REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

CRIMINAL REVISION 926 OF 2011

(From original order in Miscellaneous Criminal Application No. 9 of 2011 of the Chief Magistrate's Court at Nairobi)

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

SAMUEL KIMUCHU GICHURU.....1ST RESPONDENT

CHRYSANTHUS BARNABAS OKEMO.....2ND RESPONDENT

R U L I N G ON REVISION

By a letter dated 6th July 2011, **Hon. Keriako Tobiko**, the Director of Public Prosecutions in the exercise of the powers conferred on his office under section 7(1) of the Extradition (Commonwealth Countries) Act, Chapter 77 of the Laws of Kenya as read with Section 7 of the Sixth Schedule to the Constitution, while signifying that a request had been made to him by a competent Judicial Authority of the United Kingdom on behalf of the Island of Jersey, for the surrender of fugitives namely **Samuel Kimuchu Gichuru** and **Chrysanthus Barnabus Okemo** (the respondents herein), expressed no objection to the said request. He proceeded to authorize the Chief Magistrate to issue a warrant for arrest and detention of the respondents in accordance with Section 8 of the said Act. It is this letter that triggered the proceedings in Nairobi (Milimani) Chief Magistrate's Miscellaneous Application No. 9 of 2011, the subject of this revision. The proceedings were commenced before the Principal Magistrate **Mrs. G W Ngenye Macharia**.

In the said proceedings **Mr. Patrick Kiage** led a team of state counsel on behalf of the applicant herein while **Mr. Fred Ngatia** appeared for the respondents herein.

The respondents, however, raised preliminary issues to the said proceedings. After **Mr. Ngatia**, learned counsel for the respondents had competed his submissions in respect thereof and it was the turn of **Mr. Kiage**, learned counsel for the Republic to respond, **Mr. Ngatia** raised an objection to the effect that as a stay had been granted in High Court Miscellaneous Criminal Application No. 435 of 2011 between **Henry Kiprono Kosgey** and **Director of Public Prosecutions & Another** (hereinafter referred to as ***the Kosgey Case***), **Mr. Kiage** could not purport to carry out duties as if no such decision had been made. He accordingly argued that the matter cannot be conducted by a person who has no status to appear before the court and that the continued participation of **Mr. Kiage** would vitiate the proceedings and compel a repetition of the case. In the course of the arguments, the learned trial magistrate directed that **Mr. Kiage** addresses the court on his mandate conferred upon him by the Director of Public Prosecutions (hereinafter referred to as the DPP) to specifically prosecute the matter.

After listening to the submissions of both parties, by her ruling dated 22nd November 2011, the learned trial magistrate while conceding that the objection raised by **Mr. Ngatia** in so far as it was based on the High Court decision was unmerited since it did not give a blanket stay against **Mr. Kiage** to prosecute in any other matter, found that she could not base her decision on speculation that the said application would proceed without a specific order barring **Mr. Kiage** from prosecuting the matter before her.

With respect to the second issue, the learned judge found that under section 85 of the ***Criminal Procedure Code*** (hereinafter referred to as ***the Code***) it is mandatory that a person so appointed as a special Public Prosecutor to conduct the duties spelt out thereof, be gazetted and the purpose of publishing the name of such a person is to legally delegate those powers and so conform with the law. According to the learned magistrate, it mattered not whether **Mr Kiage** was appointed by the Public Service Commission (hereinafter referred to as the PSC) or as an advocate of the High Court, as his appointment as a Special Public Prosecutor should be gazetted followed by an administrative appointment. As **Mr. Kiage's** term as a Deputy Public Prosecutor expired after one year's contract from 15th February, 2007, without following the procedure laid down in section 85 of ***the Code*** (i.e. gazettement) the court proceeded to find:

(a) That Mr. Kiage was not properly appointed under the law to act as a special Public Prosecutor in those proceedings;

(b) That Mr. Kiage had no locus henceforth to appear before the Court in the same proceedings unless appointed pursuant to section 85 of the Code;

(c) That the submissions which Mr. Kiage made in response to the Respondent's submissions in support of the objection to the extradition proceedings be expunged from the court record; and

(d) That the DPP should appoint another prosecutor/state counsel to lead in submissions on his behalf beginning the 28th November 2011.

