



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MARAGA, OUKO & J. MOHAMMED JJ.A)**

**CIVIL APPEAL NO. 152 OF 2009**

**KENYA ANTI-CORRUPTION COMMISSION ..... APPELLANT**

**AND**

**DEEPAK CHAMANLAL KAMANI ..... 1<sup>ST</sup> RESPONDENT**

**RASHMI CHAMANLAL KAMANI ..... 2<sup>ND</sup> RESPONDENT**

**PRINCIPAL IMMIGRATION OFFICER ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT, KIBERA, NRB ..... 4<sup>TH</sup> RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT, NAIROBI ..... 5<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (J.G. Nyamu, R. Wendoh and E. Emukule, JJ) delivered on 22<sup>nd</sup> June 2007*

*in*

**PETITION NO. 199 OF 2007 CONSOLIDATED WITH NO. 200 OF 2007)**

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**JUDGMENT OF THE COURT**

The issues leading to the impugned decision of the High Court and subsequently to this appeal were, in our view, fairly straight forward. They concerned the question as to whether **Section 31** of the Anti-Corruption and Economic Crimes Act and the orders issued by the special magistrate pursuant to that provision were in contravention of **Sections 72** and **81** of the former Constitution and whether the objectives of the Act, namely, detection, prevention, control and punishment of corruption are or are not in the public interest to warrant limitation of rights and fundamental freedoms of an individual. This is how these questions arose.

Pursuant to its mandate, the Kenya Anti-Corruption Commission (now the Ethics and Anti-Corruption Commission), the appellant, in the process of investigating allegations of corruption and economic crimes involving the procurement of various security projects between the Government of Kenya and some companies, including Anglo-Leasing and Finance Co. Ltd, obtained statements from

Deepak Kamani (the 1<sup>st</sup> respondent). Also under investigations were two members of 1<sup>st</sup> respondent's family, his father Chamanlal Kamani, brother, Rashmi Kamani (the 2<sup>nd</sup> respondent) and a fourth person, Jimmy Wanjigi.

It became necessary for the appellant to obtain court orders from the Chief Magistrate's Court in Nairobi C.M. Misc. Criminal Application Nos. 6 and 7 of 2006 respectively, requiring the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their father and Jimmy Wanjigi to surrender their passports as the appellant alleged under oath through its officer, Henry Murithi Mwithia, that it had intelligence reports that the two intended to leave Kenya. The 1<sup>st</sup> respondent's father and Jimmy Wanjigi in compliance with the aforesaid order duly surrendered their passports. The passports were subsequently returned to the two after investigations concerning them were complete.

Efforts by the appellant to trace and serve the 1<sup>st</sup> and 2<sup>nd</sup> respondents with that order to compel them to surrender their passports having failed, the appellant with the cooperation of the police posted in the police website and in the newspapers the photographs of the 1<sup>st</sup> and 2<sup>nd</sup> respondents offering a reward to any person who would "*provide information leading to the location and subsequent questioning*" of the two by the appellant's officers. Unknown to the appellant, the two respondents were already out of the country. The 1<sup>st</sup> respondent was in India and 2<sup>nd</sup> respondent in Dubai, according to a letter addressed to the director of the appellant by the advocates for the two respondents.

In the meantime, on 30<sup>th</sup> March 2006, the Principal Immigration Officer (the 3<sup>rd</sup> respondent) wrote to the two respondents through their local postal address informing them that, following the investigations "*on a number of persons relating to matters of national interest*" their passports stood cancelled. The respondents filed two separate petitions (which were subsequently consolidated) to challenge these actions on the grounds that,

- i. The 3<sup>rd</sup> respondent had no powers to cancel a passport and that the cancellation violated **Sections 72 (1), 77 (8) and 81 (1)** of the former Constitution.
- ii. The cancellation was done for improper purpose.
- iii. **Section 31** of the Anti-Corruption and Economic Crimes Act, which the appellant used to obtain *ex parte* orders from the magistrate's court, was unconstitutional, and violated **Sections 77 (1) (2) (a) and 81 and 82 (1)** of the former Constitution, and
- iv. The 3<sup>rd</sup> respondent's action of cancelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents' passports was an arbitrary exercise of power.

