



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

**Miscellaneous Criminal Application 282 of 2009**

**GUNTER GROCHOWSKI.....APPLICANT**

**VERSUS**

**1. THE ATTORNEY GENERAL**

**2. THE COMMISSIONER OF PRISONS.....RESPONDENTS**

**R U L I N G**

The application before the court is made by Chamber Summons dated 2<sup>nd</sup> July, 2009, and taken out under Section 9 of the Extradition (Contiguous and Foreign Countries) Act; Section 389 of the Criminal Procedure Code, and the Criminal Procedure (Directions in the nature of Habeas Corpus) Rules and all other enabling provisions of the law. By the application, the Applicant seeks Orders –

1. **THAT** this Honourable Court be pleased to issue summons directed to the Commissioner of Prisons and the Honourable Attorney-General to show cause why GUNTER GROCHOWSKI (the Applicant should not be forthwith released.
2. **THAT** this Honourable Court be pleased to admit GUNTER GROCHOWSKI to bail/bond pending the determination of these proceedings.
3. **THAT** this Honourable Court be pleased to deal with GUNTER GROCHOWSKI and set him at liberty in accordance with the Constitution and the Laws of Kenya.

The application is supported by the Applicant's affidavit sworn on 2<sup>nd</sup> July, 2009, and his further affidavit sworn on 7<sup>th</sup> July, 2009. The gist of the supporting affidavit is that the subordinate court's decision to have the Applicant extradited to Belgium was based on the provisions of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, otherwise known as the Vienna Convention of 19<sup>th</sup> December 1988. However, whereas Kenya ratified the Vienna Convention, there is no provision within its Municipal Law, namely the Narcotic Drugs and Psychotropic Substances (Control) Act which grants a subordinate court in Kenya jurisdiction to make an extradition order on the basis of an offence under the said Kenya Act and that extradition orders can only be made pursuant to the Extradition (Contiguous and Foreign Countries) Act, Cap. 76 of the Laws of Kenya. There is no extradition treaty or agreement between the Republic of Kenya and the Kingdom of Belgium as envisaged by the provisions of the Extradition (Contiguous and Foreign Countries) Act. Consequently, it is the Applicant's case that the order to extradite him to the Kingdom of Belgium was unlawful, contrary to the Constitution, the Judicature Act and all other Laws of Kenya, and he therefore urges the court to grant him the orders he has applied for.

The application is strenuously contested. In a replying affidavit sworn on 16<sup>th</sup> July, 2009, by Victor Mule, a State Counsel in the office of the Attorney-General, the deponent avers that on 9<sup>th</sup> March, 2009, a request was made by the Belgium Ministry of Justice through the Embassy of the Kingdom of Belgium in Nairobi for the extradition of Gunter Grochowski, the Applicant herein, to Belgium to stand trial in respect of offences related to the importation of, trading in and possession of narcotic substances and taking part in a criminal organization which offences are punishable under Belgian Laws and are extraditable crimes within the Extradition (Contiguous and Foreign Countries) Act, Cap, 76 of the Laws of Kenya. Subsequently, the Applicant was arrested and extradition proceedings commenced. At the conclusion thereof, the Chief Magistrate committed the Applicant to prison to await the decision of the Honourable the Attorney-General to surrender and extradite him to the Belgian authorities.

Mr. Mule also deposes that both Kenya and Belgium have ratified the Vienna Convention of 1988, and have also criminalized dealing in drugs and drug related offences and that this is also an extradition offence. He finally avers that there exists extradition agreements between Kenya and Belgium, and therefore the extradition proceedings and the orders of committal of the Applicant to custody to await surrender and extradition were lawful.

Mr. Amolo for the Applicant argued that when the Attorney-General moved to court, he invoked the provisions of the Extradition (Contiguous and Foreign Countries) Act. Under those provisions the court could not have ordered extradition of the Applicant to Belgium since Kenya and Belgium do not have a reciprocal extradition treaty. At that point, Mr. Amolo submitted, the learned Chief Magistrate ought to have set the Applicant free. Instead, the court proceeded to treat the matter under the provisions of the Vienna Convention which have not yet been domesticated by the Municipal law of Kenya. And since Kenya prescribes to the dualist State, those provisions would not apply unless and until they are domesticated. Therefore the Applicant ought to be set free as there is no legal basis for his extradition to Belgium.