It is the foregoing decision that provoked this revision.

Vide his letter dated 23rd November 2011, the DPP requested the Court in the exercise of the powers conferred upon the Court by section 362 of ***the Code*** to call for and examine the record of the said proceedings so as to satisfy itself and pronounce on the legality or propriety of the following findings and orders as well as the regularity of the proceedings giving rise thereto:

a) The Hon. Magistrate's unilateral decision to enquire into the "mandate to prosecute" of Mr. Kiage, a Special Public Prosecutor in this Directorate, after parties had fully argued the objection to his authority and a date fixed for Ruling.

b) The contradiction of the Hon. Magistrate's proceeding to rule on the said mandate having already found that the objection to Mr. Kiage's authority founded on a prior High Court Ruling in HC CR. MISC. Appl. No. 435 of 2011 could not stand.

c) The Hon. Magistrate's decision to direct Mr. Kiage to submit his mandate to prosecute before her in circumstances prejudicially suggestive of impropriety on his part and tantamount to placing him on trial.

d) The Hon. Magistrate's assumption of jurisdiction to enquire into and make findings, pronouncements and orders on the legality and efficacy of Mr. Kiage's appointment as a Special Public Prosecutor while full cognizant of the existence of orders of leave for the determination of the precise point by the High Court in exercise of its judicial review jurisdiction.

e) The Learned Magistrate's plainly wrong and prejudicial assertion in her Ruling that Mr. Kiage <u>had disputed</u> that the leave granted by the High Court in H.C. CR. MISC. APPL. 435 of 2011

operates as a stay to proceedings in ACC1/2011 when, in fact, that was Mr. Kiage's precise submission in support of the limited and specific scope of the stay order.

f) The Learned Magistrate's incorrect, erroneous and unfounded finding, (casting doubt on the bona fides, honesty and integrity of Mr. Kiage) that he had submitted to having been gazette in February 2011 when no such submission was made nor could, in any circumstances, be made.

g) The Learned Magistrate's wholly erroneous and incorrect presumption that Mr. Kiage was "a Public Prosecutor not ordinarily a counsel in the DPP's Office" which, in fact he is and had so demonstrate.

h) The Learned Magistrate's ignoring of all the material placed before her in proof of the Public Service Commission's employment of Mr. Kiage as an officer in the Public Service with contracts duly renewed and executed thereby wholly misapprehending Mr. Kiage's position.

i) The Learned Magistrate's importation and superimposing of the term "Special" into and onto Section 85 of the Criminal Procedure Code thereby wholly misconstruing the said provision of law to equate Mr. Kiage's position to that of an outside advocate hired to prosecute a specific case whereas he is an employee and an officer within the Chambers of and subordinate to the Director of Public Prosecutions in the Public Service.

j) The Learned Magistrate's incorrect finding that under Section 38 of the Interpretation and General Provisions Act (Cap 2) a delegation of powers by the Attorney General and Director of Public Prosecutions had to be "to a person by name" whereas the Statute gives an option, exercised in this case, of delegating Prosecutorial authority to "the person for the time holding an office specified in the notice" which delegation was duly gazetted.

k) The Magistrate's decision that Mr. Kiage, whom she found was employed in the Public Service, still needed gazettment yet had an instrument of appointment under the hand of the DPP consistent with Section 85 (20 of the C.P.C for the case before her.

l) The Magistrate's unsupported and discriminatory distinction between Mr. Kiage and other State Counsel on the basis of the latter being full time employees of the DPP which is what Mr. Kiage, in fact, is.

m) The Learned Magistrate's ultra-vires and illegal curtailment of the DPP's unfettered discretion under Article 157 (9) of the Constitution to appoint any of his officers to represent the State in Criminal matters.

n) The Learned Magistrate's decision that hoisted a technicality (improperly and incorrectly understood) to a position of trumping and negating the substance and interests of justice in violation of Article 159 (2) of the Constitution on principles of exercising judicial authority.