In consequence of these violations, the two respondents asked the High Court to declare that,

- i. The purpose of a passport is to enable the respondents to enjoy their rights to enter and leave Kenya.
- ii. The publication and posting of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the police website and newspaper as wanted persons was unlawful and in breach of their rights.
- iii. The 3<sup>rd</sup> respondent had no powers to cancel or invalidate the respondents' passports.
- iv. The proceedings before the magistrate in CM Criminal Misc. Application Nos. 6 and 7 of 2006 and the order issued in them were unconstitutional.
- v. The cancellation of the passports without due process was unconstitutional and void,  
and to order,
- vi. The annulment of the order cancelling the passports

- vii. That the 3<sup>rd</sup> respondent be restrained from interfering with the 1<sup>st</sup> and 2<sup>nd</sup> respondents' passports
- viii. The deletion of the police website depicting the two respondents as wanted people, and
- ix. The appellant to stop harassing, arresting or charging the 1<sup>st</sup> and 2<sup>nd</sup> respondents with criminal charges arising from Anglo-Leasing affair.

After hearing the consolidated petitions, the High Court (Nyamu J, as he then was), Wendo and Emukule, JJ) in a 110-page judgment rendered on 22<sup>nd</sup> June, 2007, held *inter alia*, that the validity of a Kenya passport stems from the Constitution and is issued by the executive pursuant to the Constitution; and that where the right of individual was threatened with curtailment, restriction or limitation, there must be due process of law. The order of surrender did not meet the requirement of proportionality.

In the end, the court issued declarations in terms of prayers (b), (c), (d), (e), (h) and (k) in the petition. Declarations or orders sought in paragraphs (f) (g) (i) and (j) were rejected. Effectively, from the above, the High Court declared that a passport is issued for enjoyment of fundamental rights; that the 3<sup>rd</sup> respondent had no power to cancel or invalidate the respondents' passports; that the cancellation of the respondents' passports without due process was unconstitutional; that due to adverse publicity, the 1<sup>st</sup> and 2<sup>nd</sup> respondents would not get a fair trial; and fundamentally that **section 31** of the Anti-Corruption and Economic Crimes Act, 2003 was unconstitutional, null and void.

In addition, the court quashed the directive cancelling the respondents' passports and restrained the 3<sup>rd</sup> respondents from interfering with the 1<sup>st</sup> and 2<sup>nd</sup> respondents' constitutional rights to enter and leave Kenya. That decision aggrieved the appellant. In its seven-grounds Memorandum of Appeal the appellant has challenged the decision for the reasons that;

- i. The learned Judges erred in declaring **Section 31** of the Anti-Corruption and Economic Crimes Act unconstitutional.
- ii. The holding by the High Court that any orders issued under **Section 31** aforesaid were in contravention of **Sections 72** and **81** of the former Constitution was in error.
- iii. The learned Judges erred in failing to find that the orders issued in Nbi. CM Criminal Misc. Application Nos. 6 and 7 of 2006 were to secure the public interest as contemplated by **Sections 70, 72** and **81** of the former Constitution.
- iv. The learned Judges failed to find that the impugned **section 31** reasonably balances the public interest in detention, investigation and prosecution of corruption cases *vis a vis* the requirement for due process under **section 81** of the former constitution by allowing the affected party the right to challenge any orders issued *ex parte*.
- v. The learned Judges erred in failing to find that the restrictions to the freedom of movement as prescribed by **Section 31** aforesaid is for a legitimate purpose and is a reasonable and justifiable requirement in a democratic society.
- vi. The learned Judges erred in insisting that detention, prevention, control and punishment of corruption can only qualify as public interest if expressly included in the Constitution, and
- vii. The learned Judges failed to appreciate and take judicial notice of the fact that in the interest of the general public, it is prudent that exhaustive investigations be conducted with the assurance that the individuals concerned do not pose a flight risk.

