



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPL. NO. 193 OF 2015

REPUBLIC OF KENYA.....APPLICANT

(thro Cabinet Secretary, Ministry of Interior and
Coordination of National Government)

VERSUS

PAUL GICHERU.....1ST RESPONDENT

PHILIP KIPKOECH BETT.....2ND RESPONDENT

RULING

Brief Background

1. On 1st April 2015, the Cabinet Secretary, Ministry of Interior and Coordination of National Government of the Republic of Kenya received a joint request from the International Criminal Court (ICC) dated 31st March 2015 for the arrest and surrender of Paul Gicheru, an Advocate of the High Court of Kenya and the 1st Respondent herein and Philip Kipkoech Bett, the 2nd Respondent. The Respondents, both citizens of the Republic of Kenya, have been indicted by that court pursuant to **Article 70** of the **Rome Statute** for offences against the administration of justice and warrants of arrest issued against them.

2. On receipt of the request for the arrest and surrender of the Respondents and being satisfied pursuant to **Article 91** of the **Rome Statute** and the **International Crimes Act, 2008**, the Cabinet Secretary notified the Principal Judge of the High Court of Kenya of the request and forwarded the accompanying documents as required under **Section 29** and **30** of the **International Crimes Act, 2008**.

The 1st Application

3. In furtherance of the request by the International Criminal Court, the Applicant has now filed this motion dated 28th May 2015 seeking the following orders;

1. ***“...Spent...***

2. ***THAT*** this Court do issue warrants of arrest against the respondents, PAUL GICHERU and

PHILIP KIPKOECH BETT also known as “KIPSENGERYA”, KIPSENGERAI, pending determination of their eligibility for surrender to the International Criminal Court (ICC) to face charges under Article 70 of the Rome Statute for offences against the administration of justice;

3. THAT the court be pleased to issue orders for the search of the respondents premises where they are arrested or reside at the time of arrest and any such offices utilized by them;

4. THAT the court be pleased to order the seizure of any relevant evidence, such as cell phones, computers or conversations, financial or banking records and/or cash;

5. THAT the court do grant permission for an investigator from the Office of the Prosecutor, International Criminal Court, to be present during the execution of any such searches and seizures;

6. THAT any evidence seized to be transmitted to International Criminal Court;

7. THAT upon arrest, the respondents be brought before the Court as soon as possible for the court to determine the issue of remand and bail in accordance to Section 35 (4) of the International Crimes Act;

8. THAT upon arrest, the respondents be brought before the Court as soon as possible and the Court do make a determination on the eligibility for the respondents’ surrender from Kenya to the International Criminal Court to face charges for offences against the administration of justice as set out in the warrant of arrest submitted by the International Criminal Court;

9. THAT pending hearing and determination of eligibility for surrender of the respondents, the Court be pleased to make such orders on the remand of the respondents as may be expedient.

10. THAT the Court do issues such other orders and directions as are expedient in the interest of justice.”

4. The application is premised on the grounds set out in the motion as well as the affidavit deposed by Hon. Maj. Gen. (Rtd) Joseph Nkaisserry, MGH, CBS, Cabinet Secretary, Ministry of Interior and Coordination of National Government (now deceased) dated 28th May 2015.

5. At the hearing, the Attorney General made an application to be allowed in the proceedings as *amicus curiae*. There was also an application by a Mr. Wilfred Ngunjiri Nderitu to come on record as an Interested Party since he is representing victims of post-election violence at the cases in the International Criminal Court. Both applications were allowed.

6. On 28th May, 2015, the court, (Lessit J.,) issued certain orders in terms of prayer 1. Further, prayers 2, 3, 4 and 5 in the terms set out in the motion were also granted. Prayers 6-10 were to await further directions of the court.

7. Consequently, on 30th July 2015, this court *inter alia* directed that;

(a) “The warrant of arrest issued by this court is stayed pending the hearing and determination of the application.

(b) The 1st Respondent and the 2nd Respondent are hereby released on their own personal bonds of Kshs.500,000/-. They shall be required to be present in court during the hearing until further order of the court.”

The Applicant’s case

8. The applicant's case is largely contained in the originating notice of motion and the supporting affidavit of Hon. Maj. Gen. (Rtd) Joseph Nkaisserry (now deceased). It is the Applicant's case that a request was made by the International Criminal Court pursuant to **Paragraph 1** of **Article 89** of the **Rome Statute** for the arrest and surrender from Kenya of the Respondents against whom the Pre-trial Chamber issued a warrant of arrest pursuant to **Article 58** of the **Rome Statute**. The request for arrest and surrender, it was averred, was made to Kenya and received through the authorized channels by the Minister responsible for Internal Security. It was further stated that the request is supported by the information and documents required by **Article 91** of the **Rome Statute** and the **International Crimes Act, 2008**. Additionally, it was urged that the International Criminal Court requested for the search of the Respondents' premises and seizure of any material evidence found on them.

9. The Applicant contends that on the basis of the information presented by the International Criminal Court, the Respondents are suspected of being in Kenya; and that there are reasonable grounds to believe that the respondents are the persons whom the joint request relates to and that they are eligible for surrender in relation to the offences against the administration of justice for which they have been indicted before the International Criminal Court.

2nd Application and the 1st Respondents' case

10. In opposition to the motion and in response thereto, the 1st Respondent filed an affidavit dated 9th November 2015. Further to this, the 1st Respondent has filed an application dated 19th November 2015 seeking for orders;

1. "...Spent..."

2. THAT the Honourable Court be pleased to set aside the orders dated 29th May 2015.

3. THAT the Honourable Court be pleased to quash the warrant of arrest against Paul Gicheru issued of 28th May 2015.

4. THAT the Honourable Court be pleased to issue a stay of the request by the International Criminal Court dated 30th March 2013 for the arrest and surrender of Paul Gicheru unless and until the Cabinet Secretary, Ministry of Interior and Coordination of National Government makes Regulations under Section 172 and 173 of the International Crimes Act, 2008.

