



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 212 OF 2014
KARIM LALANI.....PETITIONER
VERSUS
INTERPOL.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT
JUDGMENT

Introduction

1. This petition dated 5th May 2014 has been filed by the petitioner on behalf of one **Mr. Shezad Tejani** (hereafter “**Tejani**”) whom he states is his brother –in-law. He alleges violation of Tejani’s constitutional rights by the respondents following the publication of a ‘**red notice alert**’ allegedly by the International Police (Interpol), in respect of Tejani. He states that he has brought the petition pursuant to the provisions of Article 258 of the Constitution as Tejani is unable to bring the petition in his own name as he is outside the country. The petitioner seeks the following orders:

- 1. A declaration that by publishing a Red Notice Alert without due authority, care and just cause, the rights of Mr. Shezad Tejani under Article 47 of the Constitution have been breached.***
- 2. An order directed against the respondent directing them to supply Mr. Shezad Tejani with all relevant information under Article 35 of the Constitution regarding the issuance of the Red Notice Alert against him.***
- 3. An order directed against the respondents under Article 35 of the constitution directing them to delete the name of Mr. Shezad Tejani from the Interpol Website or any other public posting by virtue of the Red Notice Alert issued against him.***
- 4. A declaration that by publishing the Red Notice Alert without due authority, care and just cause violates and infringes upon the rights of Mr. Shezad Tejani under the Universal declaration of Human Rights under Articles 3,5,7,9,10,11(1),12 and 13***

5. A declaration that the actions of the respondents are unconstitutional and are therefore null and void.

6. An order of prohibition against the respondent from effecting any arrest against Mr. Shezad Tejani on the basis of the Red Notice Alert issued by the respondents.

7. The respondents to pay the petitioner costs of the petition in any event.

2. The petition is supported by an affidavit sworn by the petitioner on 5th May 2014. In the said affidavit, Mr. Lalani avers that the subject of the petition, Mr. Shezad Tejani, is his brother in law, a Kenyan citizen but currently resident in Dubai, in the United Arab Emirates. He states that he has filed the petition under the provisions of Article 258 of the Constitution which allows another person to institute a petition on behalf of another person and alleges that Tejani is unable to bring the petition in his name because he is domiciled in Dubai, where he has been resident since 2010. He states further that Tejani has been unable to travel to Kenya since the publication of the red notice alert by the respondents and that he is now listed as a wanted fugitive on the run from justice for facts which he is neither aware nor responsible for.

3. Mr. Lalani avers further that he was informed by Tejani, on or about the 20th March 2014, that a red notice alert had been placed against him in the Interpol website, the details of which indicated that he was wanted for obtaining goods by false pretences in Kenya. He avers that Tejani was in shock and disbelief as to the best of his knowledge he is not facing any criminal investigations or charges anywhere in Kenya. According to Mr. Lalani, from the scanty information in the Interpol website, the red notice alert had originated from the Republic of Kenya.

4. The petitioner avers that they wrote through their Advocates on record to the National Central Bureau, Interpol in Nairobi, requesting for information relating to the particular charges that Interpol seeks to have Tejani arrested for, who the complainant was, the authority in Kenya responsible for conducting the case, and whether or not the Director of Public Prosecutions had given his authority to prosecute Tejani. He avers further that Interpol Nairobi, by its letter dated 27th March 2014, named the complainant as one **Amin Mulji** and claimed that authority had been granted by the Director of Public Prosecutions.

5. The petitioner then sought further information, while invoking Article 35 of the Constitution, including a copy of the letter from the DPP authorizing the issuance of the red notice alert, full particulars of the charges that Interpol Nairobi sought to have Tejani arrested for, including copies of documentation in respect thereof; whether or not investigations had been conducted, whether they are complete and the recommendations thereof. They also sought to know whether any notice had been served on Tejani to appear before any authorities and if so when the notice was served; and further, whether any indictment had been registered in any criminal court in Kenya, and summons or a warrant of arrest issued. The petitioner states further that they also sought to know whether the arrest warrant authorizes Tejani's arrest outside Kenya.

6. According to the petitioner, Interpol, by its letter dated 9th April 2014, declined to respond to the issues raised and instead referred them to the Investigating Officer in the case. He states that despite many visits to the Interpol Offices in Nairobi, his Advocates have never been given any information or any good cause why Tejani is on the 1st respondent's wanted list.

