**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 42 OF 2012**

**ALEX MAUTIA MORUME…….....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal against the ruling in criminal case Number 3083 of 2010 in the Chief Magistrate's Court at Kibera – Nyakundi (PM) on 19/01/2012)*

**JUDGMENT**

1. The appellant, **Alex Mautia Morume,** was charged for the offence of carrying out banking business without a licence contrary to **Section 3(1)** as read with **Section 3(2)** of the **Banking Act Cap 488 laws of Kenya**, in **Kibera Cr. case No. 3083 of 2010.** It had been alleged that on diverse dates between 29th June 2007 and 1st July 2010 at Hazina Towers in Nairobi, jointly with another not before the court carried out banking business without a licence issued from Central Bank of Kenya.

2. Learned counsel for the appellant on 7th November 2011 made an oral application to have:

a. The evidence that the prosecution was to rely on excluded on the basis that the police contravened express provisions of section 20(1)(ii) of the Police Act.

b. To have the whole case dismissed because there was no proper complainant or complaint before court.

3. A ruling on that application was delivered on 19th January 2012 by the learned trial magistrate dismissing the application. The appellant being dissatisfied with the ruling, filed an appeal on grounds that:

a. The police contravened express provisions of **Section 20(1)(ii)** of the **Police Act Cap 84 Laws of Kenya** (revised 2010) by failing to take the seized documents to court.
b. The complaint was a nullity ab initio
c. The evidence on record was misapprehended and a wrong conclusion reached.

4. Mr. Kabaka, learned counsel for the Respondent conceded the appeal on grounds that the police did indeed contravene the express provisions of **Section 20(1)(ii)** of the **Police Act Cap 84 laws of Kenya** (revised 2010), when they failed to take the seized documents to court and that the trial court misapprehended the evidence and as a result reached the wrong conclusion. Mr. Kabaka opined that the applicant had clearly demonstrated the violations of the law and it was not necessary for him to belabour the points.

**5. Section 20(1)** of the **Police Act Cap 84 laws of Kenya** which is said to have been contravened provides that:

> **"When an officer in charge of a police station or a police officer investigating an alleged offence, has reasonable grounds to believe that something necessary for the purposes of such investigation 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 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 as aforesaid enter any premises in or on which he expects the thing to be and there search or cause search to be made for, and take possession of, such thing:**

Provided that:-

i. **the officer shall carry with him, and produce to the occupier of the premises on request by him, his certificate of appointment;**

ii. **if anything is seized as a foresaid he shall forthwith take or cause it to be taken before a magistrate within whose jurisdiction the thing was found, to be dealt with according to law."**

6. The law with regard to search and seizure is primarily found in the Constitution and the Criminal Procedure Code (Chap 75 laws of Kenya ) **Article 31** of the **Constitution** states as follows:

> **"Every person has the right to privacy, which includes the right not to have-**

a. **their person, home or property searched;**
b. **their possession seized;**
c. **information relating to their family or private affairs unnecessarily required or revealed; or**
d. **the privacy of their communications infringed.**

**7. Section 118** of the **Criminal Procedure Code** provides for the statutory procedure for conducting search and seizure by police as follows:

> **"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".**

8. As can be seen from the foregoing the right to privacy is expressly guaranteed by **Article 31** of the **Constitution**, while the statutory procedure for conducting search and seizure by the police has three inbuilt requirements to be met. Such requirements are that prior to the search and seizure the police should obtain a search warrant, such warrant should be issued by a judicial officer and lastly there should be proof on oath that there is reasonable suspicion of commission of an offence.

9. What is clear from the position of the law is first, that Police officers or other state agents therefore cannot without a search warrant, lawfully enter upon and search any premises, nor can they carry away any property without the authority of the Court. Second that from the provisions of the Criminal Procedure Code set out above, the onus is on the person seeking the search warrant to prove the necessity for such warrant. In **Vitu Limited vs The Chief Magistrate Nairobi & two others, HC. Misc. Criminal Application No. 475 of 2004 (Osiemo J.)** remarked that:

> **"It is therefore expected that when a police officer or any other investigator approaches the Court for a warrant, there must be reasonable suspicion of an offence being about to be committed or having been committed…"**

10. Third the section contemplates that any evidentiary material that may be obtained from the premises in respect of which the warrant has been issued is to be placed before the Court, and it is the Court to determine the mode of disposal thereof. Ojwang J (as he then was) rendered himself thus in the case of **William Moruri Nyakiba & Another v Chief Magistrate Nairobi & 2 Others, Misc Cr. App. 414 of 2006 [2006] eKLR**:

> **"I would not consider the word "application" always to mean a formal, written application set for service upon interested parties. For the purpose of Police investigation of crime, an application made is likely in the first instance to be informal and this, in the light of both s.19 of the Police Act and s.118 of the Criminal Procedure Code, only needs to be accompanied by a statement on oath.** ***Any evidentiary material retrieved on that basis is required under the law to be part of a responsible criminal investigation process which links up with criminal prosecution*****."**(Emphasis added).

11. The record of the proceedings of the lower court does not reflect that the seized documents were ever produced in court, and it is not in dispute that the officers of the respondent did not have a search warrant as envisaged in **Section 118** of the **Criminal Procedure Code Cap. 75 laws of Kenya**, when they seized documents from the appellant's office. It is immaterial in this circumstances that an inventory had been made and will be produced in court at a later date. Mr. Kabaka was therefore wise to concede the appeal.

For the foregoing reasons I find that the appeal is meritorious and allows it.

**SIGNED DATED** and **DELIVERED** in open court this **12th** day of June **2014**.

**L. A. ACHODE**

**JUDGE**