

## EXTRADITION

### Definition:

To send an accused person (who may be guilty of a crime and who escaped to another country or state) back to his or her own country for trial.

To lodge an application in court for extradition, the applicant (the Attorney General's office) will file a miscellaneous application by notice of motion and outline the reliance of the following laws;

- Extradition (Contiguous and Foreign Countries Act) Cap 76 and
- The current bilateral agreement between Kenya and the country requesting extradition of the subject.

### In reliance on section 12(1) of the Act which provides;

Where a warrant has been issued in a country to which this part applies for the arrest of a person accused of an offence punishable by law in that country, and he/she is suspected of being or on his way to Kenya, a magistrate may if satisfied the warrant was issued by a person having lawful authority to issue it, will endorse such warrant.

### In reliance on section 13 2 (a) & (b) of the Act which provides;

The arrest of the person will be granted if to the court it is proved;

- The original warrant is produced and properly endorsed
- The original warrant is produced and endorsed within such time as the magistrate thinks reasonable in the circumstances.

### In reliance on section 14 (1) of the Act which provides;

The return of prisoner is conditional on the Magistrate being satisfied;

- The warrant is duly authentic as directed by the Act and issued by a person of lawful authority to issue the same; and

- By evidence on oath that the prisoner is the person named or otherwise described in the warrant

In the proceedings the magistrate will receive any evidence which shows, the matter is relevant to section 16 of the Act.

In reliance on section 16 of the Act which provides;

A person arrested shall not be returned if;

- The offence in respect of which surrender is required is one of a political nature
- The person arrested is accused of an offence triable by a court in Kenya
- The person arrested is undergoing sentence under a conviction in Kenya until after he is discharged or the sentence expires

Where the return of a prisoner is sought and it appears to the magistrate;

- The nature of case is trivial
- The application to return prisoner is not made in good faith, in the interest of justice
- Having regard to the distance, facilities of communication and circumstances of the case, be unjust, oppressive or too severe a punishment to return the prisoner,

The magistrate may discharge the prisoner, absolutely or on bail or make any other order the court may deem fit.

The order of the court is appealable.

Reference; Miscellaneous case number 2 of 2008

ATTORNEY GENERAL versus SOSTHENE NTEZIYARENYE

The application by the A.G for the court to order extradition of the Rwandese national back to Rwanda for trial on various offences cited in the International warrant of arrest issued, signed and sealed by the Prosecutor general of Rwanda. The suspect had a history of fleeing from courts jurisdiction and had fled from Rwanda to Kenya, where he had no fixed abode.

Reference; REPUBLIC VERSUS WILFRED ONYANGO NGANYI & ANOTHER

The court discharged the subject from extradition to Tanzania, on the basis of the fact that the bilateral agreement was not taken to the National Assembly.

The High Court on appeal by the Attorney General, stated the court dwelt on the other matters, whereas the issue was the authentication of documents and *prima facie* evidence that the accused person was connected to the crime.

The defense claimed that the Legal Notice number 95 of 1966, the Extradition Act (Tanzania and Uganda) Order was not valid as it was not placed before the National assembly.

The court held;

- The court was to ensure regularity of the documents, and
- Evidence connecting the prisoner to the alleged offence of stealing Tsh5 billion from National Bank of Commerce on 21<sup>st</sup> May, 2004. The high court ordered the suspect extradited to Tanzania.

#### Torroha v Republic

It was held:

1. The proper task of magistrate before whom the return of a prisoner is sought is as follows:  
The court shall have regard to section 14(1) of the Extradition (Contiguous and Foreign Countries) Act (cap 76). The Magistrate then peruses the documentary and oral evidence and ensures that subsections 1 (a) and (b) of section 14 have been complied with.
2. Before exercising his discretion to order the return of the Prisoner, the Magistrate should peruse the entire evidence and understand it, without taking the position of a trial Court. So the degree to which the Magistrate has to be satisfied is not expected to be as high as that requested from the analysis and evaluation of evidence adduced in a trial. The Magistrate is under no duty to inquire into the merits of the charges to be preferred.

3. If there is some evidence which discloses a connecting factor between the prisoner and the alleged offences, the Magistrate should order the prisoner and the alleged offences. ~~the Magistrate should order the prisoner to be returned.~~
4. Any person accused of an extradition crime who is in Kenya shall not be surrendered if the offence for which his surrender is required is one of a political character or return would result in a punishment for an offence of a political character. It is fundamental that there cannot be extradition where fair trial cannot be guaranteed.
5. The High Court was entitled to examine the evidence, to rehear the case, reconsider the material before it and reach its own decision thereon without disregarding the judgment of the magistrate but carefully weighing it.
6. The information which the appellant gave to the police officer about Sarah Khadija was a relevant fact in terms of section 31 of the Evidence Act (cap 86) hence there was no obligation on the police officer to caution the appellant.
7. Section 16 of the Extradition (Contiguous and Foreign Countries) Act (cap 76) had been complied with and there was no doubt the appellant would receive a fair trial in the neighboring republic of Tanzania.

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A PAPER PREPARED FOR DELIVERY  
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TOPIC: Extradition Law (Practice and  
Procedure) in Kenya

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## THE EXTRADITION PROCESS IN KENYA

### COVERED

1. The definition of extradition
2. The sources of the Law on extradition in Kenya
3. The basis of extradition
4. Extradition under the Extradition (Contiguous and Foreign Countries) Act Cap.76 of the Laws of Kenya .
5. Extradition under the Extradition (Commonwealth Countries) Act Cap. 77 of the Laws of Kenya.
6. Some principles of extradition
7. A summary of the extradition process in Kenya. A practical overview
8. Other forms of surrender of criminal suspects, fugitives and aliens. An overview of the Immigration Act Cap. 172 Laws of Kenya.
  - Deportation
  - Persona non grata
  - Rendition (Sic)
  - Declaration of prohibited immigrant
9. RECOMMENDATIONS AND CONCLUSION

## 1. DEFINITION

- The surrender by one state of a person present in its territory to another state that either seeks the person for the purpose of prosecution or for the purposes of enforcing a sentence.
- Ultimately, it is an act of the executive not of the judicial authority.

Requested State  
State

Requesting

Requesting

Extradition is different from:-

- Expulsion which arises for domestic reasons (often administrative) e.g. diplomats who have differed with the Government for one reason or the other.
- Refoulement which consists in the refusal to allow an individual entry at the border (inhibition).
- Repatriation which is not in the criminal domain
- A transfer which is a notion deriving from the statute of the International Tribunal for the prosecution of persons responsible for serious violations of International Humanitarian Law in the Territory of the former Yugoslavia since 1991. It involves the transfer to the Tribunal of a person initially prosecuted by a national jurisdiction, according to the principle of primary of the tribunal over national jurisdictions for the prosecution of crimes falling under its jurisdiction. Also the Rwanda genocide tribunal.
- A surrender such as developed by the European Union within the framework of the European arrest warrant which aims to abolish formal extradition procedures by adopting a principle of mutual recognition of criminal decisions. Refer also to the surrender of the suspect of the Kampala Bombings.
- Rendition (sic): handing over prisoners to countries where torture is permitted.

Extradition presupposes that the individual is being prosecuted. If the person is only sought after in order to be heard as a witness, the issue has to be settled by a mutual legal assistance request rather than by extradition.

Extradition may be formulated (devised):-

- For the purpose of prosecution, i.e. in order to prosecute an individual suspected of having committed an offence.
- For the purpose of execution, i.e. in order to execute a custodial sentence following a conviction of an individual in the requesting state.

#### REMARKS:

The extradition request is not equivalent to a conviction of guilt. The obligation to extradite or to prosecute (aut dedere, aut judicare) does not mean however after an investigation, that an allegation established as having no basis is required to be brought to court.

## 2. THE SOURCES OF THE LAW ON EXTRADITION IN KENYA

- a) The extradition (Contiguous and Foreign Countries) Act, Cap. 76 of the Laws of Kenya.