5. THAT the Honourable Court be pleased to quash the decision of the Cabinet Secretary, Ministry of Interior and Coordination of National Government to execute the International Criminal Court request for arrest and surrender of Paul Gicheru contained in his letter dated 14th May 2015 addressed to the Director of Public Prosecutions.

6. THAT cost of this application be borne by the Republic of Kenya."

11. The application is premised on the grounds contained in the motion as well as the 1st Respondent's supporting affidavit dated 19th October 2015.

12. It is the 1st Respondent's case that in his capacity as an Advocate, he dealt with one of the alleged witnesses of the International Criminal Court Prosecutor. He states that the warrant of arrest issued against him is on the premise that he induced, solicited or corruptly influenced International Criminal Court witnesses to withdraw as prosecution witnesses. Accordingly, he states that unless he acted in contravention of his duty as an Advocate, then he cannot be found culpable of criminal conduct and thus cannot be subject of criminal proceedings.

13. The 1st Respondent states that the International Criminal Court's request for arrest and surrender is actuated and vitiated by vengeance against him *mala fides* and gross abuse of power stemming from his

unwillingness to co-operate with International Criminal Court's investigators and prosecutors in connection with the withdrawal of Samuel Kimeli Kosgei as a witness in the International Criminal Court Case No. 1.

14. He contends that provisions under the **International Crimes Act**, particularly **Sections 28, 29 and 30** are unconstitutional for being in violation of **Articles 10, 24, 27, 28, 29, 47 and 50** of the **Constitution** of Kenya. Further, that the warrant of arrest dated 28th May 2015 violates his rights under the aforementioned Constitutional provisions. The 1st Respondent argues that given the prejudicial nature of the Cabinet Secretary's decision to authorize the execution of the International Criminal Court's request, he ought to have been granted a hearing before the invocation of **Section 29** of the **International Crimes Act, 2008**.

15. The 1st Respondent further contends that **Sections 32, 172 and 173** of the **International Crimes Act, 2008** read together with **Articles 20, 24 and 47** of the **Constitution** require the Cabinet Secretary to make regulations to, *inter alia*, prescribe the procedure to be followed in dealing with requests made by the International Criminal Court bearing in mind the requirements of due process of law and the rights of the Respondents.

16. According to the 1st Respondent, under **Section 32** of the **International Crimes Act**, a Judge of the High Court cannot lawfully issue a provisional warrant unless and until the Cabinet Secretary has made rules of procedure envisaged under **Sections 172 and 173** of the **International Crimes Act, 2008** in order to protect the 1st Respondent's right to protection of law, liberty and fair hearing as enshrined in **Articles 27, 29 and 50** of the **Constitution**.

17. In further support of the 1st Respondent's case, there is deposed an affidavit by Samuel Kimeli Kosgei, the 1st Respondent's client dated 18th August 2016. He averred that the 1st Respondent prepared an affidavit on his behalf for purposes of recanting all the evidence that the Office of the International Criminal Court Prosecutor had purportedly attributed to him which was then forwarded to the International Criminal Court which acknowledged receipt of the same.

18. Mr. Kosgei stated that following the aforesaid affidavit, the office of the Prosecutor tried to contact him and the 1st Respondent in bid to have him change his position but to no avail. It is thus against this backdrop that the warrants of arrest were issued against him and the 1st Respondent for alleged interference with witnesses.

The 2nd Respondent's case

19. In opposing the request for arrest and surrender by the International Criminal Court and opposing the motion by the State, the 2nd Respondent has deposed an affidavit dated 19th October 2015. It is his case that he was going about his business when he was arrested and charged together with the 1st Respondent for allegedly corruptly influencing International Criminal Court witnesses in the case against Hon. William Samoei Ruto and Joshua Arap Sang.

20. The 2nd Respondent asserts that, not only is the motion fatally defective, but that the averments contained in the supporting affidavit are in utter violation of **Constitution** and his rights as enshrined therein. According to the 2nd Respondent, Kenyan courts are clothed with jurisdiction to try offences that the International Criminal Court has indicted him for. He further states that he ought to be furnished with all the statements, recordings, evidence and identities of persons that the International Criminal Court relied on in issuing the warrants for his arrest to enable him prepare his defence.

21. In denying the charges against him by the International Criminal Court, the 2nd Respondent states that he is a person of meager means and as such could not be said to be in a position to influence a witness with millions of shillings as stated in the charges.

Arguments in Court

The Applicant's submissions

22. At the hearing, Mr. Mule and Ms. Obuo urged the State's case. In support of the application dated 28th May 2015, it was counsels' submission that they now seek prayer No.8 since prayers 1, 2, 7 and 9 had been overtaken by events. Accordingly, it was urged that the court ought to determine the eligibility of the Respondents to be tried by the International Criminal Court. It was also stated that prayers 3, 4, 5, and 6 sought in the motion relate to material evidence seized from the Respondents at the time of arrest which should also be transmitted to the International Criminal Court.

23. It was Mr. Mule's submission that since the request for arrest and surrender by the International Criminal Court had satisfied the relevant statutory legal framework, then the question for determination would be the eligibility of surrender under **Section 39** of the **International Crimes Act, 2008** and **Section 30** on the question of eligibility for surrender. On that question, it was submitted that the legitimacy of arrest warrant has not been disputed. It was contended that the Respondents were the persons named in the warrant, that they were arrested after due process in form of the *Miranda Rules* were applied; that they were granted bond after being arrested pursuant to the warrant of arrest issued by this court (Lessit J.), and that the Respondent's rights have been respected.

