



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTION AND HUMAN RIGHTS DIVISION**

**PETITION NO. 207 OF 2014**

**BETWEEN**

**GORDON NGATIA MURIUKI ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS .....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE**

**NATIONAL POLICE SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. By an application dated 14<sup>th</sup> April 2014, Corporal Gideon Wamocha moved the Chief Magistrate's Criminal Court, Milimani in ***Misc. Appl. No. 632 of 2014*** for the following orders;
  1. *THAT this application be deemed fit for admission for hearing on a priority basis.*
  2. *THAT the Honourable court be pleased to issue a warrant of arrest against GORDON NGATIA MURIUKI.*
  3. *THAT GORDON NGATIA MURIUKI stole assorted lubricants while in transit from Mombasa to Nairobi.*
  4. *THAT there be no orders as to the cost of this application.*
2. The application was supported by the affidavit of the said Cpl Gideon Wamocha in which he deponed as follows;
  1. *THAT I am a Corporal of police attached to the Economic and Commercial Crime Unit and I am competent and have been authorized to swear this affidavit.*
  2. *THAT the Economic and Commercial Crime Unit is involved in investigation relating to an offence of theft of assorted oil lubricants in transit from Mombasa to Nairobi worth Ksh.450 million.*
  3. *THAT investigation has so far revealed that GORDON NGATIA MURIUKI with others stole the assorted oil lubricants between January, 2010 and March, 2013 the property of Vivo Energy ltd*

- valued at Ksh.450 million while in transit.
4. THAT investigation has shown that GORDON NGATIA MURIUKI was involved the commission of the offence.
  5. THAT GORDON NGATIA MURIUKI has since disappeared from area and efforts to get him have been futile.
  6. THAT I pray this Honourable Court to issue me with a warrant of arrest against the GORDON NGATIA MURIUKI.
3. Upon reading the application, the Court granted the orders as follows, “Where as it has been proved to me on oath that for the purpose of arrest a commission of an offence it is necessary or desirable to obtain warrant of arrest of (1) GORDON NGATIA MURIUKI who is suspected to be involved in theft of assorted oil lubricants while in transit from Mombasa to Nairobi valued at Ksh. 450 million the property of Vivo Energy Ltd. Now therefore I authorize (2) NO 57602 CPL GIDEON WAMOCHA an investigator with Economic and Commercial Crime unit of the Directorate of Criminal Investigations, by this warrant to obtain warrant of arrest of the said GORDON NGATIA MURIUKI.”
  4. The petitioner was shocked and surprised to read in the Daily Nation of 25<sup>th</sup> April 2014 that a warrant of arrest had been issued against him and that he was wanted in relation to economic crimes which he had committed. Naturally he was distraught and he moved the Court by a petition dated 30<sup>th</sup> April 2014 to challenge the decision to advertise his name in the newspapers. He later discovered that warrants of arrest had been issued against him.
  5. In the replying affidavit sworn on 14<sup>th</sup> May 2014, Corporal Wamocha depones that there was a proper basis to apply for the warrant of arrest as the petitioner, in partnership with other persons, was part of a crime ring involved in the theft of transit goods. The other persons have been charged in cases at the Mombasa Law Courts. Mr Ashimosi, counsel for the respondents, informed the court that there was an intention to charge the petitioner.
  6. The narrow issue, which merits consideration here, is whether the Court ought to have issued the warrant of arrest and whether as a result thereof, the petitioner’s name and photo should have been published in the newspaper. This issue is examined on the basis of the information available and furnished before the court when it issued the warrants.
  7. The application before the Chief Magistrates Court was made under **sections 118 and 121** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** deals with search warrants. **Section 118** provides as follows;
 

118. Where it is proved on oath to a Court or a Magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the Court or a Magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a Court having jurisdiction to be dealt with according to law. [Emphasis mine]
  8. Nothing in the application or the affidavit, which I have set out above, shows that the 2<sup>nd</sup> respondent was seeking anything connected with an offence or that the petitioner had anything that would entitle the applicant to be given a search warrant. The information by the deponent is thread bare and could not form the basis of an order even if it were for a search warrant. The applicant also invoked **section 180** of the **Evidence Act** which is part of **Chapter VII** of the **Act** dealing with Bankers books. It empowers a judge or magistrate to issue a warrant to investigate bankers books where reasonable suspicion exists that an offence is being or has been committed. Nothing in the application or affidavit before the court pointed the commission of an offence by the petitioner in relation to any banker’s books of any kind. In my view, the learned magistrate had

no business granting such an order that was prayed for given the facts that were deponed to.

9. Even if the application was one for a warrant of arrest, the application was devoid of facts pointing to any offence by the petitioner. The matters deponed to by Cpl Wamocha were merely conclusions not founded on any facts upon which the court could objectively assess whether there was reasonable suspicion of the petitioner's involvement in the offence alleged. The facts ought to have been disclosed for the court to make such an assessment. As regards the fact that the petitioner has disappeared, Cpl Wamocha did not depone to or provide any evidence of efforts made to locate the petitioner in place where he resided or ordinarily conducted business or that his close relatives and friends were contacted. I note that **section 64** of the *National Police Service Act, 2011* allows a police officer to apply for warrants of arrest or other legal process necessary for the investigation and detection of crime.
10. The purpose of warrants is to protect the right of a person from unreasonable searches and seizures and unnecessary arrests in light of the protections conferred by **Articles 29** and **31** of the Constitution. **Article 29** protects the right to freedom and security of the person and includes the right not to be deprived of that freedom arbitrarily or without just cause. **Article 31** protects the right of privacy which includes the right of a person not to have their person, home or property searched and possessions seized. By issuing an order without a reasonable basis being established in accordance with the law, the court violated the rights of the individual.
11. In *Manfred Walter Schmitt and Another v Republic and Another Nairobi Crim. Rev. Nos. 569 & 2326 of 2012 [2013]eKLR*, I addressed the duty of the court and the police in such circumstances. I stated as follows; “[28] *I would be remiss if I did not comment on the nature of the proceedings before the subordinate court. The duty imposed on the judiciary to issue warrants of search and seizure is a constitutional safeguard to protect the rights and fundamental freedoms of an individual. The Court is not a conveyor belt for issuing warrants when an application is made nor must the court issue warrants of search and seizure as a matter of course. When an application is made, the Court is required to address itself to the facts of the case and determine, in accordance with the statutory provisions, whether a reasonable case has been made to limit a person's rights and fundamental freedoms. On the other hand, the duty of the State and its agencies, in investigating and prosecuting crime, is to furnish the Court with facts upon which the court can conclude that there is reasonable evidence of commission of a crime by the person it seeks to implicate by the application for search and seizure.*”
12. Finally, I would add that the publication of the petitioner's photograph in the newspaper in connection with offences as a result of the warrants obtained was in violation of his rights. The warrants issued by the court did not entitle the respondent to publish the petitioner's photograph.
13. In view of what I have stated, I allow the petition and the remedy that commends itself to the Court under **Article 23** of the Constitution is as follows;
  - a. **The warrant of arrest issued in Nairobi Chief Magistrates Court Criminal Appl. No. 633 of 2014 be and is hereby set aside and discharged.**
  - b. **The 2<sup>nd</sup> respondent shall pay the petitioner's costs which are assessed at Kshs 30,000/=**

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of May 2014**

**D.S. MAJANJA**

**JUDGE**

**Mr Rutto instructed by T. K. Rutto and Company Advocates for the petitioners.**

**Mr Ashimosi, Prosecution Counsel, instructed by the Directorate of Public Prosecutions for the respondents.**