



**THE REPUBLIC OF KENYA**

LAWS OF KENYA

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**EXTRADITION (COMMONWEALTH COUNTRIES)ACT**

CHAPTER 77

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**CHAPTER 77**

**EXTRADITION (COMMONWEALTH COUNTRIES) ACT**

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## CHAPTER 77

## EXTRADITION (COMMONWEALTH COUNTRIES) ACT

[Date of assent: 27th December, 1968.]

[Date of commencement: 30th December, 1968.]

**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**

[Act No. 65 of 1968, Act No. 18 of 1970, Act No. 13 of 1982, Act No. 11 of 1983, Act 9 of 2009, Act No. 6 of 2010, Act No. 30 of 2012, Act No. 12 of 2017.]

## PART I – PRELIMINARY

**1. Short title**

This Act may be cited as the Extradition (Commonwealth Countries) Act.

**2. Interpretation**

(1) In this Act, unless the context otherwise requires—

“**application for *habeas corpus***” means an application for the issue of directions in the nature of *habeas corpus* under subsection (1) of section 389 of the Criminal Procedure Code (Cap. 75);

“**authority to proceed**” means a written authority issued under subsection (1) of section 7;

“**country**” includes any state, territory or other part of the country concerned;

“**the Court**” means the Resident Magistrate’s Court;

“**designated Commonwealth country**” means a country designated for the purposes of this Act under section 3;

“**extradition offence**” has the meaning assigned thereto in section 4;

“**fugitive**” means any person who is, or is suspected of being, in or on his way to Kenya and whose surrender is requested under this Act on the grounds that he is accused of, or is unlawfully at large after conviction for, an extradition offence committed within the jurisdiction of the requesting country;

“**imprisonment**” includes detention of any description by whatever name called;

“**overseas warrant**” means a judicial or other document, issued under the law of a requesting country, authorizing the arrest of a person accused or convicted of an offence;

“**provisional warrant**” means a warrant of arrest issued under paragraph (b) of subsection (1) of section 8 of this Act;

“**race**” includes tribe;

“**request**” means a request made under subsection (1) of section 7 of this Act by a designated Commonwealth country for the return of a fugitive, and “**requesting country**” means a country making the request;

“**surrender**” means the surrender of a fugitive to a requesting country in accordance with the provisions of this Act;

“**warrant of arrest**” means a warrant issued under subsection (1) of section 8 of this Act;

“**warrant of surrender**” means a warrant issued under subsection (1) of section 11.

(2) For the purposes of this Act—

- (a) a person convicted of an offence in his absence shall be treated as a person accused of an offence;
- (b) a person shall be deemed not to have been convicted of an offence against the law of a requesting country where the conviction is, under that law, a conviction for contumacy, but a person so convicted for contumacy shall be deemed to be accused of an offence against that law.

### 3. Designated countries

(1) The Attorney-General may, by order, designate for the purposes of this Act any country that is, at the date of such order, within the Commonwealth.

(2) An order under subsection (1)—

- (a) may be made subject to any specified limitations, exceptions, conditions or modifications;
- (b) may contain such transitional or other incidental or supplementary provision as the Attorney-General considers expedient.

(3) For the purposes of an order made under this section any territory for the external relations of which a designated Commonwealth country is responsible may be treated as part of that country or, if the government of that country so requests, as a separate country.

(4) An order made under this section shall be laid before the National Assembly without unreasonable delay and, if a resolution is passed within twenty days on which the National Assembly next sits after any such order is laid before it that the order be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of a new order.

### 4. Extradition offences

(1) For the purposes of this Act, an offence is an extradition offence if—

- (a) it is an offence against the law of a requesting country which, however described in that law, falls within any of the descriptions contained in the Schedule to this Act and is punishable under that law with imprisonment for a term of twelve months or any greater punishment; and
- (b) the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Kenya if it took place within Kenya or, in the case of an extra-territorial offence, in corresponding circumstances outside Kenya.

(2) In determining for the purposes of this section whether an offence falls within a description contained in the Schedule to this Act, any special intent or state of mind or special circumstances of aggravating which may be necessary to constitute that offence under the relevant law shall be disregarded.

(3) The descriptions contained in the Schedule to this Act include in each case offences of attempting or conspiring to commit, of assisting, counselling or procuring the commission of or being accessory before or after the fact to the offence described, and of impeding the apprehension or prosecution of persons guilty of those offences.

## PART II – RETURN OF FUGITIVES

### 5. Liability of fugitives to surrender, etc.

Every fugitive is liable, subject to this Act and to any limitations, exceptions, conditions or modifications to which the application of this Act in relation to the requesting country is subject, to be arrested, detained, and surrendered in the manner provided by this Act and is so liable whether the offence in respect of which the surrender is sought is alleged to have been committed, or was committed, before or after the commencement of this Act or the application of this Act to the requesting country.