It will suffice to state at this stage that the 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the appeal while the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents supported it.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents through their advocate submitted that the appeal was incompetent as it did not challenge each and every ground upon which the High Court decision was based. It is also their contention that the appeal has been overtaken by events following the adoption of a new constitution in 2010, repealing the former Constitution under which the proceedings the subject of this appeal were conducted; that this Court ought to consider the issue of constitutionality by reference to the relevant provisions of the 2010 Constitution; that it will be in vain to determine the appeal by reference to the provisions of the former Constitution. If the appeal was to be allowed on the basis of the former Constitution and **Section 31** reinstated without examining it by reference to the 2010 Constitution, that Section may still be found to be unconstitutional the 2010 Constitution. In this connection, counsel maintains that if the Court was to examine **section 31** against **Articles 1 (1), 2 (1), 2, 19 (3) (a) and (c), 20 (3), (b), 24, 25 (c), 28, 29 (a), 39 (1) and (2), 47 and 50 and 249 (1) and (2)** of the 2010 Constitution, it would still be found to be unconstitutional.

Learned counsel representing the appellant and the DPP do not agree with these submissions. They argued that **Section 31** meets the criteria for limitation of rights in **Article 24** of the Constitution and is in tandem with **Section 24 (3)** of the Kenya Citizenship and Immigration Act, which allows suspension of a passport for lawful cause.

Way back on 7<sup>th</sup> December, 2010, counsel representing the parties in this appeal recorded a consent that the appeal be disposed of by way of written submissions. While the appellant's submissions were filed on 23<sup>rd</sup> February, 2011, that of the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not filed until nearly one year later on 22<sup>nd</sup> January 2014 and those of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents on 14<sup>th</sup> February 2014, some four years after the consent was recorded. This does not depict an effective case management on the part of the court and the advocates involved.

In considering the two questions we have identified and enumerated earlier that fell for determination, it is important to set out **Section 31** of the Anti-Corruption and Economic Crimes Act as well as **Sections 72 and 81** of the former constitution.

The objective of the Anti-corruption and Economic Crimes Act is declared in its preamble as:-

**“An Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith.”**

**Section 31** stipulates that:-

**“31 (1). On the *ex parte* application of the Commission, a court may issue an order requiring a person to surrender his travel documents to the Commission if,**

- a. **The person is reasonably suspected of corruption or economic crime and**
- b. **The corruption or economic crime is being investigated.**

**2) If a person surrenders his travel documents pursuant to an order under sub section (1) the Commission –**

- a. **Shall return the documents after the investigation of the corruption or economic crime concerned is completed, if no criminal proceedings are to be instituted; and**
- b. **May retain the documents at its discretion whether with or without conditions to ensure the appearance of the person.**

**3) A person against whom an order under subsection (1) is made may apply to**

**the court to discharge or vary the order or to order the return of his travel documents and the court may, after hearing the parties discharge or vary the order or order the return of the travel documents or dismiss the application.**

**4) If a person fails to surrender his travel documents pursuant to an order under sub section (1) the person may be arrested and brought before the court and the court shall unless the court is satisfied that the person does not have any travel documents, order that the person be detained pending the conclusion of the investigation of the corruption or economic crime concerned.**

**5) A person who is detained pursuant to an order under subsection (4) shall be released if:**

- a. He surrenders his travel documents to the commission;**
- b. He satisfies the court that he does not have any travel documents, or**
- c. The investigations of the corruption or economic crime concerned is completed and the court is satisfied that no criminal proceedings are to be instituted.**

**6) A person who is detained pursuant to an order under subsection (4) shall be brought before the court at least every eight days or at such shorter intervals as the court may order to determine if the person should be released under subsection (5)”**