24. With regards to the evidence seized, it was submitted that the orders pertaining the same should be suspended.

25. It was further submitted that none of the Respondents had addressed the question of eligibility. This, it was stated should have been challenged under **Articles 17, 18** and **19** of the **Rome Statute** together with **Rules 51 - 62** of the **Rules of Procedure and Evidence** of the **International Criminal Court** and as such would have enabled the court to stay proceedings under **Section 56** of the **International Crimes Act, 2008**. Additionally, it was submitted that the court is supposed to consider exceptional circumstances in accordance with **Section 19** of the **International Crimes Act, 2008**.

26. On the issue of quashing the warrant of arrest, it was submitted that a court of equal jurisdiction cannot quash a warrant as in this case.

27. To further urge the Applicant's case, Ms. Obuo submitted that the provisions under **Part IV** of the **International Crimes Act, 2008** are legal. It was urged that Kenya having ratified the **Rome Statute**, is obligated to domestic it, hence the **Act**. Kenya is thus enforcing her obligation under **Article 26** of the **Vienna Convention on the Law of Treaties** which it must perform in good faith.

28. On the question of jurisdiction, it was submitted that this court has jurisdiction by dint of **Section 37** of the **International Crimes Act**. On eligibility, it was submitted that by virtue of **Section 39(b)** of the **International Crimes Act, 2008** no evidence ought to be adduced. This can only be canvassed before the International Criminal Court.

The Interested Party's' Submissions

29. Mr. Nderitu made submissions on behalf of the interested party. In relying on the submissions filed in court, and in support of the State's application dated 28th May 2015, it was the Counsel's submission that this court has jurisdiction to hear and determine the application contained in the motion. Reliance was placed on **Section 30** of the **International Crimes Act, 2008** on the question of whether the Respondents are eligible for arrest and eventual surrender.

30. According to the Interested Party, there has been no violation of **Articles 10, 24, 27, 28, 29, 47** and **50** of the **Constitution**. It was further urged that it was within the mandate of the Cabinet Secretary to proceed in the manner that he did.

Amicus Curiae's brief

31. Mr. Mutinda presented the *amicus brief*. It was his submission that since Kenya is a party to the International Criminal Court, it had obligation to domesticate the statute under the **International Crimes Act, 2008** thus, the court should bear in mind the duty of the State to co-operate with the International Criminal Court.

32. On the question of jurisdiction, it was submitted that by virtue of the **Rome Statute** of the International Criminal Court and **International Crimes Act, 2008** that Kenya has enacted, jurisdiction on offences against the administration of justice is a shared jurisdiction. It can thus be invoked by either **Rules 162(1) or 162(3)** of the **Rome Statute**. On the question of waiver of jurisdiction, it was submitted that this has to be made to the International Criminal Court. In this instance, it was submitted that the Attorney General has not made such a request.

33. On the issue of absence of Regulations on arrest and surrender, it was the Attorney General's submission that the same cannot be a basis to invalidate the present proceedings or to deny a party before court a remedy. Whichever process is employed by the court, it was submitted, it safeguards the rights of all the parties.

1st Respondent's submission

34. Extensive submissions were made on behalf of the 1st Respondent by Mr. Kibe and Dr. Khaminwa. In opposing the State's application and in urging the 1st Respondent's application, it was Mr. Kibe's submission that the matter of arrest is governed by the municipal laws of a country. In this instance, the **Constitution of Kenya**. Mr. Kibe further submitted that, the **International Crimes Act, 2008** predates the **Constitution 2010** hence the provisions therein must be interpreted subject to adaption, alterations, qualifications and exceptions necessary to bring it in conformity with the **Constitution**. He submitted that the jurisdiction of the International Criminal Court is complementary to national jurisdiction hence the principle of complementarity; extraction cannot be granted as a matter of principle where fair trial cannot be guaranteed as observed in the case of **Toroha vs. Republic (1989) KLR 630**. According to Mr. Kibe, the 1st Respondent is facing allegations of criminal culpability because of his representation of a prosecution witness at the International Criminal Court who withdrew as a witness in one of the cases before the International Criminal Court. Under Kenyan law, it was submitted, an Advocate has a right to represent both good and bad clients.

35. On the issue of jurisdiction, it was submitted that by dint of **Article 50(2)(d)** of the **Constitution**, the 1st Respondent is not eligible for trial before the International Criminal Court. It was Mr. Kibe's submission that the Kenya Government cannot facilitate the trial of a Kenyan in another court. It was his further submission that because Kenya ratified the **Rome Statute** and further, taking into consideration the issue of complementary jurisdiction, then **Article 1** of the **Rome Statute** should be read with **Article 50(2)(d)** of the **Constitution**. The issue, it was said, can only arise if it is established that Kenya has failed to co-operate with the International Criminal Court. The court was told that jurisdiction is both procedural and substantive, and as such, procedurally, the Director of Public Prosecutions (DPP) is yet to determine in accordance with **Section 18** of the **International Crimes Act, 2008** and **Article 70** of the **Rome Statute** whether or not the Respondents should be tried in Kenya. He also submitted that there were no regulations which the Minister was supposed to formulate under **Section 72** of the **International Crimes Act**. Thus, in the absence of these regulations, the Director of Public Prosecutions has no power to act in the manner that he did. He emphasized that the question of regulations lie at the heart of these erroneous proceedings. Thus, there cannot be satisfaction without a legal procedure. To support his submissions, Mr. Kibe placed reliance on the cases of **Trusted Society for HR vs. Cabinet Secretary for Devolution & 3 Others [2017] eKLR** and **Peter Gichuki Kingara vs. IEBC [2014] eKLR**.

36. It was Mr. Kibe's submission that the application is incurably defective. He contended that the court cannot issue orders in a miscellaneous Application.