Accordingly the applicant seeks from this Court that the following orders of the Subordinate Court be reversed;

a) That Mr. Kiage is not properly appointed under the law to act as a Special Public Prosecutor.

b) That he Mr. Kiage has no status to appear before the said proceedings unless appointed as stipulated under Section 85 of the C.P.C.

c) That submission which Mr. Kiage made in response to the Respondent's Submissions in support of their Objection to the extradition proceedings be and we hereby expunge from the Court record."

To the said grounds, the respondents filed a notice of preliminary objection dated 28th November 2011 in

which they raised the following issues:

a) A decision based on principles of public law (High Court Constitutional & Judicial Review Application 435/2011) was made to the effect that it is doubtful whether Mr. Patrick Kiage had been validly and legally appointed a public prosecutor and/or special public prosecutor and as a consequence thereto did stay a prosecution which was being conducted by Mr. Patrick Kiage.

b) The revision application is a collateral attack on the decision and findings made in (a) above.

c) The revision application seeks to confer public law status on Mr. Patrick Kiage which has been doubted in the aforestated decision.

d) If the revision application is allowed, there shall exist two irreconcilable decisions by the High Court regarding the status of Mr. Patrick Kiage.

e) To that extent, the revision application is an abuse of process.

These grounds were, however, canvassed in the revision itself, which was prosecuted by written submissions and highlighted by counsel.

In the applicant's submissions the High Court's power of revision is to be found in section 362 of ***the Code***. It is submitted that the prayers challenging the appointment of **Mr. Kiage** to conduct the prosecution the subject matter of the Judicial Review Application have since been withdrawn and a copy of the order is annexed. Since the Court has power under section 362 aforesaid to call for any finding, sentence or order recorded or passed, it is submitted that this Revision is properly before the court. According to the applicant Article 157(9) of ***the Constitution*** as well as section 85(2) of ***the Code*** gives the DPP the requisite powers in the matters forming the subject of this application.

It is further submitted that **Mr. Kiage's** designation at the office of the DPP, where he has served on successive terms since 15th February 2007, is that of a Special Prosecuting Counsel. Prior to that, he was an advocate in private practice in the firm of **Kiage & Co. Advocates** where he remains a dormant partner without any active role therein. He is a full time employee of the office of the DPP. His role as a lecturer at Catholic University of East Africa was in the Faculty of Law which according to the applicant was a corollary to his work as a prosecutor since he was teaching Criminal Procedure and Practice. However, at the expiry of his contract on 31st January 2012, he opted not to renew the same, though he still lectures part time at the Kenya School of Law, a government institution, and there has been no dissatisfaction with his performance at the office of the DPP. According to the applicant, **Mr. Kiage** not being a State Officer is not barred by ***the Constitution*** from engaging in any other kind of gainful employment. Therefore, it is submitted that his previous engagements do not negate his position as a Public Prosecutor.

Since the objection taken in the ***Kosgey Case*** to **Mr. Kiage's** role in the prosecution was abandoned and was never dealt with it is submitted that **Mr. Kiage's** authority to prosecute stands intact as it has not been nullified, impugned or impeached by the High Court in the said matter hence the preliminary objection must fail since the ***Kosgey Case*** has no precedential value.

It is submitted that under section 85(2) of ***the Code*** there is no duty or obligation of notification or publication of such appointment since all that is required is that the person so appointed be either an advocate or a person in the public service and the appointment be in writing. Since **Mr. Kiage** was both an advocate and a Public Servant, and duly qualified for appointment the case of **Elirama & Another vs. Republic [2003] KLR 537**, is distinguishable. It is submitted that since **Mr. Kiage's** mandate was not the subject of the respondents' objection, by proceeding *suo moto* and unilaterally to inquire into that mandate without conducting an inquiry as to the respondents' counsel's mandate, the learned magistrate action was unfair, discriminatory and unconscionable as it converted the session to a trial of **Mr. Kiage** which was not the matter before her. Having been placed before her a written instrument in the hand of the DPP, by which **Mr. Kiage** was appointed, it is submitted that it was improper, incorrect, unreasonable

and unacceptable that the trial magistrate embarked on a journey of enquiring beyond and behind the said appointment as contemplated by law.

