



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CONSTITUTION PETITION NO. 2 OF 2018**

**PATRICK NJIRU KURIA.....APPLICANT**

**V E R S U S**

**1.DIRECTOR OF CRIMINAL INVESTIGATIONS....1<sup>ST</sup> RESPONDENT**

**2. INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**3. DIRECTOR OF PUBLIC PROSECUTORS.....3<sup>RD</sup> RESPONDENT**

**4. THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**5. ANTI-COUNTERFEIT AGENCY.....5<sup>TH</sup> RESPONDENT**

**RULING**

On 10/7/18 this matter came up for interparties hearing of the petition which was filed by Patrick Njiru Kuria under various **Articles of the Constitution**. The petition was against the Director of Criminal Investigations, Inspector General of Police, Director of Public Prosecutions, Attorney General and Anti Counterfeit Agency. An oral application was made to preserve the subject matter. The applicant further made an application that the petitioners be allowed access to the sugar then said to be at the Director of Criminal Investigations Headquarters for purpose of collecting samples. It was intended to present the samples for analysis for the purpose of determining the safety of the sugar.

The application was opposed by the Director of Public Prosecution on the basis that the application was made without notice and they had no instructions. The Director of Public Prosecution was given time to respond and he proceeded on 18/7/18 by making a response to the petitioner's oral application.

**Petitioner's case**

The petitioner relying on **Rule 23(1) and 24(1) of the Mutunga Rules** and **Articles 21(1) and 23 of the Constitution** prayed that they be allowed access to the sugar at the Director of Criminal Investigations Headquarters for purposes of collecting samples and to present them to an independent analyst for the purposes of determining the safety of the same. This is for the reason that police officers stormed their warehouse and confiscated sugar suspected to be unfit for human consumption.

They are not aware whether samples were taken or if they were presented to an analyst. They are in darkness as to what is happening to the sugar and is apprehensive that his sugar may have been mixed with others. In addition, the Counterfeit agency and the Director of Public Prosecution have not communicated to the petitioner about the results.

That the person mandated is Kenya Bureau of Standards which is supposed to ensure safety but the analyst is being done by government chemist which is not supposed to ensure quality but used in penal investigations.

**3<sup>rd</sup> Respondent's case:**

The 3<sup>rd</sup> respondent opposed the application since there are government agencies which test goods for standards, the bureau of standards which test the commodities and the government chemist which tests the standard of goods.

He has been informed that a number of business people whose sugar was confiscated have co-operated with the agencies to have the sugar

tested and have been given results as to whether the sugar complies with safety standards. That they cannot have a scenario where every trader does his own testing therefore the reason there are government agencies. That the applicant is supposed to co-operate with investigations because they are supposed to take samples in the presence of the applicant. That the applicant should have the sugar tested and if it is not harmful, it will be returned. That it is in the public interest that the sugar be tested to determine whether it is fit for consumption.

### **Applicant's response**

The applicant says that they have a problem with how the commodity was confiscated since procedures were flouted. That he is seeking orders because **Section 27 of Ant-Counterfeit Act** requires confiscators to keep them in safe custody in their depot. In addition, under the said Section, the analysis is to be made within five days. That the goods are in custody of the DCI who is not the rightful person.

### **3<sup>rd</sup> Respondent's further response:**

They stated that the applicant was confusing issues. That the sugar was not seized by the Anti-Counterfeit agency but by the Director of Criminal Investigation and therefore **Section 27** is not applicable. The Constitution mandates the Director of Criminal Investigation to investigate crimes and the sugar was seized due to allegation that they were not fit for human consumption.

### **5<sup>th</sup> Respondent's response:**

He concurred with the submission for the 3<sup>rd</sup> respondent and added that **Section 27(3)** envisages a situation where goods are seized by the 5<sup>th</sup> respondent and it allows for collection of samples. It is read with **Regulation 22 of the Anti-Counterfeit Regulations** which is to the effect that the samples are to be analyzed by approved laboratories.