The preamble provides that, it is,

"An Act to amend and consolidate the Law relating to the extradition of criminals and for matters connected therewith and incidental thereto".

- b) The Extradition (Commonwealth Countries) Act Cap.77 of the Laws of Kenya.

The preamble to this Act provides as follows;

"An Act of Parliament to make provision for the surrender by Kenya to other Commonwealth Countries of persons accused or convicted of offences in those countries, to regulate the treatment of persons accused or convicted of offences in Kenya who are returned to Kenya from such countries and for purposes incidental thereto and connected therewith".

REMARKS:

- It is worthwhile to note that, though both the Republic of Tanzania and Uganda are Commonwealth Countries the Act governing extradition between the said countries and Kenya is Cap 76 and not Cap.77.
  - Commonwealth comprises of about 54 countries governed by the same policies of commerce and democratic principles. They are mostly former British protectorates or colonies.
- c) The current Constitution of Kenya provides in Article 2 Sub Articles 5 and 6 as follows:
- "(5) The general rules of international Law shall form part of the Law of Kenya
- "(6) Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this constitution".
- d) Common Law, doctrines of equity and statutes of general application in force in England on the 12<sup>th</sup> August 1897 and the procedure and practice observed in the courts of justice in England as at that date in so far as the circumstances of Kenya and its inhabitants permit and such qualifications as those circumstances may render necessary.

### 3. THE BASIS FOR EXTRADITION

1. A person may be extradited in accordance with the [present or relevant extradition treaty or agreement on the request of a requesting state for the purpose of prosecution or enforcement of a sentence in respect of an extraditable offence]
2. Extradition may be granted by virtue of comity or where on the basis of assurances given by the competent authority of the requesting state it can be anticipated that this state would comply with a comparable request or where it is otherwise deemed to be in the interest of justice. (For the definition of comity, see elsewhere in this paper).
3. Generally, the legal basis for extradition shall be as wide as possible and guided by:-
  - ❖ Bilateral or regional/MLA treaties
  - ❖ International arrangements or schemes
  - ❖ International Treaties that contain provisions on:-
    - Universal instruments against terrorism
    - UN Conventions against Transnational Organized crime
    - UN convention against corruption
    - 1998 Convention against Drugs
  - ❖ Reciprocity and/or domestic Law.

## 4. EXTRADITION UNDER CAP.76

### a) Important definitions

- (i) "Extradition Crime" - "means a crime which if committed within the jurisdiction of Kenya, would be one of the crimes described in the schedules". (see Annexure 1)
- (ii) "fugitive criminal" - means any person accused or convicted of an extradition crime committed within the jurisdiction of any other country who is in or is suspected of being in Kenya"

NB: Reference to a fugitive criminal of a country is a reference to a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that country".

### b) Pre-requisite to surrender of fugitive criminal

- An agreement made between any country other than a designated Commonwealth Country under Cap.77 with respect to the surrender to that country of any fugitive criminal.
- An order published in the Kenya Gazette declaring that part II of Cap. 76 shall apply which shall state the conditions, exceptions and qualifications. This order should be published by the Minister for the time being responsible for Legal Affairs or some other Minister of State of the Country concerned.
- The order must recite or embody the terms of the agreement and shall not remain in force for any longer period than the agreement.
- The order must be laid before the National Assembly for ratification.

### c) The obligation to surrender

Under the Act, every fugitive criminal of any country to which the Act applies and who is in or suspected of being in Kenya is liable to be arrested, detained and surrendered in the manner provided under the Act.

- Whether the crime in respect of which the surrender is sought was committed:-
  - (i) Before or after the commencement of the Act (29.3.1966) or
  - (ii) The application of Part II - i.e. agreement and order duly published.
- Whether there is or is not any concurrent jurisdiction in a court in Kenya over that crime. Meaning, a fugitive criminal can be extradited whether or not he or she can still be tried in Kenya for the same offence, i.e. courts in Kenya have jurisdiction to try the fugitive criminal.

d) How the process of surrender/extradition is initiated.

- Step 1 - a diplomatic representative or consular office of the requesting state makes a request for the surrender of the fugitive criminal to that country. (see format for a request Annexure 2)
- The request is made to the Minister for the time being responsible for legal affairs or some other Minister of State.
- In Kenya, requests are transmitted through the diplomatic channels i.e. Embassies, Consular offices, or other diplomatic missions etc, to the Ministry of Foreign Affairs.
- Step 2, upon receipt of the request, the Minister may by order under his hand signify to a Magistrate that a request has been made. (See form of order annexed and marked Annexure 3).
- In the order, the Minister, in our case the Attorney General, requires the magistrate to issue his warrant for the arrest and detention of the fugitive criminal.

NOTE: The Minister (Attorney General) may refuse to make the order if he is of the opinion that the offence is of a political nature.

- What is an offence of a political nature?
  - e.g. - Human rights activists
  - Persons fighting for democracy e.g. PM Tsangirai of Zimbabwe
  - Persons fighting racism, for democratic rights.

- Step 3 - Issue of a warrant of arrest. The Magistrate upon receipt of the order from the Attorney General issues a warrant of arrest on the following conditions.
  - (i) On such evidence which in his opinion would justify the issue of the warrant if the crime had been committed or the criminal convicted in Kenya. This basically refers to all criminal offences.
  - (ii) On such complaint or complaint after such proceedings as would in his opinion justify the issue of a warrant had the crime been committed or the criminal convicted in Kenya. In this case, no order of the Attorney General before the magistrate issues the warrant of arrest.
  - (iii) Where the magistrate issues a warrant of arrest without an order from the Attorney General he is obligated to forward the report of the same together with the evidence and information or complainant or certified copies thereof to the Attorney General.
  - (iv) The Minister may order the warrant of arrest to be cancelled and the fugitive criminal released.  
( See Annexure 4 for an arrest warrant)

NOTE (IN SUMMARY): A warrant of arrest may be issued by the Magistrate on two instances;

- (i) Upon receipt of order from the Minister (Attorney General)
- (ii) On such information or complaint.evidence, or proceedings as would in his opinion justify the issue of a warrant of the crime had been committed in Kenya or the fugitive convicted in Kenya.
- (iii) In this latter case, the Minister should be notified forthwith. The Minister is supposed to forward an order to the Magistrate signifying that a requisition has been made for the surrender of the fugitive criminal.
- (iv) The fugitive is entitled to be discharged if the magistrate does not receive an order within a reasonable time.

- Step 4 - Upon arrest, the fugitive criminal is supposed to be taken before a magistrate as soon as possible.
- Step 5 - Hearing of the case and evidence.

The magistrate hears the case in the same manner and has the same jurisdiction and powers as nearly as may be as in a trial before a subordinate court.

- Step 6 - Powers of the court to commit or discharge of the prisoner.
  - The court hearing the extradition proceedings must be satisfied that the foreign warrant authorizing the arrest of the criminal is duly authenticated. (See authentication certificate marked 5).
  - The court considers the restrictions enumerated herein after
  - The court receives evidence to show that the crime of which the prisoner is accused is not an extradition crime.
  - Upon consideration of the above, the magistrate may commit the fugitive to prison or discharge him.
  - The purpose of committal is to await the warrant of the Minister for his surrender. In this case the magistrate is supposed to send to the Minister a certificate of committal and any other report of the case as he may think fit.  
(See annexure 6 - surrender warrant).  
Annexure 7 committal warrant).
- Step 7 - At the time of the committal of the fugitive, the magistrate shall inform him that:
  - (i) He shall not be surrendered until after the expiry of fifteen days.
  - (ii) He has a right to apply for the issue of directions in the nature of habeas corpus.

- Step 8 - Upon the expiry of the 15 days or upon the issue of directions in the nature of habeous corpus the Minister may by warrant under his hand order the fugitive criminal to be surrendered and the criminal shall be surrendered.

#### DELAY IN SURRENDERING

- The fugitive criminal may be discharged if he is not surrendered within two months.

