



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Criminal Case 2 of 2011

JAPHET CHENGO.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. On 23rd January, 2009, the Applicant herein was arraigned before the Chief Magistrate's Court in Malindi in Criminal Case No. 111 of 2009 on a charge of Operating a Sewage System without an Effluent Discharge Licence contrary to Section 75(1) of the Environmental Management and Co-ordination Act (hereinafter EMCA), as read with Regulations 6 (a) and 27 (1) of the Water Quality Regulations properly called the Environmental Management and Co-ordination (Water Quality) Regulations (hereinafter the Water Regulations). It was alleged that on 22nd January, 2009 at Crystal Bay Resort Watamu in Malindi, as manager of the said resort the applicant operated a sewage system without an Effluent Discharge Licence (EDL). The applicant denied the charges.

2. Two witnesses gave evidence on behalf of the prosecution on 29-6-09. Thereafter, the applicant through his lawyer Mr. Ole Kina lodged a constitutional reference to this court. On 10th May, 2011, this Court adopted the proposed constitutional issues dated 4th September, 2009 as framed by the applicant's advocates, the National Environmental and Management Authority (NEMA) appeared through Mr. Wabwoto. In opposition to the reference it filed nine grounds of objection to the framed issues. The matter was eventually argued before me on 21st March, 2012.

3. The ten issues or questions forwarded for determination under Section 67 of the Repealed Constitution, and the corresponding supporting arguments can be conveniently clustered and summarised for purposes of clarity:-

A. Grounds 1 and 2

Sections 70, 72, 76, 82 of the Constitution.

On the applicant's rights to equal protection of the law under Section 70 and 82 of the Constitution, and the fundamental rights and freedoms under section 72 and 76 of the Constitution: whether the proceedings in criminal case no. 111 of 2009 are a nullity for abrogating the respective rights.

B. Grounds 4, 5, 6 and 7

Sections 70 and 77(8)

Juxtaposing the applicant's rights as enshrined above, namely the fundamental rights and freedoms and the equal protection of the law, against the statutory duties imposed upon the Malindi Local Authority and Malindi Water and Sewerage Company (MAWASCO) to construct, provide and maintain a central sewage system, a treatment facility and sewage plant under the Local Government Act and the Public Health Act, the Water Act: Whether proceedings in criminal case no. 111 of 2008 have deprived the applicant of his right to protection of the law and violated his fundamental rights and freedoms.

C. Grounds 8 and 9

Sections 70, 75 and 82 of the Constitution

On the applicant's fundamental rights and freedoms, the right of protection from deprivation of property and from discrimination on grounds of race, tribe, etc.: Whether Section 75 of the EMCA and part III of the Water Regulations are null and void for being discriminatory because of the requirement that the applicant and other users of water for trade and industrial purposes do maintain records and fixed indices of effluent discharged, a requirement not imposed on private individuals; and, whether the applicant and like others have been discriminated by the imposition upon them of "onerous responsibilities" for the monitoring of effluent discharged into the environment, thereby depriving the applicant of the right to property.

4. The tenth framed issue is not a ground as such. It is more of a general restatement of the applicant's entitlement to the cited constitutional rights and the right to seek redress under section 67 of the Constitution.

5. In his oral arguments, Mr. Ole Kina emphasised two aspects of discrimination; the first was the requirement under EMCA and the Water Regulations imposing a duty on a certain category of persons, namely operators of trading and industrial premises, to obtain a licence (EDL) in order to operate sewage systems and to discharge effluent. Secondly, he submitted that all premises in Malindi Municipality, including schools and hotels use septic tanks in the absence of a central sewage system.

6. He stated that the responsibility of constructing and maintaining such a system as well as sewage treatment works lies with the local authority under the Local Government Act, the Public Health Act and the Water Act. Referring to the testimony of PW1 during cross-examination in the Lower Court trial, Mr. Ole Kina argued that the selective prosecution of the applicant, out of a category of many non-compliant businesses in the locality was discriminatory, there being no evident objective criteria.