37. He contended that the **Constitution** of Kenya prohibits the prosecution of any Kenyan by the International Criminal Court in respect of any crimes under the laws of Kenya or under **International**

Law that is triable in a court of competent within the jurisdiction in Kenya.

38. He submitted that contrary to the provisions under **Article 157(10)** of the **Constitution of Kenya**, the proceedings herein were commenced under the authority of the International Criminal Court. According to him, the Director of Public Prosecutions ought to have prosecuted the Respondents in Kenya under **Sections 18 and 19** of the **International Crimes Act, 2008** and the relevant provisions of the **Rome Statute**.

39. As regards **Section 30** of the **International Crimes Act, 2008**, Mr. Kibe drew the court's attention to the provisions under **Article 29** of the **Constitution of Kenya**. He stated that, the issue of warrant of arrest in extradition is serious and reference must be made to the **Constitution**. Further, that for purposes of surrender proceedings, evidence must be given *prima facie* and the judge must be satisfied that there is a just cause. The court was urged to do more than what is required under **Section 39** of the **International Crimes Act, 2008**. As regards **Section 42** of the same **Act**, it was submitted that the court ought to make inquiry and that it cannot just be an executor of a formal process. It was also submitted that under **Section 19(2)** of the **International Crimes Act**, surrender may be unjust or oppressive as is the instant case, thus the court can decline to order for surrender.

40. On constitutionality of **Part IV** of the **International Crimes Act**, it was submitted that **Section 7** to the **6th Schedule** of the **Constitution of Kenya** addresses laws that were in existence before the promulgation of the **Constitution of Kenya**. Thus, the invocation of **Article 2(b)** of the **Constitution, 2010** is to the effect that any treaty applies to the extent of consistency, with the laws of Kenya. With regard to **Section 37** of the **International Crimes Act, 2008**, it was Mr. Kibe's submission that the court must consider the right to information and evidence under the **Constitution**. Thus, evidence must be placed before court to be persuaded that surrender is valid as such, the Minister is estopped from only producing a charge sheet and warrant of arrest.

41. In furtherance of the 1st Respondent's case, Dr. Khaminwa submitted the court has discretion in administering justice and that the same cannot be taken away by the Rome Statute. In particular, Dr. Khaminwa submitted that **Article 59(1)** of the **Rome Statute** provides for "**arrest proceedings in the State party**". He thus, submitted that the laws of Kenya apply in such arrest and surrender. Dr. Khaminwa also submitted that the Director of Public Prosecutions' discretion has not been taken away, therefore, he still has discretion to decide whether or not to prosecute the Respondents.

42. Dr. Khaminwa submitted that the 1st Respondent being a respectable and able Advocate and the Chair of the Procurement Review Board, criminal charges made against him should not be taken lightly. He submitted that there was an advocate –client relationship between the 1st Respondent and his client who had initially made a complaint to the International Criminal Court before seeking his services. The complaints, it was stated alluded to unethical conduct by the officers attached to the Court and the withdrawal of Samuel Kimeli as a witness for the prosecutor. Accordingly, he submitted that there was no evidence of misconduct by the 1st Respondent in representing his client.

2nd Respondent's submissions

43. Mr. Kiprono and Mr. Kosgei urged the 2nd Respondent's case. In associating himself with the submissions made on behalf of the 1st Respondent, it was Mr. Kiprono's submission that the Director of Public Prosecutions has ceded his authority since powers to prosecute under the **Constitution of Kenya** are vested in him. It was further submitted that contrary to the provision of **Article 157(10)** of the **Constitution**, the Director of Public Prosecutions was being directed by an organ not recognized under the **Constitution of Kenya, 2010**. As such, it was submitted that the application was invalid.

44. As regards eligibility for arrest, it was submitted on behalf of the 2nd Respondent that the request for surrender should be in accordance with **Section 137** of the **International Crimes Act, 2008** and as such, the court exercises criminal jurisdiction. However, it was stated that the rights of Respondents under the **Constitution** must come into play. In this regard, the court was told that it ought to consider whether the

constitutional threshold was met. It was stated that where statute does not incorporate matters of due process, the **Constitution** should then be applied.

45. On the issue of complementarity, it was submitted that the Director of Public Prosecutions plays a complementary role of prosecution in the national criminal jurisdiction of Kenya as a State party of the International Criminal Court. Thus, in this regard, it was submitted that national courts are the courts of first instance. The Director of Public Prosecutions, it was urged, can only abdicate this responsibility when the national court is unwilling and unable to prosecute a case.

46. It was counsel's submission that the single judge at the Pre-trial Chamber in issuing the warrants stated that the court may consult State parties and may have jurisdiction to deal with the case, however, it held that an effective prosecution may not be able to be mounted by the State. Further, it was Mr. Kiprono's submission that no evidence was adduced to support this assertion.

47. In looking at the special circumstances, it was contended that the Minister or the Attorney General should have considered the same given that **Section 19(2)** of the **International Crimes Act, 2008** gives him powers to refuse to accede to the surrender. It was contended that the Minister ought to have been satisfied first that the constitutional threshold was met, as failure to guarantee such safeguards constitutes exceptional circumstances.

48. Mr. Kosgei submitted that this is the only court that can determine whether or not the Respondents are eligible for surrender. He further submitted that the particulars as regards the 2nd Respondent are not attributable to him. It was stated that the 2nd Respondent has a right under **Article 50(2)(b)** of the **Constitution** to be provided with information so that he can adequately prepare his defence. Finally, he urged that the **International Crimes Act, 2008** and International treaties that Kenya is a signatory to are inferior to the **Constitution** which ought to be adhered to at all times.