7. The petitioner further avers that their Advocates wrote on 16th April 2014 to the officer in charge of investigations, Central Police Station, Nairobi seeking for the information and clarification, but that to date, neither their Advocates nor Tejani is aware of the reasons for the publication of his name in the Interpol list, and no authorization from the DPP to warrant the issuance of the red notice alert has been shown.

8. Mr. Lalani avers that the Constitution at Article 21 guarantees to everyone the right to enjoy the fundamental rights in the bill of rights to the greatest extent consistent with the right and fundamental freedom, and that Article 35 guarantees the right to correction or deletion of misleading information. He

states that the publication of Tejani as a wanted fugitive be corrected as the publication has injured him, the petitioner, seriously.

9. The petitioner also alleges that the respondents have violated Tejani's rights under Article 47 which guarantees to everyone the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. He claims that the respondents have failed to protect Tejani's rights and have treated him in a manner that is unlawful and unprocedural which is contrary to Article 47 of the Constitution.

10. He also alleges violation of Tejani's rights under Articles 3, 5, 7, 9, 10, 11, 12 and 13 of the Universal declaration on Human Rights, and submits that under the doctrine of proportionality, the crime he may have been accused of does not warrant the publication of the red notice alert on the Interpol website. It is also his case that any warrants of arrest under the Criminal Procedure Code are executable within the Republic of Kenya, and that there is no authorization by any court for the warrants to be executed against Tejani internationally.

11. The petitioner also swore a supplementary affidavit on 9th July 2014 in response to the averments on behalf of the respondents. He deposes in the said affidavit that the 1st respondent is an international organization with its headquarters in Lyon, France, and is not a government institution covered by the Government Proceedings Act to warrant representation by either the Director of Public Prosecutions or the Attorney General.

12. He claims further that the matter between the said Mr. Amin Mulji and Tejani was and is a civil, not a criminal matter, and alleges that the agreement between the two parties annexed to the affidavit of Mr. Andove is a forgery as there was no written agreement between the parties. He further contends, among other things, that the agreement was purportedly drawn on 3rd April 2009; that Kshs One Million (Kshs1,000,000/-) was paid upon execution of the agreement and postdated cheques were issued by Tejani for various dates from 7th May 2009 to 10th July 2009. Mr. Lalani avers that section 316 A(2) of the Penal Code "*ousts the jurisdiction of the Penal Code with regard to Postdated cheques*" and that the company that issued the cheques, Track It, went into receivership in April 2009 and has been the subject of HCCC No 299 of 2009 in the Commercial and Tax Division of the High Court.

13. The petitioner further avers that while the entire criminal case against Mr. Tejani is based on the agreement and the post-dated cheques, and the agreement between the parties is still enforceable in the Commercial Division, there was no evidence that the complainant ever filed a case before any court or attempted to enforce the agreement in any way.

14. Mr. Lalani further contends that the placing of a red notice alert in accordance with the Regulations of the 1st respondent require authorization by a court of law, yet the 1st respondent had not shown any such authorization, and neither had an attempt been made to request Tejani to appear before any authority in Kenya before the criminal matter was filed in court. He avers, however, that his advocates have perused the court file relating to the intended charge sheet and discovered that there was another criminal case of the same nature being **Criminal Case No 1631/2011 Republic versus Shezad Tejani**, that was instituted without Tejani's knowledge.

15. The petitioner avers that he has been informed that the purpose of filing the criminal charges when Tejani was out of the country was purely for the purpose of obtaining a warrant of arrest from the court for failure to appear by the accused person; that in **Criminal Case No 1368 of 2013**, the Chief Magistrate's Court confirmed that the Investigating Officer had used an incorrect procedure of extracting a warrant of arrest and consequently the charges against Tejani were withdrawn, and further, that the Court observed that the warrant of arrest had been sought without bringing or asking Tejani to appear in court and the prosecution was only trying to make it appear to the court that Tejani was absenting himself from court.

16. It is his contention therefore that, as held by the Chief Magistrate's Court in Criminal Case No 1368

of 2011, the warrants of arrest used against Tejani are null and void ab initio. He alleges malice on the part of the respondents for failure to disclose this fact, and also due to certain factual contradictions between the charge sheet and the complainant's statements with regard to the motor vehicle(s) in respect of which the dishonoured cheques were issued.

