



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Revision 480 of 2007

ATTORNEY-GENERALAPPLICANT

- VERSUS -

IBRAHIM HUSSEINRESPONDENT

RULING ON REVISION

The respondent herein is yet to undergo the hearing of a case against him, this being *Criminal Case No. 23 of 2003* before the Subordinate Court.

The charge is in eight counts, as follows:

Count 1: Abuse of office contrary to s. 101(1) of the Penal

Code (Cap. 63, Law of Kenya);

Count 2: Abuse of office contrary to s. 101(1) of the Penal Code ;

Count 3: Abuse of office contrary to s. 101(1) of the Penal Code;

Count 4: Abuse of office contrary to s. 101(1) of the Penal Code;

Count 5: Abuse of office contrary to s. 101(1) of the Penal Code;

Count 5: Abuse of office contrary to s. 101(1) of the Penal Code;

Count 7: Abuse of office contrary to s. 101(1) of the Penal Code;

Count 8: Abuse of office contrary to s. 101(1) of the Penal Code.

Why has the trial on the eight counts not been conducted and concluded, some five years later? This is the question which brings the *revision* matter before the High Court.

The Attorney-General, by his letter of 23rd June, 2007, states that there is, resting in the High Court, a putative *constitutional reference* which was not proper in law, in its provenance, but is the reason for halting the criminal proceedings against the respondent.

At the early stages of hearing the said criminal case, the learned Senior Principal Magistrate, **Mrs. M.A. Odero**, allowed an application for adjournment on 17th June, 2003, for the purpose of giving the

Attorney-General an opportunity to serve documentation upon the defence counsel. The learned Magistrate directed on that occasion, that trial would proceed on 7th and 8th August, 2003, and the matter would be listed for mention on 17th July, 2003. On the date of mention, the learned Magistrate confirmed the trial for hearing as originally directed. But on the first scheduled hearing date, 7th August, 2003, counsel for the defence came up with a new application, which led to the hearing not taking place. Learned counsel **Mr. Maanzo** who held brief for learned counsel **Mr. Orengo**, said in Court: “We have filed a constitutional reference before the High Court and we have served the State; we seek a mention”. The learned Senior Principal Magistrate fixed the matter for mention on 9th September, 2003; and on that occasion **Mr. Orengo** stated in court: “We have filed the reference before the High Court. It is yet to be listed for hearing.” Over several months thereafter, the matter repeatedly came up for mention: on 3rd October, 2003; on 31st October, 2003; on 8th December, 2003; on 22nd January, 2004; on 23rd March, 2004. On 23rd March, 2004 counsel was not in Court; but the accused *in person* informed the Court: “My application before the High Court is for hearing on 11th and 12th May, [2004]. I ask for a mention date in June.” And the learned Chief Magistrate, **Mrs. Karanja** set 10th June, 2004 as the mention date.

On 10th June, 2004 the trial Magistrate, **Mrs. M.A. Odera** heard from learned counsel **Mr. Kilukumi**, for the accused, that “this case is listed for hearing before a Constitutional Bench, and dates have been given”; and she proceeded to order as follows:

“Hearing is adjourned pending the determination of the constitutional reference.”

This is precisely the order against which the Attorney-General is seeking the exercise of this Court’s revision jurisdiction, by virtue of s. 362 of the *Criminal Procedure Code* (Cap. 75, Laws of Kenya). The Attorney-General is asking this Court “to satisfy itself as to the correctness, legality or propriety of the said Order and, if it finds that the said order was issued without jurisdiction, to alter or reverse the said order.”

It is contended that the said Order was given *without jurisdiction* as the accused person had made *no application* to the Court pursuant to Rules 2 and 3 of the then operative *Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001* (Legal Notice No. 133 of 2001). It is contended further that the Subordinate Court in that case, although bound by *established precedents*, failed to adhere to the rule that as no constitutional reference had been made in accordance with prescribed procedure, there was no inhibition to the conduct of the criminal proceedings in hand. Consequently, it was contended, “the accused person was improperly granted a stay order [against the trial process].”

The Attorney-General urged that the indefinite pendency of trial was causing much prejudice to the State, because “the memory of the witnesses will be adversely affected by the passage of time, [and] there is increased risk of damage or loss to documents.” It was contended that in the prevailing circumstances, “vital evidence may be distorted, witnesses may fall ill, experience accidents or acts of God, that will adversely affect the trial.”

On the occasion of hearing this matter, the respondent was not represented even though documentation had been duly served upon the respondent, and directions for fixing hearing date had been given in the presence of counsel for both sides. On this question of representation, this Court, on 16th June, 2008 (the date of hearing) thus recorded:

“[M/s. Kilukumi & Co. Advocates] were duly served on Tuesday 13th May, 2008 at 12.30p.m. one Jackie of their office received service. They are not, however, in Court. Hearing is to proceed.”

