



**Mwaura v Republic (Criminal Petition E001 of 2023)
[2024] KEHC 6362 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL PETITION E001 OF 2023
DR KAVEDZA, J
JUNE 4, 2024**

BETWEEN

SAMWEL NJENGA MWAURA PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. Before the JKIA Chief Magistrate’s Court, the applicant/petitioner is facing a charge of trafficking in narcotic drugs contrary to section 4(1) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No. 4 of 1994. He pleaded guilty to the charge and the trial is yet to commence.
2. When the case came for hearing on 30th January 2024, the applicant's counsel Mr. Omwenga raised the issue of admissibility of evidence supplied by the prosecution. The trial court did not determine the issue as the applicant did not make an application to disqualify the evidence allegedly illegally obtained.
3. The applicant through a petition, sought conservatory orders from this court to stay the trial proceedings pending before the subordinate court. The application is supported by an affidavit sworn by the applicant and is grounded on the following assertions: The applicant challenged the decision of the Office of the Director of Public Prosecutions (ODPP) to institute charges against him. He contended that, during the investigation, he protested the manner in which the entry, search, and purported seizure of the alleged narcotics were conducted. This protest was formally communicated to the ODPP via a letter dated 3rd August 2023. The applicant was aggrieved by the decision to charge him. He asserted that the evidence upon which the prosecution relies was obtained unlawfully. He argues that the decision to charge him is therefore unreasonable and irrational.
4. The application was canvassed by way of written submissions. The applicant submitted that the prosecution’s conduct in the matter has been devoid of public interest in wanting to proceed with illegally obtained evidence. The respondent is bound by the Constitution and the same should be



adhered to. He argued that the application had demonstrated a miscarriage of justice. He urged the court to grant the prayers sought.

5. I have considered the application, the written submissions, and the applicable law. The crux of this application is the applicant's assertion that his constitutional rights, as enshrined in the Constitution of Kenya, have been violated.
6. In particular, the applicant contended that his rights were violated during the arrest, search, seizure, and weighing of the alleged exhibits. He pointed to sections 73 and 74A of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No. 4 of 1994.
7. There is a claim by the applicant that the respondent violated his constitutional right by arresting him without a warrant of arrest. He did not point to any specific constitutional provision which provides that a person suspected of committing a criminal offence will not be arrested without a warrant of arrest. Indeed, Section 58 of the *National Police Service Act*, Cap. 84 authorizes a police officer to arrest a person without a warrant of arrest as follows:

“Subject to Article 49 of the *Constitution*, a police officer may without a warrant, arrest a person—

- (a) who is accused by another person of committing an aggravated assault in any case in which the police officer believes upon reasonable ground that such assault has been committed;
 - (b) who obstructs a police officer while in the execution of duty, or who has escaped or attempts to escape from lawful custody;
 - (c) whom the police officer suspects on reasonable grounds of having committed a cognizable offence;
 - (d) who commits a breach of the peace in the presence of the police officer;
 - (e) in whose possession is found anything which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing;
 - (f) whom the police officer suspects upon reasonable grounds of being a deserter from the armed forces or any other disciplined service;
 - (g) whom the police officer suspects upon reasonable grounds of having committed or being about to commit a felony; or
 - (h) whom the police officer has reasonable cause to believe a warrant of arrest has been issued.”
8. Section 2, the *Criminal Procedure Code*, cap. 75 defines a "cognizable offence" to mean an offence for which a police officer may, in accordance with the First Schedule or under any law for the time being in force, arrest without a warrant. The charges preferred against the applicant are trafficking in narcotic drugs.
 9. The First Schedule of the *Criminal Procedure Code* indicates that these are cognizable offences for which the police may arrest without a warrant of arrest. In any event, what initially led the police to the applicant was intelligence-led information that he may have committed serious crimes under the *Narcotic Drugs and Psychotropic Substances (Control) Act*.



10. I take judicial notice of the fact that investigating transnational organised crimes, including cases of trafficking in narcotics, officers rely on intelligence-based information. Obtaining warrants may not always be possible due to the sensitivity of the investigations where exhibits may be moved or destroyed. Indeed, the requirement to get a search warrant is not mandatory. An officer if he has reasonable grounds to believe that an offence is being committed or has been committed in a particular premise may enter, search, seize, and arrest without any warrant of arrest. I therefore do not agree that the constitutional right of the applicant was violated as alleged.
11. The applicant also raised the issue of the admissibility of the prosecution's evidence. Section 74A of the *Narcotics and Psychotropic Substances Act* provides for the procedure to be followed when a substance suspected to be a narcotic drug or psychotropic substance is seized by the police. The applicant contended that the said provision of the law was not complied with and the evidence obtained was therefore inadmissible.
12. The right to a fair trial is a non-derogable right. It includes the right to adduce and challenge evidence. As such, it should not be limited. Denying such a right would be a threat to the right to access justice. I do not find any requirement in law that denies the applicant an opportunity to challenge the evidence of the prosecution.
13. According to the record of the subordinate court, the prosecution has yet to present the evidence, and the court is yet to determine whether the evidence is admissible or not. The court has the authority to regulate the conduct of its own proceedings and can make appropriate directions on the modalities of taking the evidence and its admissibility.
14. In addition to that, Article 24 of the *Constitution* provides for justification where a right has been violated. The said provision states that certain rights may be limited if the said limitations are reasonable and justifiable. As to whether the evidence is admissible or not, is a matter to be raised before the trial court where he will have a chance to challenge the said evidence.
15. The upshot of the above analysis is that the application is premature and is dismissed.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 4TH DAY OF JUNE 2024.

D. KAVEDZA

JUDGE

In the presence of:

Mr. Omwenga for the Applicant

Ms. Tumaini Wafula for the Respondent

Joy Court Assistant

