



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT MISCELLANEOUS APPLICATION NO.302 OF 2000

STEPHEN MWAI GACHIENGO 1ST ACCUSED/APPLICANT

ALBERT MUTHEE KAHURIA 2ND ACCUSED/APPLICANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

This is a Constitutional Reference brought pursuant to the Provisions of S.67(1) and S.84(3) of the Constitution of Kenya. STEPHEN MWAI GACHIENGO (first applicant) was charged in the Chief Magistrate's Court Nairobi with nine (9) counts of abuse of office c/s 101(1) of the Penal Code Cap 63 Laws of Kenya. ALBERT MUTHEE KAHURIA (second applicant) also faced four (4) charges relating to the same offence of abuse of office. Before their appearance in court the Attorney General sanctioned the prosecution of both applicants under section 101(3) of the Penal Code.

When the matter came up for hearing before the Senior Resident Magistrate on 29th May, 2000, Counsel for the applicants raised preliminary objections on points of law and, in their lengthy submissions, urged the trial magistrate to refer the issues raised to this court for interpretation, in so far as the same touched on the Constitution of Kenya. By a ruling delivered on 5th July, 2000 the learned trial Magistrate held that the questions raised are substantive and not frivolous and vexatious. She accordingly referred the same to the High Court for determination. The matter was placed before Oguk, J. Who on

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11th July, 2000 made an order that before the file could be placed before the Hon. the Chief Justice for the necessary directions, the file be remitted back to the trial magistrate to set out the issues upon which a Constitutional reference was being sought. In compliance with the order, the learned trial magistrate on 3rd August, 2000 framed four (4) issues for determination by the Constitutional court. These are:-

1. Whether it is unconstitutional and contrary to the principle of separation of powers for Kenya Anti-corruption Authority (KACA) to be headed by a High Court Judge.
2. Whether such leadership compromises the accused's right to a fair trial before an impartial court under S.77(1) of the Constitution.
3. Whether the Attorney General's consent to this prosecution is valid under the Constitution.
4. Whether the provisions establishing KACA are in conflict with the Constitution, and especially S.26 thereof.

We propose to deal with the second framed issue first.

Counsel for the applicants contend that the leadership of Kenya Anti-corruption Authority (hereinafter called KACA) by a Judge of this court is an infringement of their Constitutional rights as spelt out in S.77 of the Constitution. Mr. Bowry for the first applicant submitted that there can be no fair play in a criminal trial before a magistrate as long as KACA is the prosecuting body. He argued that KACA has an undue advantage in that regard, as the trial magistrate will be under fear to rule against KACA as he/she will be mindful of the fact that, the matter before him/her has had an input from a High Court Judge. Dr. Khaminwa for the second applicant amplified this submission by stating that, no magistrate will question a charge sheet that has had the input of a High Court Judge. In these situations, Counsel argued, an accused person will not be accorded a fair trial.

Leading Counsel for the respondent, Mrs. Okwengu countered the submissions by submitting that the issues raised were spurious and impugns the independence and the integrity of judicial officers. According to her, the argument implies that judicial officers

get intimidated by the status of parties who appear before them. The courts, she continued, have an obligation to be fair to all parties that appear before it, their social standing notwithstanding. Counsel went ahead to illustrate how the arguments by the applicants became absurd. She gave the example of the position of the Honourable the Attorney General who, in spite of sitting in the Judicial Service Commission, appears in our courts as a litigant. The other example is in the case of suits being filed by or against Judges of our courts. The last illustration she gave was in respect of H.C. Misc. Appl. No.542/96 Dr. Kiplagat vs the Law Society of Kenya (LSK).

In that case the applicant is an Advocate of the High Court. The matter was heard by Aluoch, J and Commissioner of Assize Philip Ransley who is also a member of the Law Society of Kenya. In all the above instances, lack of impartiality on the part of the members of the bench sitting was never raised. Regarding the authorities cited by Mr. Bowry on the issues, Mrs. Okwengu submitted that Counsel for the applicants misinterpreted the principles set out in the authorities which largely dealt with disqualification of a sitting judge. The authorities are:-

- (1) METROPOLITAN PROPERTIES CO. LTD vs LANNON AND OTHERS (1968) 3 ALL ER 304
- (2) THE DISCIPLINE OF LAW BY LORD DENNING
- (3) DIRECTOR OF PUBLIC PROSECUTION vs HUMPREYS (1975) 2 ALL ER 496
- (4) WHARTONS LAW LEXICON 4TH EDITION.

