



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CONSTITUTIONAL PETITION NO. 82 OF 2012

**IN THE MATTER OF: ARTICLES 2, 12(1)(a), 19, 20, 21 (1), 22(1), (3), 23(1), 159(2)(a),
(d),(e), 165(3)(b),(d)(i)(ii), 238(2)(a),(b) & 244(c) OF THE CONSTITUTION OF KENYA,
2010**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27(1),(2), 28, 31, 40(3) AND 50(1) OF THE
CONSTITUTION OF KENYA**

BETWEEN

ABUBAKAR SHARIFF ABUBAKAR.....PETITIONER

VERSUS

1. THE HON. ATTORNEY GENERAL

2. THE DIRECTOR PUBLIC PROSECUTIONS.....RESPONDENTS

JUDGMENT

By way of the petition dated 14th August, 2012 and filed in court on even date the petitioner prays for the following:

“(i) A declaration that the application for the search of the home of the petitioner by the police officers in Mombasa Chief Magistrate’s Court Miscellaneous Application No. 168 of 2011 was without reasonable or justifiable cause, mala fides, incompetent and an abuse of the law, the criminal process and the process of court.

(ii) A declaration that the Search Warrant issued on 23rd June, 2011 in Mombasa Chief Magistrate’s Court Miscellaneous Application No. 168 of 2011 was/is patently fatally defective and invalid for failure to specify the offence/s committed or under investigation, failure to specify the particulars of items to be seized and taken possession of and failure to specify the police officer or the person authorized to execute the warrant.

(iii) A declaration that the entry into and the search of the petitioner’s home by police officers on 23rd June, 2011 based on the defective and invalid Search Warrant issued on 23rd June, 2011 in Mombasa Chief Magistrate’s Court Miscellaneous Application No. 168 of 2011 was unconstitutional and a violation of the petitioner’s fundamental rights to equal protection

and benefit of the law, inherent human dignity and privacy guaranteed by Articles 27(1), 28 and 31 of the Constitution of Kenya, 2010.

(iv) A declaration that the search, seizure and confiscation by police officers on 23rd June, 2011 of the petitioner's properties not contained in the Search Warrant issued on 23rd June, 2011 in Mombasa Chief Magistrate's Court Miscellaneous Application No. 168 of 2011 was unauthorized, unlawful, illegal, unconstitutional and in violation of the petitioner's fundamental right to equal protection and benefit of the law, inherent human dignity, privacy and protection of property guaranteed by Articles 27(1), 28, 31(a) and 40(3) of the Constitution of Kenya, 2010 and an abuse of the process of court.

(v) A declaration that the failure by police officers to make and file a return in Chief Magistrate's Court Mombasa Miscellaneous Application No. 168 of 2011 immediately after execution of the Search Warrant nor to produce the petitioner's confiscated items before the court was unlawful, a breach of sections 118 and 121 of the Criminal Procedure Code, an abuse of the law and the court process and a violation of the petitioner's fundamental right to equal protection and equal benefit of the law guaranteed by Article 27(1) of the Constitution.

(vi) Special damages.....Kshs. 270,000/=

(vii) An award of general damages for violations of the fundamental rights and freedoms of the petitioner in prayers (iii) to (v) above as may be assessed by his Honourable court.

(viii) An award of exemplary, aggravated and/or punitive damages for oppressive and highhanded conduct of the police in the circumstances of this petition.

(ix) Costs of this petition.

(x) Interest on all monetary awards.”

The petition was supported by the affidavit of the petitioner **ABUBAKAR SHARIFF ABUBAKAR** sworn on 14th August, 2012. The court directed that parties file written submissions. The petitioner filed their submissions on 17th October, 2012 and on 7th March, 2013 the matter was before court for purposes of highlighting. The respondents being the **HONOURABLE ATTORNEY-GENERAL** and **THE DIRECTOR OF PUBLIC PROSECUTIONS** both relied on the replying affidavits filed by **CHIEF INSPECTOR ABEDNEGO KILONZO** of the Anti-Terrorism Police Unit Mombasa. At the outset I would like to express my regret for the delay in delivering this ruling. This has been caused by the hearing of Election Petitions, the High Court Service Week, the High Court Vacation as well as the many other vagaries of duty. The delay is sincerely regretted.