It is further submitted that the position occupied by **Mr. Kiage** as a Special Prosecuting Counsel was duly advertised and all procedures followed leading to his employment by the Public Service Commission as a Special Prosecuting Counsel at Grade SL8 with the rank of Deputy Director of Public Prosecutions, which is a prosecutor in the Office of the Director of Public Prosecutions and was assigned a Personal No. 2007011379 and accordingly placed on the Payroll of the State Law Office complete with a Staff Identity Card. That employment, it is submitted has been renewed from time to time with the latest extension due to run until 14th February 2013 by the Public Service Commission through the Solicitor General at the request of the DPP. Since **Mr. Kiage** has been delegated authority by the DPP vide Gazette Notice No. 104 of 10th August 2011, the former has been lawfully discharging the functions of a Special Public Prosecutor in the Office of the DPP wherein he has discharged his duties as such on a full time basis.

Under section 38 of the ***Interpretation and General Provisions Act*** Cap 2, Laws of Kenya, it is submitted delegation may be perfectly and lawfully done either to a person by name or to the person for the time being holding a specified office. Accordingly, it is submitted that the finding that the procedure is by publishing the names of the person to whom powers are delegated in the gazette was a plain error on the part of the learned magistrate as to render the decision incorrect, irregular and improper thus justifying the invocation of the Court's revisionary intervention. Taken to its logical conclusion it is submitted, this finding has the effect of locking out all other state counsel in the office of the DPP who derive their authority from similar instrument. In effect, the learned magistrate's decision amounted to nullification of the legal notices without jurisdiction to do so. It is further submitted that under section 45 of Cap 2 once there is delegation of powers, the designation is immaterial.

The gazettement of **Mr. Kiage** after his initial appointment though expressed to be under section 85(1) of the Code, it is submitted was unnecessary since appointment of state counsel by Public Service Commission are never gazetted. Further the incorrect and unnecessary gazettement was not the basis of **Mr. Kiage's** exercise of prosecutorial powers which commenced prior to its publication. It is on that basis that it is submitted that the non-publication of any notice upon the subsequent renewal of **Mr. Kiage's** contracts is violative of no law and reliance is placed on the case of **Alice Muthoni Wahome vs. James Maina Kamau & 2 Others [2011] eKLR.**

The High Court's revisionary powers, it is submitted, are very wide and not restricted to final adjudications and the holdings to the effect that revision does not apply to interlocutory orders are plainly wrong and run counter to the clear word of the statute. Accordingly, it is submitted, that revision apply to all reversible errors not amounting to conviction or acquittal and this position, according to the applicant is in conformity with section 367 of the Code. On the authority of **Livingstone Maina Ngare vs. Republic Nairobi High Court Revision No. 88 of 2011**, the Court is urged to consider this matter as amenable to the Court's revisionary jurisdiction and reverse it accordingly.

In conclusion the Court is urged to find that the trial magistrate's decision is serious and untenable interference with the exercise of the DPP's legitimate power and authority to decide who among his officers should conduct cases on behalf of the Republic. This, the applicant contends is an illegal and improper interference with matters outside the jurisdiction of the learned Magistrate hence the need for reversal. The learned trial magistrate's decision, it is contended, compromised its bounden duty to do speedy and substantial justice untrammeled by technicalities, especially of diversionary kind.

