



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CONSTITUTIONAL PETITION NO. 3 OF 2016

IN THE MATTER OF: ARTICLES 2, 3(1), 6(2), 10, 19, 20, 21, 22, 23(1) & 3, 27(4), 27(5), 47(1), 49(2), 50(1), 50(2) (A), 50 (2) (J), 50 (4), 73(1), 73(2) (B), 157 (4), 157 (11), 159 (2) (C), 159 (2) (e) AND 258 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: RULES 10, 11, 22, 23, AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE PROCEDURE RULES, 2013

AND

IN THE MATTER OF: SECTIONS 73, 74 (A), 75, 77 OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (CONTROL) ACT, NO. 4 OF 1994

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 25, 26, 28, 31, 40, 47, 48, 49, 50, 51, 73, 157, 159, 159 (2) (e), 165 AND 258(1) OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

JAMES NJENGA KIHATO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE...2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AGNES TUNE.....INTERESTED PARTY

JUDGMENT

1. The facts of the case are not in dispute and they can be briefly stated. On 13/07/2016, the Police went to the Petitioner's house in Lavington, Nairobi, conducted a search in the house, and arrested the Petitioner. The Police said they were searching for narcotics and were commanded by the Interested Party herein.

2. The Petitioner was detained that night at Ruaraka Police Station and was presented before the Chief Magistrate's Court in Kiambu the following day in *Kiambu Chief Magistrate's Misc. Crim. Application No. 23 of 2016*. The Police requested the Learned Magistrate to

permit them to hold the Petitioner for seven days as they were conducting investigations.

3. The Court granted the orders. The Petitioner was then held in custody at Ruaraka Police Station until they were arraigned in Court with two others in *Kiambu Chief Magistrate's Criminal Case No. 1721 of 2016*. The Petitioner and his Co-Accused faced two counts of trafficking in a narcotic drug contrary to section 4(a) of the Narcotics Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994 (hereinafter, "the Act").

4. The Petitioner complains that during the pendency of the criminal trial, and in particular, on 18/07/2016, the Interested Party and other Police Officers took the Petitioner to the Government Chemist situate at Kenyatta National Hospital with the intention of forcing him to open a mysterious parcel which was in their possession. The Petitioner avers that the intention of the Police was to obtain a certificate envisaged under section 74A of the Act.

5. Section 74A of the Narcotics and Psychotropic Substances Act provides for the procedure to be followed when a substance suspected to be narcotic drug or psychotropic substance is seized by the Police. The section provides as follows:

(1) 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 authorised 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 analysing and identifying the same.

(2) After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts' certificates for production at the trial of the accused person.

(3) Upon receipt of the designated analyst's certificates and the samples analysed in accordance with the

foregoing subsections the authorized officers shall, where the drug is found to be a narcotic drug or psychotropic substance within the meaning of this Act, arrange with a magistrate for the immediate destruction by such means as shall be deemed to be appropriate of the whole amount seized (less the sample or samples taken as evidence at any subsequent trial or any contemplated trial particularly where the identity is not yet known or the accused person is outside the jurisdiction of Kenya at the time of taking such samples).

(4) The destruction of drugs and psychotropic substances ordered under subsection (3) shall be carried out by the authorised officers in the presence of the Magistrate and the accused person, where practicable, and his advocate (if any) and thereafter the magistrate shall sign a certificate in the prescribed form relating to such destruction.

(5) The production in court by either one of the authorised officers at the trial of an accused person of the sample or samples together with the designated analysts' certificates and the magistrate's certificate of destruction shall be conclusive proof as to the nature and quantity of the narcotic drug or psychotropic substance concerned and of the fact of its destruction in accordance with the provisions of this section.

6. The Petitioner herein challenges the constitutionality of these provisions. Paraphrased for clarity, in particular, the Petitioner raises three complaints verging on his constitutional rights:

a. First, he argues that the provisions are violative of his right to privacy as guaranteed by Article 31 of the Constitution as he finds them to be impermissibly intrusive in allowing law enforcement agencies to unreasonably search people's homes and persons in order to seize suspected contrabands.

b. Second, he argues that the schema provided in this section violates his rights to fair trial by endorsing the collection of evidence in violation of his right not to give self-incriminating evidence.

c. Third, the Petitioner argues that section 74A(5) violates his right to fair trial by decreeing that any certificate presented by the Government analyst will be conclusive proof as to the nature and quantity of the narcotic drug or psychotropic substance concerned – since that sub-section ousts the possibility that an Accused Person can present evidence proving that the conclusions of the Government Analyst are wrong.