#### e) RESTRICTIONS TO SURRENDER AND ARREST UNDER CAP.76

- A fugitive criminal cannot be surrendered or arrested if:-
  - (i) Offence specified in the warrant is of a political nature or character
  - (ii) Requisition for surrender, the application for endorsement of the warrant and the return of the person named is made with a view to try or punish him for an offence of a political character.
  - (iii) The fugitive criminal or the person arrested is accused of an offence triable by a court in Kenya.
  - (iv) He is undergoing sentence under any conviction in Kenya until or unless he has been discharged by acquittal or expiration on his sentence or otherwise (e.g. appeal, revision, commutation of sentence, clemency or pardon).
  - (v) Provision is made by law or by agreement, shall have the opportunity of returning to Kenya.
  - (vi) Provision is made by law or agreement that he shall not be detained or tried for any offence other than an extradition crime for which the surrender is grounded.
    - That is to say, the fugitive criminal cannot be tried for any offence other than the one specified in the request.
  - (vii) Before the expiry of 15 days from the date of committal to prison to await his surrender.
  - (viii) The case is of a trivial nature
  - (ix) Application for the surrender is not made in good faith in the interests of justice.
  - (x) Having regard to the distance, facilities of communication and all circumstances of the case, it would be unjust or

oppressive or too severe a punishment to return the fugitive at all or at a later date.

f) RECIPROCAL BACKING OF WARRANTS

(1) When it applies

- (i) Minister has to be satisfied that reciprocal provision has been or will be made by or under the law of any contiguous country, not a designated commonwealth country, for the backing of warrants issued in Kenya and their execution in that country.
- (ii) It is appropriate to do so
- (iii) An order is published in the Gazette declaring that there shall be reciprocal backing of warrants between Kenya and that other country.

NOTE: Order shall contain such conditions, exceptions and qualifications as may be specified therein.

-The order shall be laid before the National assembly for ratification.

(2) BACKING OF WARRANTS ISSUED IN ANOTHER COUNTRY

How and when endorsed:-

- Warrant issued in a country duly Gazetted declaring that there shall be reciprocal backing of warrants.
- Warrant shall be for the arrest of a person accused of an offence punishable by law in that country.
- The fugitive is or is suspected to be in or on his way to Kenya
- A magistrate is satisfied that the warrant was issued by a person having lawful authority to issue it.

NOTE: The magistrate endorses the warrant of arrest issued in the other country if the above conditions are met.

-The warrant may then be executed in Kenya by arresting the person named therein.

-It does not matter whether the offence was committed before the commencement of the Act i.e. 29<sup>th</sup> March 1966 or before the country was gazette.

(3) PROVISIONAL WARRANT

- Issued by a magistrate before endorsement in the above manner.
- Issued on such information and under such circumstances as would in his opinion justify the same if the person were accused of an offence punishable by the Law of Kenya if committed in the jurisdiction of Kenya.
- A person arrested pursuant to such a warrant shall not be returned to another country until the warrant is endorsed by the magistrate in the manner envisaged above.

(4) RETURN OF THE PRISONER: POST ARREST (EXECUTION)

- Warrant has to be endorsed as above
  - Original
  - Provisional
- Magistrate has to be satisfied that:-
  - (a) The warrant is duly authenticated
  - (b) Warrant was issued by a person having authority to issue the same.
  - (c) The prisoner is the person named in the warrant
- After the magistrate is satisfied as above, he orders the return of the prisoner to the country which had issued the warrant.
- Magistrate during proceeding of this nature has powers as in any other trial e.g.
  - Bail
  - To remand
  - Receive evidence.
  -

(5) DELAY IN RETURNING:

When to discharge:-

- If not returned within one month
- Upon application by or on behalf of the prisoner
- Notice of application duly given to the person holding the fugitive and the Commissioner of Police.
- If prisoner shows sufficient cause (discretionary).

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(6) REDRESS AVAILABLE TO THE PRISONER

- Right of an application to the High Court in the nature of habeas corpus.
- Appeal to the High Court
- Minister is of the opinion that the offence is of a political character.

## 5. EXTRADITION UNDER CAP.77

a) Some definitions,

(i) "Fugitive" means any person who is or is suspected of being in or on his way to Kenya and whose surrender is requested under the Act (Cap.77) on the ground that he is accused of, or is unlawfully at large after conviction for an extradition offence committed within the jurisdiction of the requesting country.

(ii) An offence is an "extradition offence" if:-

- It is an offence against the law of the requesting state
- falls within any of the descriptions contained in the schedule to the Act.
- It is punishable under the law with imprisonment for a term of twelve months or any greater punishment.
- It is an act or omission constituting an offence under the laws of Kenya if it was committed in Kenya.
- It includes an attempt, conspiracy to commit, abetting, counseling or procuring the commission of the offence or an accessory before or after the fact to the offence.
- Includes impeding the arrest or prosecution of the persons guilty of those offences.

b) Pre-requisite to extradition

- Order by the Attorney General designating a country with the Commonwealth a "designated Commonwealth country"

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- Order must have been laid before the National Assembly without unreasonable delay for ratification.
- Before ratification, anything done in the interim period deemed lawful.

c) Liability of fugitives to surrender

- Subject to the Act, every fugitive is liable to be arrested, detained and surrendered in the manner provided in the Act.
- It does not matter whether the offence was committed before or after the commencement of the Act (which is 30<sup>th</sup> December 1968) or the designation of the requesting state.

d) Restrictions to surrender

- (i) The offence of which the fugitive is accused or was convicted is of a political character.
- (ii) Request is made for purposes of prosecuting or punishing him on account of his race, religion nationality or political opinion.
- (iii) He might, if surrendered be prejudiced at his trial or punished detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.
- (iv) If he were charged in Kenya, he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction. Rule on *autrefois acquit* and *autrefois convict*. The purpose of these two common defenses is to protect the subject against double jeopardy i.e. repeated prosecutions for the same offence.
- (v) Unless provision is made by the law of the requesting country or by arrangement made with that country securing that unless he has first been restored or had an opportunity returning to Kenya, he will not be dealt with in respect of any offence committed before his surrender.

NOTE: This is the rule on specialty i.e. Fugitive cannot be dealt with in respect of any other offence other than the one forming the basis of the request or a lesser offence or any other extradition offence to which the Attorney General has consented.

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(e) The process of extradition

- Step 1 - A request is made to the Attorney General by or on behalf of the Government of a designated commonwealth country in which a person is accused or was convicted.
- The request should be accompanied by an overseas warrant issued in the requesting country.
- In case of a convicted person, a certificate of conviction and sentence and a statement of the sentence, if any, that has been served.
- Also to be included in the request:
  - (i) Particulars of the fugitive
  - (ii) Facts of the case
  - (iii) Law under which he is accused or was convicted
  - (iv) Evidence sufficient
- Step 2 - Attorney General issues an authority to proceed to a magistrate (see annexure 8).
- Step 3 - arrest of the fugitive for purposes of committal.
  - The magistrate issues a warrant for the arrest of the fugitive upon receipt of the fugitive upon receipt of the authority to proceed.

NOTE: A magistrate may however, issue a warrant of arrest a fugitive without the authority to proceed from the Attorney General upon information that the fugitive is or is believed to be in or on his way to Kenya. This is called a provisional warrant. In this case the magistrate is supposed to give notice to the Attorney General and transmit.

- (i) The evidence and
- (ii) Information upon which the warrant was issued.
- The Attorney General may then issue an authority to proceed or discharge the fugitive.

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- If the offence is in respect of stealing or receiving stolen property or any other offence in respect of property the magistrate may issue a warrant to search the property
- Where? And who? To execute Warrant?
- In Kenya.
  - By a police officer
- Step 3 - proceedings for committal:-
  - (i) Person arrested must be brought to court as soon as is reasonably practicable before a magistrate with jurisdiction.
  - (ii) Proceedings conducted under the jurisdiction and powers of the court as in a trial.
  - (iii) In case of a provisional warrant and the court has not received authority to proceed, the court may fix a reasonable period with notice to the Attorney General after which the fugitive shall be discharged if authority to proceed is not received.
- Step 4 -taking of evidence the hearing if court is satisfied that the:-
  - If the court is satisfied that the offences:-
    - Offence in the request is an extradition offence
    - Offence would warrant his trial for that offence in Kenya
    - The fugitive was at large after conviction and
    - There is no prohibition under the Act for his extradition.
  - The court commits him to custody to await his surrender.
  - If the above conditions are not met, the court discharges him.
  - The fugitive is entitled to be given his property, if any, at the time of surrender.

