

Act No: No. 6 of 2010

Act Title: PREVENTION OF ORGANISED CRIMES

An Act of Parliament to provide for the prevention and punishment of organised crime; to provide for the recovery of proceeds of organised criminal group activities and for connected purposes

[Act No. 6 of 2010, Legal Notice 162 of 2010.]

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PART I – PRELIMINARY

1. Short title

This Act may be cited as the Prevention of and Organised Crimes Act, 2010.

2. Interpretation

In this Act, unless the context otherwise requires—

"benefit" means money, valuable consideration, office or employment;

"criminal group funds" means—

- (a) funds which may be applied or used for the commission of, or in furtherance of or in connection with, acts of an organised criminal group;
- (b) the proceeds of the commission of acts of an organised criminal group or of activities in furtherance of or in connection with such acts; or
- (c) the resources of an organised criminal group;

"Minister" means the minister for the time being responsible for matters relating to internal security;

"monetary instruments" means—

- (a) coins and paper currency of Kenya, or of a foreign country, designated as legal tender and which is customarily used and accepted as a medium of exchange in the country of issue;
- (b) travellers' cheques, personal cheques, bank cheques, money orders, investment securities; or
- (c) any other negotiable instruments that are in bearer form, or other form through which title passes upon delivery;

"organised criminal group" means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of—

- (a) committing one or more serious crimes; or
- (b) committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit, other advantage for the organized criminal group or any of the members of organized criminal group; and includes a group declared an organised criminal group under section 22 of this Act;

"property" means all monetary instruments and all other real or personal property of every description, including things in action or other incorporeal or heritable property, whether situated in Kenya or elsewhere, whether tangible or intangible, and includes an interest in any such property and any such legal document or instruments evidencing title to or interest in such property;

"public officer" means a public officer as defined under the Public Officers and Ethics Act (No. 4 of 2003);

"records" includes—

(a) a photographic record; and

(b) an electronic or magnetic record, and any computer, disk, tape, apparatus or thing in or on which the record is stored;

"serious crime" means conduct constituting an offence against a provision of any law in Kenya punishable by a term of imprisonment of at least six months, or an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision of any law in Kenya; and

"structured group" means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

PART II – ORGANISED CRIMINAL ACTIVITIES

3. Organised criminal activities

A person engages in organised criminal activity where the person—

(a) is a member or professes to be a member of an organised criminal group;

(b) knowingly advises, causes, encourages or recruits another person to become a member of an organised criminal group;

(c) acts in concert with other persons in the commission of a serious offence for the purpose of obtaining material or financial benefit or for any other purpose;

(d) being a member of an organised criminal group, knowingly directs or instructs any person to commit a serious crime;

(e) threatens to commit or facilitate the commission of any act of violence with the assistance of an organised criminal group;

- (f) threatens any person with retaliation in any manner in response to any act or alleged act of violence in connection with organised criminal activity;
- (g) being a member of an organised criminal group with intent to extort or gain anything from any person, kidnaps or attempts to kidnap any person, threatens any person with injury or detriment of any kind;
- (h) provides, receives or invites another to provide or receive instructions or training, for the purposes of or in connection with organized criminal activity;
- (i) possesses an article for a purpose connected with the commission, preparation or instigation of serious crime involving an organised criminal group;
- (j) possesses, collects, makes or transmits a document or records likely to be useful to a person committing or preparing to commit a serious crime involving an organised criminal group;
- (k) provides, receives, or invites another to provide property and intends that the property should be used for the purposes of an organised criminal group;
- (l) uses, causes or permits any other person to use property belonging to an organised criminal group for the purposes of the activities of an organised criminal group;
- (m) knowingly enters into an arrangement whereby the retention or control by or on behalf of another person of criminal group funds is facilitated;
- (n) being a member of an organized criminal group endangers the life of any person or causes serious damage to the property of any person;
- (o) organises, attends or addresses a meeting for the purpose of encouraging support of an organised criminal group or furthering its activities.

4. Offence

(1) A person who engages in any organised criminal activity specified in section 3 commits an offence and shall, upon conviction, be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding fifteen years, or both.