In opposing the revision, the respondents submitted that it is common knowledge that **Mr. Kiage** is a legal practitioner in the law firm of **Kiage & Co. Advocates** in which he is a Senior Partner. He is also a law lecturer in the Faculty of Law of the Catholic University as well as a part time lecturer at the Kenya School of Law. According to the respondents all other State Counsel at the Attorney General's Chambers or the Directorate of Public Prosecutions are in full time public service and do not hold other positions either in private practice or teaching appointments. Neither do they hold practicing certificates. However, it is submitted that **Mr. Kiage** is involved in all the foregoing and also earns Kshs. 500,000.00 per month. It is submitted that from the decision in the ***Kosgey Case***, **Mr. Kiage's** triple *persona* makes him entirely

different from any other person in the public service and it may be argued that he is obtaining public funds under false pretences. The High Court accordingly prohibited Mr. Kiage from continuing the prosecution in that case.

In the respondent's view, it is of vital importance that the person who purports to conduct a public prosecution has legal authority to do so. And want of that authority, it is submitted based on **Elirama & Another vs. Republic [2003] KLR 537**, would vitiate all the proceedings. The orders made by the trial Court, it is submitted do not debar Mr. Kiage from returning to the proceedings once he is properly appointed under section 85 of ***the Code***. According to the respondents, a perusal of both sections 362 and 364 of the Code reveals that for the sentence or order to be subject of revision the same should be a final adjudication rather than the day to day orders and directions which a trial court must exercise in the proper management of a case, which, in the respondents' view was what the trial court was engaged in. Relying on **Republic vs. Samuel Chepkonga High Court Criminal Appeal No. 1181 of 2005** and **David Njogu Gachanja vs. Republic [2006] eKLR**, it is submitted that revisional jurisdiction of the High Court should not be invoked so as to micro-manage the Lower Court's proceedings. On the authority of **Republic vs. Kumbwa Mohamed Seif & 2 Others Nairobi High Court Criminal Revision No. 36 of 2004**, it is submitted that section 362 of the Code cannot be applied to interlocutory rulings made before the final decision of the subordinate court, especially where the trial is still going on before the court.

In order not to subject the respondents to a trial which may have to be repeated afresh on the ground that the prosecutor was not validly appointed, the respondents urge the Court to decline the request for revision and direct that the hearing resumes.

The respondents submit that the appointment of Mr. Kiage made vide Gazette Notice issue No. 2554 dated 7th March 2007 expired on 14th February 2008. Since then there was no other gazette notice and the Public Service Commission cannot appoint Mr. Kiage to carry out duties under section 85 of ***the Code***. With respect to the alternative argument that **Mr. Kiage** is a Public Servant, it is submitted that the Local Agreement documents tendered specifically prohibit a public servant from engaging in any other gainful employment and given **Mr.Kiage's** triple *persona*, he cannot claim to be a public servant. According to the respondents it would be impossible to conclude the trial process in the subordinate court if every decision made is subjected to a revision application.

The applicant's supplementary submissions are assailed on the ground that they are self-serving statements from the bar without any evidentiary value and the Court is urged to ignore the same. It is the respondents' position that **Mr. Kiage** is the proprietor of the law firm since the concept of "dormant partner" is unknown to law. Since it is admitted that **Mr. Kiage** was also law lecturer at Catholic University in contravention of the prohibition in the Local Agreement documents, he has violated every tenet of the Local Agreement by the fact despite his belated resignation. **Mr. Kiage's** legal knowledge, it is submitted, is immaterial since the issue is whether he has been validly appointed to conduct public prosecution. According to the respondents the only valid appointment of **Mr. Kiage** is the one year term made by the Attorney General and published in the Kenya Gazette and not the other appointments communicated by the Solicitor General. According to the respondents the issues for determination in this revision are:

(a) Whether the revisionary jurisdiction donated to the High Court by sections 362 and 364 of the Criminal Procedure Code encompasses interlocutory decisions and/or directions.

(b) Whether Mr. Kiage is validly appointed to carry out public prosecutions.

(c) What orders should be made in this case.

In the respondent's view, the applicant cannot show a "sentence" or "order" envisaged by Section 362 of ***the Code*** which is to be the subject of revisionary jurisdiction. Similarly, in the respondents' view, no instrument has been shown under section 85 of ***the Code*** which authorizes **Mr. Kiage** to undertake public prosecutions. Since **Mr. Kiage** earns a salary way beyond comprehension by other public officers; has a

full-fledged law practice; was at material times a law lecturer at Catholic University as well as a part time law lecturer at the Kenya School of Law, he cannot equate himself with other State Counsel. Accordingly the Court is urged to speedily conclude the matter so that the objections raised in the trial court can be concluded.