Discussion and Analysis

49. This application brings to the fore the question of the respective jurisdictions of this court, as a national court which has jurisdiction to interpret the **Constitution of Kenya 2010** as provided under **Article 165(3)(d)** and specifically **Article 165(3)(b)** which grants this court "**jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened**" and that of the **International Criminal Court** which has jurisdiction in certain cases specified in the **International Crimes Act, 2008** and the **Rome Statute of the International Criminal Court**.

50. **Article 2** of the **Constitution** of Kenya, 2010 provides that:

"(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorized under this Constitution.

(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

51. The Applicant's application is predicated on **Article 157(6) and (7) of the Constitution**, the inherent powers of the court and **Sections 4, 19, 20, 23, 28, 29, 30, 35, 37, 39, 72, 73, 96 and 97 of the International Crimes Act, 2008** and **Articles 89 and 91 of the Rome Statute of the International Criminal Court**. The preamble of the **International Crimes Act, 2008** provides that:

“An act of Parliament to make provision for the punishment of international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to cooperate with the International Criminal Court established by the Rome Statute in the performance of its function.”

52. **Section 4(1)** of the **International Crimes Act** provides that:

“The provisions of the Rome Statute specified in subsection (2) shall have the force of law in Kenya in relation to the following matters-

- (a) the making of requests by the ICC to Kenya for assistance and the method of dealing with these requests;*
- (b) the order of an investigation by the Prosecutor or the ICC;*
- (c) the bringing and determination of proceedings before the ICC;*
- (d) the enforcement in Kenya of sentences of imprisonment or other measures imposed by the ICC, and any related matters;*
- (e) the making of requests by Kenya to the ICC for assistance and the method of dealing with those requests.”*

53. **Section 7** of the **Act** provides thus:

“(2) For the purposes of any such proceedings-

- (a) the provisions of Kenyan law and the principles of criminal law applicable to the offence under Kenyan law shall apply, and*
- (b) a person charged with the offence may rely on any justification, excuse, or defence available under the laws of Kenya or under international law:*

Provided that-

- (i) in the event of any inconsistency between the provisions specified in subsection (1) and the provisions and principles specified in paragraph 9(a) of this subsection, the provision specified in subsection (1) shall prevail; and*
- (ii) the fact that an act done outside Kenya is not an offence under the law of the place where it was done shall not be held to be any justification, excuse, or defence.*

(4) For the purposes of subsection (1), the articles of the Rome Statute specified in that subsection (other than article (20) shall apply as if-

- (a) a reference of the ICC were a reference to the Kenyan court exercising jurisdiction in respect of the proceedings; and*
- (b) a reference to the Rome Statute included a reference to this Act.*

(5) For the purposes of interpreting and applying articles 6 and 8 of the Rome Statute in

proceedings for an offence under section 6-

(a) the Kenyan Court exercising jurisdiction in the proceedings shall have regard to any elements of crimes adopted or amended in accordance with article 9 of the Rome Statute; and

(b) provisions of the Penal Code, to the extent of any inconsistency with the application of paragraph (a), shall not apply.”

54. For the avoidance of doubt, **Section 7(3)** of the **Act** does not exist.

55. **Section 9** to **17** of the **International Crimes Act** sets out offences against administration of justice. These sections more or less mirror **Article 70** of the **Rome Statute** in regard to what the Statute sets out as offences against the administration of justice.

56. **Section 18** of the **Act** provides thus:

“A person who is alleged to have committed an offence under any of sections 9 to 17 may be tried and punished in Kenya for that offence if-

(a) the act or omission constituting the offence is alleged to have been committed in Kenya or on board an aircraft or vessel which is registered in Kenya; or

(b) at the time the offence is alleged to have been committed, the person was a Kenyan citizen or was employed by Kenya in a civilian or military capacity; or

(c) the person is, after commission of the offence, present in Kenya.

(2) A trial authorized by this section to be conducted in Kenya may be conducted in any court of competent jurisdiction.”

57. It is common ground that Kenya is a signatory to the Rome Statute of the International Criminal Court.

58. The preamble of the **Rome Statute** of the **International Criminal Court** provides that the International Criminal Court established under the Statute shall be complementary to national criminal jurisdictions. In that regard, **Article 1** of the **Rome Statute** specifically provides that the court in exercise of its jurisdiction *“shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the court shall be governed by the provisions of this Statute.”*

59. **Article 17** of the **Rome Statute** sets out the circumstance under which the International Criminal Court may admit a case in its jurisdiction. It provides thus:

“(1) Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, Paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of the process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse of unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

60. In the present Application, the applicant has applied for this court to issue a warrant of arrest against the Respondents, and thereafter determine the eligibility of the Respondents to be surrendered to the International Criminal Court to face the charges under **Article 70** of the **Rome Statute** for offences against the administration of justice. The Applicant further asks the court to issue an order for the seizure of any relevant evidence, including cellphones, computers, diaries, notes or recordings of meetings or conversations, financial or banking records from the Respondents. The Applicant further asks the court to grant permission to the investigators from the Office of the Prosecutor of the International Criminal Court to be present during the execution of such searches and seizures. The Applicant further asks the court to direct that such evidence that shall be seized be transmitted to the International Criminal Court.

61. In the affidavit in support of the application, Major Gen. (Retired) Joseph Nkaissery (now deceased), the then Cabinet Secretary Interior and Coordination of National Government, swore that upon receipt of the request from the International Criminal Court, he was satisfied that such request was valid and should be presented to this court for appropriate consideration. In particular, he deponed that:

“8. THAT upon receipt and perusal of the said request and the accompanying documents, I am satisfied that the request:

a. Is Supported by the information and documents required by article 91 of the Rome Statute and the International Crimes Act, 2008.

b. Satisfies all the requirements of the law in Kenya and the Rome Statute.