(2) If as a result of the act referred to in section 3(n) a person dies, the member of the organized criminal group shall on conviction be liable to imprisonment for life.

5. Oathing

(1) A person who—

(a) is present at and consents to the administering of any oath or engagement in the nature of an oath purporting to bind the person who takes it to belong to an organised criminal group or engage in an organised criminal activity;

(b) administers an oath or engagement in the nature of an oath purporting to bind the person who takes it to belong to an organised criminal group or engage in an organised criminal activity;

(c) takes any such oath or engagement in the nature of an oath; or

(d) by use of physical force, or by threat or intimidation of any kind compels another person to take such oath or engagement in the nature of an oath, commits an offence and shall on conviction be liable to imprisonment for life.

(2) It shall not be a defence for a person who takes any oath or engagement in the nature of an oath referred to in subsection (1) to prove that he was compelled to do so unless, within five days after the taking of such oath or engagement in the nature of an oath, he reported to the police or any other law enforcement agency.

6. Aiding and abetting

A person who attempts, aids, abets, counsels, procures, or conspires with another to commit an offence under this Act commits an offence and shall, upon conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding fourteen years, or both.

7. Member of an organised criminal group

In considering whether a person is a member of an organized criminal group for purposes of this Part, the court shall have regard to the following factors, namely that such person—

- (a) admits to being a member of an organised criminal group;
- (b) is, upon reasonable ground, identified as a member of an organised criminal group;
- (c) resides in or frequently visits a particular organized criminal group's area and adopts the name, colours, symbol, style of dress and grooming, use of hand signs, language, tattoos or other representation associated with the organised criminal group or otherwise knowingly associates with members of such group;
- (d) has been arrested more than once in the company of identified members of an organised criminal group for offences which are consistent with organised criminal group activity;
- (e) ascribes to the ideologies, values, practices, oathing, mannerisms and general conduct of the organised criminal group members; or
- (f) knowingly receives any financial or material benefit from an organised criminal group.

PART III – OBSTRUCTION OF JUSTICE

8. Obstructing justice

(1) A person who willfully attempts in any way to obstruct, pervert or defeat the cause of justice under this Act commits an offence.

(2) A person who, in relation to a witness or a public officer in any proceedings to which this Act applies—

- (a) uses physical force or threats;
- (b) intimidates or attempts to intimidate; or

- (c) dissuades or attempts to dissuade a person from giving evidence:
- (d) induces false evidence;
- (e) interferes with the giving of evidence;
- (f) interferes with the production of evidence for the purpose of interfering with the judicial process; or
- (g) promises or offers a benefit, commits an offence.

9. Retaliation against witnesses

A person who, by act or omission, does anything against a person or a member of the family of the person in retaliation for the person having given evidence under this Act commits an offence.

10. Obstructing a public officer

A person who resists or willfully obstructs a public officer in the execution of his duties under this Act, or a person lawfully acting in aid of the public officer commits an offence.

11. False statement

A person who, with intent to mislead, makes a false statement under this Act knowing that the statement is false commits an offence.

12. Intimidation

A person who, for the purpose of compelling another person—

- (a) to abstain from doing anything that the person has a lawful right to do;
- (b) to do anything that the person has a lawful right to abstain from doing under this Act; or

(c) causes the person to reasonably fear for his safety or the safety of anyone known to him,

commits an offence.

13. Disclosure of information, etc.

(1) A person who, knowing or having reasonable cause to suspect that a police officer is conducting an investigation into the activities of an organised criminal group—

(a) discloses to another person anything which is likely to prejudice the investigation; or

(b) interferes with material which is likely to be relevant to the investigation,

commits an offence.

(2) It is a defence for a person charged with an offence under this section to satisfy the court—

(a) that he did not know and had no reasonable cause to suspect that the disclosure or interference was likely to affect an investigation carried out under this Act; or

(b) that he had a lawful excuse for the disclosure or interference.

14. Penalty under this Part

A person who commits an offence under this Part, shall, on conviction, be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding ten years or to both.

