were completed hence no other investigations are pending.
29. However, a withdrawal of the charge under section 87(a) of the *Criminal Procedure Code* is not absolute. The suspect can still be rearrested and charged with the same offence and the applicant's counsel acknowledged this fact in her oral submissions. It follows that investigations having been completed way back in 2022, should the Respondents wish to reopen the case for whatever reason, then they need not harass the applicant. They can issue her with Summons to attend court and take a plea and only when she resists or defaults should they arrest her.
30. Times are gone when suspects who are not armed and who do not pose any danger or threat to the police are handcuffed and bundled into those Mahindra pickups and taken to court in an embarrassing and demeaning manner. Suspects do not waive their right to dignity simply because they are suspects of offences and especially where they are not armed.
31. There is need to cultivate a civilized culture for our police service to remain transformed in word and actions. They are, as a service, expected to approach each case depending on its peculiar circumstances.
32. In my experience both on the bench and bar, despite the police vigorously pursuing suspects and arresting them, and charging them with offences, when it comes to prosecution of those suspects whom they exposed so much to the rest of the world as the worst criminals, they develop their feet and take too long to avail witnesses thereby subjecting suspects to violation of their rights to a speedy trial.
33. When a suspect who has already been to court and the charge withdrawn is harassed and subjected to mental anguish, what benefit does the police or the complainant derive? I find none.
34. An accused person's right to be presumed innocent is violated when in such circumstances, they are harassed and treated like they are already guilty of the offence with which they are suspected of having committed. This then erodes the right to be presumed innocent from the onset with your accusers being your prosecutors and judge.
35. The police should never be agents of torture whether it is physical or mental or psychological. They are expected to be civil in handling suspects and especially suspects who, from the look of things, appear not to be violent at all on seeing the police.
36. Arresting one in a hurried manner is one thing while prosecuting them successfully is another thing all together. Even if the police believe that they have overwhelming evidence against a suspect, they must be civil enough. They ought not to act at the whims of the complainant but act in accordance with the law and the constitutional dictates.
37. In this case, the complainant and the applicant live in the same homestead and their husbands are brothers. They are therefore, essentially, family members. Following the alleged offence of a personal nature against the victim, investigations were carried out and the applicant was charged in court. There is no evidence that she failed to attend court until the charges were terminated against her and she was discharged. There is also no evidence that the applicant escaped after allegedly committing the offence in question and if it is true as submitted by the ODPP that she interfered with witnesses, there are remedies for those kinds of actions.



38. As earlier stated, nothing prevents the police from summoning the applicant and requiring her to attend court on the same charge as the withdrawal of the charge was not an acquittal. The Summons should indicate the accused person's right to appear in court with her advocate for legal representation and submit to the authority of the court for the court process to take off.
39. I reiterate that there are no investigations that the applicant would interfere with if she is not arrested before being charged. If there were any such investigations then nothing prevented the investigators from swearing an affidavit to indicate how the applicant would be required to assist in such investigations and why she must be placed in custody thus seeking custodial orders for a specific time within which to complete those investigations.
40. On the other hand, the applicant must know that she was never acquitted and therefore she is not expected to be indifferent and or harass the police or the complainant.
41. In this case, I am satisfied that the applicant has demonstrated that her right to be presumed innocent is threatened to be violated if she is arrested in the manner that she has described in her supporting affidavit and that albeit this court cannot stop the police or ODPP from charging her with the same offence as that which was withdrawn under section 87(a) of the *Criminal Procedure Code*, this Court can grant anticipatory bail as a temporary reprieve to save her from the mental anguish that she appear to be subjected to leading to her filing of this application.
42. On their part, courts of law remain custodians of the rule of law and therefore the protection and promotion of human rights and fundamental freedoms guaranteed in the *Constitution*. Accordingly, its processes should never be used to settle personal scores. It is for this reason that I concur with what Mumbi J stated in *Rosemary Wanja Mwangiri & 2 Others v Attorney General & 2 Others*, [2013]eKLR that:
- “The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.”
43. Accordingly, I allow the application dated 1st of January, 2024 to the extent that the applicant herein Ruth Awuor Oloo is arrested by this court and is granted anticipatory bail pending any case that may be revived against her in connection with the offence of causing grievous harm which was initially withdrawn against her before Maseno SPM'S Court Criminal Case No. 156 of 2022; conditional upon the applicant depositing into this court a cash bail sum of one hundred thousand Kshs 100,000 within seven (7) days of today upon which she will be required to report to the OCS, Ratta Police Station after every two weeks until a formal charge, if any is presented to court for her to take plea, which formal charge should be presented to court within 90 days of today; and upon such charge being presented to court, the applicant will be required to attend court for plea upon which the bond terms herein granted will lapse and the cash bail so deposited shall be refunded.
44. Pending the payment into court of the cash bail herein granted, the applicant shall not be arrested in connection with the said offence.
45. This file is closed.
46. I so order.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL, 2024

R.E. ABURILI

JUDGE