Counsel ended her submissions by stating that, Justice Ringera is performing a non judicial function. We have given consideration to submissions by Counsel on both sides in respect of this issue. We agree with Mrs. Okwengu that, our courts are under a duty to dispense justice to all the parties who appear before them irrespective of their class in society. Judicial officers take an oath to discharge their duties without fear or favour. We accordingly find the applicants' arguments on the issue spurious and misplaced.

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We will deal with issue No.3 and issue No.4 together as the questions for determination are intertwined. Counsel for the first applicant submitted that the establishment of KACA created a two-tier prosecutorial bodies – KACA and the Attorney General and that KACA cannot prosecute Penal Code offences. Its limitations are within the Prevention of Corruption Act – Cap 65 Laws of Kenya (hereinafter referred to as Cap.65). Counsel posed the question whether KACA can prosecute in respect of offences committed prior to its inception. To illustrate that KACA cannot digress outside Cap.65, Counsel referred us to an interview Justice Ringera gave to the Nairobi Law Monthly Magazine. The relevant excerpt is contained in Issue No.78 of January, 2000. We quote:-

“Although the Act empowers KACA to investigate and prosecute other offences involving corrupt transactions, corrupt transactions have not been defined. Corrupt transactions involving theft, fraud, embezzlement, evasion of taxes or misappropriation can therefore only be dealt with under the Penal Code – Cap 63 Laws of Kenya which provides for offences relating to abuse of office, administration of justice, public authority and property “.

On the contention that it is only the Attorney General who has the Constitutional mandate to prosecute Counsel cited to us the holdings in these cases:-

- (1) MOHANLAL KARAMSHI SHAH vs AMBALAL CHOTABHAI PATEL & 5 OTHERS 21 EACA 236.
- (2) RICHARD KIMANI AND S.M. MAINA vs NATHAN KAHARA – CRIMINAL (RIVISION) CASE NO. 11/83.
- (3) JOPLEY CONSTANTINE OYIENG vs REPUBLIC CR. APPEAL NO. 45/88.

Dr. Khaminwa contended that it is contrary to the administration of justice for KACA to investigate and prosecute. He said the Attorney General does not control KACA which is only answerable to its Director or the Advisory Board. The Attorney General comes in only for purposes of giving consent which is given as a

formality. The discretion to weigh values and interests before prosecuting has been taken away from the Attorney General in respect of cases handled by KACA. The success of KACA will not be attributed to the Attorney General. In the circumstances therefore, any consent given by the Attorney General to KACA is superficial. Counsel stressed that, KACA is not an authority that enjoys governmental powers. Unlike the police who derive their powers from the Constitution which establishes the office of the Commissioner of Police, that is not the case with KACA.

Mr. Kangatta Counsel assisting Mrs. Okwengu urged us to rule and direct that, the question as to the validity of the Attorney General's consent is not a Constitutional matter and that it is a question falling entirely within the jurisdiction and responsibility of the trial court. Counsel contended that, there is harmony between the provisions of Cap.65 and those of the Constitution and that, the two Acts are not mutually exclusive. KACA can only prosecute with directions of the Attorney General and is a body subordinate to the Attorney General. To Counsel, KACA prosecutors are Public Prosecutors within the meaning given in S.2 of the Criminal Procedure Code Cap.75 Laws of Kenya and that their role is complementary to that of the Attorney General. He reiterated that the Provisions of Cap.65 are not inconsistent with the Constitution. Counsel urged us not to use the eiusdem generis rule in interpreting the provisions of S.11 B 3(b) of Cap.65 but to apply the mischief rule. The mischief that was intended to be tackled is the rampant corruption.

The establishment of KACA came about by the enactment of S.11B of Cap.65. This was done vide Legal Notice Number 10 of 1997. The functions of the Authority are set out in S.11B(3). These are:-

- (a) to take necessary measures for the prevention of corruption in the public, parastatal and private sectors.
- (b) To investigate, and subject to the directions of the Attorney General, to prosecute for offences under this Act and other offences involving corrupt transactions; and
- (c) To advise the Government and the parastatal organizations on ways and means of preventing corruption;

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- (d) To inquire and investigate the extent of liability of any public officer in the loss of any public funds and to institute Civil proceedings against the officer and any other person involved in the transaction which resulted in the loss for the recovery of such loss;
- (e) To investigate any conduct of a public officer which is connected with or conducive to corrupt practices and to make suitable recommendation thereon;
- (f) To undertake such further or other investigations as may be directed by the Attorney General.
- (g) To enlist members of the public in fighting corruption by the use of education and outreach programmes.