17. It is also the petitioner's contention that, contrary to alleged communication from the 1st respondent to the petitioner's Counsel that the Director of Public Prosecutions had authorized their use of the red notice alert, no specific authority was granted to them. It was his contention that the DPP had only displayed an extradition request to Uganda, but that Tejani has always been resident in Dubai, not Uganda.

18. According to the petitioner, under Interpol's Rules on the Processing of Data, the only institution that has the power to authorize a red notice alert is a Kenyan court. He referred to the wording of the notice which indicates that the said Tejani is wanted by the judicial system in Kenya.

19. The petitioner contends that the issuance of the red notice alert is an attempt to settle a civil matter through the criminal justice system thereby violating Tejani's right to fair administrative action under the provisions of Article 47 of the Constitution, and that in view of the averment that there was an attempt to settle the matter amicably, there is an explicit intention to use the police as debt collectors. It is also his claim that the averment by the respondent that there was an attempt to settle the matter amicably is a confirmation that Tejani was available for contact, investigation, summons or any other lawful action and there was therefore no justification for the issue of the red notice alert by Interpol.

20. In his written submissions, the petitioner argues that even though the DPP has the constitutional mandate to prosecute and does not need the consent or authority of anyone to do so, he must exercise the discretion in a just and fair manner. He relies on the decision in **Republic -vs- Commissioner of Police & Another ex parte Erick Mwirigi Mbaabu Misc. Application No 204 of 2012** for the proposition that the DPP must exercise his discretion in a fair and just manner. It is his submission that the criminal process should not be used to pursue a civil claim.

21. The petitioner has also relied on the decision in **Republic -vs- Chief Magistrate's Court at Mombasa ex parte Ganjee & Another (2002) 2 KLR 703** in support of his argument that a party wishing to pursue a debt can do so in civil proceedings which are provided for by law. He also relies on the case of **Kuria & 3 Others -vs- Attorney General (2002) 2 KLR 69** to submit that if there is another motive for the institution of criminal proceedings other than the fair administration of justice, then the courts should halt the proceedings.

22. The petitioner submits that in accordance with Article 83 of the **Interpol Rules on Processing of Data**, the red notice alert should not have been issued as it emanates from a purely private dispute which can be resolved using the normal civil dispute resolution mechanism.

23. The petitioner argues, with regard to the alleged violation of Article 47, that Tejani was not informed of the charges facing him or issued with any notice prior to the publication of the red notice alert. He relies on the decision of the court in **Multiple Hauliers East Africa Limited -vs- Attorney General & Others Petition No 88 of 2010** and **Dry Associates Limited -vs- Capital Markets Authority and Another Petition No. 328 of 2011** with regard to the application of Article 47.

24. The petitioner has also alleged violation of Tejani's right to information under Article 35. He submits that the information that they were seeking was only supplied after the petition was filed. It is his submission that Interpol has a duty to provide such information before publishing a notice to enable a suspect sufficiently respond to the charges. He has relied on the case of **Nairobi Law Monthly Company Limited -vs- Kenya Electricity Generating Company & 6 Others High Court Petition No. 298 of 2011** to submit that the information sought from the 1st respondent was required for the protection of Tejani's rights to freedom of movement, association and liberty which were threatened.

27. Finally, the petitioner relies on the principle of proportionality. He argues that the principle requires that the legal method or force used to address a violation should be proportionate to the violation. He has

relied on the case of **Nancy Makokha Baraza -vs- Judicial Service Commission & 9 Others Petition No 23 of 2012**, and Article 83 of the Interpol Rules on the Processing of Data to argue that the allegations against Tejani that prompted the red notice alert emanate from charges of obtaining goods by false pretences and issuing bad cheques contrary to sections 313 and 316A of the Penal Code, and that the said offences are misdemeanours, which are not serious offences and therefore do not fall within the category of serious offences contemplated by Article 83.

26. The petitioner therefore prays for the grant of the orders in the petition in light of the violation of Tejani's rights under Articles 35 and 47, and the fact that the actions taken to resolve the matter, which is purely civil in nature, are disproportionate.

The Case for the 1st Respondent

27. The 1st respondent opposes the petition and has filed an affidavit sworn by Mr. Fernandez Andove, the Investigating Officer in respect of the complaint the subject of the red notice alert, on 27th June 2014. The 1st respondent has also filed submissions dated 24th October 2014.

28. In his affidavit, Mr. Fernandez Andove states that he is a police officer attached to the Directorate of Criminal Investigations, Sub-County Central Division, Nairobi and one of the investigating officers in the matter involving Mr. Tejani. He has set out in his affidavit the series of events leading to the issue of the red notice against Tejani.