7. To fortify his arguments, Mr. Ole Kina relied on the High Court decision in **WAWERU VS R, NRB MISCELLANEOUS CIVIL APPLICATION NO. 118 OF 2004** whose facts he said compared with the present case. He urged the court to declare Section 75 of EMCA and the Water Regulations discriminatory. And further to find the prosecution of the applicant as null and void and to terminate the proceedings via an order of certiorari.

8. The position taken by the respondent through the written grounds and oral arguments is as follows:

None of the applicant's rights have not been violated and neither has he been discriminated against. The provisions of section 75 of EMCA and Regulations 6 (a) and 27 (1) of the Water Regulations cover trade and industrial facilities – a broad enough definition covering every such person who ought to refrain from acts causing pollution, in order to ensure sustainable use of all the respective properties including the applicant's. It is further submitted that the charges brought under section 75 of EMCA are clear existing offences respecting the discharge of effluent without the relevant licence.

9. Mr. Wabwoto stated that the responsibility for obtaining the EDL lies with the operator even while conceding that the responsibility of constructing and maintaining a central sewerage system lies with the local authority and the relevant Water Services Board. He said the purpose of the EDL is to ensure that exhaustion of effluent is carried out in accordance with the regulations, thereby protecting the environment. Where there is a central sewerage system no EDL would be required of the trading or industrial premises. He argued that the nature of the right allegedly violated has not been specifically demonstrated in this case. Finally, Mr. Wabwoto distinguished **WAWERU VS R** from the facts of this case. He said that the applicant in that matter was not prosecuted for a charge similar to that facing the present applicant but an offence under the Public Health Act. That the latter charges did not raise the issue of the EDL.

10. In response, Mr. Ole Kina submitted that the discrimination lies in the description of parties required to be EDL compliant. That the principles in the **Waweru Case** are applicable to this case even though the charges therein had been brought under the Public Health Act.

11. I have considered all the material placed before me with regard to this reference. In my considered view, the applicant's core complaint is two pronged. First, that the provisions of Section 75 EMCA and Regulations 6 (a) and 27 (1) of the Water Regulations are discriminatory for imposing certain obligations on a certain category of persons. Second, that the action of charging the applicant from among possibly hundreds of other non-compliant establishments in Malindi Municipality is discriminatory. And that the "discriminatory" provisions and actions have resulted in violation of the applicant's following rights:

1. Section 70 of the Constitution: Fundamental rights and freedoms; specifically, protection from discrimination, protection of the law and of property.

2. Section 72 of the Constitution:

Protection of the right to personal liberty

3. Section 75 of the Constitution: Protection from deprivation of property

4. Section 76 of the Constitution:

Protection from arbitrary search or entry

5. Section 77 (8) of the Constitution: Protection from conviction for an undefined offence

6. Section 82 of the Constitution: Protection from discrimination on the grounds of race, tribe etc.

12. The basic facts pertaining to this reference are not disputed. That the applicant is charged in criminal case no. 111 of 2009 with an offence under section 75 of the EMCA as read with Regulations 6(a) and 27(1) of the Water Regulations. Secondly, that the applicant is charged in his capacity as the manager of Crystal Bay Resort, one of the many hotels and trade premises located in Watamu within Malindi Municipality. That at the time of the alleged offence there was no centralized sewage system serving Malindi Municipality, hence many establishments used septic tanks as receptacles for effluent emanating from their premises.

13. Finally, that despite the gazettelement of the Water Regulations, a number hotels and business premises in Watamu and Malindi generally did not comply with the regulation requiring them to obtain the EDL. The applicant's hotel fell in this category and was one of those inspected by the District Environment Officer and his team on 16-9-08. The hotel was allegedly found not to be compliant and issued with a notice. The charges were eventually brought in January, 2009.