#### Step 5: post committal proceedings

- (i) At time of committal - fugitive must be notified of his right to make an application for habeas corpus ..
- (ii) Notice of committal shall then be given to the Attorney General.
- (iii) Cannot be surrendered until after the expiry of 15 days from the date of committal.
- (iv) Cannot be surrendered pending the hearing of the habeas corpus application if one filed.
- (v) At the hearing of the application for habeas corpus, the High Court may order the fugitive to be discharged if it appears that:-

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- The offence was of a trivial nature.
- Passage of time since the offence was committed or the time he became unlawfully at large.
- Accusation not made in good faith in the interests of justice.
- Having regarded to the circumstances of the case it would be unjust or oppressive to surrender him.

NOTE: High Court may receive additional evidence during the hearing of an application for habeas corpus.

- Step 6 - The surrender

- (i) Attorney General issues a warrant for the surrender of the fugitive if High Court has not discharged him.
- (ii) Attorney General has discretion to issue or not to issue a warrant for the surrender of the fugitive.
- (iii) If fugitive is serving another sentence in Kenya, he should first serve the same to completion.
- (iv) If fugitive been prosecuted for another offence in Kenya, the same to be concluded first before surrender.
- (v) If an offence does not carry a death penalty in Kenya but carries a death penalty in the requesting State, the Attorney General may decline to issue a warrant of surrender.
- (vi) If another country has made a request for the surrender of the fugitive under Cap.76, the Attorney General may decline to issue a warrant of surrender if taking into account the circumstances of the case preference should be given to the other country.
- (vii) Other considerations which the Attorney General may take into account in declining to surrender
  - Danger to the life or prejudicial to the health of the fugitive.

NOTE: The fugitive must be notified that a warrant of his surrender has been issued.

- Step 7 - delay in surrendering

- (i) After two months from the date he could have been surrendered if not surrendered, the fugitive may apply to the High Court to be

discharged and give notice of such application to the Attorney General.

- (ii) If High Court is satisfied that the said notice of one week was duly given to the Attorney General and if sufficient cause is not shown, the High Court may discharge from custody and quash the warrant of surrender.

- Step 8 - warrant of surrender by who executed?
- Police officers directed the warrant have authority to receive the fugitive, keep him in custody and convey him into the jurisdiction of requesting country.

## 6. TRANSMISSION OF REQUESTS FOR EXTRADITION

- ❖ Diplomatic channels; the mandating authority can transmit its request translated in the language of the requested state through diplomatic channels i.e. via embassies and consular offices
- ❖ Interpol: the notice used is called the "red notice".
- ❖ Directly to the competent authority; the request can be made directly to the foreign judicial authority when convention provides for this. This can be done where the location of the person sought is known with precision.

## 7. SOME COMMON PRINCIPLES AND VOCABULARY IN THE EXTRADITION PROCESS

- "Extradition" means the surrender of any person who is sought by the requesting state for criminal prosecution or for an extraditable offence or for imposition or enforcement of a sentence of such an offence. It can also be defined as the surrender by a state(the requested state) of a person present in its territory to another state(the requesting state) that seeks this person for purposes of judging an offence which he has committed or for the purpose of having the person face the sanction issued by its courts.

- “Requesting state” - means a state which requests of ( country of adopting the Law) the extradition of a person or the provisional arrest of a person with a view to extradition
- “Receiving state” - means a state to which a person is to be extradited from a third state through the territory of (country of adopting law).
- “Transferring state” - means a state from which a person is being extradited to a third state (receiving state) through the territory of (country adopting the law).
- “Extradition treaty” - means a bilateral treaty concluded between (country adopting the law) and a foreign country, or a multilateral treaty to which (country adopting the law) is a party, which provisions governing extradition of persons who are in the territory of (country adopting law).
- “A person sought” - means a person whose extradition is requested or provisional arrest with a view to extradition is requested by means of submitting a relevant request to the competent authorities of ( country adopting the law)
- “Transferee” means a person transferred through the territory of (country adopting the law) while being extradited from a third state ( transferring state ) to the receiving one.
- “Comity of nations” - is the recognition of fundamental concepts that nations share. It is an act performed to promote uniformity, limit litigation and most important to show courtesy and respect for the other courts decision. It is the voluntary acceptance by courts of one state of the decision of a sister state on a similar issue or question.
- The extradition of a person who has been sentenced to imprisonment or other deprivation of liberty imposed for such an offence cannot be granted unless at least a period of at least six (6) months of such sentence remains to be served or more severe punishment remains to be carried out.
- Extradition may be refused if the offence for which it is requested is of a political nature.
- Extradition cannot be granted if in view of the competent authority of the adopting state there are substantial grounds to believe that the request for extradition has been made for purposes of prosecuting or punishing the person sought on account of his race, religion, nationality, ethnic origin, political opinions, gender or status or if his position may be prejudiced by any of the foregoing.

- Extradition cannot be granted if in the view of the competent authority of the country adopting the law, the person sought has been or would be subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment.
- Extradition may be refused if in the view of the competent authority of the requested state, the person sought would not receive the minimum fair trial guarantees in criminal proceedings in the requesting state.
- Extradition requested for the imposition or enforcement of a sentence may be refused if the judgment was rendered in absentia in the requesting state, the convicted person has not had or will not have the opportunity to have the case retried in his presence, unless the competent authorities of the requesting state give assurances considered sufficient to guarantee to that person the right to a re-trial which safeguards his rights of defense, or unless the person has been duly notified and has had the opportunity to appear and arrange for his defense and has elected not to do so.
- Extradition may be refused if the person sought would be liable to be tried or sentenced in the requesting state by an extraordinary or ad hoc court or tribunal unless the competent authorities of the requesting state give assurances considered sufficient that the judgment will be passed by a court which is generally empowered under the rules of judicial administration to pronounce on criminal matters.
- Non bis in idem rule (also referred to as NE BIS IN IDEM) i.e. Extradition may be refused if there has been a final judgment rendered against the person sought in respect of the offence for which extradition is requested. The principle expresses the prohibition against the accumulations for the same acts. This is because plurality of criminal proceedings is detrimental to the rights and interests of the individual.
- Extradition may be refused if prosecution or punishment against the person sought is barred under the law of limitation of the requested state or the requesting state by lapse of time, prescription or the statute of limitation at the time of receipt of the request for extradition.
- Military offences-Extradition may be refused if the offence for which it is sought is an offence under military law, which is not also an offence under ordinary criminal law in the requesting state.
- Death penalty-If the offence for which extradition is requested carries the death penalty under the law of the requesting state, and it is not so

punishable under the law of the requested state, extradition may be refused unless the competent authorities of the requesting state give assurances considered sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.

- Extraterritoriality- Extradition may be refused if the offence for which it is requested has been committed outside the territory of the requesting state and the law of the requested state does not allow prosecution for the same offence when committed outside its territory
- Concurrent requests- Where two or more states request for the extradition of the person sought either for the same offence or for different offences, the requested state shall determine which of the requests , if , any, to grant. In this case the said state shall take into account existing treaty obligations and where appropriate, all the relevant circumstances such as , time and place of the offence, time sequence of receipt of the requests, nationality of the person sought and the victims, ordinary place of residence the fugitive, whether extradition is requested for the purpose of prosecution or imposition or enforcement of a sentence ,the interests of justice and the seriousness of the offence.
- The requested party may refuse to extradite the person if there are pending proceedings against him in respect of an offence or offences for which extradition is requested.
- Rule on speciality- A person extradited shall not be proceeded against, sentenced, and detained with a view to carrying out a sentence or detention order for an offence committed prior to his surrender other than that for which he was extradited. Under this rule, the documents obtained through international cooperation in criminal matters may not be used for other purposes and proceedings other than those for which cooperation was required. If the person was extradited by virtue of a conviction, only the sentence handed down by the decision for which the extradition was sought can be executed. If the state discovers subsequent to the extradition request that actions that took place prior to that date need to be prosecuted, it applies for the state authorization of the requested state to prosecute on those new facts which is called, extradition extension request.