The court referred to in this section is the court presided by a special magistrate appointed under **Section 3** of the Act. Nbi. C.M. Misc. Criminal Application No. 6 of 2006 in respect of the 2<sup>nd</sup> respondent was filed on 28<sup>th</sup> February 2006, heard and granted. It is not clear from the registry stamp when Nbi. CM Misc. Criminal Application No. 7 of 2006 in respect of the 1<sup>st</sup> respondent, his father Chamanlal Kamani and Jimmy Wanjigi was filed. But it was also granted. The effect of the two orders was that the 1<sup>st</sup> and 2<sup>nd</sup> respondents as well as Chamanlal Kamani and Jimmy Wanjigi were ordered to surrender their passports or other travel documents to the appellant.

While the latter two complied with those orders, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not as they were said to be overseas. Their absence from Kenya, which was seen by the appellant as a deliberate way of evading the on-going investigations, precipitated the letter by 3<sup>rd</sup> respondent cancelling the passports and the publication in the newspaper and police website by the appellant that they were wanted persons. The 1<sup>st</sup> and 2<sup>nd</sup> respondents for their part understood the cancellation of their passports while abroad as a manifestation of the 3<sup>rd</sup> respondent’s intention to deny them an opportunity to return to Kenya, which amounted to an expulsion from Kenya.

In an affidavit sworn on behalf of the 3<sup>rd</sup> respondent by Dume Odhiambo Wanda, an Immigration Officer, on 22<sup>nd</sup> March 2007 in response to the petition in the High Court, it was deposed:-

**“15. THAT further, the decision averred hereabove in paragraph 3 was not intended to expel the applicant from Kenya. The intention was to keep the subject in the realm to attend to the queries of the 2<sup>nd</sup> respondent, only that at the time of effect, the applicant happened to be out of the country.**

.....

**17. THAT..... the petitioner is at liberty to present themselves to the Kenya High Commission in the host country for issuance of a one way travel document upon surrendering the cancelled passport physically to the immigration**

**attaché, which one way travel document will enable him to travel to Kenya to vindicate himself.**

**18. THAT once he has subjected himself to investigation by the 2<sup>nd</sup> respondent and been exonerated, he is at liberty to make a fresh application for a Kenya passport and the same will be accorded due consideration.”**

No doubt at the time the 1<sup>st</sup> and 2<sup>nd</sup> respondents petitioned the High Court, their passports had been cancelled.

The right to personal liberty and freedom of movement guarantees the citizens, among other things, the right to leave and return to Kenya. To facilitate this, the Government issues passports to all its citizens because a passport is a necessary condition for travel abroad. This necessity was succinctly stated in the case of **Abrurahman Kadhr V. Attorney General for Canada**, [2006] F.C. 727:

**“In today’s world, the granting of a passport is not a favour bestowed on a citizen by the state. It is not a privilege or luxury but a necessity. Possession of a passport offers citizen the freedom to travel and to earn a livelihood in the global economy.”**

Although the former Constitution made no mention of the word passport, **Section 72 (1)** thereof however stipulated that:-

**“72 (1). No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases-**

- a. ....
- b. ....
- c. ....
- d. ....
- e. **Upon reasonable suspicion of his having committed or being about to commit, a criminal offence under the law of Kenya.”**

**Section 81 (1)** on the other hand, provided that:-

**“81.(1) No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.**

**2) Any restriction on a person’s freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.**

**3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-**

- a. **For the imposition of restrictions on the movement or residence within Kenya of any person or on any person’s right to leave Kenya that are reasonably required in the interests of defence, public safety or public order;**
- b. **For the imposition of restrictions on the movement or residence within Kenya or on the right to leave Kenya of persons generally or any class of persons that are reasonably required in the interests of defence, public safety, public order, public morality, public health or the protection or control of nomadic peoples and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable**