14. Mr. Wabwoto correctly submitted that the onus lies on the applicant to specifically demonstrate the nature of right violated. Having carefully looked at the material presented by the applicant, I think it is important to separate the wheat from the chaff at the onset before getting into the real issues before the

court. With regard to the applicant's right under section 77(8) it is not the applicant's case as I understand it, that he is being tried for an unknown offence. Rather that the provision defining the offence and in its operation is discriminatory. Section 77 (8) of the Repealed Constitution provides:-

“No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed in a written law:”

The offence facing the petitioner in the lower court is defined and a penalty therefor prescribed. Clearly therefore section 77 (8) of the Repealed Constitution does not avail to the applicant.

15. Similarly, section 75 and 76 of the Repealed Constitution do not seem to have any bearing on this case. The entire content of section 75 relates to protection from deprivation of property, which in my understanding is not among the applicant's complaints. Nor does he complain that his right to protection against arbitrary search and entry guaranteed in section 76 have been violated. Besides, entry by NEMA officers or agents in the course of inspection of premises would be covered by Section 76(2) of the Repealed Constitution and the provisions of the EMCA. Indeed it is an offence under section 137(c) of the EMCA to refuse entry to an environment inspector upon any land, premises, vessel etc.

16. As regards the applicant's reliance upon section 72 of the Repealed Constitution, it is not possible to see its relevance to the present matter. The section deals with the protection of personal liberty. Section 72(1) (e) allows for the deprivation of liberty upon a reasonable suspicion that a person has committed an offence. Unless the requirement for the applicant to attend the criminal trial is construed to constitute a deprivation of his liberty, there is no evidence that he was at any time confined, or in any manner deprived of his liberty.

17. The gamut of the applicant's complaint appears to fall within Section 70 and 82 of the Repealed Constitution, with respect to the protection against discrimination. This probably explains Mr. Ole Kina's emphasis on these matters during oral submissions, and the seeming abandonment of other issues contained in the formal statement of framed issues.

18. The two main questions to be answered is whether section 75 of the EMCA and Part III of the Water Regulations are discriminatory and whether the applicant has been treated in a discriminatory manner by being charged as he was. In this regard, it is useful in my view, to first set out the relevant part of section 70 of the Constitution:-

“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place or origin or residence or other local connexion political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

a)...

b)...

c)...

the provisions of this chapter shall have effect for the purpose of finding protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

19. Two things are self evident from the above provision:

1. Section 70 summarises the rights and fundamental freedoms enshrined in Chapter V for all persons regardless of: race, tribe, origin, residence or local connexion, political opinions, colour creed or sex.

2. No right is absolute.

It is interesting to note that the categories of grounds of discrimination outlined in section 70 are repeated in section 82 which affords protection from discrimination.

20. Section 82(1) provides that subject to subsections (4), (5) and (8) no law shall make any provision that is discriminatory either of itself or in its effect. Subsection 82(2) outlaws discriminatory treatment of any person by a person “acting by virtue of any written law or in the performance of the functions of a public office or public authority”. This provision is subject to subsections (6) (8) (9). Helpfully, section 82(3) defines the meaning of the expression “discriminatory”. It states that:

“the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by (the same categories again) race, tribe, place of origin or residence or other local connexion, political opinions, colour creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges of advantages which are not accorded to persons of another such descriptions.

Clearly, the categories of discrimination are well set out. Mr. Ole Kina placed reliance on the authority of **Waweru Vs R** where the court held inter alia that:

“picking on a few residents in an arbitrary manner for prosecution was discriminatory. The applicants were discriminated against due to their local connection”.

21. As pointed out by Mr. Wabwoto the charges challenged in that decision related not to an EDL but to the offences of discharging raw sewage into a public water source and the environment: and failure to comply with a statutory notice, contrary to the Public Health Act.