BACKGROUND

On 23rd June, 2011 at 1.00 p.m. while the petitioner was away from his home in Saba Saba Estate in Mombasa a squad of police officers stormed his house armed with a search warrant which had been issued on the same day at the Mombasa Chief Magistrate's Court vide **CMCC MISC. APPLICATION NO. 168 OF 2011**. The warrant allowed for the search and seizure of “*drugs, explosives, illegal firearms and military uniform*”. The said items were not recovered in the house but police instead seized other items which they found inside the house. A list of the seized items which included electronic equipment, phones and computer items was prepared at the scene which list was signed by **KHADIJA SALIM** the wife of the petitioner who was present in the house at the time the search was conducted and the items taken away. The items so seized were later released to the petitioner on 28th July, 2011 after the magistrate's court found their continued retention by police to have been unlawful. The petitioner alleges loss of user of the property for over a month and costs including hiring of legal counsel at the proceedings before the magistrate's

court.

The petitioner avers that the search and seizure was illegal for the following reasons –

- i. The petitioner had not at the time been charged with any offence, neither had he committed any.
- ii. The search warrant was issued without reasonable basis.
- iii. The seizure of items not included in the search warrant was unlawful and amounted to a violation of the petitioner’s fundamental right to privacy and property.

On this basis the petitioner seeks the declarations and awards enumerated in the petition.

The petition was defended. In his replying affidavit dated 19th September, 2012 Chief Inspector Abednego Kilonzo of the Anti-Terrorism Police Unit states that the police had received credible intelligence information that the petitioner had stored in a bunker inside his house, illegal arms, military uniforms, narcotic drugs and explosive materials. This information prompted the police to apply for a search warrant. The information received by police further revealed that the contraband material had been concealed in various items justifying the seizure of items outside of the warrant. He argued that the delay in presenting the seized items before the court ought not to have found unlawful and indication that the police did intend to appeal against this finding. The intention to appeal had only been hampered due to a delay in procuring the typed record of the proceedings before the subordinate court. The Chief Inspector states that the court ordered the release of the items before a forensic analysis by the Cyber Crime Unit based at the CID headquarters in Nairobi had been completed. Finally the respondents submit that there was proper and justifiable cause for the search warrant and that in the premises none of the petitioner’s rights under the Constitution of Kenya, 2010 had been breached, thus he was not entitled to the prayers sought.

ANALYSIS

The Constitution of Kenya, 2010 guarantees certain rights to all persons. Article 31(a) and (b) of the Constitution provide as follows:

“Every person has the right to privacy, which includes the right not to have –

- a. **their persons, home or property searched**
- b. **their possessions seized**
- c. **.....”**

The right to privacy and the affected rights are also explicitly guaranteed by Article 12 of the Universal Declaration of Human Rights as well as by Article 17 of the international Covenant on Civil and Political Rights. I have carefully perused the petition as well as all annexures and the petitioner’s Bundle of Authorities filed in court on 22nd October, 2012. I have also given careful consideration to the submissions filed in court as well the highlighting of the same by counsel. The following issues arise for determination.

- i. **Was the application made by the respondent and the subsequent grant of orders for search and seizure unjustified**

It must be remembered that although the Constitution grants certain rights, these rights are not absolute. Any right can be lawfully curtailed for the common good or to prevent or expose crime. Section 118 of the Criminal Procedure Code provides for the instances in which a court may issue a search warrant. Section 118 provides:

“Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant

(called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and if the thing is found, to seize it and take it before a court having jurisdiction to be dealt with according to the law.”

A clear reading of section 118 makes it clear that the question of whether or not to issue a search warrant lies entirely at the discretion of the court to which the application has been made. Any decision which is based on the discretion of a magistrate may only be disturbed if there exists proof of abuse of such discretion. In issuing a search warrant a court must be satisfied on the basis of the facts presented before it by the police that there are sufficient grounds to grant a search warrant. This is what is commonly known as ‘*probable cause*’ in other jurisdictions. Since a constitutional right is involved this discretion must be exercised carefully and with caution. If ‘*probable cause*’ is found to exist at the time of issuance of the warrant, this amounts to justifiable cause to warrant a limitation of the persons constitutional right to privacy as guaranteed by Article 31, then the warrant remains valid even in cases where a search yields nothing.

In this instance the magistrate relied on the affidavit of **No. 56510 ISIAH THURANIRA** an Inspector of Police attached to Provincial Police Headquarters in Mombasa. That affidavit was sworn on 28th June, 2011 and is titled ‘*Affidavit for Search*’. I have carefully perused the said affidavit. I find that though brief this affidavit did capture the necessary and salient points. The petitioner argues that he had not been charged with any criminal case. It is not a requirement that one must be facing criminal charges in order for a warrant to be issued. Indeed the purpose of a warrant is mainly to enable police conduct investigations in order to detect and/or uncover crime. I am aware that in the United States of America the system is to deliver a sealed affidavit whose contents are divulged **only** to the Judge (or magistrate) for the purpose of securing a search warrant. This could be one area that may be explored to be applied in this country.