Learned counsel, **Mr. Bryant** presented the Attorney-General’s case for a revision. He submitted that the respondent had, on 16th July, 2003 filed in the Subordinate Court a document which bore no title, and so its character under procedure prescribed by law, was unclear.

I have had the opportunity to see and to peruse the said 24-paragraph document set on seven close-typed pages; and it is the case, as counsel states, that it *does not describe* in a rubric the kind of motion it is, but its heading thus reads:

“Section 84(3) of the Constitution of Kenya and Rule 2 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001”

The said document then goes on to make assertions that may be summarized as follows: s. 77(1) of the Constitution has been contravened; the Anti-Corruption Court which is presiding over the criminal proceedings is not a court established by the Constitution; the charges preferred against the applicant do not fall under the anti-corruption law; the criminal proceedings are an abuse of process; the Constitution and s. 7 of the State Corporations Act (Cap. 446, Laws of Kenya) confer upon the President broad and absolute powers that undermine the authority and mandate of state corporations; the anti-Corruption and Economic Crimes Act, 2003 will affect and impact upon the criminal proceedings; the accused person's right to personal liberty under ss 70(a) and 72(1) of the Constitution have been, are being, and are likely to be contravened on account of confusion, disharmony and conflict in the law; the accused had acted on the direction of the President who had powers to give orders under the State Corporations Act; the criminal proceedings are “oppressive, harassing, vexatious, frivolous, scandalous and an abuse of the process of the Court”; the accused's rights and freedoms protected under s. 77(4) of the Constitution have been, are being, and are likely to be contravened; the accused's rights and freedoms protected under s. 77(8) of the Constitution have been, are being, and are likely to be contravened; the accused's rights and freedoms protected under s. 77(2) of the Constitution have been, are being, and are likely to be contravened; the National Hospital Insurance Fund Act (Cap. 255, Laws of Kenya) is inconsistent with the State Corporations Act; the accused's rights and freedoms, particularly the right to the secure protection of the law as provided in s. 77(1) of the Constitution have been, are being, and are likely to be contravened; the accused has been treated by the Attorney-General in a discriminatory manner, contrary to s. 82(1) of the Constitution; the Anti-Corruption and Economic Crimes Act is unconstitutional; the criminal proceedings instituted against the accused are an abuse of the process of the Court; the High Court should terminate and prohibit the criminal proceedings brought against the accused.

If those be the pleadings, learned counsel submitted that they were accorded no place in the Subordinate Court proceedings of 17th July, 2003. Even when, thereafter, counsel for the accused informed the Subordinate Court that a question had been brought before the High Court, there was *no mention* of the pleadings aforesaid: see the proceedings of 7th August, 2003; 9th September, 2003; 31st October, 2003; 8th December, 2003; 22nd January, 2004; and 23rd March, 2004.

Counsel urged that there had not been any proper *application* formal or informal, by the accused, to have the complaints referred to the High Court for determination. In this regard, it was urged, there had been no attempt by the accused to comply with the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 (Legal Notice No. 133 of 2001).

As already noted, the application for revision has been made because of the Magistrate's Court orders of 10th June, 2004 – as orders made *ex mero motu* and without jurisdiction. Now learned counsel subsequently observed that in the *coram* record for 10th June, 2004 the State was not represented; and the accused's advocate, without any documentary basis at all, *merely represented* to the Court that “the matter was before a constitutional Bench, and dates had already been given.” There is no indication at all that there was an *application* before the learned Magistrate which she determined, and allowed a *reference* to be made to the High Court on constitutional questions; and therefore there was no compliance with *Rules 2 and 3* of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules. The said Rule 3 required that the Magistrate should allow an application for such reference *only if she was satisfied there was merit* in the application under Rule 2. the record, counsel urged, did not indicate that the learned Magistrate was satisfied with an application of merit, nor, indeed, that she *allowed* a reference to be made to the High Court. This rule (Rule 3) had as its mischief the frivolousness of attempts to avert intended Magistrates' Court hearings and to engage the time and attention of the High Court otherwise than for a proper purpose.

Counsel urged that as at June, 2008, the accused had *no application* pending before the *High Court*, just as there hadn't been before the *Subordinate Court*. Rule 8 of the said Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules provided that whenever a constitutional reference remained pending, all proceedings in the Subordinate Court would be stayed; and this rule had now been resorted to improperly to hold the trial proceedings pending for several years.