22. In the present case it is not clear whether the applicant alleges discrimination on grounds of local connection as one of the users of water for trade or other purposes (business) in Malindi Municipality or even the propertied (there was an allusion to the protection of property). In the **Waweru Case**, it appeared that notices had been issued to some selected persons in Kiserian township to put up septic tanks. The court did not accept the applicant’s argument that the cost of such an exercise was prohibitive. Not having had the advantage of reading the affidavits and materials presented in that matter, I can only surmise that they supported the finding that discrimination was on the ground of the local connexion. That said, I cannot transplant that finding onto the facts of this case, different as they are, without the necessary material justification. There is a lacuna in this case as to the ground upon which discrimination is alleged. Yet the Constitution has clearly delineated categories of grounds for discrimination which a successful applicant must demonstrate apply to himself.

23. Is there any evidence that commercial water users in Malindi are subjected to different set of standards under the EMCA and Water Regulations from individuals in Malindi and/ or counterparts in other townships? The wording of Section 75 EMCA and the Water Regulations, as Mr. Wabwoto stated appears wide enough to be of general application, not just to relevant persons in Malindi, but to any and every person in defined categories. Section 75(1) targets any “local authority operating a sewerage system or owner or operator or any trade or industrial undertaking.” Section 75(2) targets “every owner or operator of a trade or an industrial undertaking discharging any effluents or other pollutants to the environment.” The Water Regulations prescribe penalties in addition to other application details”

24. In issue no. 8 and 9 Mr. Ole Kina sought to make a comparison between the application of section 75 of EMCA to “users of water for trade or industrial purposes” and private individuals, suggesting that their differentiated treatment is discriminatory. That argument was seemingly abandoned during oral submissions and substituted with the complaint that some trade/industrial users of water were charged but others were not. Clearly, it would be illogical to impose similar standards for effluent disposal on individuals and industrial operators. It would not be unreasonable to expect the latter to discharge more effluent, probably of more toxic nature than say a mere latrine in a homestead. Not that the latter are at

liberty to dispose of effluent anyhow. **Waweru's Case** shows that there are appropriate sanctions under the Health Act (see also Section 87 – 90, 142, 143 of EMCA).

25. Furthermore, **Waweru's case** also demonstrates the notorious fact that most of Kenyan rural towns and small urban centres do not have centralized sewerage systems and how public authorities have attempted to deal with the resulting environmental challenge. Admittedly, the duty to construct, maintain such systems and treatment works fall under the respective local authorities or water boards. The applicant herein has not been required to shoulder the statutory duty of these defaulting bodies, in this case Malindi's. He has been required to obtain an EDL as an operator of a sewage system (septic tank) under section 75 of the EMCA. As Mr. Wabumoto correctly submitted, that is the applicant's personal duty.

26. The local authority would equally have a similar duty if it operated a central sewerage system. The intent of the section must be seen for what it is; the regulation and monitoring of the discharge of effluent from business/industrial and other premises onto the environment. Public interest obviously looms large here. The underlying constitutional principle is the rider in section 70 that fundamental rights and freedoms are "subject to respect for the rights and freedoms of others and for the public interest." A more hackneyed phrase is that one's fundamental rights and freedoms end where the next person's begin.

27. In light of the foregoing, I fail to see how the provisions of section 75 of the EMCA and Water Regulations can be said to be discriminatory against a hotelier/trader/industrial operator or property owner in Malindi Municipality or at all. Whether the above section is discriminatory in its operation, as argued in the oral submissions, on account of picking only on a few defaulters such as Crystal Bay Resort for charging, the answer is found in section 82(a) of the Repealed Constitution. It states:

"Nothing in sub section (2) (on discriminatory treatment by a person acting by virtue of any written law or in the performance of the functions of a public office or authority) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in a court, that is vested in a person by or under this constitution or any other law"

28. That discretionary power for purposes of this case was vested in NEMA or its lead agents as delegated to them by the Attorney General (AG). Under Section 26 of the Repealed Constitution the AG had wide discretion on the institution of criminal cases, which he could delegate for purposes of mounting prosecution for offences under various statutes. That discretion is carried over and reinforced in the 2010 Constitution. It is a safeguard for the rights of "others" and the public interest. I would venture to say that any sustained and unwarranted whittling down of that discretion would be contrary to public policy and a threat to the Rule of Law.

