REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 4 OF 2019

STEPHEN V. MANGIRA & ANOR.....PETITIONER

VERSUS

THE SNR. PRINCIPAL MAGISTRATE,

SHANZU & 9 OTHERS.....RESPONDENTS

J U D G M E N T

Outline of historical facts

1. On 25/01/2019, the petition dated 21/01/2019 and running into some 26 pages was filed and bound in a bundle containing among other documents; Notice of Motion dated the same day and Affidavits sworn by Stephen Vicker Mangira and Nabil Oloo Mohammed said to verify the petition and in support of the Notice of Motion. The said bundle also contained a Certificate of Urgency seeking that the matter be placed before a judge for purposes of conservatory orders being considered for grant.

2. The file was initially placed before the presiding judge of the station who was also the judge under whose docket the petition fell and on the 31/01/2019 the judge directed that the file be heard by this court.

3. By this time it was the Notice of Motion filed under certificate of urgency that was the focus of the parties and the court. Indeed, on the 18/2/2019 and 3/5/2019 Notice of Motion was argued into conclusion only for the counsel to note that the arguments advanced were sufficient to dispose of the petition and therefore requested to file additional submissions. By consensus therefore the motion was marked as abandoned, submissions offered on it adopted for those of the petition with the parties getting the liberty to file additional written submissions.

4. Pursuant to that consensus by the parties the petitioner filed written submissions on the 25/6/2019, the 2nd, 3rd, 8th and 9th Respondents did so on 20/6/2019, the 4th and 5th Respondents filed on 11/6/2019 through one Gitiri Jennifer, state counsel while other submissions were lodged on behalf of the 3rd 4th & 5th Respondents on the 21/6/2019 by Mr Nguyo Wachira, Principal Litigation Counsel. Even if so disclosed, I do consider the Submissions by Mr wachira to be those offered on behalf of the 10th respondent. This position is informed by the parties address to court on the 14.02 2019 when Mr Wachira introduced himself as appearing for the 1st and 10th respondents

5. Prior to those additional submissions, the parties had filed various papers which formed the basis of urging the petition.

Pleadings

6. The petitioner did file the petition as verified by the two Affidavits of the two petitioners and a supplementary Affidavit sworn by the 2nd applicant whose purport was evidently limited to exhibiting photographs of the money alleged to have been taken from the two petitioner at the point of arrest by the 2nd Respondent.

7.The petition seeks a record 30 prayers attacking various provisions of statutes to have been contravened or for being unconstitutional; alleging that some offices and officers had acted contrary to the law; declarations as to the constitutionality of some laws and actions by state agencies; orders striking out applications filed in other files and seeking to preserve assets, recovery of money and assets seized upon arrest and setting aside freezing orders against bank accounts; orders restraining the allocation of any funds to the 4th Respondents and a declaration of how much surplus of the allocations since 2016 was being held by the 4th Respondent and not surrendered to the consolidated funds together with general damages for alleged violations.

8. The facts said to ground the petition and its prayers can be summarized that on or about the 11/2/2017, the 1st Petitioner being a traditional doctor, *mganga* or just herbalist and others were arrested while guests at the Reef Hotel, Mombasa by the 2nd Respondent, who was then not a police officer and thus not bestowed with powers to arrest. Upon arrest it is alleged the 2nd respondent took from the 1st Respondent a sum of Kshs.20,600,000/= together with the keys to Motor Vehicle Registration No. KCK 444B, Toyota V8.

9. The 2nd Petitioner was equally confronted along the corridors of the said Reef Hotel, subjected to personal search upon which a car keys to motor vehicle *KCH 328 R, Toyota Vitz* was recovered. He was then locked and detained in Hotel Room No. 104 while the 2nd Respondent left with the car keys to the parking lot a place not visible from the Hotel Room, for some 30 minutes. It is asserted that the 2nd petitioner was not given a chance to monitor the access by the 2nd Respondent into the 2nd petitioner car.

10. Later the 2nd respondent was removed from the Hotel room and bundled into the boot of a motor vehicle he described as a while Nissan Tilda where he was kept for some 10 minutes before being ordered removed and put into a Ford Ranger double cabin. He was them marched by people who had not identified themselves to his car for a search. His car was at that time surrounded by some four to five people one of whom announced that he had recovered something in the said car. It was that something that was to turn out to be the plastic bag said to contain 540.88 grams of heroin for which the 2nd petitioner was made to sign a seizure notice with a disclaimer that whatever was allegedly found in the car did not belong to him.

11. The two petitioners were after the arrest held at different police stations till the 13/2/2017 when they were presented to court but without a charge. They were remanded again till the 21/2/2017. Meanwhile a raid was conducted in the 1st petitioners house in Kericho, in his absence and a sum of Kshs.200,000/= was recovered together with some eight motor vehicles, of different makes, which were seized on allegations of being the proceeds of crime, namely trafficking in narcotics.

12. The two petitioners were subsequently charged in Shanzu Criminal Case Number 257 of 2017 and several counts preferred against the two and others who were Tanzanian nationals. However, when granted bonds, the two petitioners before the court were granted bonds later then the Tanzanians and the terms were higher than those imposed against the Tanzanians. It is those charges the petitioners alleged to amount to mere harassment by the 1st, 3rd & 8th Respondents and thus illegal and untenable for having been pursued and undertaken contrary to the law under Section 26, Criminal Procedure Code, Sections 42 of the National Intelligence Service Act as well as Section 73(5) of the Narcotic Drugs and Psychotropic Substances Control Act.