That the claim of the goods not being properly seized is based on misunderstanding of **Section 22** on appointment of Inspectors. That police officers are designated inspectors under **Section 22(3)** which is read with **Regulation 6 of the Anti-Counterfeit Regulations**.

This application was made orally which was not procedural and it was not clear under what provisions it was made. The applicant changed midway and brought in provision of Counterfeit Act. There were no pleadings which he was bound with and so he waded uncontrolled as the trite principle that a party is bound by his pleadings could not be ensured. Be thus as it may I will proceed to rule on the matter.

I have considered the application, and he submissions.

The issues which arise are whether the sugar was properly seized, whether the sugar the subject matter of this application is in proper custody and thirdly whether the petitioner should be allowed to collect samples of the sugar and do private analysis.

It was stated that the commodity which was confiscated by the police was done under **Section 27 of the Counterfeit Act**. The section provides:-

***1) "Goods that have been seized under section 23(1) shall be stored and kept in safe custody at a counterfeit goods depot until the person in charge of the depot—***

***a) is ordered by a court to return, release, destroy or otherwise dispose of those goods as specified in the order:***

***Provided that in the case of counterfeit goods, such goods shall be destroyed at the expense of the local manufacturer or importer, as the case may be, based on the environmental considerations and the capacity of the country to destroy the goods, or shall be reshipped;***

***b) is directed by an inspector under section 28 to release the goods to the person from whom they were seized.***

***2) Upon an application in the prescribed manner, goods seized under section 23(1) shall, within five working days, be made available for inspection by the complainant or prospective complainant, if any, the suspect or any other interested person, at the counterfeit goods depot at any reasonable time.***

***3) Upon an application in the prescribed manner, the Executive Director may make a sample of the seized goods available within a period of five working days to the applicant for testing or analysis.***

***4) An inspector may take, in the prescribed manner, samples of goods in reasonable quantities for testing or analysis".***

This section relates to goods confiscated under **section 23(1) of the Act** which provides for powers of Inspectors. This is based on allegation that the goods are suspected of being counterfeit goods. Under **Section 22(3) of the Act** the police are designated as Inspectors. The section must be read with **Regulation -6- of the Anti-Counterfeit Regulations**.

**Section 23(3) of the Anti-Counterfeit Act** provides:-

***"In addition to inspectors appointed under subsection (1), any member of the Board, Police Officer, Authorized Customs Officer, Trade Development Officer, Industrial Development Officer, Trade Mark and Patent Examiner, Seed and Plant Inspector, Public Health Inspector, and Inspectors appointed under the Standards Act (Cap. 496), the Weights and Measures Act (Cap. 513), the***

Copyright Act (No. 12 of 2001), the Food, Drugs and Chemical Substances Act (Cap. 254), the Pharmacy and Poisons Act (Cap. 244) and the Pest Control Products Act (Cap. 346) are hereby designated as inspectors for purposes of this Act.

**Regulation 6 of the Anti-Counterfeit Regulations, 2010** provides:-

- 1) A designated inspector under section 22(3) of the Act shall operate under the instruction and direction of his respective institution.
- 2) The institutions under which the designated inspectors operate, shall report to the Agency, concerning all matters relating to counterfeit goods, on a monthly basis.

According to the Director of Public Prosecution the commodity was not seized under the **Anti-Counterfeit Act** but by the Director of Criminal Investigation who was investigating an alleged crime of the commodity not being fit for human consumption. As such the provisions of the Act do not apply.

I will now address the issues. **Section 22(3) of the Anti-Counterfeit Act** gives the police officers power to seize goods. However these are goods which are seized under the **Counterfeit Act**. The **Act** gives the function of the **Anti-Counterfeit Agency under Section 5(b) of the Act** which provides:-

**“Combat Counterfeiting, trade and other dealings in Counterfeit goods in Kenya in accordance with this Act”.**

In his submission counsel for the applicant submitted that the sugar was kept at the D.C.I’s headquarters. In view of the above provisions I find that the Police Officers who seized the sugar could do so under the **Act** as designated Inspectors to confiscate the sugar on allegation that it was unfit for human consumption. It is however denied that they seized the sugar as counterfeit. It is clear that even if they were seized as counterfeit goods the police had powers to do so under that **Act**.