9. THAT on the basis of the information presented by the ICC, I am satisfied that:

a. The persons named therein are suspected of being in Kenya;

b. There are reasonable grounds to believe that the respondents are the persons to whom the joint request from the ICC relates;

c. The respondents are eligible for surrender in relation to crimes against the administration of justice for which they have been indicted before the ICC;

10. THAT having been satisfied as aforesaid, I notified the Principal Judge of the High Court of

Kenya of the request and forwarded the accompanying documents as required under Section 29 and 30 of the International Crimes Act, 2008.”

62. The Respondents have objected to the application on the grounds that it was unconstitutional and further that the Cabinet Secretary Ministry of Interior and Coordination of National Government had no jurisdiction to apply to the court to for the surrender of the Respondents without first satisfying the conditions precedent stipulated in **Articles 10, 24, 27, 28, 29, 47 and 50** of the **Constitution** and **Sections 18, 29, 172 and 173** of the **International Crimes Act**. In essence, the Respondents are submitting that their rights to fair trial and due process as protected by the **Constitution** must first be adhered to before the Cabinet Secretary can purport to present an application for their surrender to the International Criminal Court.

63. On his part, the Attorney General, as *amicus curiae*, submitted in regard to the constitutionality of the application that:

“We submit that the ICA (International Crimes Act) is constitutional based on the above analysis. It is evident that Kenya, through a process of domestication, and the people of Kenya in exercise of their sovereign will through their constitutionally mandated representatives in Parliament, have in exercise of such sovereignty, ratified, adopted, incorporated and received the Rome Statute, including the provisions not domesticated, as part of the law of Kenya under the supremacy of the Constitution. We urge your lordship to uphold the decision of the applicant herein to apply for the warrant of arrest under the provisions of the law.”

64. Mr. Nderitu, the advocate for the Victims supported the application.

65. Having carefully evaluated the applicable law and the rival submission made in this application, it is clear to this court that the matter in issue is determinable on the question of jurisdiction.

66. The International Criminal Court, in seeking the surrender of the Respondents, is exercising a complementary jurisdiction to that of this court as provided in the **Preamble** and **Article 1** of the **Rome Statute**. This is more so in respect of an alleged offence against the administration of justice. Before the International Criminal Court exercises this jurisdiction, it had to satisfy itself of the precondition set out in **Article 17** of the **Rome Statute** particularly **Article 17(2)**.

67. The single Judge of the Pre-trial Chamber (Judge Ekaterina Trendafilova) was aware of this fact when she considered the application made by the Prosecutor of the International Criminal Court seeking the issuance of the warrant of arrest of the Respondents. In Paragraph 6 of the decision, the Learned Judge stated thus:

“6. With respect to the appropriateness of exercising jurisdiction, rule 162(2) of the Rules provides, as examples, a number of factors which the Chamber may consider in making a decision whether or not to exercise jurisdiction over offences against the administration of justice under article 70 of the Statute. Rule 162(1) of the Rules also states that before making this decision, the Court “may consult with States parties that may have jurisdiction over the offence”.

7. The Single Judge considers that based on the available information before the Chamber,⁵ an effective national prosecution is unlikely to take place in the particular circumstances of the present case. Moreover, the size and extent of organization of the alleged criminal effort to corruptly influence witnesses of the Court, as they appear from the evidence provided by the Prosecutor in support of the Application, as well as the related concerns for witness protection, including the general security situation with regard to persons associated with proceedings of the Court, are reasons overwhelmingly militated in favour of the exercise of the jurisdiction of the Court. In these circumstances, the Single Judge also does not consider that there is a need to consult with any State Party that may have jurisdiction over the offences allegedly committed.”

5. Application, para 14

68. The Single Judge of the Pre-trial Chamber of the International Criminal Court assumed jurisdiction in the case involving the Respondents after she had been moved in an application filed by the Prosecutor of the International Criminal Court. The application was made *ex parte* without reference to any other concerned party, including Kenya which is a State Party, and which it is expected it would comply with the request for assistance to secure the surrender of the Respondents.

69. The Single Judge of the Pre-trial Chamber was aware under the **Paragraph 10** of the **Preamble**, **Articles 1, 17, 70** of the **Rome Statute** of the **International Criminal Court** and **Rule 162** of the **Rules of Procedure and Evidence** of the **International Criminal Court**, the court with the primary jurisdiction to hear and determine any charges relating to offences against the administration of justice is a national court of a State Party hence the requirement for the International Criminal Court to “**consult**” with the State Party that “**may have jurisdiction over the offence**” (See **Rule 162(1)** of the **Rules**.).

70. For the Single Judge of the Pre-trial Chamber to base her decision on “**available information before the Chamber**” that “**an effective national prosecution is unlikely to take place in the particular circumstance of the present case**” without first consulting Kenya as a State Party on whether it is willing to prosecute the Respondents on the basis of the evidence that the Prosecutor of the International Criminal Court has, is to say the least, contrary to **Article 17** of the **Rome Statute** of the **International Criminal Court** where the court was required to defer to a State Party “**unless the State is unwilling or unable genuinely to carry out the investigation or prosecution**” (See **Article 17(1)(a) and (b)** of the **Rome Statute**).