**in a democratic society;**

- c. **For the imposition of restrictions, by order of a court, on the movement or residence within Kenya of any person or on any person's right to leave Kenya either in consequence of his having been found guilty of a criminal offence under the law of Kenya or for the purpose of ensuring that he appears before a court at a later date for trial of such a criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or lawful removal from Kenya."**

Both the right to personal liberty and the freedom of movement are regarded as the most fundamental human rights as this Court, Madan J.A (as he then was), Kneller and Nyarangi, JJ.A) noted in **Ndegwa V. R** [1985] KLR 534, saying-

**"No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration."**

The right to liberty can be traced back to the English *Magna Carta* [1215] and the United States Declaration of the Right of Man and Citizen [1789]. Even though the *Magna Carta* only guaranteed rights to a limited group of people, the feudal noblemen, it nevertheless required that arrest or detention be lawful, and the individual was protected against the excesses of his or her ruler. During the French Revolution [1787], the notion of freedom of movement and the right to leave was construed as part of the broader right to personal liberty. Later, the French Constitution which came into force in 1791 made provision guaranteeing its citizen "*the freedom of everyone to go, to stay, or to leave without being halted or arrested in accordance with procedure established by the Constitution.*" At the international level the right to liberty of the person found its first legal formulation in **Articles 9** and **13** of the Universal Declaration of Human Rights, 1948 and subsequently in the 1966 International Covenant on Civil and Political Rights, both of which have been ratified by Kenya and by dint of **Article 2 (6)** of the Constitution are part of the laws of Kenya.

We have said these things to demonstrate that the right to personal liberty and freedom of movement are as old as mankind.

Based on the equality of every citizen before the law, many constitutions the world over and international human rights laws recognize that few human rights are absolute but place reasonable limits on the enjoyment of derogable rights.

**Article 29(2)** of the Universal Declaration of Human Rights declares that:-

**"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."** (Our emphasis).

Bearing in mind these principles, which resonate with the provisions of the former Constitution that are the subject of this appeal, can it be said that **Section 31** of the Anti-Corruption and Economic Crimes Act is in violation of **Sections 72** and **81** of the former Constitution? **Section 72 (1)** recognized that a person may only be deprived of his personal liberty in the following specific instances, germane to the matter at hand;

- i. if such deprivation is authorized by law, and
- ii. upon reasonable suspicion of the individual having committed, or being about to commit, a criminal offence under the law of Kenya.

The freedom of movement has four facets; free movement throughout the country; residence in any part of Kenya, to leave and return to Kenya and immunity from expulsion from Kenya. This right may be limited by a lawful detention or in the interest of defence, public safety or order, public morality, public health or where a person has been found guilty of a criminal offence or for purpose of ensuring that he appears before a court at a later date for trial of such criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or lawful removal from Kenya.

The appellant was conducting criminal investigations of the 1<sup>st</sup> and 2<sup>nd</sup> respondents with a view to preferring criminal charges and that is the sense in which we understand the term “*proceedings preliminary to trial,*” to be used in **Section 81 (3) (c)**.

It is a principle of constitutional interpretation that in construing a provision of the Constitution, all provisions bearing on the particular provision should be considered together to give effect to the purpose of the instrument, and where the language of the Constitution is clear the court would have no reason to depart therefrom. See **Center for Human Rights, Education and Awareness & Another V. John Harun Mwau & 6 others** Civil Appeal Nos. 74 and 82 of 2012. In this regard, **Section 70** of the former Constitution is important in the holistic appreciation of limitation of constitutional rights and fundamental freedoms under the former Constitution. It provides that:-

**“70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely –**

- a. **life, liberty, security of the person and the protection of the law;**
- b. ....
- c. ....