PART IV – TRACING, CONFISCATION, SEIZURE AND FORFEITURE OF PROPERTY

15. Property tracing

(1) Where the Attorney-General has reasonable grounds to suspect that a person, a member of an organised criminal group or an organised criminal group has committed, is committing or is about to

commit a crime or is in possession of property that belongs to an organised criminal group, he may, for the purposes of the investigation of an offence under this Act, apply to the High Court for an order—

- (a) compelling the person to deliver up any document or record relevant to identifying, locating or quantifying any property belonging to him or to the organised criminal group, or in his possession or control;
- (b) requiring a bank or any other financial institution, trustee, cash dealer or custodian to produce all information and deliver up all documents and records regarding any business transaction conducted by or on behalf of the person concerned.

(2) Where any person fails to comply with, is delaying or is otherwise obstructing an order made under this section, the High Court may, upon information sworn to that effect by the Attorney-General, authorise the Attorney-General or any officer deputed by him to enter any premises, including a bank or other financial institution, and search the premises and remove any documents or records for the purposes of executing the order.

(3) An order under this section shall lapse upon the expiry of thirty days from the date of the order unless the High Court, after hearing the parties, otherwise directs.

16. Restraint orders

(1) The Attorney-General may make an ex parte application to the High Court for a provisional order temporarily suspending dealings relating to all moneys and other property due, owing or belonging to, or held on behalf of—

- (a) a person charged or about to be charged with an offence under this Act; or
- (b) any other specified person.

(2) The Attorney-General may make an ex parte application to the High Court for a provisional order temporarily suspending dealings relating to all moneys and other property due, owing or belonging to, or held on behalf of—

- (a) an organised criminal group;

(b) a specified person reasonably suspected of being a member of such organised criminal group; or

(c) any other specified person.

(3) An order made under this section may—

(a) prohibit any person from making money or other property available to or for the benefit of the organised criminal group or suspect;

(b) provide for the granting of authority to make money or other property available to such persons and on such conditions as may be specified in the order;

(c) require a person to provide such information or produce such documents or records as may be reasonably required for the investigation of an offence under this Act; or

(d) include such other condition as the court may impose.

(4) The Attorney-General shall—

(a) cause notice of an order made under this section to be published in the next issue of the Gazette and in two daily newspapers with a national circulation;

(b) give notice of the order to—

(i) banks, financial institution and cash dealers;

(ii) any other interested or affected parties; and

(iii) any other person who he knows or suspects may hold or be vested with property belonging to or held on behalf of the organised criminal group or suspect.

(5)

An order under this section shall lapse upon the expiry of thirty days from the date of the order unless the High Court, after hearing the parties, otherwise directs.

17. Seizure and detention of organized criminal group cash

(1) An authorised officer who has reasonable grounds to suspect that any cash which is being imported into or exported from Kenya, or is being brought to any place in Kenya for the purpose of being exported from Kenya, is the property of an organised criminal group, may seize the cash.

(2) An authorised officer may seize cash under this section even if he reasonably suspects part only of the cash to be the property of an organised criminal group, where it is not reasonably practicable to seize that part only of the cash.

(3) An authorised officer may exercise his powers under subsection (1), whether or not any proceedings have been brought for an offence in connection with the cash concerned.

(4) The authorized officer shall, as soon as is reasonably practicable and in any event not later than seven days after the seizure of cash under this section, make an application to the High Court for a detention order with respect to that cash.

(5) The court shall not make an order for detention of the cash unless it is satisfied that there are reasonable grounds for suspecting that the cash is the property of an organised criminal group.

(6) Subject to subsection (8), any order made under this section shall remain valid for a period of sixty days, and, unless the cash is sooner produced before the court in proceedings against any person for an offence with which the cash is connected, may be renewed for further periods of not more than thirty days at a time, by the High Court, on further application.

(7) Any cash detained under this section shall be deposited by the authorised officer in an interest-bearing account with a reputable bank.

(8) The cash, with the interest, shall be released by order of the High Court to a person appearing to the court to be lawfully entitled to it—

(a) where the conditions under subsection (5) are no longer met; or

(b) if no proceedings have been brought in connection with the cash within six months of the seizure of the cash.