13. After the arraignment in court, the 4th and 5th Respondents then filed several applications including Mombasa No. 195/2017 and 269 of 2017 and obtained preservation orders against the cash and motor vehicle recovered from the two petitioners and are now pursuing forfeiture proceedings against the same cash, motor vehicles as well as the same money in the 1st petitioners account. The petitioners contend that the respondents' actions have rendered them destitute by deprivation of assets while the 3rd & 8th respondents have suppressed the evidence of the informant to the 2nd Respondent and have since then manufacture evidence by adding to the guest registration form to include the 1st petitioner's car registration number and a forged register of motor vehicles entering and leaving the Reef Hotel on 10/2/2017 and 11/2/2017. In doing so, it is alleged the 3rd and 8th respondents have maliciously delayed the hearing and determination of the criminal case at Shanzu contrary to the dictates of article 50(2) e of the constitution. The petitioners therefore allege extensive violations of both articles 49 and 50 of the constitution by the respondents as well as violation of Section 122 of the proceeds of crime and Anti-money Laundering Act.

14. Against the 4th & 5th Respondents it was alleged violation of both Articles 40 and 50 in the manner they have dealt with the assets of the petitioners it being alleged that they have proceeded as though the petitioners have been convicted. An attack is then lodged against various provisions of the proceeds of Crime and Anti-Money Laundering Act (POCAMLA) as being unconstitutional

on the basis that the same run affront the right of any accused to remain silent and to refuse to self-incriminate. That it upsets the right to privacy; violates and takes away the powers of the office of the Attorney General and the Police Service Commission outside the constitution. It is also alleged that the Act creates the 5th respondent in the stature of a state officer not vetted by parliament and vests on the 4th Respondent finds from the Consolidated Funds when the 4th respondent is neither an independent commission nor and independent officer under article 248 of the constitution and lastly that the surplus of its funds are not subject to surrender to the consolidated funds contrary to the constitutional dictate that such be surrendered.

15. The whole of Part VII of the Act is attacked for being a usurpation of the powers of the 3rd Respondent and muddles the boundaries between the offices of the Attorney General, The Agency director, the court and that of the Director of public prosecution. In effect Section 56, 64, 65, 68, 69, 70, 71, 81, 82, 88, 90, 92, 94, 100, 104, 131 are all said and alleged to contravene the constitutional architecture of assigning duties and powers to constitutional offices and by derogating on enshrined rights and freedoms. Based on such alleged violations the petitioners sought the whooping 30 prayers.

16. I must at this juncture comment that brevity and Succinct isolation of dispute help in expeditious disposal of court matters while verbosity and vagueness does nothing more that repeat, overstress and in the course obscure the real points and thus subject the application of judicial resource in time to some inefficient employment. I will however return to that point at a later opportunity when I would try to rationalize and condense the grounds and prayers into purposeful clarity for not only the parties but also any person who may in the future seek to read and understand the dispute and the court's decision.

Respondent's opposition to the petition

17. Even though evidence was availed that all the respondents were served, not all responded to the petition nor sent a representative at the hearing. The 6th & 7th Respondents even though served did not file any responses nor send a representative at the hearing and at all.

18. For the 1st & 10th Respondent a Memorandum of Appearance, Notice of Motion dated 13/2/2019 curiously seeking to strike out the name of the 2nd Respondent from the proceedings as well as a Notice of Preliminary Objection dated 30/01/2019 and a list of some six authorities were filed. The notice of motion even though filed by the Attorney General's office should have actually been expected to come for the 2nd, 5th and 9th Respondents who were not represented by the office of the Attorney General.

19. However the same raise the questions of law regarding the immunity from being sued as provided under Sections 15, of the Office of Director of Public Prosecutions Act, Section 73 of the National Intelligence Service Act and Section 19 of the Proceeds of Crime and Anti-Money Laundering Act. It was contended in the preliminary objection that the procedure under Section 13A Government proceedings had not been followed.

20. On the other hand the preliminary objection faulted the petition for being *sub-judice* the **Shanzu RMCCR 257/2017** in which the cash and motor vehicles are exhibits and liable to forfeiture under Section 389 A of the Criminal Procedure Code and that an application for provision of living expenses had been filed and determined by dismissal while there was pending a forfeiture suit in Misc. Appl. No. 269 of 2017. Accordingly, the 1st & 10th Respondents took the view and position that the petition and the application for conservatory orders were bad for evidencing-shopping and were thus frivolous, vexatious and designed to derail the criminal and forfeiture proceedings thereby being abusive of the court process. Those contentious in the motion and preliminary objection were then urged to be buttressed by the list of authorities filed which were largely enacted legislation and one decision by the High Court Maraga J, as he then was in ***Gabriel Mghendi vs Registrar of Societies [2006] eKLR***.

21. For the 2nd, 3rd, 8th & 9th Respondents, Grounds of opposition dated 15/2/2019 and a Replying Affidavit by the 9th Respondent were filed. The gist of the Grounds of Opposition was that the petition was bad for being too general and speculative, that the criminal trial at Shanzu was already very advanced which showed that the arrest, detention and seizures were conducted by the Anti-Narcotics Unit as evidenced by documents produced at trial and that throughout the criminal trial none of these petitioners had alleged any offence having been committed against them.

22. The Replying Affidavit sworn by the 9th Respondent on its part asserted that the 9th Respondent was part of the team which effected the arrest of the petitioners among other persons at the Reef Hotel. The deponent said that the 2nd Respondents motor vehicle KCH 328R was inspected in his presence by Cpl. Wafula and PC George Odhiambo during which search a black polythene bag was recovered containing a powdery substance suspected to be narcotic drug and thereafter a search certificate and inventory of the recovered items was prepared which he exhibited as **HM1.**

23. Upon completion of the search the 2nd Petition is said to have led the deponents team to room 104 where two Tanzanians were. A search of that room led to the recovery of USD 1,500, Kshs.348,000 together with other documents as disclosed in the annexure **HM 3, 4 & 5.**