I have considered the material before, the submissions of counsel as well as the authorities cited and this is the view I form of the matter.

Section 362 of the ***Criminal Procedure Code*** provides as follows:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

Section 367 of the Code, on the other hand, provides as hereunder:

When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.

It is the respondents' position that revisional jurisdiction is not exercisable in interlocutory proceedings. A strict reading of section 362 of the Code, however, does not expressly limit the High Court's revisional jurisdiction to final adjudication of the proceedings. The section talks of "any criminal proceedings". "Any criminal proceedings" in my view includes interlocutory proceedings. Suppose a subordinate court would be minded to make an absurd decision of commencing a criminal trial by directing the accused to give evidence before the prosecution, I do not see why the High Court cannot call the proceedings in question to satisfy itself as to the correctness, regularity or legality of such order. In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine ***the regularity of any proceedings of any such subordinate court*** as well. In this case there was a lengthy ruling delivered by the learned Trial Magistrate. From that ruling emanated an order barring **Mr. Kiage** from prosecuting the matter. Just like **Ochieng, J** in ***Livingstone Maina Ngare's Case (supra)***, I find that this court has the requisite jurisdiction to inquire into the findings and the orders by the learned trial magistrate, with a view to revising it, if the court should find in necessary to do so. Accordingly, I am with respect, not in agreement by the holding in ***Chepkonga's Case, Kumbwa Mohamed Seif's Case*** and ***David Njogu Gachanja's Case*** (Supra) that revisional jurisdiction cannot be invoked with regard to interlocutory rulings when the case is still ongoing. If the Legislature had intended that to be the position, in my respectful view, nothing would have been easier than for it to have expressly stated so. I am further reinforced by the provisions of section 364 of the Code which provides:

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may -

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

From the foregoing it is clear that the High Court cannot exercise revisional jurisdiction in an order of acquittal. It may however exercise the said jurisdiction in case of a conviction or ***in any other order***. Accordingly, I join **Ochieng, J** in ***Livingstone Maina Ngare's Case (supra)*** in holding that the High Court should exercise its jurisdiction if satisfied that any finding, sentence or order recorded or passed; or the regularity of any proceedings of any court subordinate to the High Court, did not meet the required standards of correctness, legality and propriety.

I therefore find and hold that this Court has jurisdiction to entertain the application for revision.

I, however, agree that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisional jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion. The revisional jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in **Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:**

"The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice…If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion…This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case".

On the merits, since, the learned trial magistrate found that the decision in ***Kosgey's Case*** did not bar **Mr. Kiage's** prosecution of the case before her and that the objection by the respondent on account of the said High Court Orders could not stand, a finding I am fully in agreement with, I do not wish to spend more time than necessary on the impact of the High Court decision on her ruling. Suffice to say that in granting leave and stay in an application for judicial review, the court's jurisdiction at that stage is limited to finding whether or not a *prima facie* case has been established. That finding, in my view, save for the matters directly in issue, cannot be said to be binding on the Court itself leave alone other Courts since the Court after hearing the main application may well find that the case is not merited after all. See **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8.**

An issue has been raised with respect to the propriety of the learned trial magistrate's *suo moto* inquiry into **Mr. Kiage's** mandate in the conduct of the prosecution before her. I do not agree with **Mr. Kiage** that by so doing, the learned trial magistrate was unduly interfering with the exercise of the DPP's legitimate power and authority to decide who among his officers should conduct cases on behalf of the Republic. The Court in my view is perfectly entitled when properly moved to make a preliminary finding on the issue whether or not the person before it is properly authorized to present a case before it. To do so when not legally authorized would, in my respectful view, amount to an abuse of the process of the Court and all Courts are enjoined to take necessary measures to prevent abuse of their process. However, it is clear that the issue was not the basis upon which the objection was raised by the respondents. This is clearly manifest from the order in which the proceedings were conducted before the learned trial magistrate. It is clear that the issue was raised by the court itself and the burden of proving whether or not he was mandated to carry out the prosecution was cast upon **Mr. Kiage**. In my view the Court should not have taken it upon itself to inquire into the issue when the same was not the subject of the objection before it. Had it not been for the fact that the parties were accorded adequate opportunity of canvassing