### 6. General restrictions on surrender

(1) A fugitive shall not be surrendered, or committed to or kept in custody for the purposes of surrender, if it appears to the court of committal, or to the High Court on an application for *habeas corpus*, or to the Attorney-General, that—

- (a) the offence of which the fugitive is accused or was convicted is an offence of a political character; or
- (b) the request for his surrender (though purporting to be made on account of an extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or
- (c) that 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.

(2) A fugitive accused of an offence shall not be surrendered, or committed to or kept in custody for the purposes of surrender, if it appears to the court of committal, or to the High Court on an application for *habeas corpus*, or to the Attorney-General, that he would, if charged with that offence in Kenya, be entitled to be discharged under any rule of law relating to previous acquittal or conviction.

(3) A fugitive shall not be surrendered, or committed to or kept in custody for the purposes of surrender, unless provision is made by the law of the requesting country, or by an arrangement made with that country, for securing that he will not, unless he has first been restored or had an opportunity of returning to Kenya, be dealt with in that country for or in respect of any offence committed before his surrender, other than—

- (a) the offence in respect of which his surrender is requested; or
- (b) any lesser offence proved by the facts proved before the Court of committal; or
- (c) any other extradition offence in respect of which the Attorney-General may consent to his being so dealt with.

(4) An arrangement of the kind mentioned in subsection (3) may be an arrangement made for the particular case or an arrangement of a more general nature; and for the purposes of that subsection a certificate issued by or under the authority of the Attorney-General confirming the existence of an arrangement with any country and stating its terms shall be conclusive evidence of the matters contained in the certificate.

#### **7. Authority to proceed**

(1) Subject to the provisions of this Act relating to provisional warrants, a fugitive shall not be dealt with in any manner under this Act except in pursuance of the written authority of the Attorney-General, issued in pursuance of a request made to the Attorney-General by or on behalf of the government of the designated Commonwealth country in which such person is accused or was convicted.

(2) There shall be furnished with any request—

- (a) in the case of a fugitive accused of an extradition offence, an overseas warrant issued in the requesting country;
- (b) in the case of a fugitive unlawfully at large after conviction of an extradition offence, a certificate of the conviction and sentence in the requesting country, and a statement of the amount (if any) of that sentence which has been served,

together (in each case) with particulars of the fugitive concerned and of the facts upon which and the law under which he is accused or was convicted, and evidence sufficient to justify the issue of a warrant of arrest.

(3) On receiving a request, the Attorney-General may issue an authority to proceed, unless it appears to him that a warrant of surrender in that case could not lawfully be made, or would not in fact be made, under this Act.

#### **8. Arrest for purposes of committal**

(1) A warrant for the arrest of a fugitive may be issued by a magistrate—

- (a) on receipt of an authority to proceed; or
- (b) without an authority to proceed, upon information that the fugitive is or is believed to be in or on his way to Kenya.

(2) A warrant of arrest may be issued upon such evidence as would, in the opinion of the magistrate, authorize the issue of a warrant for the arrest of a person accused of committing a corresponding offence or, as the case may be, of a person alleged to be unlawfully at large after conviction of an offence, in Kenya.

(3) Where the warrant of arrest issued in respect of a fugitive is a provisional warrant—

- (a) the magistrate who issues it shall forthwith give notice to the Attorney-General, and transmit to him the information and evidence, or certified copies of the information and evidence, upon which the warrant was issued; and
- (b) the Attorney-General may in any case, and shall if he decides not to issue an authority to proceed, cancel the warrant, and discharge the fugitive from custody if he has been arrested under the warrant.

(4) Where a warrant of arrest is issued in respect of a fugitive accused of an offence of stealing or receiving stolen property or any other offence in respect of property, a magistrate shall have the like power to issue a warrant to search for the property as if the offence had been committed in Kenya.

(5) A warrant of arrest may be executed in any place in Kenya by any person to whom it is directed or by any police officer.

#### **9. Proceedings for committal**

(1) A person arrested in pursuance of a warrant of arrest shall (unless previously discharged under subsection (3) of section 8) be brought as soon as practicable before the Court.

(2) If a person is arrested in pursuance of this Act and brought before a magistrate who has no power to exercise jurisdiction under this Act, that magistrate shall have power to order that person to be brought before some magistrate having such jurisdiction, and to remand or admit that person to bail, and effect shall be given to any such order.

(3) For the purposes of proceedings under this section, the court shall have the like jurisdiction and powers, as nearly as may be, as it has in a trial.