24. From room 104, the team proceeded to the parking lot where 1st petitioner was being held and the 1st petitioner is said to have said that he had checked in at the hotel the same morning in a motor vehicle KCK 444B which was then searched and two suitcases containing cash in Kshs.1000/= denominations recovered. The 1st petitioner confirmed the sum totaled Kshs. 18,400,000/= together with another Kshs. 100,000/= kept separately making an aggregate of Kshs. 18,500,000/= for which a certificate was prepared and signed by the said 1st petitioner. He then added that when asked about his itinerary, the 1st petitioner said that had travelled from Kericho to come and buy two apartments in Mombasa. A search certificate and inventory as well as a notice of seizure were prepared which were exhibited in the Affidavit as HM 6, 7 & 8 respectively. The four suspects were then booked in three different police stations till the 13/2/2017 when they were arraigned in court. The suspected substance was then weighed in the presence of the 2nd petitioner by the government analyst, one Dennis Owino Onyango prepared a sampling certificate while the 9th respondent prepared a weighing certificate. The two certificates were signed then and then exhibited as HM 9 & 10.

25. While he exhibited the Notice of seizure of the suspected substance and the motor vehicle, he said that the 2nd petitioner declined to receive the notices marked as HM 11 & 12. The suspected substance was sealed in an exhibit bag HM 14" and analyzed which analysis proved it as heroin (HM 15).

26. He added that when interrogated and made to write a statement, the 1st petitioner said that he had sold a parcel of land in Kericho at Kshs.20.5 million which he had come with to Mombasa to buy an apartment and two hearses but had not details nor documents of the land sold or the property he had intended to buy. In the witness statement the 1st Respondent had disclosed only three motor vehicles but investigations traced and seized eight vehicles which were equally seized.

27. The male Tanzania arrested with the petitioner, according to 9th respondent, informed him that he had arrived in Kenya on 8/2/2017 and that he had withdrawn a total of USD 4000 from an ATM but investigations had revealed that one can only withdraw up to USD 1000 per day and not more.

28. The deponent further asserted that investigation had revealed that the said Bakari had visited the 1st petitioners home town, Kericho, and bought a mobile phone and a telephone line and that the 1st respondents passport showed regular unexplained visits to Tanzania a fact that suggested a peculiar link the two to suggest an organized criminal enterprise.

29. He exhibited to court an analysis of the trail by the two as HM 31. In addition, the deponent stated that an analysis of the 1st petitioners bank account operated at Standard Chartered Bank Kericho showed regular deposits of large sum of money between 30,000/= and Kshs. 1,500,000/= for which no reasonable explanation was given by the petitioner who is said to pay no taxes nor does he file tax returns.

30. He concluded by asserting that the money and motor vehicles seized were the subject of criminal case at Shanzu as well as the forfeiture proceedings in the High Court Mombasa and that the same were in the custody of the Director of Criminal Investigation and subject to forfeiture under POCAMLA because the same are reasonably believed to be proceeds of crime. He asserted that upon advice by counsel, he believed that by dint of Section 92(4) of POCAMLA the validity of a forfeiture order is not affected or determined by the outcome of criminal prosecution.

31. For the 4th and 5th Respondent, only Grounds of opposition were filed. In those grounds of opposition, the Respondents took the view and position that the petition was unmerited as the alleged violations were never set out with precision and specificity and does not disclose any threat or violation and a re-available for canvassing at the criminal trial. On the stature, legality and constitutionality of the 4th Respondent and the creating statute, the position was taken that the powers of the Agency are vested by legislation and that the same was res judicata Msa HCMA 195/2017. It is of note however at this juncture that even though the 9th Respondent is represented by Mr. Kemo, his affidavit was shown to have been drawn and filed by the 4th Respondent. Nothing however turns on that anomaly because evidence availed to court by any party is applied to the case in whole and not selectively to the person giving the evidence.

32. I have reminded myself that submissions were offered in respect of the application for conservatory orders only for the parties to urge that the said application be abandoned and the submission adopted for the petition with further written submissions being offered.

33. In the oral submissions, parties largely relied on the papers filed with not so much on how the law cited ought to be interpreted and understood. In coming up with the judgment, I have therefore taken into account the oral as well as written submissions.

Submissions by the petitioner

34. In his submissions, the petitioners' counsel condensed by asserting that no decision by the Asset Recovery Agency can overrides a court decision without affronting article 1 (3) c of the contribution. He also said that the actions of the 4th respondent against the petitioner has affronted and violated the provision of articles 40(6) and 10 of the constitution.

35. On the assertion that the matters complained about here could be dealt with and determined by the criminal court in Shanzu, counsel submitted that articles 23 when read with 165(3) does not leave the declaration of infringement of rights to the determination by magistracy. The provisions of article 24 and 25 were then underscored to set the parameters of limiting rights and that the rights to a fair hearing and protection against slavery and servitude cannot be limited. The grant of bond by the trial court at Shanzu was highlighted to demonstrate discrimination in that the Tanzanians were readily released on lower bond terms and that the two Kenyans were released some three months later and on higher bond terms.

36. As against the 2nd Respondent counsel submitted that in the year 2017, he was not a police officer and was by provisions of Section 5 of Act No. 28 of 2012 forbidden from purporting to carry out police functions like arrest and that a violation of the provision invited a criminal penalty of imprisonment for a term of up to 10 years and or a fine of up to Kshs. 5,000,000/=. Counsel observed that there had never been a rebuttal of that fact by any of the respondents, including the 9th Respondent who had filed sworn affidavit, and therefore under Rule 16 of the constitution, protection of (Fundamental Rights and Freedoms) practice rules 2013 the same must be treated as undisputed facts. In the submissions, it was contended that a declaration of illegally obtained property pursuant to Article 40(6) must be judicially made and that it was not for the Act to vest it upon the 4th Respondent.