71. In making the decision, the Single Judge of the Pre-trial Chamber denied Kenya, a State Party, the primary opportunity to investigate and prosecute the Respondents as provided under **Section 18** of the **International Crimes Act**. This court shudders to imagine that the Single Judge of the Pre-trial Chamber chose not to consult Kenya because that court had determined, without input from Kenya, that the State fell in the category of States defined in **Article 17(3)** of the **Rome Statute** i.e. that Kenya’s criminal justice system suffers from “**total or substantial collapse or unavailability of its national judicial system...**”

72. The Respondents justifiably complained that the Cabinet Secretary, Ministry of Interior and Coordination of National Government, the Director of Public Prosecutions and the Attorney General shirked and abdicated their responsibilities as State Officers to uphold the national value and principles of governance as provided under **Articles 10** and **259(1)** of the **Constitution**. These officers, when confronted with the request made by the International Criminal Court, firstly, for the arrest, and secondly, for the surrender of the Respondents, instead of making inquiry whether the Pre-trial Chamber of the International Criminal Court had jurisdiction to issue such orders without consulting Kenya as a State Party to the **Rome Statute** or considering whether to assume jurisdiction as provided under **Section 18** of the **International Crimes Act** and in accordance with the **Constitution** of Kenya and the **Rome Statute** of the **International Criminal Court**, filed the present application.

73. This court agrees with the submission made on behalf of the Respondents that their fundamental rights and freedoms to fair trial as enshrined under **Article 25(c)** of the **Constitution**, which cannot be limited or abridged under any circumstances would be breached if the court allowed the application made by the Applicants.

74. Mr. Mule for the Applicant submitted that this court had no jurisdiction to inquire into the validity or otherwise of the order issued by the Pre-trial Chamber of the International Criminal Court. He further submitted that if the Respondents were aggrieved by the decision of the Pre-trial Chamber, they were at liberty to challenge the said decision before the Pre-trial Chamber itself as provided under **Article 19** of the **Rome Statute**. In essence, this court heard Mr. Mule say that this court had no option but to allow the application for the arrest and subsequent surrender of the Respondents to the International Criminal Court.

75. The question that Mr. Mule on behalf of the Applicant was not able to satisfactorily explain to this court was what role he perceived this court is to play in the application presented before it. Mr. Mule submitted that this court's role in the application was restricted to facilitating cooperation with the International Criminal Court as provided under **Articles 87, 88 and 89** of the **Rome Statute**. Mr. Mule was saying that this court's hands were tied from making any inquiry into the process that the Pre-trial Chamber reached its decision to request for the surrender of the Respondents and that the Cabinet Secretary was entitled to make the present application without making inquiry whether Kenya, under the **Constitution** and the **Law**, had primary jurisdiction to try the Respondents in Kenya.

76. The Respondents challenged this position.

77. Upon evaluating the submission made by the parties before this court, it was clear to this court that the position taken by the Applicant in regard to the role of this court is not only unconstitutional but in breach of the self-same **Rome Statute** that provide procedure to be adopted under **Articles 17 and 70** of the **Rome Statute** of the **International Criminal Court** in regard to offences against the administration of justice.

78. This court has reached this determination on the basis of the following reasons:

(a) The Pre-trial Chamber of the International Criminal Court is a court of complementary status with this court. Under **Section 18** of the **International Crimes Act**, this court has the primary jurisdiction to try persons accused of offences against the administration of justice allegedly committed within its jurisdiction. The Pre-trial Chamber of the International Criminal Court clearly fell in error when it assumed jurisdiction on the basis of undisclosed "**available information before the court**" that "**an effective national prosecution is unlikely in the particular circumstances of the present case**" and that "**in the circumstances, the Single Judge also does not consider there is need to consult any State Party that may have jurisdiction over the offences allegedly committed.**" No evidence was presented to this court by the Applicant to support the above contention by the Single Judge of the Pre-trial Chamber that Kenya, as a State Party, is unwilling or unable to investigate and prosecute the Respondents if such evidence of the commission of offences against administration of justice was presented to the constitutionally mandated organs of the Republic of Kenya. It will not do for the Single Judge of the Pre-trial Chamber to reach a finding to the effect that "**national prosecution is unlikely in the particular circumstances of the present case**" without the Single Judge of the Pre-trial Chamber first consulting with the State Party (Republic of Kenya) as required under **Rule 162(1)** of the **Rules of Procedure and Evidence** of the International Criminal Court. The least the International Criminal Court Prosecutor could do was to avail such evidence before this court to persuade it that such finding was made on the basis of credible evidence. The Single Judge of the Pre-trial Chamber overlooked the law which grants Kenya, a State Party, the primary mandate to investigate, prosecute and try offences against the administration of justice alleged committed within its jurisdiction unless inability or procrastination is established. This court holds that the above finding reached by the Single Judge of the Pre-trial Chamber of the International Criminal Court is speculative in so far as no attempt was made by the Single Judge of the Pre-trial Chamber or the Office of the Prosecutor of the International Criminal Court to consult the necessary State Party (in this case, the Republic of Kenya).

(b) The Cabinet Secretary, Ministry of Interior and Coordination of National Government, the Director of Public Prosecution and the Attorney General neglected or abandoned and or failed in their duty to uphold the sovereignty of the people of Kenya as provided under **Article 1(1)** of the **Constitution** and in particular, by failing to exercise their delegated functions as provided under **Article 3(b)** of the **Constitution** by refusing to assert and exercise the authority delegated to them by the **Constitution** to uphold the national values and principles of governance as provided under **Articles 10 and 259** of the **Constitution**. They dismally neglected to perform their functions as mandated to them in the **International Crimes Act**. It was clear to this court that the above State officers had, in filing the present application before this court before making inquiry on the validity or legality or otherwise of the request for the surrender of Respondents made by the International Criminal Court, abdicated their responsibilities to assert their Constitutional authority on behalf of

the Republic of Kenya as a State Party of the Rome Statute to exercise jurisdiction in the first instance in respect of the offences against the administration of justice before the International Criminal Court exercised its complementary jurisdiction as provided under *Paragraph 10* of the *Preamble* and **Article 1** of the **Rome Statute of the International Criminal Court**.