- "The principle of AUT DEDERE, AUT JUDICARE means the obligation of a state to extradite or prosecute. Thus, the simple presence of a person suspected of having committed an offence in the territory of a state is an obligatory cause for it to establish its jurisdiction regardless of the nationality of the offender and location in which the offence was committed, as long as the national authorities decide not to extradite the perpetrator of the alleged offence. The purpose of principle is to ensure that no safe haven exists for offenders. The custodial state is in a unique position by virtue of the presence of the offender in its territory and therefore has the obligation to take necessary steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdictional case.
- The principle of DUAL CRIMINALITY is to the effect that the offence concerned in the request must constitute an offence in the Law of both the countries concerned in order for the request to be accepted. In extradition Law the absence of dual criminality is mandatory ground for the refusal of the request and as such the requested country may not provide assistance if the offence under which the extradition request is formulated is not punishable under domestic Law. Dual criminality may arise once both countries have signed or ratified a multinational instrument.
- All extradition requests are preceded by a Mutual Legal Assistance Request. Mutual Legal Assistance Request in criminal matters is the process by which states seek and provide assistance in gathering evidence for use in criminal matters. Under international Law, and in most Universal instruments as well as those formulated by the UN, States are required to afford one another the greatest measures of assistance including assistance in obtaining evidence in their possession necessary for any proceedings.

## 8. APPLICATION OF INTERNATIONAL TREATIES IN KENYA

There are two principle ways in which to apply international treaties in domestic Law. Thus, depending on the legal tradition of the States:

- MONIST SYSTEM

In a monist system, international and national laws manifest a unified nature. The two sources considered as belonging to the same legal family.

Under this approach, when a state ratifies a treaty, the treaty has the same authority as the specific legislative provisions in order to obtain this effect. Thus, once a treaty has been signed and ratified, a country with a monist system is bound by the conventional text.

Accordingly, national jurisdictions and other public organizations refer directly to the provisions of the treaty as a source of Law.

- DUALIST SYSTEM

Dualist systems are subject to one constraint: international Law and national Law exist separately and most often function independently from one another. In contrast to monist systems, when a state with dualist system binds itself to an international treaty, the treaty does not automatically have the authority of the national law. Accordingly, national legislative action is required for the incorporation in order to give the treaty its full effect. However, once a state has been bound by a treaty, through its signature and ratification, it is bound by international legal obligations. It is therefore required to comply or risk violating its international obligations.

## 9. RECOMMENDATIONS, REMARKS AND CONCLUSIONS

There is need to harmonize the Law on extradition into one Law.

Victor Mule  
Guest Lecture  
Kenya School of Law

# ANNEXTURE A

16

CAP. 76

Extradition (Contiguous and  
Foreign Countries)

IRev. 1987

18 of 1970, s. 11,  
11 of 1983, Sch.

## SCHEDULE

(s. 2 (1))

### EXTRADITION CRIMES

#### *Criminal Homicide and Similar Offences*

Murder and attempt and conspiracy to murder.

Manslaughter.

#### *Injury to Persons Not Amounting to Homicide*

Wounding or inflicting grievous bodily harm.

Assault occasioning actual bodily harm and other aggravated assaults punishable by imprisonment for five years or more.

#### *Abduction, Rape and Similar Offences*

Rape, defilement and unlawful carnal knowledge.

Indecent assault.

Abortion and offences relating thereto.

Child-stealing.

Kidnapping and false imprisonment.

Procuration.

#### *Narcotics and Dangerous Drugs*

Offences relating to narcotics.

Offences relating to traffic in dangerous drugs.

#### *Damage to Property*

Malicious damage to property.

Arson.

#### *Falsification of Currency and Similar Offences*

Counterfeiting and altering money, and uttering counterfeit or altered money.

Offences relating to counterfeiting.

#### *Forgery and Similar Offences*

Forgery, counterfeiting, altering and uttering what is forged or counterfeited or altered.

#### *Misappropriation, Fraud and Similar Offences*

Theft, and offences relating thereto.

Fraudulent conversion.

Burglary and housebreaking, robbery, robbery with violence.

Threats by letter or otherwise with intent to extort, intimidation.

Obtaining money or goods by false pretences.

Perjury and subornation of perjury.

Bribery and corruption.

Offences by bankrupts against bankruptcy law, or any cognizable offence under the laws relating to bankruptcy.

Fraudulent misappropriations and fraud.

Receiving stolen property.

(c) in the case of a document which certifies that he was convicted on a specified date of an offence against the law of a designated Commonwealth country, if the document purports to be certified as such and in any such case the document is authenticated by the oath of a witness or by the official seal of a secretary or other officer administering a department of the Government of the country concerned.

(3) For the purposes of this section "oath" means affirmation and nothing in this section shall preclude admission in evidence of any document which is adduced in evidence apart from this section.

*Amendment of Schedule*

*Regulations*

16 of 1970, s. 11,  
11 of 1983, Sch.

17. The Attorney-General may, by order, amend the Schedule by adding to it the description of any other offence or by deleting any description from it.

18. The Attorney-General may make regulations prescribing the form of any warrant or order to be used under this Act.

**SCHEDULE**

**DESCRIPTION OF EXTRADITION OFFENCES**

1. Murder of any degree.
2. Manslaughter or culpable homicide.
3. An offence against the law relating to abortion.
4. Maliciously or wilfully wounding or inflicting grievous harm.
5. Assault occasioning actual bodily harm.
6. Rape.
7. Unlawful sexual intercourse with a female.
8. Indecent assault.
9. Procuring, or trafficking in women or young persons for immoral purposes.
10. Bigamy.
11. Kidnapping, abduction or false imprisonment, or dealing in persons.
12. Stealing, abducting, exposing or unlawfully detaining a child.
13. Bribery.
14. Perjury or subornation of perjury or conspiring to defeat the course of justice.
15. Arson or fire-raising.
16. An offence concerning counterfeit currency.
17. An offence against the law relating to forgery.

SCHEDULE—(Contd.)

Piracy and Similar Offences

Piracy by the law of nations.

Sinking or destroying a vessel at sea or an aircraft in the air, or attempting or conspiring to do so.

Assault on board a ship on the high seas or an aircraft in the air with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt, by two or more persons, on board a ship on the high seas or an aircraft in the air against the authority of the master, or captain of the aircraft.

Hijacking and offences committed in relation thereto offences relating to aircraft set out in section 5 of the Protection of Aircraft Act.

Slave Dealing

Offences against the Slave Trade Act 1873, or otherwise in connection with the slave trade, committed on the high seas or on land, or partly on the high seas and partly on land.

General

Counselling, procuring, aiding and abetting, or being an accessory before or after the fact to any of the foregoing.

## SCHEDULE—(Contd.)

18. Stealing, embezzlement, fraudulent conversion, fraudulent false accounting, obtaining property or credit by false pretences, receiving stolen property or any other offence in respect of property involving fraud.
19. Burglary, housebreaking or any similar offence.
20. Robbery.
21. Blackmail or extortion by means of threats or by abuse of authority.
22. An offence against bankruptcy law or company law.
23. Malicious or wilful damage to property.
24. Acts done with the intention of endangering vehicles, vessels or aircraft.
25. An offence against the law relating to dangerous drugs or narcotics.
26. Piracy.
27. Revolt against the master of a ship or the commander of an aircraft.
28. Contravention of import or export prohibitions relating to precious stones, gold and other precious metals.
29. Hijacking and offences committed in relation thereto.
30. Offences relating to aircraft set out in section 5 of the Protection of Aircraft Act.