29. In the famous case of **GITHUNGURI VS R (1984)KLR 1** the Court restated the principle that individual rights are not absolute and they must be balanced against other rights and freedoms and general community welfare. And a clean and healthy environment is both the duty and right for all under the 2010 Constitution (Article 42, 69-70) and EMCA (Section 3)

More recently, the watershed decision by the Court of Appeal in **JULIUS KAMAU MBUGUA VS R (2010)e KLR**, turned the tide on the hitherto popular trend of issuing prohibitions against prosecution of suspects on account of alleged violation of their constitutional rights. By the time of that decision the jurisprudence that had gained currency especially in the High Court was that any prosecution mounted in violation of the rights of a suspect was a nullity, regardless of the nature of the violation.

30. One of the few decisions going against the grain and considered in that case was **REPUBLIC VS DAVID GEOFFREY GITONGA CR. CASE NO. 79 OF 2006 (Meru)(unreported)** where Emukule J. disagreed with the prevailing jurisprudence by stating:

"...such a trial is not a nullity at all ...firstly the principle of nullity presupposes that the process of the trial is void either because it is against public policy, law, order...for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existent or that the court

seized of the matter has no authority to do so”

31. The Court of Appeal approved the reasoning of Emukule J. Although the case of **JULIUS KAMAU MBUGUA** had a different factual background from the case before us, I think that it contains invaluable guidelines with respect to the twin questions of:

- a) Individual rights vs the public interest; and
- b) the appropriate remedies to be granted where constitutional violations are proved.

Two of the ten principles distilled by the court from a rich consideration of a wide range of commonwealth and international jurisprudence are rendered thus:

i) The right (in that case to trial within a reasonable time) is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.

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.....
.....

xb) Under the Common Law and under the Jurisprudence of European Court of Human Rights, a permanent stay of proceedings is considered a draconian remedy only granted where it is demonstrated that the breach is so severe that a fair trial cannot be held.”

32. Commenting on alleged pre-trial constitutional violations the court stated:

“Nor is it correct to state that the court has no jurisdiction to try a suspect after his rights to personal liberty have been breached by police before he was charged. The law gives jurisdiction to the criminal courts to try any person suspected of having committed a criminal offence subject to constitutional safeguards. There is no law including the 1963 Constitution before repeal which bars such prosecutions or ousts the jurisdictions of criminal courts in such cases. The issue of jurisdiction does not, with respect arise....

Lastly, had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised.”

33. I have been asked to terminate the criminal charges pending against the applicant on grounds that they are a nullity for abrogating his constitutional rights. In this case, I am not satisfied that the alleged breach of the applicant’s right to protection against discrimination has been established. But even if it had been proved, the remedy of terminating the proceedings would in my view not commend itself in the circumstances of this case. Besides, the “discriminatory” treatment alleged is sanctioned by the same constitution under Section 82(9). As was pointed out by Mr. Wabwoto, the applicant has not complained that his right to a fair trial has been breached or is threatened.

34. For the foregoing reasons, I find no merit in the reference before me and will dismiss it accordingly. I direct that the Lower Court file be transmitted back and placed before the Chief Magistrate on **20th June, 2012** so that dates can be taken for the expeditious further hearing of the case against the applicant.

Delivered and signed at Malindi this **11th June, 2012** in the presence of Ms. Nyawinda holding brief for Mr. Ole Kina for the applicant, Mr. Wabwoto for NEMA absent. Applicant present

CC- Evans & Leah

C. W. MEOLI

JUDGE