I am however not persuaded nor has it been demonstrated by the petitioner that the magistrate acted *mala fides* and/or injudiciously in the exercise of his discretion to grant the search warrant. True the affidavit could have been better prepared and could have contained greater detail but even as it was my belief is that it covered all the salient points. As is stated at paragraph 4 of the affidavit the belief by a law enforcement officer on the basis of information (intelligence) that a house contains illegal ‘*arms*’, drugs, explosives and military uniforms does amount to ‘*probable cause*’ sufficient to merit the issuance of a search warrant. I therefore find that the application for and the issuance of the search warrant laid sufficient basis and was indeed justified in the circumstances. As such I find that the search conducted on the petitioner’s residence was done pursuant to a lawful warrant issued by a court of law. I therefore dismiss prayers (i) and (ii) of the Petition.

ii. **Did the search seizure conducted by police at the residence of the petitioner constitute a violation of his rights**

In any petition seeking the enforcement of fundamental rights and freedoms, the petitioner must plead with precision the nature of the alleged breach in relation to himself [see **ANARITA KARIMI NJERU – VS – ATTORNEY GENERAL [1979] KLR 54** and **MATIBA – VS – ATTORNEY GENERAL [1990] KLR 666**]. In this petition the petitioner has claimed that the conduct of the respondents amounted to a violation of his right to equal protection and equal benefit of the law, his right to human dignity and privacy as guaranteed by Articles 27(1), 28, 31 (a) and (b) of the Constitution.

As stated earlier, Article 31 of the Constitution does indeed guarantee the right to privacy. However, this right is not absolute. Article 24 of the same Constitution places a limit on the rights and fundamental freedoms guaranteed by the Constitution. Article 24(1) provides:

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all

relevant factors.....”

The existence of a valid search warrant and probable cause (as has been shown to be the case here) provides valid justification for the limitation of a person’s right to privacy. P. Kiage [Now Hon. Justice of Appeal P. Kiage] in **Essentials of Criminal Procedure in Kenya, Law Africa, 2010 at page 24** cites the English Judge Lord Denning in the case of **CHIC FASHIONS (WEST WALES) LTD. – VS – JONES (1968)2 QB 299** in which he stated:

“No mans house is to be used as a hiding place for thieves or receptacle for stolen goods. If there is reasonable ground for believing that there are stolen goods in the house, information can be laid before the magistrate on oath and the magistrate can then issue a warrant authorizing a constable to enter the house and seize the goods.”

Therefore although it is a general principle that a man’s house is his castle, and a policeman is never in principle allowed to enter and search a man’s house, certain lawful exceptions to this general rule do exist. Where there exists a lawful search warrant issued by a court of law then any search and seizure in pursuance of that warrant cannot be said to amount to a violation of a persons constitutional rights and freedoms. Therefore the search by police of the petitioner’s residence having been properly sanctioned by law did not amount to a violation of his fundamental rights and freedoms. I therefore dismiss prayer (v) of the Petition.

iii.

iv. **Were the police justified in seizing goods which were not specifically mentioned in the search warrant**

In the affidavit for search Inspector Thurairaja made mention of the following items – *“illegal arms, drugs, explosives and military uniform”*. The assumption would be that these are the items which the police were searching for and if found would be taken out of the petitioner’s residence. The search warrant issued by the court on 23rd June, 2011 did not specify what items were to be removed from the house. The warrant reads:

“This is to authorize and require you to enter the said house with such assistance as shall be required and to use if necessary reasonable force for that purpose and to search every part of the said house and to seize and take possession of”

The items which were to be taken possession of is left blank. It may however be safely presumed that the search warrant was to cover the articles named in the affidavit. As it was police did search and seized several items as listed in the certificate of search dated 23rd June, 2013. From the list provided no arms, drugs, explosives and/or military uniforms were found in the petitioner’s house. Did this violate the search warrant or amount to a misuse of the power of seizure?

