



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL MISCELLANEOUS APPLICATION CASE E099 OF 2021**

**SAID MOUSSA MOUSSA.....APPLICANT**

**VERSUS**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF**

**NATIONAL GOVERNMENT .....3<sup>RD</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....4<sup>TH</sup> RESPONDENT**

**THE OFFICE OF THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**RULING**

The applicant **MOUSA SAID MOUSSA**, has moved this court by way of Notice of Motion application dated 31.3.2021. The application is brought under several Constitutional and legal provisions including Articles 22, 258(2), 21, 49, 47, 165(6) and (7) of the constitution of Kenya, and section 12 and part III of the Extradition (Contiguous and Foreign countries) Act, cap 76 Laws of Kenya. The application lists upto 10 prayers as follows:-

1. **THAT** a declaration that the conducts/acts of the Respondents of extraditing the applicant was contrary to and inconsistent with the provisions of part III of the Extradition (Contiguous and Foreign Countries) Act, Cap 76 Laws of Kenya.
2. **THAT** an order directing the Respondents to produce a record of the extradition proceedings before this court.
3. **THAT** an order compelling the Respondents to produce before this court the search and arrest warrant pursuant to section 12 of the Act.
4. **THAT** an order that the actions of the 3<sup>rd</sup> Respondent constitute gross misconduct and abuse of office
5. **THAT** an order compelling the Respondents whether by themselves or through their agents and or officers to allow the re-entry of the applicant into the country.
6. **THAT** an order compelling the Respondents where by themselves or through their agents and or officers to remove/delete the name of the applicant from the list of prohibited persons.
7. **THAT** an order compelling the Respondents whether by themselves and or through their agents and officers to allow the applicant’s peaceful entry, residence, stay, working and or carry our business in Kenya.
8. **THAT** an order that the arrest and detention of the applicant for a period of 13 days by the Respondent and failure to produce him in a court of competent jurisdiction was unconstitutional.
9. **THAT** a declaration that the Respondents violated the constitutional rights of the applicant and in particular Articles 21, 49 and

47.

10. **THAT** an order for adequate compensation for damages for the unlawful arrest, and detention and for deprivation for his constitutional rights in (8) and (9) above by the respondents.

This application is supported by an affidavit of Robert Odanga, advocate for the applicant. The Director of Public Prosecutions (2<sup>nd</sup> Respondent) opposed this application and filed a replying affidavit of the investigating officer, Inspector Andrew Chege.

During the course of the hearing of this application, counsel for the applicant applied to have the investigating officer be cross examined on his affidavit, a request the court granted. The cross examination took place on 7.10.2021. The oral evidence of the investigating officer was that the applicant was removed from the territory of Kenya by order of the Minister on national interest. This followed a request by Interpol and a request from Chad. That the applicant had committed an offence in Chad, and that the minister in the circumstances make an order of deportation. No arrest warrant was obtained from court. Further, that his presence in Kenya is against national interest in the wisdom of the minister, who then declared him a prohibited person, which orders still remain in force.

The investigating officer further stated that the applicant was duly informed of the reason for his arrest. And that as to whether he was legally in Kenya, that is an issue which can only be explained by the Immigration department.

Both sides, by agreement filed written submissions with the applicant side filing further submissions after the oral evidence of the investigating officer.

On the part of the applicant, it was submitted that basically 2 issues are up for determination:

***i) Whether the acts (conducts of extraditing the applicant was contrary to and inconsistent with the provisions of part III of the Extradition (Contiguous and Foreign Countries) Act, Cap 76.***

***ii) Whether the Respondents acts constituted violation of the applicant's rights?***

It was submitted that contrary to section 12 of the said Act, the arrest warrant was neither authenticated nor endorsed by a magistrate, nor signed by a magistrate. That this was in blatant breach of the law. Thus the extradition was without due process, was unlawful, unconstitutional and a violation of his rights. It was further submitted that the violation of his rights were manifested in the fact that he was subjected to 13 days illegal detention, search and confiscation of his property without warrants, and failure to comply with the legal process of extraction.

In the further submissions, counsel for the applicant maintained that the applicant was not deported, but rather extradited. That one is not deported to answer to charges in another country, but rather, it is a case of extradition, these 2 being different procedures. That in the circumstances, the cabinet secretary acted ultra vires and committed an illegality. A plea was made to allow the application as prayed.

The respondents (1<sup>st</sup> and 2<sup>nd</sup> Respondents), on the other hand, submitted that this court lacks jurisdiction in this matter, it being a criminal court. That jurisdiction lies with the Constitutional and Judicial Review Division. Counsel relied on *Meixner Versus Republic (2005)2KLR 189*, that;

***“Judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of the bodies or persons whose decisions are susceptible to Judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or inconsequence of an error of law.”***

It was denied that the rights of the applicant were violated on arrest since it was in the evening of a Thursday, thus within 24 hours' rule in satisfaction of the requirement of Article 49. Counsel also maintained that the cabinet secretary acted rightly under the Kenya Citizenship and Immigration Act, 2011. Counsel urged that this application be dismissed.