37. Citing article 50, the counsel stressed the presumption of innocence before conviction that the provisions of POCAMLA cannot override such provisions and that the evidence that petitioners right to be informed of the charges was violated and further that the evidence being employed against the petitioners was so obtained unlawfully and thus inadmissible pursuant to article 50(4). Counsel then submitted that the 9th Respondent had conceded to having conducted a search without warrant pursuant to Section 26 of the Criminal Procedure Code but it is the petitioners position that provision cannot bless the actions complained about because the same relates to moving motor vehicles and not premises like hotel rooms and parking areas.

38. On the stature, character and identity of the Asset Recovery Agency, counsel submitted that as created under the Act, it is a body corporate under the sole control of the 5th Respondent without any oversight board or agency and, was not created as a subordinate to the Attorney General and therefore neither a state office, agency or independent commission as known in law under the constitution. It was pointed out that there is a unique protection accorded to the Agency under Section 54 never to return its surplus or excess funds to the consolidated fund. Section 53 on its part is faulted for attempt at creative a parallel police force outside the command of the inspector General.

39. The 1st petition claim to having been discriminated against for reasons that even four of his team were arrested only him had his property frozen and bank accounts gagged.

40. The provisions of Section 73(5) of Narcotic Drugs and Psychotropic substances were said to have been violated for failure to give reasons for the search; in carrying out the searches in the 1st petitioners home in Kericho while he was remanded at Bamburi Police Station and for failure to observe the requirements of the Regulations made thereunder on seizures. In particular, it was pointed out that while the seizure was carried out on the 11/2/2017, the inventories were made on 1/3/2017, 3/3/2017 and 7/3/2017 and the weighing of the suspected sustained done on 23/02/2017 some 11 days later, way outside the time prescribed of 24 hours. Lastly counsel submitted that Section 122 POCAMLA was contra the statute for granting to the Attorney General prosecutorial powers against the dictates of the constitution.

41. In the written submissions the petitioner contended and asserted that the foreign decision cited by the respondents were of no assistance to the court unless shown to be based on provisions in such foreign jurisdictions that are comparable to those of the Kenya constitution. Counsel then emphasized the fact that however impressive the disclosed intention of POCAMLA may be, the same cannot be a justification for the court's focus to be blurred toward constitutional principles and ethos including the presumption of innocence. Counsel the concluded by reiterating the pleaded violations in the petition and oral submission without much effort toward citing any decided case on the pertinent issues.

Submissions by the 1st and 10th respondents

42. As said at the beginning, Mr Nguyo Wachira filed papers and informed the court that he appears for the 1st and 10th respondents and therefore I take the submissions filed on the 21.06.2019 and disclosed to be on behalf of the 2nd, 3rd and 5th respondents to actually be those on behalf pf his clients. In the submissions the position taken is that the petition should be dismissed on the merits but claim against the 2nd, 5th and 9th should struck out for being in contravention of section 15, of The Office of Director of Public Prosecutions Act, section 19 of Proceeds of Crime and Anti-Money Laundering act, section 73, National Intelligence Service Act on the basis that those statutes shield the three respondents with immunity against being sued in the manner the petitioner has done where their actions are taken in good faith.

43. Further submissions were made to the effect that the petition is bad for failure to conform to the provisions of section 16, Government proceedings Act made the claim against the said respondents untenable and even unenforceable because they do not incur any personal liability but such liability must be borne by the Government or the Attorney General. In addition, it was submitted that the prayer for release of the money which an exhibit in the Shanzu Criminal case would violate section 389A and determine the case in this petition. He reiterated the fact that the overriding objective of POCAMLA was to seize and preserve assets and that an order for release would compromise the forfeiture proceedings and that this petition should have been filed and pursued as a challenge in the forfeiture proceedings. Counsel then cited ton court the decision in **Gabriel Mugendi vs Registrar eKLR** of societies for the proposition that a suit filed contrary to the provisions of The Government Proceedings are is fatal defective and cannot succeed.

Submissions by the 2nd 3rd, 8th and 9th respondents

44. These respondents opposed the position on the basis of the Grounds of opposition, the Replying Affidavit by the 9th Respondent and list of authorities dated the 15.3.2019. it was asserted that grant of different bond terms and grant of bond by court at different times to accused persons charged jointly is grounded upon the materials availed to court by the prosecution and it is thus preposterous to infer discrimination. On accusation that searches were conducted without warrants, counsel submitted that section 57(i) of the police Service Act and section 73(5) of the Drugs and psychotropic substances act permitted such and that the searches of motor vehicles were conducted lawfully. On the conduct of the 2nd respondent as a police officer when he was not, counsel said that nothing in the law prohibited him for carrying out arrests and that he did so pursuant to section 6 of the Act which allows an officer in that service to collaborate with any other person in performing his duties. Otherwise the counsel took the view that all these complaints including allegation of denial of fair trial should have been made before the criminal court rather than here. The photos of the money exhibited by the petitioner were termed inadmissible under section 106 of the evidence act. Counsel then cited to court the decisions in **Thuita Mwngi Vs Eacc** for the proposition that the trial court is best suited to test justification for the subject transactions in the trial and Asset Recovery Agency vs **Quorandum ltd (2018)eKLR** on how to treat forfeited assets and that property illegally obtained is not protected. Counsel therefore urged that the petition be dismissed.

Submissions by the 4th and 5th Respondents

45. Mr Ngumi in his submissions did rely on the grounds of opposition, the submissions and the authorities cited. He took the view that the prayer seeking release of the frozen assets were dealt with in the preservation proceedings of assets and await determinative forfeiture proceedings. He emphasized that there are clear provisions on how to handle orders and that a petition is not one such means.

46. On the constitutionality of the POCAMLA, counsel referred the court to the decision in Thuita Mwangi (supra) in which the presumption of constitutionality of every statute was stresses and that the purpose of the Act must be ascertained. He stressed the point that section 92 of the act made it clear that a forfeiture order is not dependent upon conviction but granted on a balance of probabilities. He also urged that the petition be dismissed.