Cap. 68.

Teleglobe "Safaricom", Nairobi  
Telephone: Nairobi 227461  
when replying please quote:

AG/CR/2014/2900

get no .....,  
and date

7<sup>th</sup> January, 2009



ATTORNEY GENERAL'S CHAMBERS  
P.O. Box 40112-00100  
NAIROBI, KENYA

ANNEXURE



Competent authorities in Ireland  
Kenya Embassy  
Dublin 11,  
Ilgin Road,  
Balls Breach  
Dublin 4  
IRELAND

RE: LETTER OF REQUEST .

I present my compliments to the Competent Judicial Authorities of the Republic of Ireland and have the honor to request your assistance in obtaining evidence for the purpose of criminal investigation currently under way.

This request is made under article 16/17/18 of the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth. The evidence obtained as a result of this letter of request cannot be used, without your consent, for any other purpose than that specified in the request.

AUTHORITY INITIATING THE REQUEST

The investigating authority in this case is the Criminal Investigation Department of the Republic of Kenya which is vested

Legal Advisor to the Government. The Attorney General has delegated the powers to prosecute to the Director of Public Prosecutions.

The office of the Director of Public Prosecutions is seeking assistance touching on a criminal matter that was investigated by Kenya Anti-Corruption Commission and is pending before the Anti-Corruption Court in Kenya and which, evidence indicates, has connections in the Embassy of the United States of America.

KACC is an independent statutory investigative authority which is empowered by a statute; the Anti-Corruption and Economic Crimes Act, 2003 to carry out investigations into corruption and related offences and to work with any international authority in furtherance of its investigations under section 12(3) of the Anti-Corruption and Economic Crimes Act of 2003, a copy of the relevant section is enclosed and marked KACC 1.

- A. The witnesses are required to give evidence on 14<sup>th</sup> of January 2009 at the Nairobi Chief Magistrates Court No 2 at 8.30 am.
  - (i) The summons to appear are herewith attached and marked a and b.
  - (ii) The affidavit of the Investigations Officer is herewith marked (c).
  - (iii) The documents on which we need evidence are marked (d).

B The need for Assistance

This request for assistance is being made in the interests of justice. It will not be used for political, military or fiscal purposes in Kenya.

C A brief synopsis of the case

KACC received a complaint from one Humphrey Onyango Omboto ("Humphrey") an Information Technology Assistant employed by the Kenya Furniture Rental Business that accused person Francis Leki Marawoshe ("Francis") who was at the time of arrest a Fraud Manager at the Embassy of the United States of America was corruptly soliciting for a benefit as an inducement to compile a favorable home report which was needed before the couple could be issued with Diversity Visas. Upon receipt of this complaint, investigations were carried out and the accused person was arrested and charged.

The brief facts of this case are that some time in October 2005, Humphrey's wife one Maureen Achieng Apoko ("Maureen"), then his fiancée, had applied for a green card during their engagement period. The two later married on 10<sup>th</sup> November 2005 in accordance with the Luo customary law. Later on Maureen received a letter from Kentucky Consular Centre, in US informing her that she had won a Diversity Visa (Green Card). The letter also sought to confirm whether her status had changed. In May 2007 the two received a letter inviting them to go for Diversity Visa interview, which was to be held at Embassy's Nairobi office. On 11<sup>th</sup> June 2007, the couple went to the Nairobi office of the U. S. Embassy as advised where

they were advised to formalize their marriage, under statute, since the US Government did not recognize customary law marriages as they had been married under Luo Customary law. The two were given a further appointment for 3<sup>rd</sup> July 2007. On 3<sup>rd</sup> July 2007 the couple having had formalized their marriage and obtained a certificate, took the certificate of marriage to the US Embassy. The couple was given a further appointment on 5<sup>th</sup> July 2007 for a further interview. On 5<sup>th</sup> July 2007, Francis interviewed each of them separately after which Francis gave Humphrey his cell phone number and he was to contact them later.

On 8<sup>th</sup> July 2007 at around 4.37 p.m. Francis called Humphrey and requested that they meet at a gas station along Mombasa Road, Nairobi. Upon meeting Francis demanded Kshs.100,000 and this was after Humphrey had bought Francis some drinks. After a bargain Francis agreed that Humphrey pays him Shs.50,000 as deposit and the balance to be paid after Francis had done a favorable report to the US Embassy. Humphrey did not have the Ksh.50,000 but he promised to give Francis Kshs.20,000 the following day.

On 9<sup>th</sup> July 2007, Humphrey met Francis and Francis demanded for the Shs.50,000. Humphrey did not have the money with him. Francis was very infuriated and threatened to do a bad report on them which he later did. On 19<sup>th</sup> July 2007 Humphrey decided to report the matter to KACC and a trap operation was arranged. On 20<sup>th</sup> July 2007 Humphrey met with Francis at a hotel in Parklands area of Nairobi and held a tape recorded conversation with Francis where Francis was tape recorded demanded for a benefit, in the form of fuel,

agedly to fuel his (Francis's) car and visit the residence of Humphrey so as to compile a favorable home report which was issued before the couple could be issued with the Diversity Visas.

When the taped conversation was analyzed, it became clear that Francis had corruptly solicited for a benefit from Humphrey in form of "fuel" and in a bid to justify his demand Francis proceeded to state that he does not use a government vehicle. KACC sought further guidance from the Embassy as to whether this was proper.

KACC was advised that an employee of the U.S. Embassy is not supposed to solicit or accept a gift given because of his official position or from a prohibited source, where a prohibited source is defined to include any person seeking official action by the Embassy. In light of this, there can be no justification or explanation for the demand for "fuel". In the circumstances, the demand for fuel amounted to corruptly soliciting for a benefit. Francis was arrested with the assistance of the U.S. Embassy officials and arraigned in court where he was charged with three counts of the offence of soliciting for a benefit contrary to section 39(3) (a) read together with section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

#### B. Type of case

This is a criminal matter presently before the Anti-Corruption Court in Nairobi. The Accused person has already been charged with two counts of soliciting for a benefit contrary to section 39(3) (a) read together with section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

The relevant sections of the statutes are enclosed KACC 2.

E. The nature of the assistance required

The prosecution case has progressed substantially. The prosecution is relying on certain documents (copies attached) that emanated from the Embassy of the United States of America where the accused was working prior to his arrest. These documents are crucial to the prosecutions case, particularly in proving that the accused was an employee of the Embassy, a position which he abused to commit the offence. According to the Kenyan Evidence Act (Cap.80) of the Laws of Kenya, a fact in issue is proved by the original document or in certain cases when the original document can not be obtained, upon laying a proper basis, the production of a certified copy may be admissible. However, the only competent person to produce a document in court in Kenya is either the maker of the document or a person who had dealt with the said document. The makers of the documents that we are relying on are US officials who enjoy diplomatic immunity. The assistance required at this stage is;

1. That you waive the inviolability accorded to the attached documents from such archives, for the limited purpose of making available to the Kenya Anti Corruption Commission the said documents for investigation and prosecution regarding the case of Marawoshe Francis Leki.
  
2. That you avail and release the originals of the attached certified copies to the Kenya Anti Corruption Commission for

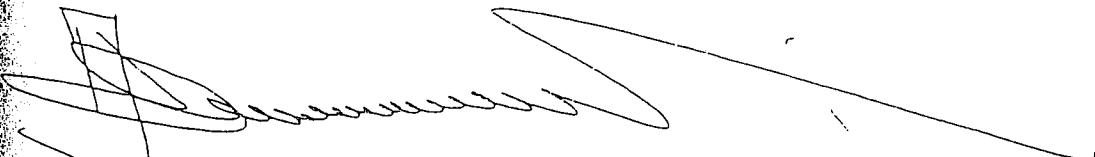
### Reciprocity between Kenya and Ireland

The office of the Attorney General and the Kenya Police will assist Ireland in the investigation of any crime by persons within the jurisdiction of the Republic of Kenya in the spirit of Mutual Legal Assistance in the suppression of crime.