It must be noted that the applicant had not raised the issue that the goods were seized as counterfeits. This was raised after the submissions by the Director of Public Prosecution that the sugar was seized by the Director of Criminal Investigation on allegation that it was unfit for human consumption.

**Article 245(4) under Part 4 of the Constitution** which establishes the National Police Service provides:

**“4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-**

**General with respect to—**

- (a) the investigation of any particular offence or offences;**
- (b) the enforcement of the law against any particular person or persons;**

**or**

- (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.”**

The provision gives the Inspector General and by extension the Director of Criminal Investigation the exclusive right to conduct investigations without any direction from any quarters. **Section 28 of the National Police Service Act** establishes the Directorate of Criminal Investigations which is under the direct command of the Inspector General. The functions of the Directorate of Investigations are provided under **Section 35 of the Act** and it is provided:

**“The Directorate shall –**

- b) undertake investigations on serious crimes including**

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**among others.**

- c) Maintain law and order.**
- d) Detect and prevent crime.**
- e) Apprehend offenders.**
- f) Conduct forensic analysis .....” etc.**

The Director of Criminal Investigations had power to seize the commodity and conduct analysis to determine whether a crime had been committed and whether the sugar was fit for public consumption. This a mandate he has and performs it independently without direction or interference from any quarters. This was in the interest of the public. I hold that the sugar was properly seized.

The sugar is kept by the Director of Criminal Investigation in furtherance to the investigations on the allegation that it is unfit for human consumption. **Section 27 of the Counterfeit Act** does not apply as the sugar was not seized under the **Counterfeit Act**. Indeed the 5<sup>th</sup> respondent in his grounds of opposition raised an issue that they were not involved in the seizure of the goods. This is an issue which is pending determination. In any case the Director Criminal Investigation has admitted that they are the ones who seized the commodity. It is submitted that the sugar is undergoing analysis together with other sugar which was confiscated from other businessmen who have co-operated with other agencies who are testing the sugar and have been given the results. The results of the applicant's sugar have not been given. It means the Director Criminal Investigation is still investigating and in line with the constitutional provisions, the Director of Criminal Investigation conducts such investigation independently. As submitted there are Government Agencies which are capable of analyzing the sugar and give results. That is Kenya Bureau of Standards and the Government Chemist. Other consignment of sugar which were seized were subjected to the analysis by the agencies and results given. The Constitution prohibits discrimination and the applicant should therefore not be treated differently. **Article 27(1) of the Constitution** provides:-

***“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”***

Furthermore, **Article 159(2)(a) of the Constitution** provides:-

***“Justice must be done to all irrespective of status.”***

The applicant should therefore let the Director of Criminal Investigation do the analysis like he has done with sugar seized from other traders. The matter is of great public interest who have a right to know whether the sugar is fit for human consumption. In enjoyment of right a court must balance the rights. In this case the rights of the applicant and the larger public interest must be balanced. It is in the public interest that independent public bodies inform the public on the status of the commodity.

I am in agreement with the Director of Public Prosecution that there would be chaos if every trader were to do his own testing and saying that the sugar meets the standards. These would erode public confidence in the process. That is why there are Government Agencies who do the analysis and file a report. I find that the sugar was seized by the Director of Criminal Investigation who has a mandate to investigate allegations that a crime is suspected to have been committed. **Section 27 of the Counterfeit Act**, does not apply as the sugar was not seized by the police under the Provisions of the Act.

There is no confirmation that the sugar has been tested. It is premature for the applicant to apply for samples. The need for him to do analysis would depend on the outcome of the analysis by the Government Agencies. It is not necessary to have a parallel analysis of the sugar at this stage. I find that the application to collect samples by the applicant is without merits. I decline the application. Costs to the 1<sup>st</sup>, 3<sup>rd</sup> & 5<sup>th</sup> Respondents.

**Dated at Kerugoya this 18<sup>th</sup> day of October 2018.**

**L. W. GITARI**

**JUDGE**