7. The Petition was opposed by the Director of Public Prosecutions. Mr. Kinyanjui argued on his behalf and filed written submissions in opposition.

8. Since this is a straightforward matter in which the singular issue is the constitutionality of section 74A of the Act, I will analyse each of

the three issues presented in seriatim below.

B. DOES SECTION 74A OF THE ACT VIOLATE THE APPELLANT'S RIGHTS TO PRIVACY?

9. It is true, and it is not disputed that section 74A of the Act envisages a situation where Police Officers may search a person's house or property and seize goods their suspect to be contrabands. The Petitioner argues that this is a violation of his rights under Article 31 of the Constitution.

10. Article of the Constitution states as follows:

31. Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

11. The Court in ***Samura Engineering Limited and Others v Kenya Revenue Authority Nairobi Petition No. 54 of 2011*** emphasized the importance of the right to privacy in the following words:

*“[66] The right to privacy enshrined in our Constitution includes the right to not to have one's person or home searched, one's property searched or possessions seized. Since searches infringe the right to privacy, they must be conducted in terms of legislation which must comply with the provisions of Article 24. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains of ordinary citizens is one of the features that distinguish a democracy from a police state. (See *Mistry v Interim National Medical and Dental Council & Others CCT 13/1997 [1998] ZACC 10* at para. 25 per Sachs J.)”*

12. While the Act does not specifically reference the general power and authority of the Police to detect and investigate crime, there is no question that the National Police Service has a Constitutional and statutory mandate to do so. The permissible manner in which the Police may perform their constitutional and statutory mandate includes the power to search premises and seize property without warrants in certain circumstances as permitted by the ***National Police Service Act (Chapter 84 of the Laws of Kenya)***.

13. Section 57 of the ***National Police Service Act (Chapter 84 of the Laws of Kenya)*** provide as follows:

57. Subject to the Constitution, if a police officer has reasonable cause to believe—

(a) that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success of the investigation; or

(b) that any person in respect of whom a warrant of arrest is in force, or who is reasonably suspected of having committed a cognizable offence, is in any premises, the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct the search, and may, if necessary in order to effect entry, break open any outer or inner door or window or other part of such premises.

14. Section 60 of the same Act provides as follows:

60.(1) When a police officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something was used in the commission of a crime, is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code (Cap. 75) will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant, enter any premises in or on which he or she suspects the thing to be and search or cause search to be made for, and take possession of such thing.

(2) Sections 119, 120 and 121 of the Criminal Procedure Code (Cap. 75) as to the execution of search warrant, and the provisions of that Code as to searches shall apply to a search without a warrant under this section.

15. These sections, in my view, provide the reasonable limitation to the right to privacy secured under Article 31 of the Constitution. They reasonably mandate a Police Officer who has reasonable cause to believe that a crime has been committed to enter premises and search it and while therein, seize any goods which such an officer reasonable suspects to be evidence of a crime. Such was the case here. The Petitioner has not placed any materials before the Court to demonstrate where he thinks section 74A is unreasonable in its comprehension of the possibility of a search and seizure without warrant. Neither has he demonstrated to the Court that, as applied to him, the search and seizure

was unreasonable and in violation of his constitutional rights to privacy.

C. DOES SECTION 74A OF THE ACT VIOLATE THE APPELLANT'S RIGHTS NOT TO GIVE SELF-INCRIMINATION EVIDENCE?

16. In their second salvo, the Petitioner argues that section 74 of the Act violates Article 50(2)(l) of the Constitution. That sub-article of the Constitution guarantees every arrested person a right to refuse to give self-incriminating evidence.

17. The Petitioner argues that by forcing an Accused Person to be present when a sample of contraband is being taken and by adducing that sample in Court, the Prosecution violates the Constitution. This is because, the Petitioner argues, the Petitioner has a right not to give self-incriminating evidence but that once the sample taken from him is adduced as evidence that amounts to compelling him to give self-incriminating evidence.

18. In *R v Mark Lloyd Steveson [2016] eKLR (Kiambu Criminal Revision No. 1 of 2016)*, I quoted from the European Court of Justice in *Saunders v United Kingdom A/702 (1997) 23 EHRR 313* as it explained the policy rationale, constitutional objectives and contours of the right to refuse to give self-incriminating evidence in the following words:

The Court explained that the right against self-incrimination lies...in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence ... The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understoodit does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purposes of DNA testing.