The Attorney General at the Republic of Kenya will be grateful for any assistance that the Competent Judicial and Administrative Authorities of the Republic of Ireland can offer in response to this request as the criminal activities concerned have an adverse bearing on the National Understanding and Security of Kenya.

### Undertaking

We hereby undertake to abide by the terms and conditions of the governing legislation in the Republic of Ireland and the Republic of Kenya.



KERIAKO TOBIKO  
DIRECTOR OF PUBLIC PROSEUCTIONS (KENYA)  
FOR: ATTORNEY GENERAL

5

AG/CR/2014/5333

16<sup>th</sup> March, 2010

THE COMPETENT AUTHORITY OF THE  
UNITED ARAB EMIRATES

THRO'

UNITED ARAB EMIRATES  
DEPARTMENT OF JUSTICE  
UNITED EMIRATES EMBASSY  
NAIROBI, KENYA

RE: REQUEST FOR ASSISTANCE IN CRIMINAL CASE NUMBER 2486 OF 2009

ACCUSED: JOHN LUBEGA  
COMPLAINANT: OLALY CHARLES LWANGA NYAMBUORO  
OFFENCE: OBTAINING MONEY BY FALSE PRETENCES  
CONTRARY TO SECTION 313 OF THE PENAL CODE.

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I present my compliments to the Competent Judicial Authority of the United Arab Emirates and have the honour to request your assistance in obtaining evidence for the purpose of criminal investigation and trial currently underway.

AUTHORITY INITIATING THE REQUEST.

The investigating authority in this case is the Criminal Investigations Department of the Republic of Kenya which is vested by the Constitution of Kenya with powers to maintain Law and Order, investigate all Criminal matters and arrest criminal offenders.

This request is being submitted by the Attorney-General of Kenya who is the designated by the Constitution as the prosecuting Authority of Kenya. Accordingly the Attorney-General is vested with powers to institute and undertake criminal proceedings before any court of law in Kenya. The Attorney-General is also the Competent Authority for purposes of International Cooperation in criminal matters. He is also the Principal Legal Advisor to the Government of the Republic of Kenya and has powers under section 26 of the Constitution to give, to such an extent as he considers appropriate, advice to the police force in all matters relating to

criminal offences. He is also mandated to request the appropriate authority of any state for assistance in criminal matters. He may seek assistance of the appropriate authority of a foreign country to arrange for evidence to be taken in the foreign country or documents or other articles in the foreign country to be produced for the purposes of criminal proceedings in Kenya.

The Attorney-General has delegated the powers to prosecute to the Director of Public Prosecutions. The office of the Director of Public Prosecutions is seeking assistance touching on a matter that was investigated by the Criminal Investigations Department and is pending before a Court of Kenya and which evidence indicated has connections in the United Arab Emirates.

#### THE NEED FOR ASSISTANCE

This request for assistance is made in the interests of justice. It will not be used for political, military or fiscal purposes in Kenya.

#### A BRIEF SYNOPSIS OF THE CASE

On 22<sup>nd</sup> January, 2010, some fraudsters successfully executed fraudulent transfers of US \$ 800,700 FROM Account number 140082977301 held at CFC Stanbic Bank in Nairobi Kenya in the name of Sinohydro Corporation. Sinohydro Corporation is an International Company currently undertaking road construction in Kenya. The beneficiary account of the fraudulent transfer was account number 01-4908279 -01 held at Standard Chartered Bank, Main Branch in Bur Dubai, United Arab Emirates (U.A.E) in the name of Ahmednur Mohd Trading.

On the same day, the same fraudsters attempted to make another fraudulent transfer of US \$ 480,000.

The intended beneficiary of this second attempt was H.C.G. Middle East holder account number 4342020001 held at Abu Dhabi Commercial Bank (ADCB), Sharjah branch in the United Arab Emirates (U.A.E). The latter transaction was however stopped by the C.F.C. Stanbic Bank Management here in Kenya after citing some irregularities in the cash transfer instruction.

The Standard Chartered Bank account in Bur Dubai into which the funds in the first transaction were transferred has since been frozen through the intervention of Interpol but the funds are yet to be returned to the Kenyan bank from where they were withdrawn/transferred.

### THE NATURE OF CASE

The actions of the fraudsters of issuing instructions to CFC Stanbic Bank transfer monies from an account not held by them amount to criminal offence to wit:

- I. Fraud
- II. Forgery
- III. Stealing

Section 345 of the Penal Code Cap.63 of the Laws of Kenya defines forgery in the following terms.

"Forgery is the making of a false document with intent to defraud or deceive."

Section 347 criminalizes forgery. The said section reads as follows:- Any person makes a false document who -

- (a) Makes a document purporting to be what in fact it is not; or
- (b) Alters document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document; or
- (c) Introduces into a document without authority whilst it is being drawn up matter which if it had been authorized would have altered the effect of the document; or

Stealing is defined in section 268 (1) of the Kenyan Penal Code as follows:-

- (i) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to his use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

Section 275 which criminalizes theft reads as follows:

"Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."

### ASSISTANCE REQUESTED

To enable the criminal investigations and prefer charges as appropriate it is requested that the funds in the sum of US\$ 800,700 which were

fraudulently transferred from CFC Stanbic Bank in Nairobi to standard Chartered Bank Main Branch in Dubai, United Arab Emirates (U.A.E) be returned in the former bank.

#### BASIS OF THE REQUEST

In the absence of a Mutual Legal Assistance Treaty between Kenya and the United Arab Emirates this request is made in the framework of the United Nations Convention against Transnational Organised Crime.

Article 2 (a) of the said convention defines organized crime as: "Organised Criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

Article 2 (b) defines "Serious Crime" as shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or more serious penalty;

Article 2 (f) defines "freezing" or seizure as shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

Article 2 (g) defines confiscation as Article 13 of the said Convention makes extensive provisions for identification tracing , freezing, seizure and confiscation of proceeds of crime as is the case herein.

#### DOCUMENTS IN SUPPORT OF THE REQUEST

We enclose the following documents in support of the request. Viz.

1. Letter dated 29<sup>th</sup> January, 2010 lodging the complaint with the criminal Investigations Department.
2. Letter dated 21<sup>st</sup> January 2010 forged by the fraudsters addressed to CFC Stanbic Bank for the transfer of US \$ 800,700 to Standard Chartered Bank Main branch in Bur Dubai, U.A.E.
3. Confirmation of the transfer of US\$ 800,700.

4. Letter dated 21<sup>st</sup> January, 2010 forged by the fraudsters for the transfer of US\$480,000 FROM CFC Stanbic Bank in Kenya to ADCB Bank in the UAE.

#### THE CRIMINAL CASE.

This is a criminal matter namely Criminal Case No. 2489 of 2009 presently before the Chief Magistrate Court, Kibera, Nairobi. The accused person John Lubega has been charged with the offence of obtaining money by false pretences contrary to section 313, of the Laws of Kenya, the same is related to the forged tickets that were in the possession of Oloy Charles Twanga Nyambuoro when he was detained in Dubai, U.A.E.

#### ASSISTANCE REQUIRED

To enable the criminal investigations and the criminal case to be concluded the repatriation of Oloy Charles Twanga Nyambuoro to Kenya would be crucial.

#### RECIPROCITY BETWEEN KENYA AND THE UNITED ARAB EMIRATES

The office of the Attorney-General and the Kenya police will assist the United Arab Emirates in the investigation of any crime by persons within jurisdiction of the Republic of Kenya in the spirit of Mutual Legal Assistance in the suppression of crime.

The Attorney-General of the Republic of Kenya will be grateful for any assistance that the Competent Judicial and Administrative Authorities, of the United Arab Emirates can offer in response to this request as the criminal activity is adverse to the interests of justice in Kenya.