The power to seize is generally limited to articles named in the search warrant, articles which are either involved in, used during or may provide proof of the commission of an offence or may provide proof of the fact that the commission of an offence was planned. In the case of **CRAZIER – VS – CUNDEY, 108 ER 49** it was held that a policeman could properly seize goods other than those mentioned in the warrant if the seized goods provided useful evidence to substantiate the charge for which the warrant was issued. In the earlier cited case of **CHIC FASHIONS** Lord Denning MR reviewed cases relating to the power of a constable entering a house in possession of a search warrant to seize goods not covered by the warrant but which he reasonably believed to have been stolen and to be material evidence on a charge of stealing or receiving against the person found in possession. In the Scottish case of **PRINGLE – VS – EREMNER & STIRLING (1867)5 Macph HC55** a constable was authorized by a search warrant to search a house for pieces of wood and fuse used to cause an explosion, had also taken away private books and papers found inside the house. Lord Chelmsford LC recognized that though the constable had no right to go beyond the terms of the warrant he added a rider that:

“But supposing that in a search which might have been improper originally, there were matters discovered which showed the complicity of the pursuer in a crime, then I think that the officers, I can hardly say would have been excused by the result of their search.”

The conclusion from these cases is that when a policeman enters a house by virtue of a search warrant, he may seize not only the goods which he reasonably believes to be covered by the warrant, but also any other goods which he believes on reasonable grounds to contain material evidence on any other charge against the person in possession of the items. It was explained that the computer and electronic equipment seized were to be taken for forensic analysis by the Cyber Crime Unit in Nairobi. The court takes judicial notice of the fact that many crimes (including fraud and terrorism) have now gone high-tech. There is much that can be gleaned from the analysis of computers, hard drives, discs as well as electronic equipment. It was therefore not totally illogical, unreasonable or unjustified for police to seize these items for analysis even though they were not specifically covered in the search warrant. My own view is that the existence of the warrant allowed police to seize any article which they reasonably believed could be used to commit, perpetuate or conceal crime. Therefore I find that the police did not act unlawfully in seizing the items not named in the certificate of search. I therefore dismiss prayer (iv) of this Petition.

Having said that I recognize that sections 118-121 of the Criminal Procedure Code deals with search warrants and how items seized are to be treated. Section 118 provides that

“any article seized in pursuance of a search warrant is to be taken before a court having jurisdiction to be dealt with according to law.”

Though no time frame is given within which a seized item ought to be presented to court, it is only logical that any item seized from a lawful search ought to be presented to a court as soon as it is reasonably practicable to do so. Indeed the search warrant upon which the seizure was based contains an endorsement requiring that the warrant and any items seized thereunder should be returned to court **immediately** upon its execution. In this case after the seizure on 23rd June, 2011 the police kept custody of the articles seized until directed by the court to produce the said articles on 5th July, 2011 several weeks after said seizure. The police did not report back to the court voluntarily in contravention of section 121 Criminal Procedure Code which provides:

“When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.”

The petitioner had to engage counsel to apply on his behalf that his seized property be brought to court. A warrant is not a licence for the police to seize property and then keep the same in their custody for as long as they wish. If the police needed to conduct further analysis on the seized items then they ought to have **first** returned the warrant and seized articles to court, and sought proper authority for further retention and/or disposal of such items. No doubt section 121(1) exists to ensure that items seized during a search are properly accounted for, properly (and safely) stored and preserved. The requirements that the same be presented to court exists in order to avoid any illegal tampering with seized articles. It was not upon the police to decide when it would be convenient for them to report back to the court. They had a legal duty to report back immediately. It was only the court that is mandated to give directions of further retention of the seized items for whatever purpose. The explanation offered by police for failing to comply is not persuasive. I find that the actions of the police in retaining the seized items until ordered by the court to produce them contravened the Criminal Procedure Code and was therefore unlawful. The petitioner is entitled to general damages for this violation. I therefore award to him general damages in the sum of Kshs. 400,000/= plus interest at court rates. I find that the special damages of Kshs. 270,000/= claimed by the petitioner (and proved by annexed receipts) as payment to a firm of advocates in respect of proceedings to compel the police to produce in court the items seized from his residence is merited. I therefore award to the petitioner special damages in the sum of Kshs. 270,000/= plus interest at court rates.

SUMMARY

1. The court declines to make declarations in terms of prayers (i), (ii), (iii) and (iv) of the petition dated 14th August, 2012.
2. I hereby declare that the failure by police to make and file a return in the Chief Magistrate's Mombasa, Misc. Appl. 168/2011 and their failure to produce the seized articles before the court was a contravention of section 121 of the Criminal Procedure Code and was therefore unlawful.
3. For the above violation I award to the petitioner general damages in the amount of Kshs. 400,000/= as well as special damages in the amount of Kshs. 270,000/= plus interest at court rates from today's date until payment in full.
4. I decline to make any award for exemplary aggravated and/or punitive damages.
5. Each party to meet its own costs for this petition.

Dated and delivered in Mombasa this 26th day of March, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Mureithi for Petitioner

Mr. Mureithi for Director Public Prosecutions