On her part, Mrs Gakobo for the Respondents submitted that the order committing the Applicant was lawful and supported by cogent evidence before the court. In the proceedings before the lower court, it was amply demonstrated that the Applicant was the person sought to be extradited, that the offence allegedly committed by the Applicant was extraditable, and the proper procedure was followed. Mrs Gakobo submitted that Kenya and Belgium had ratified the United Nations Convention Drugs and Psychotropic Substances, 1988, and that Kenya had further domesticated that Convention under its Act No. 4 of 1994. Having done so, the extradition of the Applicant was properly founded upon that convention and subsequent legislation. The issue of whether Kenya subscribes to the monoist or dualist theories does not arise. She referred to Article 6 of the Convention and Section 59 of Kenya's Act No. 4 of 1994 and urged the court to find that the committal of the Applicant was lawful and that there was a proper basis for committal into custody and dismiss the application.

In a brief response, Mr. Amolo reiterated that Kenya subscribes to the dualist doctrine of the application of International Law. He also submitted that neither Article 6 of the Vienna Convention nor Act No. 4 of 1994 includes "arrest" or "extradition" and therefore we fall back onto Kenya's Extradition Act (Cap. 76) under which there is no extradition agreement between Kenya and Belgium. In the absence of such an agreement he urged the court to allow the agreement.

I have considered the rival submissions by the respective counsel. Mr Amolo started by stating that when the Attorney- General came before the Chief Magistrate, the provisions of the Extradition (Contiguous and Foreign Countries) Act (hereinafter referred to as "**the Extradition Act**") were invoked to the prejudice of the Applicant. However, the orders sought were not based or granted under the Extradition Act. If they had been based on that Act, the application would have succeeded only if there had been an extradition treaty between Kenya and Belgium. But Belgium is not listed as one of the countries under which Kenya has an extradition treaty. In the absence of such a treaty, under the Extradition Act the Applicant could not and cannot, be extradited to Belgium. But since the lower court ordered that the Applicant herein be extradited to Belgium to face charges for illicit trafficking in narcotic drugs and psychotropic substances, the issue narrows down to whether there was justification for the court to do so.

It is clear from the record that the request to the Attorney-General for the extradition of the Applicant was not based on the Extradition Act. It was expressly stated to be based on “the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988); the Agreement dated 28 September 1967, 26 January 1968 and 10 February 1968 and signed in Nairobi that upholds the Convention dated 29<sup>th</sup> October 1901 between the Kingdom of Belgium and the United Kingdom of Great Britain and Ireland on the extradition of fugitive criminals, the Additional Agreement dated 5 March 1907 and the Additional Agreement dated 3 March 1911. Both Kenya and Belgium are signatories to and have ratified the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. Therefore they are parties to that Convention and are bound thereby.

Article 6 of the said Convention is relevant. Paragraph (1) thereof states as follows –

***“This article shall apply to the offences established by the parties in accordance with article 3, paragraph 1.”***

So far as is relevant to this matter, Article 3 paragraph 1 provides in turn that –

***“Each party shall adopt such measure as may be necessary to establish as criminal offences under its domestic law ..***

***(a) (i) The preparation ... offering for sale, distribution, sale, delivery on any terms whatsoever ... dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance ...”***

The Applicant herein is sought to be extradited to Belgium to stand trial in respect of offences related to the importation or exportation of narcotic substances which is an offence under Article 3 (a) (i) of the Convention. Mr. Amolo’s contention that such extradition cannot be effected unless and until it is domesticated flies right in the face of paragraph 3 of Article 6 of the Convention which states –

***“If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies ...”***

It is my respectful view that this paragraph covers the concerns raised by Mr. Amolo. What I understand it to mean is that if Kenya makes extradition conditional on the existence of a treaty as espoused in the dualist doctrine, and if Kenya receives a request for extradition from another Party like Belgium, with which it has no extradition treaty, it may consider this convention as the legal basis for extradition in respect of any offence under this article.

Since the Convention can be used as a legal basis for extradition where there is no extradition treaty, as in this case, then I find that the order for extradition as granted by the learned Chief Magistrate was well founded and lawful. For that reason, this application must fail and it is accordingly dismissed. It is so ordered.

Dated and delivered at Nairobi this 22nd day of September 2009.

**L. NJAGI**

**JUDGE**