Analysis and determination

47. Having anxiously considered the petition and its prayers, I do consider that some of the prayers are disjunctive and truncated and need to be condensed and considered together. In my attempt at that task, I consider the prayers to be capable of being grouped into three broad groups or categories; those that challenge the arrest and the ensuing proceedings; the preservation and forfeiture proceedings before the High Court in Mombasa, and the specific attack on specific provisions of POCAMLA and the stature and character of the 4th and 5th respondents. It is in that broad regrouping that I will purpose to consider the petition and its prayers

before I determine what orders merit being made on the prayers sought.

48. I thus purpose to deal with prayers **b, c, d, e, f, g, h, k, m & bb** together on the understanding that they relate to and question the arrest of the petitioners, the process of evidence gathering and their subsequent charge and prosecution before the Magistrates Court at Shanzu; prayers **a, l, o and u** as questioning the preservation and forfeiture proceedings; prayer **n** as questioning the constitutionality of the provisions of POCAMLA creating the office of the 5th respondent; prayers **x, y, z and aa** as questioning allocation of revenue to the 4th Respondent and how the money so far allocated has been utilized while prayers **p, q, r, s, t, v and w** as seeking restitution and compensation for the wrongs the petitioners allege to have been committed against them . I consider prayer **cc** to have been spent with the decision to abandon the pursuit of conservatory orders. In effect the court will pose and then seek to answer the following question: -

i) Whether the arrest, searches, charges and subsequent prosecution of the two petitioner was in compliance with the law and dictates of the constitution"

ii) Whether the preservation proceedings undertaken in Mbs HC Misc App 195 of 2017and the forfeiture proceedings now pending in Mbs HC Misc app No 269 of 2017 are meet the constitutional thresholds or should be struck out"

iii) Whether the office of the 5th respondent a public office mandated to hold, manage and deal with public funds"

iv) Whether the allocation of public funds to the 4th respondent was constitutional"

v) Whether there is proved violation of the constitutional rights of the petitioners as to entitle them to any of the remedies sought"

Legality, propriety and constitutionality of the arrest, charge and prosecution in Shanzu SPMC No. 257 of 2017

49. In arguing and faulting the process leading to the prosecution aforesaid, the petitioner takes the position that the arrest, searches charge and subsequent prosecution was bad for having been conducted by the 2nd respondent when he was not entitled to carry out the work of police and contrary to the National Intelligence Security Act; that the searches were conducted contrary to the basic requirement of the law and that evidence was suppressed before the court. Against such fault the respondent took the singular position that nothing forbade the said respondent from effecting the arrest that a search can be conducted without warrant and that such complaints were due and adequately capable of being raised and dealt with before the trial court.

50. My reading of the National Intelligent Service Act creates an intelligent service whose purpose and mandate is to secure the national security interest, the national foreign relations and economic wellbeing but in doing so comply with the constitution and the law in respecting, upholding the bill of rights, national principles of governance and public service. In short the value systems in the constitution are binding upon the service and its officers like all else. The specific functions are then provided for under Section 5 with a provision that police function is not the mandate of the service. I understand the justification for that limitation to be grounded on the nature of the convert operations expected of the service. It would thus be counterproductive for an operative of the service to expose himself the way a regular police officer in uniform does. However, the duty of arrest is not outrightly forbidden.

51. My reading of Section 6A, an amendment of 2014, is that a member or officer of the service has the power to arrest and handover the arrested person to the nearest police station. I do therefore find that there was nothing wrong, illegal, unlawful let alone unconstitutional in the action by the 2nd Respondent when he participated in the arrest of the petitioners as agreed he did.

52. On the searches carried out in the vehicles at the Reef Hotel and in the 1st petitioners' residence in Kericho, the position taken by the petitioner is that it required a warrant of arrest before such could be carried out and that in carrying out the search without a warrant the law was flouted and therefore the subsequent trial ensuing cannot be fair.

53. I get the respondents, particularly 1st, 2nd, 8th, 9th & 10th to respond that not every search must await a search warrant. In doing so reliance was placed upon article 24 of the constitution as read with sections 57 &60 of National Police Service Act and section 72 of the Narcotic Drugs and Psychotropic Substances (Control) Act together with section 26 Criminal Procedure Code to permit search without Warrant in specific cases.

54. In response, petitioners submitted that the law relied upon by the respondents only allow the stoppage of vehicles on the road but

not at a parking bay. I have given due regard to those submissions by reading the cited provision of the law. I do find that they require a police officer to obtain a search warrant beforehand but that requirement is not absolute. The cited provisions of the law specifically provide that if the circumstances of a case, in the opinion of a police officer, would prejudice investigations, then it is permissible to proceed with a search in the absence of a warrant. The two provisions of the national Police Service Act I find to be self-evident read as follows: -

57. Power to enter premises and stop vehicles, etc., without warrant

(1) Subject to the Constitution, if a police officer has reasonable cause to believe—

(a) that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success of the investigation; or

(b) that any person in respect of whom a warrant of arrest is in force, or who is reasonably suspected of having committed a cognizable offence, is in any premises, the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct the search, and may, if necessary in order to effect entry, break open any outer or inner door or window or other part of such premises.

(2) A police officer may stop, search and detain any vehicle or vessel which the police officer has reasonable cause to suspect is being used in the commission of, or to facilitate the commission of, an offence.

Power to search without warrant in special circumstances

(1) When a police officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something was used in the commission of a crime, 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 (Cap. 75) 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, enter any premises in or on which he or she suspects the thing to be and search or cause search to be made for, and take possession of such thing.

(2) Sections 119, 120 and 121 of the Criminal Procedure Code (Cap. 75) as to the execution of search warrant, and the provisions of that Code as to searches shall apply to a search without a warrant under this section.