When S.11B was inserted into Cap.65 the provisions of S.26 of the Constitution remained unamended. Under S.26 of the Constitution the Attorney General is the principal legal adviser to the Government of Kenya. He has powers under the Constitution to institute and undertake proceedings against any person and to take over or discontinue criminal proceedings instituted or undertaken by any person or authority. Under S.26(4) the Attorney General may require the Commissioner of Police to investigate a matter as relates to any offence. S.11B(4) of Cap.65 stipulates that in the performance of their functions the members of KACA shall have all the powers of a police officer of or above the rank of Assistant Superintendent of Police. S.11B(5) provides that the Director of KACA may assume responsibility for any investigation or prosecution commenced by the police. S.10 of Cap 65 gives powers to the Director of KACA to cause a police officer to investigate any bank account, share account or purchase account of any person (underlining ours).

From the foregoing, it is crystal clear that S.10 and S.11B of Cap 65 are in direct conflict with S.26 of the Constitution. Whether or not KACA purports to act under the direction of the Attorney General in relation to prosecution, the exercise of powers under S.11B of Cap.65 offends the Constitution. By alienating powers conferred upon him by the Constitution the Attorney General was being escapist and is a mark of abdication of responsibilities bestowed on him by the Constitution. He should not have abdicated his duty to render the desired legal advice. The powers of the Commissioner of Police have been curtailed by S.10 and S.3B(5) of Cap.65. That is unconstitutional.

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The provisions of S.3 of the Constitution are quite clear in that, if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency be void. KACA is not a department in the Office of the Attorney General. It is a body corporate. The powers conferred on it by S.11B(1) strip it of any semblance of independence. Acting by or against KACA cannot be in reference to the Government Proceedings Act Cap. 40 of the Laws of Kenya. The existence of KACA undermines the powers and authority of both the Attorney General and the Commissioner of police as conferred on them by the Constitution. Consequently, we find and hold that, the Provisions establishing KACA are in conflict and inconsistent with the Constitution. We were not addressed as to why the amendment to S.11 of Cap.65 was necessary. In our view we found no deficiency in the Act that called for the amendment.

It was contended on behalf of the applicants that it is both unconstitutional and contrary to the principles of separation of powers for KACA to be headed by a High Court Judge. Mr. Bowry contended that the Director of KACA – Hon. Justice Ringera – has to make an election either to remain a Judge or resign and head KACA. He stated that for a Judge to head a corporate body is perverse to the judicial oath and contrary to custom and tradition respecting the behaviour of Judges. It would be repugnant to justice and morality, added counsel. The contentious section relating to the establishment of KACA is S. 11B(1) of Cap 65 which reads as follows:-

“There is established an Authority to be known as “the Kenya Anti-Corruption Authority” (hereinafter referred to as “the Authority”) which shall be a body corporate with perpetual succession and a common seal, with power, in its corporate name, to –

- (a) sue and be sued;
- (b) take, purchase or otherwise acquire, hold, charge or dispose of both movable and immovable property;
- (c) borrow or lend money;
- (d) enter into contracts; and
- (e) do or perform all such things or acts necessary for the proper performance of its functions under this Act which may be lawfully done by a body corporate.

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Dr. Khaminwa submitted it is both unconstitutional and irregular for a High Court Judge to perform duties which he was not sworn to perform. Mrs. Okwengu argued that whatever duties Justice Ringera is carrying out are done in his capacity as the Director of KACA and not as a Judge. She stated that there exists no complete separation of powers in the organs of government and that the Constitution is clear on that. She gave the example of the Attorney General who sits in the Judicial Service Commission, in Parliament and in the Cabinet. She sought to distinguish the facts of this case with those in the case of *LAW SOCIETY OF LESOTHO vs PRIME MINISTER OF LESOTHO AND ANOTHER* (1986) L.R.C (Const.).