(4) Where a fugitive arrested in pursuance of a provisional warrant is in custody and the court has not received an authority to proceed, it may fix a reasonable period (of which it shall give notice to the Attorney-General) after which it will discharge the fugitive from custody if it has not received an authority to proceed.

(5) Where the court has received an authority to proceed in respect of a fugitive arrested, and it is satisfied, after hearing any evidence tendered in support of the request for the surrender or on behalf of the fugitive, that the offence to which the authority to proceed relates is an extradition offence, and if further satisfied—

- (a) where the fugitive is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed in Kenya; or
- (b) where the fugitive is alleged to be unlawfully at large after conviction of the offence, that he has been so convicted and appears to be so at large,

the court shall, unless his committal is prohibited by any other provision of this Act, commit him to custody to await his surrender, but if the court is not so satisfied, or if the committal is so prohibited, the court shall discharge him from custody.

(6) Any property in the possession of a fugitive committed to custody under this section at the time of his apprehension that may be material as evidence in proving the offence for which his surrender is requested shall, if the court so directs, be delivered up with him on his surrender.

[Act No. 13 of 1982, Second Sch.]

#### **10. Application for habeas corpus, etc.**

(1) Where a fugitive is committed to custody under section 9, the court shall inform him of his right to make an application for *habeas corpus* and shall forthwith give notice of the committal to the Attorney-General.

(2) A fugitive shall not be surrendered—

- (a) in any case, until after the end of fifteen days beginning with the day on which the order for his committal to custody was made;
- (b) if an application for *habeas corpus* is made in his case, so long as proceedings on that application are pending.

(3) On an application for *habeas corpus*, the High Court may, without prejudice to any other jurisdiction vested in it, order the fugitive to be discharge from custody if it appears to the High Court that—

- (a) by reason of the trivial nature of the offence of which he is accused or was convicted; or
- (b) by reason of the passage of time since he is alleged to have committed the offence or to have become unlawfully at large, as the case may be; or
- (c) because the accusation against him is not made in good faith in the interests of justice,

it would, having regard to all the circumstances, be unjust or oppressive to surrender him.

(4) On an application for *habeas corpus*, the High Court may receive additional evidence relevant to the exercise of its jurisdiction under section 6 or under subsection (3).

#### **11. Warrant of surrender**

(1) Where a person is committed to await his surrender and is not discharged by order of the High Court, the Attorney-General may by warrant order him to be surrendered to the requesting country, unless—

- (a) the surrender is prohibited, or prohibited for the time being, by any of the provisions of this Act; or
- (b) the Attorney-General decides under this section not to issue the warrant in his case.

(2) A warrant of surrender shall not be issued in respect of a fugitive if he is serving a sentence of imprisonment, or is charged with an offence, in Kenya—

- (a) in the case of a fugitive serving such a sentence, until the sentence has been served;
- (b) in the case of a fugitive charged with an offence, until after the charge has been disposed of or withdrawn and, if it results in a sentence of imprisonment (not being a suspended sentence), the sentence has been served.

(3) The Attorney-General shall not issue a warrant of surrender if it appears to him, on the grounds specified in section 10(3), that it would be unjust or oppressive to surrender the fugitive concerned.

(4) The Attorney-General may decide not to issue a warrant of surrender if—

- (a) the fugitive is accused or convicted of an extradition offence not punishable with death in Kenya, and could be or has been sentenced to death for that offence in the requesting country;
- (b) another country, besides the country in consequence of whose request the fugitive was committed, has made a request for his surrender, or has made a requisition for his surrender under Part II of the Extradition (Contiguous and Foreign Countries) Act (Cap. 76), or has applied for the endorsement of a warrant or the issue of a provisional warrant under Part III of that Act, and it appears to the Attorney-General, having regard to all the circumstances of the case and in particular—
  - (i) the relative seriousness of the offences in question; and
  - (ii) the date on which each such request, requisition or application was made; and

- (iii) the nationality or citizenship of the fugitive and his ordinary residence,

that preference should be given to the other request, requisition or application.

(5) Where the Attorney-General is of the opinion that it would be dangerous to the life or prejudicial to the health of a fugitive to surrender him, he may, in lieu of ordering that he be surrendered, by warrant, order that he be held in custody at the place where he is for the time being, or at any other place to which the Attorney-General considers that he can be removed without danger to his life or prejudice to his health, until such time as he can without such danger or prejudice be surrendered.

(6) Notice of the issue of a warrant under this section shall forthwith be given to the fugitive who is to be surrendered or held in custody under it and the warrant may be executed according to its tenor.

## **12. Discharge where delay in returning**

(1) If a fugitive committed to await his surrender is in custody in Kenya under this Act after the expiration—

- (a) in any case, of two months beginning with the first day on which, having regard to subsection (2) of section 10, he could have been surrendered; or
- (b) where a warrant of surrender has been issued, of one month beginning with the day of the issue,

he may, after giving at least one week's notice to the Attorney-General, apply to the High Court for his discharge.