29. According to Mr. Andove, the Directorate of Criminal Investigations received a complaint on 23rd November 2011 from a Mr. Amin Mulji. The complaint was that the said Mulji had supplied motor vehicles to one Shezad Tejani, who had then issued cheques in part payment, but that the said cheques had been dishonoured upon presentation to the complainant's bankers. Following the complaint, the police commenced investigations in accordance with the mandate of the National Police Service.

30. The investigations established that the complainant and the accused had entered into an agreement under which the suspect was to purchase nine cars at a cost of Ksh11,150,000/- from the complainant; that the suspect paid a deposit of Kenya shillings 2,000,000/- and issued cheques in part payment of the balance thereof, and the cheques were dishonoured on presentation. The dishonoured cheques were drawn on the account of **Track It Limited**, and investigations revealed that most of the transactions involving the said company were conducted by Mr. Shezad Tejani. Following investigations, the matter was filed in court and warrants of arrest issued in the manner provided in law.

31. Mr. Andove states that it was later discovered that the suspect had fled the country and was running a business in Uganda and had interests in other countries, including the United Arab Emirates. As the suspect was outside the jurisdiction of Kenyan authorities, the matter was referred to the office of the Director of Public Prosecutions, and as a result, the office of the Director of Public Prosecutions prepared and submitted a request for reciprocal backing of warrants of arrest issued in Kenya for their execution in the Republic of Uganda.

32. The 1st respondent avers that Tejani's pending arrest was properly sanctioned in the manner provided for by law; that the allegation that Tejani is likely to be arrested "*for facts of which he is unaware or without lawful authority*" is untrue; that Tejani is fully aware of why he fled from Kenya having issued cheque which he has never made good, and the averments made on his behalf are false.

33. In its written submissions, the respondent submits that as the suspect was outside the jurisdiction, the matter was referred to the office of the DPP and a request for reciprocal backing of warrants of arrest made to the authorities in Uganda. It sets out the powers of the National Police Service, both under the Constitution and the National Police Service Act, and submits that the petitioner has not shown that the office of the DPP acted without or in excess of the powers conferred upon it, or in any way violated its constitutional mandate.

34. With regard to the information that the petitioner was requesting for, the 1st respondent states that it is an affiliate of the National Police Service and that upon receipt of the letter from the petitioner's Advocate seeking information, it supplied the said information by way of the letter erroneously dated 27th February 2014, which it indicates should have been dated 27th March 2014. It submits that upon receipt of the said letter, Tejani should have known the case against him and acted in accordance with the advice received from the National Police Service contained in the letter date 9th April 2014. It therefore prays that the petition be dismissed with costs.

The Case for the 2nd Respondent

35. The 2nd respondent opposes the petition and has filed grounds of opposition dated 6th October 2014. In the grounds of opposition, the 2nd respondent argues that the petition is frivolous, misconceived and an abuse of the court's process; that the actions complained of by the petitioner constitute the legitimate obligations of the respondents under the relevant statutes and therefore no triable issues arise; and that the rights alleged by the petitioner to have been violated are not absolute but are subject to certain limitations envisaged in Article 24 of the constitution.

36. It is also its contention that the orders that the petitioner seeks cannot issue as they would interfere with the criminal justice system, and the petition does not disclose any denial, violation, infringement or threat to the petitioner's or the suspect's fundamental rights and freedoms.

37. In the written submissions dated 23rd October 2014, the 2nd respondent adopts the averments of fact by the 1st respondent and submits that Tejani is a fugitive facing various charges in Kenya including obtaining money by false pretences and issuing bad cheques.

38. The 2nd respondent addresses itself to three issues which it submits arise from the proceedings. These are whether the issuance of the red notice alert was lawful and justified in the circumstances; whether Tejani's rights have been violated by the issuance of the notice, and whether the orders sought should issue.

39. The 2nd respondent submits that the issuance of the red notice was justified in the circumstances of the case. The police had received a complaint from Mr. Mulji that Tejani had issued bad cheques in respect to the purchase of cars, and when it became apparent that the suspect was outside the jurisdiction of Kenyan courts, it became necessary to seek international police co-operation.

40. The 2nd respondent submits that Interpol notices are international requests for co-operation allowing police in member countries to share crime-related information; a red notice indicates that the persons concerned are wanted by national jurisdictions for prosecutions or to serve a sentence; and that the role of Interpol is to assist the national police force in identifying and locating these persons with a view to their arrest and extradition.

