



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CONSTITUTIONAL PETITION NO.5 OF 2019

IN THE MATTER OF CONTRAVENTION OF ARTICLES 2,3,10,19,20,23(3),24,25,27,28,29,47,49,50,73,75,157(4) (11), 159(2) c, 165(7), 232,238(2), and 239(3) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (CONTROL) ACT NO.4 OF 1994

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT NO.11A OF 2011, OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT NO.2 OF 2013

AND

IN THE MATTER OF MARSABIT CHIEF MAGISTRATE'S COURT CRIMINAL CASE NO.242 OF 2019 (Consolidated with Cr.366 of 2019)

JAFFER ISAAK KANU SORA.....PETITIONER

VERSUS

INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.....1ST RESPONDENT

DIRECTOR OF CRIMINAL

INVESTIGATIONS.....2ND RESPONDENT

DIRECTOR OR PUBLIC PROSECUTIONS3RD RESPONDENT

MAGISTRATE COURT MARSABIT.....4TH RESPONDENT

RULING

The notice of motion dated 10th September, 2019 and amended on 3rd October, 2019 seek the following orders:

- 1. Pending hearing and determination of the application herein this honourable court be pleased to issue conservatory orders staying the proceeding in Marsabit Chief Magistrate's Court criminal case No.242 of 2019 (consolidated with CR. 366 of 2019)**
- 2. Pending hearing and determination of the Petition herein this honourable court be pleased to issue conservatory orders staying the proceedings in Marsabit Chief Magistrate's Court Criminal Case No.242 of 2019 (consolidated with CR 366 of 2019).**
- 3. The honourable Court be pleased to grant the plaintiff's costs of the application herein.**

The application is supported by the applicant's affidavit. The respondents filed grounds of opposition to the application.

Mr. Njengo appeared for the applicant. Counsel submitted that the application raises two issues for determination namely:-

1. Whether the applicant has been/will be accorded fair hearing

2. Whether the proceedings in Marsabit Chief Magistrate's Court criminal case No.242 of 2019 (consolidated with Cr.366 of 2019) are legal and constitutional.

It is submitted that Article 50 of the constitution provides for the right to a fair hearing. Several other rights arise from the right to fair hearing such as the right to be presumed innocent until the contrary is proved and right to adduce and challenge evidence. Article 50(4) states as follows:

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence render the trial unfair, or would otherwise be detrimental to administration of justice.

Counsel further submitted that Section 74A of the Narcotic Drugs and Psychotropic substance, (control) Act No.4 1994 provide a very elaborate and complex procedure to be adopted upon seizure of narcotic drugs and states as follows:-

Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as "the authorized officers") shall, in the presence of where practicable—

(a) the person intended to be charged in relation to the drugs (in this section referred to as "the accused person");

(b) a designated analyst;

(c) the advocate (if any) representing the accused person; and

(d) the analyst, if any, appointed by the accused person (in this section referred to as "the other analyst"), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analyzing and identifying the same.

Counsel contend that the respondent breached the mandatory provisions of section 74A. The drugs are expected to be used as exhibits during the trial. Failure to follow the provisions of section 74A is prejudicial to the applicant and he will not be accorded fair hearing as enshrined in the constitution. Counsel referred to the case of **NDEGWA-V-REPUBLIC (1985)KLR 534** where the Court of Appeal held inter alia:

No rule of natural justice, statutory protection and evidence of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration. (emphasis added)

Mr. Njengo further contend that the applicant is facing an offence which has a serious sentence. His freedom will be at stake hence the procedure leading to the prosecution should be properly followed to ensure that he is accorded not just a hearing but a fair hearing as enshrined in the constitution. Failure to follow mandatory procedure in preparing evidence to be adduced in court is not only illegal but also prejudicial to the applicant making the proceedings unprocedural, null and void.

The state opposed the application. Mr. Kihara, prosecution counsel, relied on the grounds of opposition. It is stated that the application seeks to pre-empt evidence which is yet to be adduced before the trial court. The application can be resolved by the trial court and right of appeal will be available to the applicant. Section 74 and 74A of Act No.4 of 1994 provide for collaborative evidence.

The application is grounded on one main issue namely that section 74A of the Narcotic Drugs and Psychotropic substance (Control) Act No.4 of 1994 was contravened. According to the petitioner, since that section was contravened then he will not get a fair trial. It is the applicant's contention that non-compliance with the section amounts obtaining evidence contrary to the provisions of Article 50(4) of the Constitution.

The petitioner was charged with the offence of trafficking in Narcotic drugs contrary to section 4(a) of Narcotic and Psychotropic Substance Control Act. The particulars of the offence are that the appellant and two others on 19th day of June, 2019 at Marsabit Central Sub County within Marsabit County, jointly with others not before Court were found trafficking Narcotic drugs namely *cannabis sativa* (Bhang) to wit 89 bales of 5 kilograms each totaling 445Kgs of street value of Kshs.11,125,000.00 by transporting in a Toyota Prado TX registration number KCF 007Q Hauling trailer registration number ZB 936B in contravention of the said Act.

Among the documents annexed to the petitioner's application is a weighing certificate, a search certificate and Seizure notice. The Seizure notice read as follows:

I IP Mua, and Sgt Abdi Kadir both attached at Marsabit DCI office now serve one Jaffer Sora with a seizure notice of Motor vehicle registration number KCF 009Q and its trailer registration ZB – 9366 after the trailer was found packed with 89 bales of substance believed to be bhang.

Signed by Jaffer Sora ID No.8672490

Police officers

IP Mua signed

Sgt Abdi Kadirsigned

The weighing certificate on the other hand reads as follows:-

The following officers namely IP MUA, Sgt Abdi Kadir, Cpl Gichuki all attached at Marsabit DCI Weighed 89 bales of 5kgs each and took (1-89) samples of substances for analysis witnessed by:

Signed by Jaffer Isaack Sora ID 8672490

Signed by Police

- 1. IP Mua**
- 2. Sgt Abdi Kadir**
- 3. Cpl Gichuki**
- 4. Cpl**

Section 74A (1)(d) calls for the weighing of seized drugs and thereafter samples taken for analysis to confirm if what has been seized is narcotic drug. It is not expected that the suspect will be taken to the Government analyst and participate in the analysis of the suspected drugs. Further, Section 74A (1) contain the words "**where practicable.**" The effect of the section is that at times it may not be practicable to comply with that section.

The matter is still pending in court. The prosecution case against the applicant is that they seized drugs from the applicant. The drugs were weighed in his presence and a weighing certificate was signed. This is part of the evidence to be adduced before the trial court. This Court cannot stay proceedings at this stage on the applicant's contention that section 74A of Act No.4 of 1994 was not complied with. There is no indication that the applicant will not get a fair trial. There is no contravention of any of the Articles of the Constitution cited on the application. The applicant should undergo the trial and wait for the evidence to be adduced. He can challenge the evidence on the ground that it was not properly obtained. The court will have to make a ruling on the objection. I do find that granting the orders at this state would be to pre-empt the prosecution case. More still, in my view, contravention of section 74A of Act No.4 of 1994 should not lead to stay of a criminal case against an accused or the termination of the proceedings. The trial Court has to hear all the evidence and make its determination on the totality of the evidence.

I do find that the application herein has been brought without any good grounds. The applicant should wait for the production of the exhibits and challenge the witnesses as to how the drugs were weighed and analysed. The application dated 3.10.2019 lacks merit and the same is hereby dismissed.

Dated, Signed and delivered at Marsabit this 10th day of December, 2019

S. CHITEMBWE

JUDGE