(2) Where the High Court hears an application under subsection (1), and is satisfied that due notice has been given to the Attorney-General, it may, unless sufficient cause is shown to the contrary, order that the applicant be discharged from custody and, if a warrant of surrender has been issued, quash that warrant.

## **13. Custody**

(1) A fugitive who is remanded or committed to custody under section 9 shall be committed to the like institution as a person charged with an offence before the Court.

(2) If any person who is in custody by virtue any warrant issued under this Act escapes out of custody, he may be retaken in any part of Kenya in like manner as a person escaping from custody under a warrant for his arrest issued in respect of an offence committed therein.

(3) A warrant of surrender shall be sufficient authority for all persons to whom it is directed and all police officers to receive the fugitive, keep him in custody and convey him into the jurisdiction of the requesting country.

## **PART III – TREATMENT OF PERSONS RETURNED TO KENYA**

### **14. Person returned not to be tried for other offence**

A person who is accused or convicted of an offence under the Law of Kenya, and who is returned to Kenya from a designated Commonwealth country under a law of that country corresponding with this Act, shall not be dealt with in Kenya for or in respect of any offence committed before he was returned to Kenya, other than—

- (a) the offence in respect of which he was returned; or

- (b) any lesser offence proved by the facts proved for the purposes of securing his return; or
- (c) any other offence in respect of which the government of the country from which he was returned may consent to his being dealt with,

during the period beginning with the day of his arrival in Kenya on his return and ending forty-five days after the first subsequent day on which he has the opportunity to leave Kenya.

#### **15. Restoration of person not convicted**

Where a person accused of an offence under the law of Kenya is returned to Kenya from a designated Commonwealth country under a law of that country corresponding to this Act, and either—

- (a) proceedings against him for the offence for which he was returned are not begun within the period of six months beginning with the day of his arrival in Kenya on his return; or
- (b) on his trial for that offence he is acquitted or is discharged under section 35 of the Penal Code (Cap. 63),

the Attorney-General may, if he thinks fit, on the request of the person, arrange for him to be sent back free of charge and with as little delay as possible to that country.

### PART IV – SUPPLEMENTAL

#### **16. Evidence**

(1) In any proceedings under this Act, including proceedings on an application for *habeas corpus*—

- (a) a document, duly authenticated, that purports to be an overseas warrant shall be admissible in evidence;
- (b) a document, duly authenticated, which purports to set out evidence given on oath in a designated Commonwealth country shall be admissible as evidence of the matters stated in it;
- (c) a document, duly authenticated, which purports to have been received in evidence, or to be a copy of a document received in evidence, in proceedings in a designated Commonwealth country shall be admissible in evidence;
- (d) a document, duly authenticated, which certifies that a person was convicted on a specified date of an offence under the law of a designated Commonwealth country shall be admissible as evidence of the fact and date of the conviction.

(2) A document shall be deemed to be duly authenticated for the purposes of subsection (1)—

- (a) in the case of a document purporting to set out evidence given in a designated Commonwealth country, if the document purports to be certified by a judge or magistrate or officer in or of that country to be the original document containing or recording that evidence or a true copy of such a document;
- (b) in the case of a document which purports to have been received in evidence, or to be a copy of a document received in evidence, in proceedings in a designated Commonwealth country, if the document

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purports to be certified as foresaid to have been, or to be a true copy of a document which has been, so received;

- (c) in the case of a document which certifies that a person was convicted on a specified date of an offence under the law of a designated Commonwealth country, if the document purports to be certified as aforesaid,

and in any such case the document is authenticated either by the oath of a witness or by the official seal of a Minister, secretary or other officer administering a department of the Government of the country concerned.

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

**17. Amendment of Schedule**

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. Regulations**

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

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SCHEDULE

DESCRIPTION OF EXTRADITION OFFENCES

[Section 4, Act No. 18 of 1970, s. 11, Act No. 11 of 1983, Sch., Act No. 9 of 2009, Sixth Sch., Act No. 6 of 2010, s. 24, Act No. 30 of 2012, s. 52, Act No. 12 of 2017, s. 27.]

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 bodily 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 slaves.
12. Stealing, abandoning, 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.
  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).
  31. Any offence that constitutes an offence of money laundering under the Proceeds of Crime and Anti-Money Laundering Act, 2009.
  32. Organised Criminal Group Offences.
  33. Any offence that constitutes a terrorist act under the Prevention of Terrorism Act, 2012.
  34. Offences of torture and other cruel, inhuman or degrading treatment or punishment.
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