#### UNDERTAKING

We hereby undertake to abide by the terms and conditions of the Governing Legislation in the United Arab Emirates and the Republic of Kenya.

I attach hereto copies of correspondence and other relevant documents pertaining to this matter for your information and reference.

KERIAKO TOBIKO  
DIRECTOR OF PUBLIC PROSECUTIONS  
FOR: ATTORNEY-GENERAL

# ANASTACIA OLUOCH

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT  
AT NAIROBI  
MISCELLANEOUS CRIMINAL APPLICATION

NUMBER ..... A .. OF 2010

REPUBLIC ..... APPLICANT

ANASTACIA OLUOCH ..... RESPONDENT

## ORDER

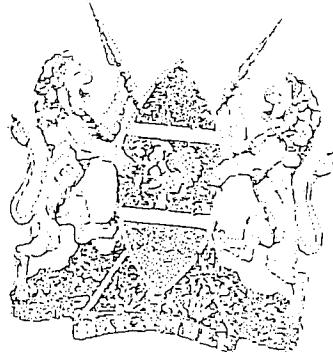
(Pursuant to the provisions of section 5 (1) of the Extradition (contiguous and foreign countries) Act Cap.76 Laws of Kenya).

TO : The Chief Magistrate  
Nairobi Law Courts  
High Court Building  
P. O. Box 30041—00100  
NAIROBI

WHEREAS a request has been duly made to me Amos Wako Attorney-General of the Republic of Kenya, on behalf of the United States of America for the surrender of Anastacia Oluoch who is accused of the extraditable offences of :-

1. Assault in the second degree
2. Reckless endangerment
3. Abuse or neglect of a vulnerable adult in the second degree and

# ANNEXURE NO 5/1



## AUTHENTICATION CERTIFICATE

AMOS WAKO, ATTORNEY GENERAL of the Republic of Kenya,  
hereby certify that the signature on the warrant of arrest is  
of MRS. G.L. NZIOKA, SENIOR PRINCIPAL MAGISTRATE,  
NAIROBI, KENYA and that all documents attested and signed  
here receive full faith and credence in Kenya.

Given under my hand Seal of the Attorney General at NAIROBI  
day of JULY 2010

AMOS WAKO, EGH, FCI, Arb., SC MP  
ATTORNEY GENERAL

# Annexure "B"



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT

AT NAIROBI

MISC. APPLICATION NUMBER 4 OF 2009

**REPUBLIC** ..... **APPLICANT**

## VERSUS

GUNTER GROCHOWSKI..... RESPONDENT

**WARRANT OF SURRENDER AND EXTRADITION**

(Pursuant to the provision of section 9 of the Extradition (contiguous and foreign countries) Act Cap.76 Laws of Kenya).

TO: 1. The Officer In Charge  
Industrial Area Remand Prison  
P.O. BOX 18364  
NAIROBI

2. The Director of Immigration  
Ministry of State and  
Registration of Persons  
P.O. Box 30190 -  
NAIROBI

WHEREAS MR. GUNTER GROCHOWSKI Formerly residing in Diani, Ukunda Estate, Kwale District, Coast Province, Kenya is alleged to have committed offences related to the importation of, trading in and possession of narcotic substances and taking part in a criminal organization which offences are punishable under Belgium Laws was delivered into your custody by a warrant dated 19<sup>th</sup> June 2009 pursuant to the Extradition (contiguous and Foreign Countries) Act Charter 76, Laws of Kenya;

AND WHEREAS the said MR. GUNTER GROCHOWSKI has not been discharged by order of the court and I am satisfied that there is not other provision of the said Act prohibiting his extradition.

# ANNEXURE A

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT

AT NAIROBI

MISC. APPLICATION NUMBER 4 OF 2009

REPUBLIC ..... APPLICANT

VERSUS

GUNTER GROCHOWSKI ..... RESPONDENT

## WARRANT OF COMMITTAL

(Pursuant to the order of the Court issued on 18<sup>th</sup> June 2009 by the Hon. G. C. Mutembei - Chief Magistrate.

TO: THE OFFICER IN CHARGE  
INDUSTRIAL AREA REMAND PRISON  
P.O. BOX  
NAIROBI.

Be it remembered that on this 18<sup>th</sup> day of June 2009, MR GUNTER GROCHOWSKI of Diani, Ukunda Estate, Kwale District, Coast Province was brought before me pursuant to a provisional warrant of arrest issued under Article 6 (3) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances (Vienna, 20<sup>th</sup> December 1998) on the grounds that he was alleged to have committed offences related to importation of, trading in and possession of narcotic substances punishable under the Belgium Law and in as much as the provisions of Article 6 (3) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance ( Vienna, 20<sup>th</sup> December 1988) with regard to his committal have been satisfied.

This is therefore to command you, the officer in charge, Industrial Area Remand Prison, forthwith to receive the said MR. GUNTER GROCHOWSKI into your custody and to keep him safely therein until he is delivered pursuant to the provisions of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20<sup>th</sup> December 1988) for which THIS SHALL BE YOUR WARRANT.

Given under the hand and the seal of this Honourable Court at Nairobi, Kenya on the ..... 15<sup>th</sup> ..... day of ..... JUNE ..... 2009.

..... CHIEF MAGISTRATE



OFFICE OF THE PRESIDENT  
MINISTRY OF STATE FOR IMMIGRATION AND  
REGISTRATION OF PERSONS

Website: www.mirp.go.ke

Email: ps@immigration.go.ke

TEL: +254-20-222022

FAX: +254-20-315573

When replying please quote our

Nyayo House 20<sup>th</sup> Floor

P O BOX 30395-00100

NAIROBI, KENYA

DECLARATION UNDER SECTION 3 OF THE  
IMMIGRATION ACT, CAP 172 LAWS OF KENYA

I, HON. OTIENO G. KAJWANG, Minister of State, for Immigration and Registration of Persons, in the exercise of the powers invested in me by Section 3(1) of the Immigration Act, do hereby declare that the entry or presence of:-

GUNTER GROCHOWSKI

Who is not a citizen of Kenya and whose presence in Kenya is contrary to national interest. In consequence of this declaration, the said:

GUNTER GROCHOWSKI

is for all purposes of the Immigration Act, other than for the purposes of sub-section (3) of Section 3, a member of the Prohibited class and a Prohibited Immigrant.

Dated..... 10th .....day of June, ....2009

HON. OTIENO G. KAJWANG EGH, MP,  
MINISTER OF STATE FOR IMMIGRATION  
AND REGISTRATION OF PERSONS

<http://www.thefreedictionary.com/rendition>

**ThesaurusLegend:** Synonyms Related Words Antonyms

- Noun 1. rendition - a performance of a musical composition or a dramatic role etc.; "they heard a live rendition of three pieces by Schubert"  
rendering  
performance, public presentation - a dramatic or musical entertainment; "they listened to ten different performances"; "the play ran for 100 performances"; "the frequent performances of the symphony testify to its popularity"
2. rendition - an explanation of something that is not immediately obvious; "the edict was subject to many interpretations"; "he annoyed us with his interpreting of parables"; "often imitations are extended to provide a more accurate rendition of the child's intended meaning"  
interpreting, rendering, interpretation  
broad interpretation, judicial activism - an interpretation of the U.S. constitution holding that the spirit of the times and the needs of the nation can legitimately influence judicial decisions (particularly decisions of the Supreme Court)  
explanation - thought that makes something comprehensible
3. rendition - handing over prisoners to countries where torture is allowed ~~✓~~ ~~✗~~  
persecution - the act of persecuting (especially on the basis of race or religion)
4. rendition - the act of interpreting something as expressed in an artistic performance; "her rendition of Milton's verse was extraordinarily moving"  
interpretation, rendering  
reinterpretation - a new or different interpretation  
spin - a distinctive interpretation (especially as used by politicians to sway public opinion); "the campaign put a favorable spin on the story"  
performance - the act of presenting a play or a piece of music or other entertainment; "we congratulated him on his performance at the rehearsal"; "an inspired performance of Mozart's C minor concerto"