(9) In this section—

"authorized officer" means—

(a) the Commissioner of Customs and Excise holding office under the Customs and Excise Act (Cap. 472);

(b) the Commissioner of Police holding office under the Police Act (Cap. 84) (now repealed);

(c) the Attorney-General; or

(d) any other person upon whom written law vests functions of maintenance of law and order.

"cash" has the meaning assigned to it under the Banking Act (Cap. 488).

18. Forfeiture of property of organised criminal group

(1) The court by or before which a person is convicted of—

(a) an offence under this Act; or

(b) an offence under any other Act that constitutes an act of an organised criminal group within the meaning of this Act, may make a forfeiture order in accordance with the provisions of this section.

(2) Where a person is convicted of an offence under this Act the court may order the forfeiture of any money or other property—

(a) which, at the time of the offence, he had in his possession or under his control; or

which, at that time, he intended should be used for the purposes of the activities of the organised criminal group; or

(b) which, at that time, he knew would or might be used for the purposes of the activities of the organised criminal group; or

(c) to which the arrangement in question relates; or

(d) which, at the time of the offence, he knew was the property of an organised criminal group or would or might be used for the purposes of the activities of the organised criminal group.

(3) Where a person is convicted of an offence under this Act, the court may order the forfeiture of any money or other property which wholly or partly and whether directly or indirectly is received by any person as a payment or other reward in connection with the commission of the offence.

(4) Before making an order under this section, a court shall afford any person—

(a) who is not a party to the proceedings; and

(b) who claims to be the owner of or otherwise interested in any of the property which may be forfeited under this section, an opportunity to be heard.

19. Proceedings

All proceedings under this Part shall be civil in nature.

PART V – GENERAL PROVISIONS

20. General penalty

A person who commits an offence under this Act for which no penalty is provided shall, on conviction, be liable to a fine not exceeding five hundred thousand shillings, or to imprisonment for a term not exceeding ten years, or both.

21. Mutual Legal Assistance

Whenever an investigation is instituted under this Act, and mutual legal assistance is deemed necessary, the Attorney-General or any official designated by him for this purpose shall be notified of such investigation with a view to initiate mutual legal assistance and the sharing of information.

22. Declaration of an organized criminal group

(1) Where the Minister has reasonable grounds to believe that a specified group is engaged in any organized criminal activity under section 3 of this Act, he may, on the advice of the Commissioner of Police, by notice, declare that specified group an organized criminal group for the purposes of this Act.

(2) Any person aggrieved by the decision of the Minister under this section may apply to the High Court for redress within twenty-one days from the date of publishing the order.

23. Regulations

The Minister may make regulations generally for the better carrying out of the provisions of this Act.

24. Amendment of Cap. 76

The Schedule to the Extradition (Commonwealth Countries) Act (Cap. 76) is amended by inserting at the end thereof the following—

"Organised Criminal Group Offences".

25. Amendment of Cap. 77

The Schedule to the Extradition (Contiguous and Foreign Countries) Act (Cap. 77), is amended by inserting before the matter relating to "Piracy and Similar Offences" the following matter—

"Organised Criminal Group Offences".

26. Amendment of Cap. 114

The Firearms Act (Cap. 114), is amended by inserting the following new section immediately after section 4—

4A. Offences relating to specified firearms

(1) Notwithstanding section 4, any person who—

- (a) is found in possession of any of the specified firearms without a licence or permit or other lawful justification; or
- (b) being licensed to possess, hold, trade in or otherwise have custody of any of the specified firearms, ammunition or parts of such firearm or ammunition hires or otherwise unlawfully permits another person to take possession of or use that firearm or ammunition to advance the course of organized criminal activity,

commits an offence under this Act and is liable to imprisonment for life.

(2) For the purposes of this section, "specified firearm" means any of the following firearms—

(a) AK 47;

(b) G3

(c) MP 5; and

(d) such other similar firearms as may be specified by the Minister by order published in the Gazette.

(3) A court before which an offence under subsection (1) is found to have been committed may order the forfeiture to the State of any firearms, ammunition or other parts produced as exhibits in the trial