**the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”** (Emphasis supplied)

Enjoyment of fundamental rights and freedoms under the former Constitution could be curtailed for instance, to ensure they did not themselves infringe upon the rights of others or harm the public interest. There was no clear exposition in the former Constitution of what constituted “public interest”. But a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large. The Anti-Corruption and Economic Crimes Act was enacted **“to provide for the prevention, investigation and punishment of corruption, economic crime and related offences.”**

The learned Judges, in no less than four instances acknowledged in their judgment that corruption is an object of concern of the entire country. They started by saying that the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ rights could not be curtailed on the basis of **Section 81** without corruption, being specified in that section as one of the purposes or objectives of that section. That section, the learned Judges went on, recognizes interest of defence, public safety or public order, public morality and public health as the only recognized limitations of rights. But they acknowledged, in their own words that corruption is **“an obviously pressing social need of our time.”**

Clearly, the learned Judges read **Section 81** in isolation of **Section 70** which provided for limitation of certain rights on account of public interest without spelling out its various forms. The learned Judges for the second time in their judgment noted that:-

**“Perhaps we should take the earliest opportunity to state that we think that**

**detention, prevention, control and punishment of corruption and economic crimes is a pressing social need, but we must add that its recognition as a pressing social need must be incorporated in the Constitution. It is outside the public interest categories currently specified.”**

Again this statement ignores the express words in **Section 70**, which although does not specify corruption or economic crimes, refers to public interest. The learned Judges yet again, for the third time, accepted even more categorically that;

**“While it is acknowledged without hesitation that investigation of corruption and economic crimes is a matter of public interest, this is not included as one of the purposes. There must be a constitutional provision to include this as one of the purposes in sections 72 and 81 upon which the limiting act would be based. Section 31 literally floats in the air without a constitutional limitation or purpose.”** (our emphasis)

Finally and for the fourth time, the learned Judges again in an unequivocal pronouncement confirmed;

**“To illustrate the point the Judges in the Murungaru case (ibid) did recognize the central position which the anti-corruption and economic interest occupies in our thinking. It is one of the greatest modern threats to common good. It is certainly a public interest which should be regulated by law. The Nairobi bombing and the nine-eleven incidents, have brought to the fore the need for all societies to firmly deal with terrorism for example; this is also, in our view a public interest matter. However, the truth is that all these new public interest issues have not and will not at any time we hope change the substance of the right of liberty and movement, instead, what the Executive needs is to incorporate these new public interests in the constitution and enabling laws, so as to have the necessary legal framework to limit the rights where necessary.”** (our emphasis)

With respect the suggestion to specify all matters of public interest in the constitution or statute is not only superfluous in view of the clear provisions of **Sections 70 and 81** of the former constitution but also impractical as new issues of public interest evolve everyday. Since the early 1990s, the emerging international crimes hitherto unknown to most countries and the sophistication with which they come have raised concerns among governments all over the world about the threat these crimes pose to governability, economy and stability in many countries. As was observed by the Kenya Supreme Court in **Hermanus Phillipus Steyn V. Giovanni Gnechi-Ruscione** Application No. 4 of 2012.

**“As the categories constituting the public interest are not closed, *the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.*”**

Terrorism, alluded to by the learned Judges, cyber crimes, drug trafficking, human trafficking, illegal arms and other contraband trade, piracy, are just but some of the concerns nations have to deal with daily. While organized crime has become more sophisticated corruption remains its indispensable tool. Corruption on a grand scale weakens social, political and legal institutions. In addition the consequences of corruption can be severe for a country’s economic performance. There can be no doubt, therefore that corruption and economic crimes are matters that affect the society as a whole and meet the **public interest** test in **Section 70** of the former Constitution. The High Court therefore fell into error by insisting that the nature of public interest must be specified in the Constitution or statute.

On the question whether **Section 31** of the Anti-Corruption and Economic Crimes Act violated **Sections 72 and 81** of the former constitution we come to the conclusion that by requiring a person it is investigating to surrender a passport, the appellant was perfectly within the provisions of **Sections 70, 72 and 81** of the former Constitution as the action was taken in the course of investigations authorized by law, to ensure that while those investigations were on-going public interest was not prejudiced were the 1<sup>st</sup> and 2<sup>nd</sup> respondents to abscond; the investigations were based on reasonable suspicion that the two

respondents were involved in criminal acts and if the investigations disclosed that indeed they were involved they would be charged in court appropriately.