(c) It was common ground that the acts that constitute the alleged offence against the administration of justice occurred within the jurisdiction of this court. This court has the primary jurisdiction to try such offences under the **Constitution** of Kenya 2010, and the laws made thereunder including the **International Crimes Act** unless, under circumstances specified in the **Rome Statute of the International Criminal Court**, the International Criminal Court assumes jurisdiction in exercise of its complementary jurisdiction.

(d) This court considered the evidence placed before it by way of affidavits by the Respondents. It is apparent to this court that the basis upon which the Single Judge of the Pre-trial Chamber of the International Criminal Court reached her decision for the request for cooperation for the arrest, search and surrender of the Respondents is challengeable. The Respondents have deponed that officers attached to the Office of the Prosecutor of the International Criminal Court coerced, intimidated and improperly influenced the witnesses that are the subject of the charges against the administration of justice as provided under **Article 70** of the **Rome Statute** and **Sections 9 – 17** of the **International Crimes Act, 2008** into contriving and manipulating evidence so as to fit with the charges that were brought against the Accused persons in the then pending case before the International Criminal Court. The 1st Respondent deponed that the Office of the Prosecutor of the International Criminal Court applied pressure and made attempts to coerce and intimidate him into withdrawing from representing his client (one of the witnesses in the case), and if he did not do so, charges similar to the present ones would be brought against him. The allegations raised by the Respondents are serious and cannot be wished away. The least that the Applicant (the Cabinet Secretary, Ministry of Interior and Coordination of National Government, the Inspector General of Police and the Director of Public Prosecutions) should have done in the circumstances is to investigate the allegation to establish its veracity. It was clear to this court that the Office of the Prosecutor of the International Criminal Court would, in the circumstances, be unlikely to investigate officers based at its office. The assertion by the Respondents that their fundamental rights and freedoms to fair trial as enshrined in the Constitution would likely be infringed if the allegations they have deponed in their affidavits are not investigated is not without merit.

79. The Respondents, as Kenyan citizens, are entitled to exercise the right to citizenship as provided under **Article 12(1)(a)** of the **Constitution** of Kenya. That right includes the benefit of the rights and fundamental freedoms in the Bill of Rights as provided by the **Constitution** of Kenya. That right includes the right to be tried before a court established under the **Constitution** of Kenya if it is alleged he has committed an offence within the jurisdiction of the court. State officers, such as the Cabinet Secretary, Ministry of Interior and Coordination of National Government, the Attorney General, the Director of Public Prosecutions and the Inspector General of Police cannot abdicate the mandate delegated to them by the **Constitution** particularly **Article 21(1)** which provides that:

“It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.”

In the present application, unless the contrary is established, the Respondents are entitled, as a matter of their rights and fundamental freedoms, to be tried in Kenya.

80. The **International Crimes Act, 2008** which domesticates the **Rome Statute** of the International Criminal Court was assented to on 24th December 2008. This **Act** is subject to the **Constitution** of Kenya 2010 which was promulgated on 27th August 2010. **Section 7(1)** of the **Transitional and Consequential Provisions (Sixth Schedule)** of the **Constitution** of Kenya 2010 provides that:

“All laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptation, qualifications and exceptions necessary to bring it into

conformity with the Constitution.”

Section 7(2) decrees, *inter alia*, that the provisions of the **Constitution** shall prevail to the extent of the conflict between the Constitution and that law.

81. The Respondents have pleaded with this court to uphold their fundamental rights and freedoms as provided by the **Constitution** of Kenya 2010. In particular, they pleaded with the court to uphold their right to fair trial as provided by **Articles 21, 22, 23, 24, 25, 49 and 50** of the **Constitution**. As citizens of the Republic of Kenya, the Respondents have urged this court to uphold their constitutional rights and freedoms to enjoy their liberty without restriction unless the due process of the law is followed. In the application before this court, the Applicant has, *inter alia*, applied for this court to allow for the search of the properties of the Respondents, in the presence of investigators from the International Criminal Courts, with a view to obtaining evidence in form of cellphones, computers, diaries, notes or recordings of meetings or conversations, financial or banking records from the Respondents. This request is clearly in breach of **Article 50(2)(b)** of the **Constitution** that requires every accused person to be informed of the charge that he will face with sufficient details to answer to it. It is also in breach of **Article 50(2)(j)** of the **Constitution** that requires every accused person to be informed in advance of the evidence that the prosecution intends to rely on, and have reasonable access to that evidence.

82. The application herein is devoid of the evidence that the International Criminal Court intends to rely on in the prosecution of the Respondents. The Applicant's application is in breach of **Section 23(2)** of the **International Crimes Act** that mandates any request for assistance by the International Criminal Court should be in conformity with the Kenyan Laws. It was apparent to this court that the above requests made to the court clearly indicates that the Prosecutor of the International Criminal Court was still gathering evidence to prosecute the Respondents yet charges have already been laid against them before the International Criminal Court. This court holds that in so far as the **International Crimes Act** provides that an application for the surrender of the Respondents to the International Criminal Court can be made without the Respondents being supplied with evidence in support of the charge against them, such application is not sustainable and is not within the threshold mandated by the **Constitution**.

83. In the premises therefore, this court holds that the originating motion filed by the Applicant on 28th May 2015 in purported exercise of its mandate to cooperate with the International Criminal Court cannot be allowed unless and until the International Criminal Court and Applicant complies with the conditions precedent, in compliance with the **Constitution** of Kenya 2010, and the **International Crimes Act, 2008**, the **Rome Statute** of the **International Criminal Court** and the **Rules of Procedure and Evidence** of the Court as set out by this court in this Ruling.

84. The application lacks merit in the circumstances and is hereby dismissed. The warrant of arrest issued by this court against the Respondents is hereby lifted. For the avoidance of doubt, the Applicant shall not take any action in furtherance to the request made for the surrender of the Respondents, unless and until there is compliance with the orders of this court. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2017

L. KIMARU

JUDGE