In the LESOTHO CASE a non-judicial officer was appointed to perform judicial duties. The officer who was a member of staff of the Director of Public Prosecutions was appointed as an acting Judge. The Court of Appeal of Lesotho held that the appointment was in contravention of the state's duty under the Human Rights Act to guarantee the independence of the courts. Mrs. Okwengu gave instances where Judges in this country have been appointed to head Commissions of inquiry, The Law Reform Commission and where they have been appointed to perform non-judicial functions. She gave the examples of Uganda, South Africa and Australia where Judges have been appointed to perform such functions. She submitted that the country should not be denied the use of such talents.

The doctrine of separation of powers is an old one. To be attained, the role of each arm of Government has to be clearly defined. The judiciary should not be subject to the dictates of either the executive or the legislature. In the book WADE ON CONSTITUTIONAL LAW 6th EDITION the writer maintains that in the field of independence of the judiciary, separation of powers is strictly observed. In Volume 2 of the Report of the Royal Commission of Inquiry into Civil Rights – Ontario it was recommended that the regular judicial duties of Judges should not be interfered with by their appointment to extra judicial duties. With respect, we agree.

On taking up an appointment as a Judge, one takes an oath in which he/she swears to discharge the duties of a Judge without fear or favour. In the position as head of KACA and in view of the duties one is expected to perform, we fail to comprehend how a High Court Judge will feel bound by the Judicial oath. We were asked to hold that as the

appointment of Justice Mathew Guy Muli as Attorney General and Justice Ringera as Solicitor General were not questioned, then the appointment of Justice Ringera as Director of KACA should not be questioned, notwithstanding the fact that he is still a Judge of this court. In our view, the said appointments contravened the principle of separation of powers and the fact that they were not challenged is no panacea for the irregularity of the appointments.

The only person who can be appointed as Commissioner to the Law Reform Commission pursuant to the provisions of S.2 of the Law Reform Commission Act Cap.3 of the Laws of Kenya is one who holds the office of the Judge of the High Court or Court of Appeal or by experience as an Advocate or as a teacher of Law in a University. A Commission of Inquiry under the Commissioner of Inquiry Act – Cap.102 of the Laws of Kenya shall be deemed to be a judicial proceeding for the purposes of Chapter XI and chapter XVIII of the Penal code. Chapter XI of the Penal Code relates to offences relating to the administration of justice while Chapter XVIII relates to defamation. Judicial proceedings can only be presided over by a Judicial Officer.

In that respect, a Commission of Inquiry may only be headed by one knowledgeable in law. The practice in Kenya has been that such Commissions of Inquiry are headed by Judges of the High Court and the Court of Appeal. The appointments have been made on a limited mandate and a specified time. Judges appointed to these bodies remain answerable to the Head of the Judiciary. It is the converse in the case of the leadership of KACA.

Reference was made by the leading Counsel for the respondent to Uganda, South Africa and Australia to advance the argument that Judges have been appointed to head bodies that carry out similar functions as KACA. The terms and conditions of those appointments and the legislation pursuant to which the appointments were made, were not made available to us. Counsel's arguments, therefore, became mere statements from the bar.

A Judge occupies an enviable position in society. He is enveloped by an aura of dignity. He is always on a pedestal. That position has to be jealously guarded. The temptation to disregard tradition cannot be allowed to take root in our judicial system.

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With the greatest respect therefore, we are of the view that for a Judge to head KACA is a step in the reverse and is a direct affront to his Constitutional appointment.

The end result of the foregoing is that, we uphold the submissions that:- the provisions in Cap.65 establishing KACA are unconstitutional and in conflict with the spirit and provisions of the Constitution especially section 26 thereof. It is also unconstitutional and contrary to the principle of separation of powers for KACA to be headed by a High Court Judge; and finally that the sanction by the Attorney General to this prosecution is not valid under the Constitution.

We bear in mind the provisions of Section 26 of the Constitution but we are not a trial court, neither do we purport to exercise the powers of the Attorney General under Section 26 of the Constitution. It now behoves the Attorney General to exercise his powers and mandate under Section 26 of the Constitution and take whatever steps he may deem necessary to ensure that the ends of justice are met not only in the case where the applicants are the accused but in all other cases instituted by KACA in the Magistrate's Courts.

We wish to commend each of the Counsel who appeared before us in this matter. They gallantly put forward their respective client's case. We are indebted to them by their able contributions.

Dated this 22nd day of December 2000.

A. MBOGHOLI-MSAGHA

JUDGE

J.K. MITEY

JUDGE

KASANGA MULWA

JUDGE