

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Constitutional Application 544 of 2010

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 22 THE CONSTITUTION OF KENYA

MOHAMED AKTAR KANAAPPLICANT
AND
ATTORNEY GENERALRESPONDENT
COURT

I have considered the application and the supporting affidavit of the Applicant. I have also carefully listened to Mr. Kigano Advocate who submitted that he wants his client to be subjected to the due process of the law. That argument sound attractive and basic in that every citizen is entitled to be subjected to due process no matter the gravity and seriousness of the offence he is facing or is likely to face.

However the Applicant and his Advocate have brought to the attention of this court the tenacity of the government of Kenya through its agents to simplify and trivialize the matter by saying that there is an agreement to transfer suspects within East Africa provided there is a request by one member country. That may be true but the question arises is whether an individual can be subjected to bilateral agreement in contravention of his basic fundamental rights.

The significant issue which we must not lose sight of is that the new constitution has enshrined the Bill of Rights of all citizens and to say one group can not enjoy the right enshrined under bill or rights is to perpetuate a fundamental breach of the constitution and to legalize impunity at very young age of our constitution. That kind of behavior, act or omission is likely to have far and serious ramification on the citizens of this country and the rulers. It also raises basic issue of whether a President who has just sworn and agreed to be guided by the provisions of the constitution can allow his agents to breach with remarkable arrogance or ignorance. All these, are issues which require sober and attentive judicial mind in order to address the rights and obligations of all parties involved.

Prima facie the allegations contained in this application is serious indictment on the institution of the President and whether he is protecting, preserving and safeguarding the interests, rights and obligations of all citizens as contained in the new constitution. This application is a clear indication that the security arms of this country have not tried to understand and appreciate the provision of this new Bill of Rights. It also shows yester years impunity are still thriving in our executive arm of the government

Now, it is my decision that the issue raised are of great public importance, considerably:-

- 1) I direct the Attorney General of the Republic of Kenya, the Police Commissioner of the Republic of Kenya and the Minister for Internal Security to ensure that the Applicant is not surrendered, hand over, transported and or transferred to Uganda or any other country without further orders from this Court.
- 2) If the Applicant is arrested, he shall be brought to this court without fail and subjected to the due process as enshrined in our constitution.

3) I direct that this order be served upon the office of the President through Mr. Muthaura, PS in the office of the President.

4) I direct that the application be heard interparties on 30th September, 2010.

I certify this is a true copy of the original dated the 28 day of September 2010.

WARSAME

JUDGE