the issue I would have had no difficulty in reversing the decision of the trial magistrate on the issue. Section 382 of the Code, however provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. In this case it is my view and I so hold that the raising of the said issue by the Court has not occasioned a failure of justice since the issue was thoroughly canvassed before the trial court.

There was a substantial amount of submission directed at the so called triple persona of **Mr. Kiage**. Without delving into the matter in details, it is my view that the mere fact that **Mr. Kiage** may have breached the terms of his engagement with the DPP or the Public Service Commission would not necessarily render his participation in the prosecution irregular. That is a matter solely between the employer and the employee and cannot in my view nullify the prosecution conducted by the said officer if duly appointed. In any case that was not the ground upon which the trial magistrate arrived at its decision. Its decision as far as I can detect was based on the fact that **Mr. Kiage's** appointment did not comply with the provisions of section 85 of the Code with respect to gazettment before administrative appointment. I will say no more on the issue of triple *persona*.

The appellant has also raised an issue with respect to the finding by the learned trial magistrate that the procedure under section 38 of Cap 2 does not give a choice to the person delegating the powers on the procedure to follow while delegating the powers and that the procedure is by nothing less than to publish the names of the person to whom the powers are delegated in the gazette. A close perusal of section 38 aforesaid clearly reveals that the learned trial magistrate's holding was with respect erroneous. Under section 38 of Cap 2 the delegation is to be by notice in the Gazette, to a person by name, or to the person for the time being holding an office specified in the notice. Accordingly, the delegation can either be to a person specifically mentioned by name or to a person holding a specified office without necessarily naming the person. To this extent the ruling of the learned magistrate is revised and the record amended accordingly.

That brings me to the thorny issue of the gazettement. First I wish to deal with the role of gazettement in executive appointments. My research has led me to only one case on the object of gazettement and it is the Tanzania Court of Appeal decision in **Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT)**, where it was held that the requirement that administration and remission orders made by the Minister under two statutory provisions (section 7(1) of the Customs Tariff Act of 1976 (Act 12 of 1976) and section 28(1) of the Sales Tax Act 1976 (Act 13 of 1976)), being administrative acts with no legislative effect whatever, be given publicity in the Gazette was no more than directory. The failure to comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim "ignorance of the law does not excuse" more rational, in view of the growing stream of delegated legislation.

In my view, unless the instrument in question expressly provides that an appointment thereunder is effective on gazettement, the gazettement is merely directive and the failure to gazette the appointment does not necessarily nullify the appointment. I also agree with **Mwilu, J's** decision in **Alice Muthoni Wahome vs. James Maina Kamau & Others Nairobi High Court Election Petition No. 20 of 2008** that where there is no requirement for gazettment, a reference in a gazette notice to an incorrect provision of the law under which a power is exercised does not invalidate the action.

In the present case section 85 of the Criminal Procedure Code provides as follows:

(1) The Attorney-General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

(2) The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case.

(3) Every public prosecutor shall be subject to the express directions of the Attorney-General.

The applicant's view is that **Mr. Kiage** having been procedurally appointed by the Public Service Commission was both an advocate of the High Court and a person employed in the public service and hence his appointment was under the provisions of section 85(2) and not section 85(1) hence no gazettement was necessary. The learned trial magistrate's view, on the other hand was that the provisions of section 85(2) cannot be divorced from the entire section 85 as the former is part of the latter. Assuming without deciding that the provisions of section 85 should be treated separately, it would follow that under section 85(2), the appointment of a Public Prosecutor thereunder would be for the purposes of a case. However, the applicant's submission is that **Mr. Kiage** was fully employed in the office of the DPP with the title of Deputy Director of Public Prosecutions with salary and identification particulars to boot. Accordingly, his appointment could only fall under section 85(1) aforesaid in which case his appointment is expressly stated to be by gazettment.