41. The 2nd respondent submits further that both under the Penal Code and the **Extradition (Contiguous and Foreign Countries) Act**, Cap 76 Laws of Kenya, the acts that Tejani is accused of, obtaining goods by false pretences, and issuing bad cheques are criminal offences; and that since it is admitted that he is outside the jurisdiction where he fled after transacting with the complainant, the fact that he was outside the jurisdiction was sufficient reason for the issuance of the red notice alert.

42. With regard to the petitioner's argument that the matters in dispute are civil in nature, the 2nd respondent submits that the proper court to establish whether this was the case was the trial court, not in these proceedings. It was its further submission that the present petition illustrates that Tejani, against whom a valid warrant of arrest has been issued, does not wish to come to Kenya and answer the criminal charges, It was its case that the court should not interfere with the criminal process. The 2nd respondent relied on the decision in **Stephen Kipkenda Kiplagat –vs- Chief Magistrate's Court & 2 Others High Court Petition No. 298 of 2012** in which the court held that there is no general principle that where there

are civil proceedings, criminal proceedings should not be pursued.

43. The 2nd respondent terms the petitioner's claim that the offences facing Tejani were misdemeanours and therefore it was to breach the principle of proportionality to issue the red notice against him as self-serving. It submitted that the offence in question falls within the bracket of extradition crimes covered by the **Extradition (Contiguous and Foreign Countries) Act**, and that any person accused of an extradition crime can qualify for the issue of a red notice.

44. The 2nd respondent further submits that the DPP acted within the law and in accordance with the mandate of his office as provided under Article 157 in requesting for the assistance of the 1st respondent when it became clear that the suspect was not in Kenya. It denies that there is any violation of Tejani's rights, and observes that he requested for information which was supplied to him; and that he was requested to present himself to the nearest police station which he has not done, even though he is aware that there is a warrant of arrest against him.

45. The 2nd respondent submits finally that the orders sought by the petitioner cannot issue. It is its case that the petitioner seeks to use the constitutional court to waive the warrants of arrest before responding to the criminal case facing him. It is its contention that if Tejani is as innocent as he claims, his remedy is to face the extradition proceedings and come to Kenya to face the charges against him. It was its prayer that the petition be dismissed with costs.

Determination

46. I have considered the respective averments and submissions of the parties, and the documents and authorities relied on in support of their respective cases. The sole issue that emerges therefrom, in my view, is whether there has been a violation of Mr. Tejani's rights under the constitution pursuant to the issuance of the red notice alert published in the 1st respondent's website. The petitioner has stated that he has brought this petition pursuant to the provisions of Article 258, though I believe that the proper Article is 22(2)(a), which allows a party to bring proceedings alleging that the rights of a party who is unable to bring a matter in his own name have been violated.

47. In considering this issue, I do so against the following factual background. First, the suspect on behalf of whom the petition is brought is Mr. Shezad Tejani. Tejani is described by the petitioner as a Kenyan citizen, However, the respondents describe him as an Indian national in the **Request For Reciprocal Backing of Warrants of Arrest** dated 15th January 2014.

48. Tejani and a company known as Track It Limited, whose directors are Fara Azim Rajani, Shyrose Karim Lalani, Shehzad Barkat Tejani and Pritesh Bhimjiani, engaged in certain transactions with one Amin Mulji. Cheques were issued by the said Tejani to Mulji, but were allegedly dishonoured on presentation. A complaint was made to the police, investigated, and the police were satisfied that an offence of obtaining by false pretences was disclosed.

49. Charges were preferred against Tejani and warrants of arrest issued. The warrants could not be executed as the suspect was outside the jurisdiction, where, according to the respondents, he had fled, and the DPP made the request for reciprocal backing of warrants of arrest to the authorities in Uganda. A red notice alert was also placed on the Interpol website in respect of Tejani. It appears, however, from the averments by the petitioner, that the suspect was in Dubai, not Uganda, as the authorities in Kenya thought.

50. The petitioner makes a three-pronged argument against the publication of the red notice alert. The first is that the criminal process should not be issued to pursue a civil debt. Secondly, he contends that Tejani's rights have been violated as he was not informed before the red notice alert was published, nor was he given a chance to answer to the charges before publication of the notice. Finally, it is his contention that the principle of proportionality was not adhered to in the publication of the red notice alert given the nature of the offences with which he is charged, which are misdemeanours and therefore not

sufficient to warrant the issuance of the notice.