I have considered the pleadings filed herein by the 2 sides and the submissions made by the parties. The facts of this case are generally well agreed. That the applicant, a citizen of Chad, resident in Nairobi was arrested by the Kenya Police on 18.3.2021 and placed in at least 2 police stations, Kilimani and later Parklands Police Stations. That the arrest was pursuant to an international warrant of arrest from Interpol, Djamena, Chad, where the applicant was wanted for having committed offences under the Chadian Penal Code. that the applicant was then handed over to Chadian officers on 29.3.2021 and taken back to Chad.

The divergence between the cases of the applicant and that of the respondents are that whereas the applicants case is that this was a case of an unlawful extradition since the said international warrants of arrest were never endorsed or signed by a magistrate in accordance with section 12 of the Extradition (Contiguous and Foreign Countries) Act, Cap 76, it was the case of the Respondents that this was a case of lawful deportation. That the cabinet secretary duly declared the applicant a prohibited person in accordance with section 33(1)(e) of the Kenya Citizenship and Immigration Act, 2011. And that the cabinet secretary duly signed the deportation orders as against the applicant, who was accordingly safely deported to Chad.

The application of the applicant is hinged on section 12 of Extradition (Contiguous and Foreign Countries) Act, Cap 76 Laws of Kenya. As rightly pointed out by the applicant's counsel in the submissions, in case of an extradition, the relevant warrants of arrest ought to be endorsed and be signed by a magistrate. In our case, it has been conceded by the respondents that the warrants of arrest obtained from Interpol, Chad, were never presented before a magistrate of competent jurisdiction for endorsement and or signing. Had this been a case of extradition therefore, one would comfortably arrive at the conclusion that the extradition was executed on the basis of a false process.

The documents placed before court, are however of deportation rather than extradition. The documents and indeed the evidence of the investigating officer show that this was a case of deportation under the Kenya Citizenship and Immigration Act, 2011. At the descriptive section of the said Act, "deportation" is defined;

***"deportation means the action or procedure aimed at causing an illegal foreign national to leave the country either voluntarily or compulsorily, or under detention in terms of this Act and the verb to deport" has corresponding meaning."***

A prohibited immigrant in the said Act means;

***"Prohibited immigrant" means a person declared as a prohibited immigrant under section 33(1)"***

And section 33(1) of the Act defines the many occasions in which one would be a prohibited immigrant. And section 43 of the Act, on power to remove persons unlawfully present in Kenya;

***i) The cabinet secretary may make an order in writing directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act or in respect of whom a recommendation has been made to him or her under section 26A of the Penal Code (Cap 63) shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.***

Since the above provision gives reference to section 26A of the Penal Code, it is important to consider the said provision also. The same only relates to orders for deportation upon conviction and sentence of foreign nationals.

Attached to the affidavit of the investigating officer and to the submissions of the Respondents, several documents have been exhibited. These include:-

***i) An international (warrant of arrest, from the Republic of Chad;***

***ii) Copy of complaint against the applicant i.e allegation regarding loss of US Dollars 1,400,000/=.***

***iii) A letter from advocate, demanding for payment of the money.***

***iv) A signed declaration by the cabinet secretary, under section 33(1) of the Kenya citizenship and Immigration Act, 2011, Laws of Kenya, dated 22.3.2021.***

***v) Fugitive handling/taking over certificate dated 29.3.2021.***

From the above analysis of the case of the respondent, it is clear that the issue of the applicant was handled under the Kenya Citizenship and Immigration Act, 2011. The said Act gives the cabinet secretary power to issue a deportation order against one who is not a citizen of Kenya and whose presence in Kenya is contrary to the national interest. The process was not an extradition under the Extradition (Contiguous and Foreign Countries) Act, Cap 76, as submitted by counsel for the applicant.

Worth noting is that under the Kenya Citizenship and Immigration Act, 2011, there is no requirement or provision that warrants of arrest (if at all) must be approved and or signed by a magistrate of competent jurisdiction. The responsibility of declaring one a prohibited person under the Act lies with the cabinet secretary. Similarly, the responsibility of declaring that the presence of anyone in Kenya is contrary to national interest also lies with the cabinet secretary.

The case of the applicant was therefore based on a different process (Extradition) with very different rules of procedure and a guiding statute. In my view therefore it was not of much help to the applicant to use the rules under the extradition (Contiguous and Foreign Countries) Act, Cap 76, to a process that was carried out under the Kenya Citizenship and Immigration Act, 2011. To this extent therefore, the application of the applicant dated 31.3.2021 fails and no orders prayed for in the same can issue. I accordingly dismiss the same wholly. Orders accordingly.

**D. O. OGEMBO**

**JUDGE**

**25.1.2022.**

**Court:**

Ruling read out in open court (on-line) in the presence of Mr. Mutuma for the state and Ms. Wasida holding brief for Mr. Odanga for the applicant.

**D. O. OGEMBO**

**JUDGE**

25.1.2022.