55. I do therefore find that the searches conducted at the Reef Hotel were legal and validly conducted in accordance with the law it being not in contention that the 9th Respondent was a police officer conducting investigation. However, there is the other complaint that there was a subsequent search in the 1st Petitioner's home in Kericho, conducted days later, in the absence of that petitioner because he was in police custody in Mombasa. For that search, no urgency nor justification has been offered to warrant it being conducted without a search warrant and in the absence of the 1st petitioner. I hold that the police had all the time to seek and obtain the warrant including the day the petition was presented in court for the first time. That search I do find to have been conducted contrary to the law and outside the permitted area governed by the tow provisions cited above. For that violation I find that the petitioner is entitled to damages but it does not affect the ensuing trial. It certainly therefore does not affect the criminal trial and cannot be the basis to interfere with the duty of the trial court. The law settled by the court of appeal[1]remains that otherwise proved prosecution is not negated by a violation visited prior to the prosecution. To quote the court of appeal in Julius Kamau Mbugua's case: -

"**Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it**

caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum".

56. Having found that the 1st petitioner's rights in law was violated, and considering the purpose for which the law requires a warrant for a search, the extent of that violation and the general command that the law must be obeyed, I do assess general damages at Kshs 1,200, 000.

57. The foregoing, however, does not mean that the complaints are idle because all the parties in this matter are bound to observe and uphold the law and not seek to breach it. However, this court sitting as a constitutional court cannot validly take over the duties of every other forum in the administration of justice and the justice sector in the country and disguise itself as interpreting the constitution. Granted that it has the duty to check and supervise conduct of those in public authority and offices in appropriate cases, it has no mandate to usurp and take over what is validly the duty of another agency or forum. This court has no monopoly of interpretation of the constitution. It in fact has no higher duty than the trial court for example. In the case of **Jeremiah Muku Vs. Methodist Church of Kenya Registered Trustees & Rev. Dr. Stephen Kanyaru M'impwi [2007] eKLR** Ouko J, as he then was stated: -

"But it must be remembered that constitutional references are not a panacea for resolution of all types of legal disputes. Invocation of constitutional remedies should only be reserved for serious breaches of the constitution and not for correction of errors either of substantive laws or procedure committed by courts in the course of litigation. The fact that a judgement or a ruling of the court is wrong does not mean that any fundamental rights of the party aggrieved by it has been breached…

On the other hand, it has been held that if a remedy is available to an applicant/petitioner under some other legislative provision, the court will decline to determine if the applicants'/petitioners' constitutional rights have been violated."

58. That judgment was upheld by the Court of Appeal which said: -

"What the learned Judge said, in essence, is that, invocation of constitutional remedies should only be reserved for serious breaches of the Constitution and not for correction of errors either of substantive law or procedure committed in the course of litigation and that the petition was intended to achieve what the appellant had failed to achieve in very many applications i.e the setting aside of the preliminary decree".

59. It is now settled that the mandate of reviewing and assessing the quality of evidence is that of the trial court. It is in that court that witnesses are put to task and their credibility and forthrightness tested by both cross examination and observations of demeanor. The first respondent is not being accused of bias or any inability to conduct the trial. The complaint is that the arresting officer's investigators and prosecutors have just worked or made up inadmissible evidence and suppressed relevant evidence. In **Uwe Meixner & another v Attorney General [2005] eKLR t**he court of Appeal asserted that the right forum for questioning the merits of evidence is at trial. The court said: -

"**The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in *section 77* of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court".**

60. The court takes the view that to intervene in that area at this juncture when I would have no chance to take the evidence and assess its weight and credibility will be to usurp the mandate of the trial court and thereby prejudice the process before that court. In any even Mr. Kemo reported to court and Mr. Kinyua did not rebut the fact that only one witness remains to be heard. I do find that this court as a constitutional court is ill-equipped based on the evidence availed and its scope of duty to determine that the petitioner will be denied a fair hearing. The courts mandate in this petition must be limited to finding out if there has been actual or threatened violation of a constitutional right or freedom and it is the onus of the petitioner to prove such. It is not the mandate of this court to

superintend on the trial court or the other justice sector agencies by dictating to them on how to execute their mandate[2]. I am of the view and firm belief that the right to a fair hearing enshrined under article 50 of the Constitution is firmly buttressed by the procedural safeguards embedded in the Criminal Procedure Code and the Evidence Act.

61. A keen eye and a probing mind by the defense and the inescapable duty to ensure due process is followed by the trial court should be the real assurance that the trial complies with the law. A keen eye and pubbing mind would bring out to the court the indiscretions and transgressions by the prosecutor and investigators and would also extract any evidence that could have been suppressed. I take it that in asserting that there was suppression of evidence, the petitioners are aware of the depth and weight of such suppressed evidence. I also believe that the petitioners' best interest would be better served in defending the prosecution at trial where the burden upon the prosecution is heavier.

62. In my conclusion on this point, I do find that the trial court is well equipped with the law and capacity to handle all the complaints regarding searches conducted at the time of arrest, the arrest and manner of conducting the prosecution and that this court is less equipped for that purpose. The trial court is therefore the best forum to interrogate and determine the said complaints. In coming to this conclusion, I have not ignored the petitioner's submissions that the trial court has no jurisdiction to pronounce on the constitutionality of the actions complained about. I have indeed taken those submissions into account.

63. My finding on that submission is however that while article 165(3) vests the duty to interpret the constitution and make declarations as to violations, that jurisdiction is never exclusive and does not limit the duty of all else including the trial court provided under article 3 of the constitution. To say that only the High Court has that mandate is to go against the known grain and dictate of our Constitutional interpretation that each provision support the other and none should be read and understand in isolation. I understand the duty under article 3 when applied to the trial court to include ensuring that nothing unconstitutional passes as right and legal.