51. As the crux of the petition revolves around the red notice alert, it is useful to consider the circumstances under which the notice is issued. The petitioner has set out definitions of misdemeanours and felonies, and the offences with which the petitioner is charged, namely obtaining goods by false pretences and issuing bad cheques contrary to sections 313 and 316A of the Penal Code respectively. The intended charge sheet annexed to the affidavit of Mr. Andove indicates the charges to be brought against Mr. Tejani as being:

Count 1:

Charge : Obtaining goods by false pretence contrary to section 313 of the Penal Code

SHERAD TEJANI: on the 3rd day of April 2009 at Nairobi City within Nairobi County, with intent to defraud obtained one motor vehicle Registration No. KBF 983D Toyota Corolla valued at Ksh850,000/- from AMIN MULJI by falsely pretending that a certain cheque number 002743 for Ksh 250,000/- dated 8th April 2009 drawn of account number 740000676 held at Imperial Bank Limited, Caltex Plaza Branch, you issued to him was valid and genuine payment for the said motor vehicle, fact you knew to be false.

Count II:

Charge : Issuing a bad cheque contrary to section 316 A(1)(a) of the Penal Code as Amended by Finance Act No 4 of 2004

SHERAD TEJANI: On the 8th Day of April 2009 at Nairobi City within Nairobi County, issued a certain cheque number 002743 fir Ksh250,000/- to AMIN MULJI drawn on account number 740000676 held at Imperial Bank Limited Caltex Plaza Branch knowing that the said account had insufficient funds.

Count III:

Charge : Obtaining goods by false pretence contrary to section 313 of the Penal Code

SHERAD TEJANI: On the 3rd day of April 2009, at Nairobi city within Nairobi County, with intent to defraud obtained one Motor vehicle registration Number KBF 959D Toyota Corolla valued at Ksh850,000/- from AMIN MULJI by falsely pretending that a certain cheque number 002744 for Ksh250,000/- dated 15th April 2009 drawn on account number 7400000676 held at Imperial Bank Caltex Plaza Branch that you issued to him was valid and genuine payment for the said Motor vehicle, a fact you knew to be false.

Count VI:

Charge : Issuing a bad Cheque contrary to section 316A(1)(a) of the Penal Code as Amended by Finance Act No 4 of 2004.

SHERAD TEJANI: On the 15th day of April 2009 at Nairobi City within Nairobi County, issued a certain cheque number 002744 for Ksh250,000/- to AMIN MULJI drawn on account number 7400000676 held at Imperial Bank Limited Caltex Plaza Branch knowing that the said account had insufficient funds.

52. Section 313 provides that:

“Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person

anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”

53. At section 316A, the Penal Code provides that:

(1) Any person who draws or issues a cheque on an account is guilty of a misdemeanour if the person-

(a) knows that the account has insufficient funds;

(b) knows that the account has been closed; or

(c) has previously instructed the bank or other institution at which the account is held not to honour the cheque.

(2) Subsection (1)(a) does not apply with respect to a post-dated cheque.

(3) Any person who, by deceit or any other fraudulent means, assists a person to obtain anything on the basis of a cheque drawn or issued in the circumstances described in subsection (1) is guilty of a misdemeanour.

(4) A person who is guilty of a misdemeanour under this section is liable to a fine not exceeding fifty thousand shillings, or to imprisonment for term not exceeding one year, or to both.

54. The petitioner relies on Article 83 of the Interpol Rules on the Processing of Data to submit that as the offences set out above are misdemeanours, they are not ‘**serious ordinary-law crime**’ to warrant the issuance of the red notice. He cites the provisions of Article 83 of the Interpol Rules titled “**Specific conditions for publication of red notices**” as follows:

1. Minimum criteria

(a) Red notices may be published only if the following cumulative criteria are met:

(i) The offence concerned is a serious ordinary- law crime.

55. The petitioner, however, fails to note the provisions of the remainder of Article 83, which contains the second element of the criteria for a red notices to issue as follows:

...

(ii) Penalty threshold:-

-if the person is sought for prosecution, the conduct constituting an offence is punishable by a maximum deprivation of liberty of at least two years or a more serious penalty;

-if the person is sought to serve a sentence, he/she is sentenced to at least six months of imprisonment and/or there is at least six months of the sentence remaining to be served.