Counsel submitted that there had truly been *no constitutional reference pending*, and coming from the *Subordinate Court*; no such matter was ever argued before the Subordinate Court; and no reference arising from Rules 3 and 5 of the Constitution of Kenya (Fundamental rights and Freedoms of the Individual) Practice and Procedure Rules was ever brought before the High court; and consequently, there was no *legal basis* for staying the trial Court proceedings.

To buttress the foregoing submissions, counsel cited several pertinent case authorities. In ***William Kipruto Birir arap Chelsaw v. Republic*** (No. 1) Nbi High Ct. Misc Crim. Application No. 693 of 2003 a constitutional matter had been filed, by virtue of s. 84 of the Constitution, during the pendency of a criminal case. The State raised a preliminary objection, because the applicant had not raised the question before the Subordinate Court. ***Kubo, J*** in that case thus held:

“.....the burden of proving that the person arrested or detained has been brought before a Court as soon as is reasonably practicable rests upon the person alleging that the provisions of this subsection have been complied with. This is not the case with the applicant. He is an accused person in a criminal case in a Subordinate Court alleging contravention of his fundamental rights or freedoms under section 70 to 83 inclusive and his situation is covered by rule 2 of Legal Notice No. 133 of 2001. The rule imposes a mandatory requirement for him to apply informally to the presiding Magistrate during the pendency of the proceedings before that court to file a reference [in] the High Court to determine the question of the alleged violation.”

The objection was upheld, and the application dismissed.

In a second case, ***William Kipruto Birir arap Chelashaw v. Attorney-General & The Kenya Anti-Corruption Commission*** (No. 2), Nbi High Ct. Misc. Crim. Application No. 898 of 2003, the State contested the applicant's constitutional application on the grounds that it did not comply with Legal Notice no. 133 of 2001 (rules 3 and 7), in so far as *no questions were framed for determination by the High Court* – something which was to be done *in the Subordinate Court*. The three-Judge Bench thus stated:

“We have carefully scrutinized the proceedings before the Magistrate and in particular the record on 14th November, 2003 and 19th November, 2003; and we find...as a matter of fact that the applicant advocate did not informally or otherwise apply to the presiding Magistrate to file a reference [in] the High Court to determine the question.”

The Court went on to state thus:

“We therefore hold as a matter of fact that the applicant did not apply to the Magistrate for leave to file a reference to the High Court to determine the question of any alleged violation. His “Notice” dated 5th November, 2003 on record by itself does not amount to an application as envisaged by rule 2 and remains a still-born intention.”

Mr. Bryant submitted that such was precisely the position, in the instant case. And he urged that the learned Magistrate's orders of 10th June, 2004 be quashed, as they had been made without jurisdiction.

Following the order recorded by the learned Magistrate that:

“Hearing is adjourned pending the determination of the constitutional reference,”

on 10th June, 2004 the trial in progress halted *indefinitely*; for nearly five years since then, trial has not resumed; no action has taken place in any judicial forum to serve as reason for the said order.

The State urges that the said order by the learned Magistrate had *no basis in jurisdiction*, and that it has led to an *abuse of the process of the Court*, quite apart from leading to infringements of a legal position well established in judicial precedent.

Such an argument, in my opinion, must be upheld. On 10th June, 2004 there was *no proper application* before the Subordinate Court for the referral of any particular constitutional question to the High Court for determination; and consequently the Subordinate court *framed no questions*, as required by law, for determination by the High Court.

Although on 16th July, 2003 the respondent had a lengthy document placed before the Subordinate Court, as already noted, that document was nondescript in character, and thus lacked the *capacity to move that Court* to make any orders at all, in respect of a reference before the High Court; and there was, therefore, *no jurisdiction* to make the said orders of 10th June, 2004.

Not only was the said document before the Subordinate Court nondescript, it was an *omnibus pleading* that was in every respect characterized by prolixity. Such a document, insofar as it carries no specific and structured prayer depicting a *bona fide* grievance of a legal nature, was not a lawful basis for invoking the Court's jurisdiction, and was apt to *confuse* and to *distort* the proper exercise of the Court's authority. Such a document, I would hold, amounted to an abuse of the procedure and the jurisdiction of the Subordinate court.

I consequently hold that the said order of 10th June, 2004 was made *without jurisdiction*; and I hereby quash and vacate them, by virtue of the High Court's revision jurisdiction.

I direct that *Criminal Case No. 23 of 2003* shall be listed for mention, for the purpose of giving normal trial directions, before the trial Court on 16th February, 2009. For this purpose, service shall be effected upon counsel for the respondent.

Orders accordingly.

DATED and DELIVERED at Nairobi this 19th day of January, 2009.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Huka

For the Applicant: Mr. Bryant

For the Respondent: Absent