



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
PETITION 4 OF 2011

JOSEPH MUSOMBA.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....RESPONDENT

J U D G M E N T

The petitioner's petition dated 6-4-2011 prays fundamentally for this court to declare that the search and seizure operation conducted by the respondent at the petitioner's chamber on the night of 14-2-2011 be declared unconstitutional and in contravention of his rights as envisaged under Article 31 of the Constitution.

The petitioner further prays for general damages as a consequence of the said violation.

It is not in dispute that the petitioner is an advocate of the High Court of Kenya practicing his law in Kisumu city under the name and style of **Kulecho, Musomba and Company Advocates**.

It was the petitioner's claim that on the night of 14-2-2011 at around 1800 hours he was arrested and detained by CID officers from Kisumu police station. Subsequently, and in the company of **Corporal Lawson Shiuma** and others he was escorted to his chambers at around 2100 hours and a search conducted therein. The results of the said search was confiscation of some assorted files belonging to his clients. He was later released on a police bond of Kshs. 5000/= at around 2230 hours.

On 18-2-2011 he was arraigned in court and charged with the offence of making false documents contrary to section 347 (a) of the penal code vide **Kisumu CRC No. 84 of 2011**. The petitioner contends that the above criminal case was similar to criminal case No. 858 of 2010 where he was acting for one of the accused persons.

The above criminal case was later withdrawn once he filed this petition. Consequently, the petitioner is aggrieved and seeks the orders to declare the entire process as being illegal and amounted to violation of his rights.

The respondent filed a replying affidavit through one **P.C. Muthoka Ngolia** dated 26-10-2011.

The net effect of the averments thereon confirms that a search was conducted at the petitioner's premises on the material day and some assorted documents were recovered which were in respect to the estate of the late **Christine Adhiambo Njagah**.

According to the respondent they were carrying out a massive criminal investigation in which the petitioner was one of the key suspects. He however denies that they violated the petitioner's right or at all

and that at all times the petitioner was cooperative.

The points to determine include whether or not the search conducted at the petitioner's premises or law firm was in complete violation of the laid down procedures and rules. If this is so is the petitioner entitled to damages?

What I find not in dispute is that the petitioner was indeed a suspect. On this score the police were enjoined in law to carry out the relevant investigation as provided for under section 14 (1) of the Police Act Chapter 84 Laws of Kenya which states:-

“14 (1) the force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the preservation and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged”.

The above rights must be done in consonance with all the relevant laws and of great significance the constitution.

The respondent has not denied the arrest of the petitioner and subsequent search to his offices. The arrest was properly conducted as the same did not need a warrant and in any case whether it was “dramatic” or not as the petitioner claims the police did what they ought to have done. The petitioner did not complain of any forceful arrest or at all and this is clearly portrayed by his admission that he was granted a Kshs. 5000/= police bond.

But what about the search? It is not lost that the petitioner's premises are not any other ‘ordinary’ premises, but it is a law firm. The same is not ordinary as it is protected by section 134 of the Evidence Act Chapter 80 Laws of Kenya under what is termed as **“Privileges of Advocates”**. This privilege however does not extend to circumstances whether its cause is to further criminal acts. The provisos thereunder are clearly spelt out.

Was it therefore lawful for the police to enter into the said premises whether during the day or night to carry out a search without following the laid down procedures?

It is not disputed that the petitioner was acting for one of the suspects in the criminal case and consequently he was well known by the investigators. I am not doubting that the search was conducted during the night since the respondents have not countered the affidavit of the applicant sworn on 6-4-20011. Part of the annexures therein is a handwritten search certificate dated 14-2-2011 in which Cpl Lawson Shuma confirms that they carried a search at the premises of the petitioner pursuant to the provisions of section 20 and 26 of the Criminal Procedure Code.

I have however perused the said Act and noted that section 20 thereof was repealed by legal notice No. 17 of 1967 and further section 20 deal with power to detain and search aircraft, vessels, vehicles person and not premises.