56. Thus, the criteria for issuing red notices is a cumulative: one should be wanted for prosecution in a serious ordinary-law crime, the penalty for which is “**a maximum deprivation of liberty of at least two years or a more serious penalty.**”

57. The offence of obtaining by false pretences, one of the offences for which Tejani is sought, is a “**serious ordinary law crime**”, the penalty for which is a term of imprisonment for three years. It is also, as submitted by the 2nd respondent, an extraditable offence under the schedule to the Extradition (Contiguous and Foreign Countries) Act. It cannot therefore be said that the issuance of the red notice

alert in the circumstances was disproportionate.

58. I note that there is a warrant issued in respect of Mr. Tejani on 6th December 2013 by the Chief Magistrate's Court, in consequence of which the request for reciprocal backing of the warrants was made by the DPP. It appears to me therefore that the criteria for issuance of the alert by Interpol was met.

59. The petitioner alleges violation of Tejani's rights under Article 47 of the Constitution on the basis that he was not heard before the red Notice alert was published. He has not cited any authority or provision of the law or the Interpol Rules that requires that a person should be heard before the red notice alert is issued. As I understand it, a warrant was issued for Tejani's arrest pursuant to a judicial process undertaken by the relevant authority in Kenya after he failed to present himself to answer charges for the offences he had allegedly committed.

60. The red notice was issued pursuant to a request for mutual co-operation by the police in Kenya. It seems to me that the petitioner's argument that Tejani should have been notified prior to the issue of the red notice alert would be the same as insisting that a person who has failed to come before the court and in respect of whom a warrant of arrest has been issued should be given notice before the warrant is issued, failure to do which would amount to violation of Article 47. Such an approach would be to hobble the criminal justice system, which should not be countenanced.

61. I have noted the authorities relied on by the petitioner with regard to violation of Article 47, namely the decisions in the case of **Multiple Hauliers and Dry Associates (supra)**. However, the principles in these decisions do not apply, in my view, in a situation where the respondents have properly exercised their constitutional or statutory mandates.

62. The petitioner claims that the issue between the complainant and Mr. Tejani is civil in nature, and that the criminal justice process should not be used to recover a civil debt. I agree fully with this submission. However, this court has in many decisions expressed the view, on the basis of section 193A of the Criminal Procedure Code, that the fact that the same set of facts in a criminal prosecution gives rise to a civil claim is not a bar to prosecution. This is the essence of the decision by Majanja, J in **Stephen Kipkenda Kiplagat -vs- Chief Magistrate's Court & 2 Others (supra)** relied on by the 2nd respondent, and **High Court Petition No. 341 of 2012 Florence Dorothy Seyanoi Kibera Moschion & Another -vs- The Director of Public Prosecutions**, to name but a few of a string of decisions emanating from the High Court.

63. In the present case, it is clear that the respondents have acted in accordance with the law. No unreasonableness or arbitrariness has been demonstrated that would justify the interference by the court with the exercise of the constitutional mandate of the DPP.

64. It may be that the evidence which the DPP considered sufficient to prefer charges against Tejani, and on the basis of which a warrant of arrest and a red notice alert was issued, is not sufficient to warrant a conviction. However, that determination is the preserve of the trial court, which has the mandate to weigh the evidence and determine whether an offence has been committed. To quote the words of Warsame J (as he then was) in **Michael Monari & Another -vs- Commissioner of Police & 3 Others Miscellaneous Application No.68 of 2011:**

"It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to try and/or attempt to determine the intended criminal case which is not before it. There is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment."

65. The option open to Mr. Tejani is fairly simple. He now has, as was conceded by the petitioner in his supplementary affidavit, all the information that he needs in relation to the charges facing him. He does not consider them to be serious offences, and he thinks that they are civil in nature. These are arguments that he can present before the court seized of the criminal matter when he submits himself, as he should, to the police authorities in Kenya or is arrested pursuant to the red notice alert.

66. In any event, on the material before me, I find no merit in this petition. It is hereby dismissed with costs to the respondents.

Dated, Delivered and Signed at Nairobi this 19th day of January 2015

MUMBI NGUGI

JUDGE

Mr. Muchemi & Mr. Mogere instructed by the firm of Muchemi & Co. Advocates for the petitioner

Mr. Ashimosi instructed by the Director of Public Prosecution for the 1st respondent

Ms. Kamande instructed by the State Law Office for the 2nd respondent