



REPUBLIC OF KENYA

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

Criminal Appeal 96 of 2005

REPUBLIC.....APPELLANT

-AND-

1. WILFRED ONYANGO NGANYI alias DADI.....1ST RESPONDENT

2. PATRICK AYISI INGOI.....2ND RESPONDENT

(An appeal from the Ruling of Senior Resident Magistrate Mrs. K. Mochache dated 21st February, 2005 in Miscellaneous Application No. 19 of 2004 at the Nairobi Law Courts)

JUDGEMENT

I. EXTRADITION PRELIMINARIES: RULING BY MAGISTRATE'S COURT WHICH LED TO AN APPEAL BY THE STATE

The origin of the instant appeal is in Miscellaneous Criminal Case No. 19 of 2004, in which an application by the appellant herein, had been made for a provisional warrant under s.13(1) of the Extradition (Contiguous and Foreign Countries) Act (Cap.76, Laws of Kenya).

The learned Magistrate refused the application for extradition of the respondents herein; and the vital part of her ruling thus reads:

“There can be no extradition unless fair trial is guaranteed. The question [which then arises] for determination...from the manner in which these proceedings have been conducted [is], will the subjects be guaranteed a fair trial? From the very onset, this case was investigated by a Tanzanian Police officer, A.C.P. Samali. No valid documents have been produced showing express permission for him to do so, and with the benefit of hindsight, and coupled with his behavior throughout the investigations and his demeanour before this Court during his testimony,...self-interest cannot be ruled out ...[The] onus was on the prosecution to show that the Tanzanian officers were in Kenya legally. [There is the issue on the international law principle of state sovereignty] that no State shall extend its jurisdiction to another State's territory...There was cold silence on the [applicant's] side, as regards this issue. The concern raised by defence counsel thus remains uncontroverted, and must be presumed to be truthful.

“The manner in which the matter has been conducted before this Court, and the demeanour of the witnesses, especially key witnesses who are likely to be witnesses at the main trial, including the Investigating Officer, A.C.P. Samali, Kathurima Mbogo and Magiri Mbaabu, [raises concern] on the issue of fair trial. Can the subject be guaranteed a fair trial, in the wake of blatant lies, and doctoring of evidence? I think not. It is my considered view, having gone through the evidence

before me, and having had the privilege to see the demeanour of these witnesses, that no fair trial will be guaranteed, and as such,...extradition [cannot] be ordered... I find it unsafe to order extradition of both subjects. I therefore order that, unless otherwise lawfully held in custody, the subjects are hereby forthwith discharged from imprisonment, under s.19 of [the Act].”

II. THE GROUNDS OF APPEAL

The foregoing ruling aggrieved the Attorney-General, who filed a petition of appeal citing the following grounds –

- (a) that the learned Magistrate misdirected herself in law, by taking the position of a *trial court*, when there was not trial in the application she was seized of, namely, *Miscellaneous Application No. 19 of 2004*;
- (b) that the learned Magistrate misdirected herself in law by failing to appreciate the proper *task of a Magistrate* before whom the extradition of a prisoner is sought;
- (c) that the learned Magistrate erred in law by misdirecting her mind as to the degree to which a Magistrate has to be “*satisfied*” before exercising his/her discretion not to order the return of a prisoner;
- (d) that the learned Magistrate failed to appreciate that the evidence adduced before her went far enough in *establishing a link*, a connecting factor, between the respondents and the offence which they will face at the trial;
- (e) that the learned Magistrate misdirected herself in law, by enquiring into the *merits of the charge to be preferred in Tanzania*, when she was not under duty to do so;
- (f) that the learned Magistrate misdirected herself in law when she *tried issues or attempted to try issues, when no hearing had taken place* in *Miscellaneous Application No. 19 of 2004*;
- (g) that the learned Magistrate misdirected herself in law by failing to appreciate and acknowledge that in Tanzania the respondents would receive a *fair trial*;
- (h) that the *discharge of the two respondents was illegal and improper*, in all the circumstances of the extradition proceedings in *Miscellaneous Application No. 19 of 2004*.