Granting the petitioner the benefit of doubt the proper section is under the Police Act Chapter 84 Laws of Kenya where section 20 thereof provides for the power to search without warrant in special circumstances.

Since this is the gist of the petitioner's complain it is relevant to reproduce the said section which states:-

“20 (1) 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 subsequently prejudice such investigation he may after recovering in writing the grounds of his behalf and such description as is available to him of the thing for which search is to be made without search

warrant as aforesaid either 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 aforesaid 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”.**

Section 118,119 and 120 of the Criminal Procedure code clearly provides the process and the procedure to be followed while applying for the warrants. The search certificate dated 14-2-2011 contained in annexure JNM 4 (a) in the petitioner’s affidavit demonstrate that the respondent was well aware that he was to conduct a formal search.

On 25-2-2011 the DCIO one Peter M. Matu wrote to the petitioner returning the files which were collected on the material day.

The above observation demonstrate that before a search is conducted there ought to be a formal request on oath by the respondent as envisaged by section 118 of the Criminal Procedure Code. On the other hand if for any reason the situation was that urgent that procuring court’s order would delay or prejudice the investigation then the prudent thing to do is for the police officer to record such grounds and after carrying out the search, the recovered items should be taken before the magistrate within such jurisdiction. That is the requirement of section 20 of the Police Act.

However in the case at hand, I do not find anything peculiar that necessitated the respondent not to seek the order from a magistrate’s court. Further even if the situation was urgent I did not find that the said officer recorded such reason in his handwritten certificate dated 14-2-2011.

Further after collecting the files and other items from the said law firm, he ought to have immediately submitted them to a magistrate with the jurisdiction he was working in.

The respondent has deponed that:-

“All along while undertaking the above exercise the petitioner was very co-operative and did not raise any complaint”

See paragraph 9 of the affidavit of Muthoka Ngolia sworn on 26-10-2012.

This in my mind was inconsequential. Having been arrested, taken to the police station and later to his chambers, what other option did the petitioner have? How could he not fail to co-operate in such ungodly hours of the night?

I find therefore that the search conducted by the respondent at the petitioner’s law firm was illegal. The same fell short of the requisite standards established by the aforesaid provisions of section 20 of the Police Act and section 118,119 and 120 of the Criminal Procedure Code.

Further and of great significance the same fell short of Article 25 (c) of the Constitution which provides:-

“Despite any other provision in this constitution the following rights and fundamental freedoms shall not be limited

(a)

(b)

(c) The right to fair trial”.

The clandestine way in which the respondent did their investigation was to say the least made in bad faith. The rules and procedures of investigation ought to be adhered to by all and sundry.

Does the petitioner deserve compensation in any way? The counsel for the respondent argued otherwise. His position is that since this is a criminal process the proper forum is for the petitioner to pursue a civil action.

With due respect the application before court is a constitutional petition. The rights that the petitioner is alleging that were breached are enshrined within the constitution. These are rights to fair trial. The criminal cases as conceded by the parties seemed to have been either withdrawn or settled one way or the other.

However, there is need to compensate the petitioner for the humiliation and unfair treatment suffered under the hands of the respondent. The respondent as a matter of fact did not challenged at all the fact that the petitioner was acting for some of the accused persons. For him to be lamped together with the accused person who were erstwhile his clients is to say the least embarrassing. Moreover withdrawing the charges later smarked bad faith on the respondent’s part.

For the foregoing reason I shall make the following orders:-

- (1) The search and seizure operation conducted upon the petitioner’s chambers on the night of 14-2-2011 without a search warrant was illegal and unconstitutional and violated Article 25 (5) of the Constitution of Kenya.**
- (2) The petitioner is hereby awarded the sum of Kshs. 500,000/= being general damages.**
- (3) The petitioner shall have the costs of this petition.**

Dated, signed and delivered at Kisumu this 5th day of November, 2012.

**H.K. CHEMITEI
JUDGE**

In the presence of:

Otieno for Musomba for the applicant

Oundo for the respondent

HKC/va