The constitutionality of part of POCAMLA, the stature and character of 4th and 5th Respondents

64. To summarize the grievances of the petitioners against the act and its created institution in the 4th and 5th respondents, it is said that the act negates on the presumption of innocence; negates on the principle of public finance, encroaches on the prosecutorial province delineated to the 3rd respondent and therefore it is in contravention of the constitution.

Presumption of innocence

65. No emphasis is needed to reiterate that the presumption of innocence is a well-entrenched principle of criminal justice in the commonwealth and now enshrined in the Kenyan constitution as an ingredient of the right to a fair hearing. In my view, it is a presumption that furthers fair hearing and the rule of law by curtailing the operation by whim and arbitrariness. It says that only a judicial process is possessed of the right to say once is guilty of a criminal act.

66. For this petition, it is said that the petitioner's assets have been frozen on the basis of the criminal case at Shanzu when in fact no judicial pronouncement has been made to invoke the provisions of Article 40(6) and that no person has come forward to complain about the property frozen. For those reasons it is asserted that Sections 2, 14, 17, 53, 54, 54A as well as Sections 56 – 80 (Part VII) and (Part VIII) Sections 81 -999 of the Proceeds of Crime and Anti-Money Laundering Act are unconstitutional for negating on the constitutional presumption of innocence and the right to remain silent. The particular grievance is with those provisions which require a citizen to disclose sources of property and those which allow conservation and forfeiture in the absence of a conviction for unlawfully/illegally obtained property.

67. I take the view that the position of the law complained about is not novel with the POCAMLA alone. Even prior to the advent of organized crimes there was always the doctrine of strict liability where the evidentiary burden was upon the accused person. In such case one may say the burden is shifted. However, in my opinion it is not the burden of proof that is shifted but the evidentiary burden. Like in all criminal case an accused only answers to the case as presented. It is not expected that he helps the prosecution in their mandate by self-incrimination or just filing the blanks in the prosecution's case. The easy example I can give are the traffic offences of driving without a driving license[3].

68. In such case the prosecution is still expected to prove that one was shipped asked to produce a document but failed to do so that it becomes the duly of the accused to prove his being licensed. Such are the situations where the application of Section 111

Evidence Act is called into play. That Section provides: -

111. Burden on accused in certain cases

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

69. I read the provision to say that in some situation when only the accused has special knowledge of existence of a fact then it becomes his duty to prove such existence. That I find is the same situations with the impugned Provisions of Section of POCAMLA. I understand the provision to say that when one's known income is apparently disproportionate or irreconcilable with his known assets or possessions then he has the onus to prove his other sources. That to me is a provision that sits in consonance with Section III and does not displace the presumption of innocence nor the right to remain silent.

70. It is important to note that the two rights are in the realm of criminal proceedings. As explained before, it remains the duty of the prosecution to place a case before the court to the satisfaction of the court that the accused has a case to answer.

71. I do find that there's nothing in the statute that neither infringes nor violates on the various provisions of the constitution cited and regarding right to be presumed innocent till proven guilty and the right to remain silent.

72. On the stature and character of the Asset Recovery Agency and the powers granted to its director, I start from the learning that legislation and legislative policy are within parliament as a mandate and can only be questioned by this court when the same is demonstrated to have been done contrary to the constitution or in contravention therewith. The court proceeds from the rebuttable presumption that every statute meets the constitutional threshold and it is the duty of the person alleging otherwise to prove. In **Attorney General v Law Society of Kenya & another [2017] eKLR the court of appeal reiterated the position that** every statute passed by the Legislature enjoys a rebuttable presumption of constitutionality by quoting the Court of Appeal of Tanzania in **Ndyanabo V. Attorney General** [2001] 2 EA 485, where it was held

"In interpreting the Constitution the court would be guided by the general principles that … there was a rebuttable presumption that legislation was constitutional, and…the onus of rebutting the presumption rested on those who challenged the legislation's status save that, where those who supported a restriction on a fundamental right relied on claw back or exclusion clause, the onus was on them to justify the restriction."

73. In this matter the challenge on the constitutionality of **Part VI** of the Act in creating the Agency and its director is based on the allegations that the agency is neither a state agency nor independent commission but a corporate akin to a limited liability company and thus has no right to be allocated any public funds. On the other hand, the director is said not to be neither a state officer nor a public officer appointed by president and approved by parliament, and operating without an oversight board, cannot hold, manage or deal with public funds.

74. I start by posing the question whether it is the law under the constitution that only state agencies and independent commissions are entitled to get allocation of public funds. The answer to that question resides in Chapter Twelve of the constitution which set out the principles of public finance, creates the consolidated fund and other public funds into which all money raised or received by national Government must be deposited, the allocation of such money and how it shall be appropriated. Article 206 (2) says how money may be appropriated from the consolidated fund. It says:

(2) Money may be withdrawn from the Consolidated Fund only—

(a) in accordance with an appropriation by an Act of Parliament;

(b) in accordance with Article 222 or 223; or

(c) as a charge against the Fund as authorised by this Constitution or an Act of Parliament.

(3) Money shall not be withdrawn from any national public fund other than the Consolidated Fund, unless the withdrawal of the money has been authorised by an Act of Parliament.

(4) Money shall not be withdrawn from the Consolidated Fund unless the Controller of Budget has approved the withdrawal.

75. I see nothing in the constitution that restricts the parliament while enacting the appropriation Act on who and who alone must get allocated money from the consolidated fund. In this petition, no fault has been taken against parliament on the funds it has allocated to the 4th Respondent. One cannot validly divorce sums appropriated from the consolidated funds from the relevant Appropriation Act. I read the constitution to leave it to parliament to determine the appropriation of the consolidated fund. In doing so, and beyond appropriation act, parliament by act No 3 of 2017, section 22, introduced into the Proceeds of Crime and Anti Money Laundering Act, section 54A which provides:

Funds of the Agency

(1) Parliament shall allocate adequate funds to the Agency to enable the Agency perform its functions under the Constitution, this Act and any other written law and the budget shall be a separate vote in accordance with Article 249(3) of the Constitution.