III. CANVASSING THE APPEAL

(i) *Background to the Extradition Proceedings*

Learned counsel **Mr. J.O. Oriri** and **Mr. Wandugi** represented the applicant and the respondent, respectively, in this matter.

Mr. Oriri set out by giving the background to the State’s prayer for extradition orders, by *Misc. Application No. 19 of 2004* which had been heard and determined in the Subordinate Court.

The respondents herein are suspects, in connection with a criminal offence committed in Tanzania. One of them, after discharge by the Subordinate Court aforesaid, ventured abroad and ended up under arrest in Tanzania, which had already sought his extradition, alongside the second respondent.

On 21st May, 2004, armed robbers had attacked the National Bank of Commerce at Moshi, in Tanzania. They threatened the bank’s employees with execution, and forced the manager and cashier to open up the vaults, at gun-point; they robbed the bank of large sums of money, in excess of Tshs.5 billion. Investigations began after this incident was reported to the Police at Moshi; and this led to arrests of certain Tanzanians (inside Tanzania) and certain Kenyans (the respondents herein) (inside Kenya). Then, in pursuit of the judicial process for those arrested, the Tanzanian Government made a request for the

extradition of the respondents herein.

The extradition process in Kenya is regulated by law; and the State Law Office sought to comply with the Extradition (Contiguous and Foreign Countries) Act (Cap.76, Laws of Kenya), in dealing with the Tanzanian request. The relevant provision is s.13 of that Act, which stipulates:

“(1) Notwithstanding that a warrant for the arrest of any person issued in a country to which this Part applies may not yet have been endorsed in pursuance of this Part, a magistrate may issue a provisional warrant for the arrest of such person on such information and under such circumstances as would, in his opinion, justify the issue of a warrant if the offence of which that person is accused were an offence punishable by the law of Kenya and had been committed within his jurisdiction; and such warrant may be endorsed in the manner provided for in the Criminal Procedure Code, and may be executed accordingly.”

In the terms of the foregoing provision, the Chief Magistrate’s Court issued a *provisional warrant*; and subsequently, the original warrant of arrest, duly endorsed by a Magistrate at Moshi, was brought forth, and produced before a Court in Kenya. On that basis, extradition proceedings then took place, within the framework of *Miscellaneous Application No. 19 of 2004* at the Nairobi Law Courts.

(ii) Errors of Law attributed to the Magistrate’s Court

Mr. Oriri urged that the learned Magistrate deviated from the path of the law, by regarding herself as a *trial Court* determining the substantive criminal matter on merits; and that such conduct was in departure from the terms of s.14 of the Act. S.14 of the Extradition (Contiguous and Foreign Countries) Act, thus provides:

“(1) Subject to section 16 [which relates to restrictions to the surrender of a fugitive criminal], where a person arrested under a warrant endorsed in accordance with section 12, or a provisional warrant issued under section 13, is brought before a magistrate and, in the case of a person arrested under a provisional warrant, the original warrant has been produced and endorsed, the magistrate may, if he is satisfied –

(a) that the warrant is duly authenticated as directed by this Act and was issued by a person having lawful authority to issue the same; and

(b) by evidence on oath, that the prisoner is the person named or otherwise described in the warrant,

order the prisoner to be returned to the country in which the original warrant was issued, and for that purpose to be delivered into the custody of the persons to whom the warrant is directed or any one or more of them and to be held in custody and conveyed into that country.”

Mr. Oriri submitted that the Magistrate’s role, under s.14(1) of the Act, is concerned primarily with the authentication of the relevant documentation, and with *formal matters*. The formal role, in this regard, of the Magistrate, counsel urged, is as described in s.7 of the same Act, which bears the marginal note: “Hearing of case and evidence”; that section stipulates:

“(1) When a fugitive criminal is brought before a magistrate, the magistrate shall hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, as in a trial before a subordinate court.

“(2) The magistrate shall receive any evidence which may be tendered to show that the case is one to which the relevant provisions of section 16 apply or that the crime of which the prisoner is accused is not an extradition crime.”