19. This rationale is a perfect answer to the complaints by the Petitioner in this case. The right to refuse to give self-incriminating evidence is predominantly applied to protect an Accused Person against testimonial evidence; it does not apply to the use of State's compulsory powers to obtain evidence of a crime where the evidence sought to be so obtained exists independently of the will of the suspect as is the case here.

20. As the State pointed out in its submissions, "the right to privacy is not meant to shield criminal activity or conceal evidence of crime from the criminal justice process...A balance must be struck between the interests of the individual and that of the State, a task that lies at the heart of the inquiry into the limitation of rights." (Quoting *The Investigating Directorate of Economic Crimes and Offences v Hyundai Motors Distributors (PTY) & Others CCT 2000*).

21. Consequently, this challenge to section 74A equally fails.

D. DOES SECTION 74A OF THE ACT VIOLATE THE PETITIONER'S RIGHT TO FAIR TRIAL?

22. The Petitioner also argues that section 74A (5) of the Act derogates from the core and/or essence of the right to fair trial guaranteed under Article 50 of the Constitution. He argues that the analyst's certificate contemplated in that sub-section is couched in mandatory terms as "conclusive proof or evidence" of the existence, nature, quantity of the suspected narcotic substance.

23. The Petitioner argues that since "conclusive evidence" means "evidence so strong as to overbear any other evidence to the contrary" (Black's Law Dictionary), section 74A(5) limits the Petitioner's right to challenge and contradict evidence produced against him. The section, argues the Petitioner, denies him the right to adduce evidence challenging the nature of the suspected narcotic and psychotropic substance, for reason that his analyst if any shall not be afforded an opportunity to test the samples collected from the seized substance in an effort to establish the contents thereto.

24. Consequently, the Petitioner argues that the failure of section 74A of the Act to guarantee an Accused Person's right to adduce and challenge evidence through an independent analyst "defiles" the provisions of Article 50(2)(k) of the Constitution. This is because, the Petitioner argues, it is trite that expert evidence can only be challenged by similarly adducing contradicting expert evidence yet section 74A(5) denies the Accused Person's expert the right to collect a sample of the suspected narcotic or psychotropic substance for independent analysis.

25. My reading of the elaborate schema provided in section 74A is that it is, firstly, meant to grant an Accused Person charged with an offence under the Act with procedural due process as to how the analysis of the substance suspected to be contraband will be done. It, hence, provides for the presence of independent advisors – namely an advocate and an independent analyst. Secondly, the schema is meant to ensure that after a sample of the substance is taken, the rest of the substance would be destroyed even before the trial takes place. The practical utility of this is obvious: the Prosecutor or the Court is not required to keep copious amounts of dangerous drugs as trial is awaited. This is to reduce the risk that the drugs might find their way back to the black market through corrupt means.

26. If one understands the section 74A schema in this manner, the objections raised by the Petitioner to its operation become appropriately modulated. As the State points out, the objective of section 74A schema is not to limit the rights or ability of an Accused Person to present any contrary evidence by the Accused Person. And neither does the section, in its text or implication, limit the right of an Accused Person to apply to extract a reasonable sample of the suspected substance for analysis by his independent expert. Of course, like in all such circumstances, given the sensitive nature of the substances in question, the Court entertaining such an application must address itself to the exact circumstances in the case in fashioning an appropriate order to afford the Accused Person the facilities to mount his defence. Indeed,

this is constitutionally required under Article 50(2)(c).

27. The implication of this analysis, then, is that the Petitioner's apprehension that section 74A of the Act is definitionally violative of the fair trial rights of an Accused Person is unfounded, or, at best, hypothetical. There is no necessary reading of the section that yields the conclusion that a Trial Court conducting a trial under the Act will be straitjacketed by section 74A of the Act to refuse to accord an Accused Person the facilities to independently test the sample of substance extracted for purposes of his trial. Neither does a proper reading of that section 74A of the Act capitulate to the conclusion that an Accused Person charged with an offence under the Act is disbarred from calling expert opinion to contradict the expert opinion provided by the government analyst.

28. If one understands section 74A of the Act in this way, the constitutional challenge mounted by the Petitioner dissipates. Of course, in a proper case an Accused Person might challenge the actual operation of section 74A of the Act as applied to their specific case. However, there is nothing in section 74A that is definitionally unconstitutional.

29. **For this reason, the Petition herein is dismissed.**

30. **There will be no order as to costs given the public interest nature of the challenge.**

31. Orders accordingly.

Dated and delivered at Kiambu this 7th day of June, 2018.

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JOEL NGUGI

JUDGE