We answer both questions set out earlier thus; **Section 31** was not unconstitutional the provisions of **Sections 72 and 81** of the former Constitution and secondly that the detection, prevention, control and punishment of corruption are done in the **public interest** and the limitation under **Section 31** requiring a person being investigated to surrender his or her passport temporarily during the period of investigations, with a chance to challenge the order in the court that issued it, is likewise in the **public interest**.

That brings us to the final two issues raised by learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, whether the 3<sup>rd</sup> respondent had powers to cancel a passport and whether at all any purpose will be served by reinstating **Section 31** of the Anti-Corruption and Economic Crimes Act, in view of the Bill of Rights under Constitution of Kenya, 2010. Starting with the former, the 1<sup>st</sup> and 2<sup>nd</sup> respondents having ignored an invitation to present themselves before the 3<sup>rd</sup> respondent and to surrender their passports temporarily with him, and bearing in mind the criminal allegations against the two, there was nothing to stop the 3<sup>rd</sup> respondent from taking the action he took to enforce a lawful directive.

What is the state of the law today with regard to the matters under consideration? The Constitution of Kenya, 2010 was promulgated three years after the impugned judgment of the High Court. Apart from introducing a comprehensive Bill of Rights it enjoined the State to enact laws to operationalize and actualize some of the rights, for instance the Kenya Citizenship and Immigration Act, 2011.

In addition and of relevant to the matter at hand the Constitution has made provision in **Chapter Two** for national values and principles of governance. Human rights, and integrity are part of the national values and principles of governance. A Kenyan, under **Article 12** of the Constitution is entitled to a Kenyan passport, a position reiterated by **Section 22 (1) (g) (iii)** of the Kenya Citizenship and Immigration. **Article 12 (2)** is important. It reads:-

**“12 (2) A passport or other document referred to in clause (1) (b) may be denied, suspended or confiscated only in accordance with an Act of Parliament that satisfies the criteria mentioned in Article 24.”**

Article 24 provides for instances where rights and fundamental freedoms may be limited. Because of its relevance we reproduce it.

**“24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –**

- a. the nature of the right or fundamental freedom;**
- b. the importance of the purpose of the limitation;**
- c. the nature and extent of the limitation;**
- d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
- e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

**(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—**

a. ....

b. **shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and**

**c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.”**

Unlike the former Constitution the present Constitution does not distinguish between the right to personal liberty and the freedom of movement just as we noted earlier with the 1791 French Constitution. It only provides in **Article 39** – Freedom of movement and residence. The freedom of movement entitles a person to a –

i. Right to freedom of movement

ii. Right to leave Kenya, and

iii. Right to enter, remain in and reside anywhere in Kenya.

The freedom of movement like all limitable rights can only be curtailed by law and only if they (the limitations) are reasonable and justifiable in an open and democratic society.

We have demonstrated, we believe, from the foregoing that **section 31** of the Ant-Corruption and Economic Crimes Act is still in consonance with the present Constitution. The limitation it provides is temporary in nature lasting only the period of investigations; the order imposing the limitation can, on application to the court that made it, be discharged, varied or the court can order the passport to be returned.

We, accordingly, come to the conclusion that the learned Judges of the High Court erred in making the declarations and issuing the orders in terms of prayers (c), (d), (e), (h) and (k).

In other words, the only declarations that the court below could make were that *“the purpose of a passport is to enable the 1<sup>st</sup> and 2<sup>nd</sup> respondents to enjoy their constitutional right to enter and to leave Kenya.”*

We allow this appeal with costs.

**Dated at Nairobi this 14<sup>th</sup> day of March 2014.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**REGISTRAR**

*/mgkm*