Having found that the Attorney General or the DPP as the case may be was perfectly entitled to delegate their powers to names officers or persons holding specific offices, it is my view that Legal Notice No. 104 dated 10th August 2011 was in order.

However, section 38 of Cap 2 does not deal with gazettement of appointments but only deal with delegation of duties. Appointment of public prosecutors is under section 85 of ***the Code*** and under subsection (1) of the section the appointment is by notice in the Gazette. From the record, the only gazette notice relating to the express appointment of **Mr. Kiage** was Gazette Notice No. 2154 dated 7th March 2007. According to that Notice the appointment was only for a period of one year with the result that that appointment lapsed on 14th February 2008. Without a further gazettment it is my view that the purported renewals of **Mr. Kiage's** appointment were irregular.

That leads me to the determination of the effect of such omission. My attention has been drawn to **Elirama & Another vs. Republic [2003] KLR 537.** I however, prefer to follow the decision of the Court of Appeal in the **Julius Kamau Mbugua v Republic [2010] eKLR** in which the Court cited with approval the decision of **Emukule, J** in **Republic vs. David Geoffrey Gitonga, Criminal Case No. 79 of 2006 (Meru) (unreported)**. In the latter case the learned Judge expressed himself as follows:

"I am aware that contrary opinions have been expressed by others in this court. I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly, the principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order, and indeed, nullity is non-curable. Secondly, 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 authority or court seized of the matter has no authority to do so. It is a public policy of all civilized States that offenders be subjected to due process in respect of defined offences, and by duly competent courts or tribunal…A trial will be a nullity where the offence is non-existent or there is lack of jurisdiction. To say otherwise would be against both public policy and the law. The court will not act against the law nor will it go against public policy".

In the above cases the Courts were dealing with serious allegations of breach of constitutional rights to fair hearing by reason of delay in bringing the accused to court contrary to the provisions of the law. In this case, the only issue taken is the omission by the authorities concerned to gazette the appointment of **Mr. Kiage**. It is not alleged that he was not qualified to prosecute. It is similarly not alleged that he was not authorized to prosecute. There is evidence that he had in the past been duly gazetted to carry out the said duties.

Looking at the larger picture, it is my considered view that it would be a travesty of justice to hold that all the actions taken by **Mr. Kiage** prior to the raising of the objection should be expunged. Whereas I find that there was an irregularity in his appointment the Court must weigh the consequences of nullifying his actions against the prejudice alleged. The only prejudice that the respondents stand to suffer is that they may be subjected to a second trial if it turns out that the trial was conducted by a person who was not legally empowered to do so. However, the irregularity in gazettement of Mr**. Kiage**, in my considered

view, though deplorable, is in the peculiar circumstances of this case curable under Article 159(2)(d) of the Constitution.

In the result whereas I do not agree that the learned trial magistrate's holding that "**Mr. Kiage** has no locus to henceforth appear before the court in the proceedings before the subordinate court unless appointed as stipulated under section 85 of the Criminal Procedure Code" was incorrect or unprocedural or illegal, I am not prepared to sustain the finding that the submissions which **Mr. Kiage** made in response to the Respondent's submissions in support of their objection to the extradition proceedings should be expunged from that record. In other words the irregularity was not, in my view, so grave as to justify the drastic step of expunging the said submissions and I so hold.

Accordingly, the record of the subordinate court is hereby directed to be corrected in accordance with the directions hereinabove.

I must finally express my gratitude to both counsel for their research, industry and brief but solid submissions as well as authorities.

Ruling read, signed and delivered in court this 8th day of August 2012.

G.V. ODUNGA
JUDGE

In the presence of:

Mr. Kiage for Applicant

Mr. Ngatia for Respondent