(2) The funds of the Agency shall consist of—

a) monies provided for by Parliament for the purposes of the Agency

b) a percentage of the total proceeds recovered or realized from any property seized or forfeited to the Government, as may be prescribed, from time to time, with the approval of the Cabinet Secretary for finance;

c) such monies or assets as may accrue to the Agency in the course of the exercise of its powers or the performance of its functions under this Act; and

d) all monies from any other source provided, donated or granted to the Agency towards the achievement of the objects of the Agency.

76. I do take the view that in amending the act to remove its description as a semi-autonomous body under the office of the Attorney General and creating a body corporate, the parliament was deliberately removing the agency from the control as extension of the Office of the Attorney General and creating a wholly independent body able of being funded, budgeted for, oversighted and run independent of the Office of the Attorney General. The financial oversight imposed by section 54D leave no doubt that the Agency is wholly divorced of operations of the office of the Attorney General.

77. There was also the assertion that the 4th respondent is not a public body not having been created under the constitution and run as a limited liability company. This complaint begs an answer to the question whether a public body must be created by the constitution. I find neither substance nor merit in that position. In the constitution the people of Kenya expressed in very strong words in the preamble how the affairs of the country shall be conducted and in doing so delegated their power to the three arms of government. By that delegation laws are passed by parliament on behalf of the people. In passing the law parliament has the mandate to create public bodies for specific purposes and in other situations parliament grants authority for a public office to create public bodies or institution. I have in mind section 3 of State Corporations Act which allows the President to establish state corporations just like section 65(1) Water Act authorises the Cabinet secretary, in charge of water to establish Waterworks Development Agencies. These two examples and the provisions of section 53 of the Act creating the Agency tell me that the Agency is indeed a public body duly and lawfully established.

78. However, the petitioners have raised what they call in their submission, an institution and its director not answerable to oversight by a board and apparent under the control of an individual, the agency Director. Even if not elegantly set out and prayed for, that allegation to this court is fundamental and deserves consideration by asking the question whether the need for desired good corporate governance in public institutions as envisaged under Articles 10 and 232 of the constitution. I read and understand those provisions to underscore accountability and transparency in managing public institutions and transacting public affairs. For corporates, and I consider the 4th respondent a corporate because the act says so, governance ought to be structured and systems set for policy formulation and guidance to administration in executing the mandate of the corporate. I hold the view and opinion that an individual ought not to be the soul and mind of an institution. It requires a body of persons to achieve greater level of transparency in governance. That to me is the goal to be achieved by boards of public corporations, independent bodies and even commissions. For the 4th respondent the act creates no board and it appears the 5th respondent looks unto nobody for policy formulation and oversight in governance. That I find to fall short of the constitutional dictate for transparency in governance. That I find runs afoul the dictates of the two articles of the constitution I have adverted to in this paragraph. It is a state I consider to have occurred not out of design but oversight. I therefore recommend that this decision be served Upon the Attorney General with a view to him taking remedial steps to forestall the real perception that the 5th respondent runs and controls the 4th respondent devoid of any oversight in governance.

Whether the preservation proceedings undertaken in Mbs HC Misc App 195 of 2017and the forfeiture proceedings now pending in Mbs HC Misc app No 269 of 2017 are meet the constitutional thresholds or should be struck out"

79. The petition attacks Parts VII and VIII of the act for purporting to allow criminal forfeiture without the participation of the 3rd Respondent, for imposing standards of evidence on criminal forfeiture proceedings and for usurping the power of the 3rd respondent in a manner the petitioners deem unconstitutional. In my view having read the impugned provisions, all part VII of the Act does is to clothe the court with power not only to issue confiscation and restraint orders but also to tinker with them on case by case basis and dependent upon materials placed before it and if set thresholds be met. There appears to me to be no room for whim or arbitrariness by the court. The duty to act judiciously is not sidestepped or circumvented.

80. It is thus of note that even though sections 68 and 82 of the Act sanctions that the applications for a restraint and preservation orders be made *ex-parte* by the Agency Director, the discretion of the court to grant the order and thereafter revisit and tinker with the order once made, including variation and rescission and the right of appeal, is robustly retained and upheld. Those provisions to this court are clear to all to see and it should not take an imagined all importance of a constitutional court to establish if there exist sufficient material to justify the grant any orders under the act. I find that the court before which the two applications were filed would have the capacity to determine the matters on the merits. This is the position of law I learn from various decisions of the superior court that a constitutional court is not the only court to determine all disputes to the exclusion of all other courts.

81. To avoid overlaps and prospects of conflicting decisions over a subject in different files, it is only tidy and desirable that all questions over that subject be dealt with in the first file to be filed. That is the need and purpose of the *res sub-judice* rule in our legal system. That rule is never sidestepped merely a litigant has chosen to approach the court by a constitutional petition rather than a suit. For this reason, I consider the petitioners' prayers that I consider the happenings in the two miscellaneous applications, NO 195 and 269 both of 2017, to be incapable of consideration here. I leave it to the petitions to take the challenge taken against those proceedings in the particular files and before the particular courts dealing with the matters.

82. The upshot is that save for the general damages I have awarded on account of unlawful search in the sum of Kshs 1,200,000/= I decline all the prayers in the petition and order that each party shall bear own costs.

Dated, signed and delivered at Mombasa this 26th day of May 2020

P J O Otieno

Judge

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[1] **Julius Kamau Mbugua Vs Republic (2010)eklr**

[2] Republic vs Royal Media Services [2014] eKLR

[3] Section 30 Traffic Act