To clarify the role of the Magistrate further, learned counsel invoked the authority of a Court of appeal

decision, ***Torroha Mohamed Torroha v. Republic***, Crim. App. No. 163 of 1988. The facts of that case are, in many respects, similar to those in the instant matter. The High Court had allowed an appeal by the State, from a decision of the Chief Magistrate discharging and setting free a Tanzanian national who had been a subject of proceedings under s.14 of the *Extradition (Contiguous and Foreign Countries) Act* (Cap.76).

In the appeal then lodged against the State, the two grounds were that the High Court had misdirected itself on onus of proof, and on the question whether *prima facie* evidence of the commission of the relevant offence, had been necessary. The appellant had contended there was no evidence to connect him with the offences allegedly committed in Tanzania.

Relevant portions of the Court of Appeal decision, which bear a relation to the instant matter, may be set out here:

(i) “Before exercising his discretion to order the return of the prisoner, the Magistrate should peruse the entire evidence, and understand it, without taking the position of a trial Court. So, the degree to which the Magistrate has to be ‘satisfied’ is not expected to be as high as if any such satisfaction was derived from an analysis and evaluation of evidence adduced at a trial. The Magistrate is under no duty to [inquire] into the merits of the charges to be preferred. The Magistrate does not try or attempt to try any issue, because there is no hearing, *Kinga v. Republic* [1975] E.A. 155. If there is some evidence which discloses a connecting factor between the prisoner and the alleged offences the Magistrate should order the prisoner to be returned.”

(ii) “Mr. Owino Opiyo submitted that the first appellate Court had no business [reconsidering] the evidence and that it was bound by the view of the Magistrate that there was no evidence in support of the return of the prisoner. We have no hesitation in rejecting outright that argument. It is important to bear in mind that a first appellate Court acts the same way irrespective of the substance or other authority to the contrary.”

(iii) “In our view the evidence went far enough in establishing a link, a connecting factor, between the prisoner and the offences he will face at the trial. To our mind, one cogent reason why we think the High Court was right, is that there was communication between [the Tanzanian bank-employee in flight] and the appellant...In our judgement, the High Court directed itself correctly in every respect, and so this appeal fails and must be dismissed.”

Learned counsel urged that the learned Magistrate, in the instant matter, had paid no heed to the principle in the ***Torroha*** case which was indeed brought to her attention; and that she had erred in law, by *analyzing* the evidence, making thereupon findings of law and fact, and then reaching a conclusion – whereas there was no charge sheet brought before her. Counsel urged that the learned Magistrate had, in effect, entered the arena of the trial Court, and had in consequence, reached an unlawful ruling in which she discharged the respondent. The *details and the merits of the charge*, counsel submitted, fell exclusively within the purview of the trial Court; and the Magistrate’s obligation was only to determine if the persons before her were, indeed, the ones sought to be extradited to Tanzania; her duty was to ascertain if there was any *link* between the respondents and the offence; and whether the respondents were properly identified; and it was her duty to be satisfied that the trial sought to be conducted in Tanzania was *fair in character*, and that the grievance occasioning the request for extradition was *not political* in nature.

Learned counsel drew the Court’s attention to instances in which, he urged, the learned Magistrate “went overboard, analyzed the (substantive) evidence, and erred in law. To appreciate the basis of counsel’s concern, I here set out certain particular paragraphs from the ruling:

(i) “In relation to the first subject, *Wilfred Onyango Nganyi*, he was arrested on 8th....June, 2004 by PW7...and PW8...The two arresting officers testified that they arrested him in relation to a robbery in Tanzania.”

(ii) “*Patrick Ayisi Ingoi*, the 2nd subject herein was arrested on 8th July, 2004 at about 4.00 p.m. at his house in Jacaranda...In the evidence of PW11...and PW13 ...the information leading to the arrest was received from a business card...Through this particular card, PW13 had described how he traced the subject through his office at Rehema House to his house at Jacaranda, where they finally arrested him. Recoveries were made from his house and, together with the items recovered, he was escorted to Gigiri Police Station. It is the prosecution case that this business card was recovered from a suspect in Tanzania who named the person whose name appears therein as one of the robbers. With this information, coupled with the fact that a lot of money was recovered from the suspect’s house in different currencies under questionable circumstances.. the subject was suspected to have been involved in the robbery...”

(iii) “I have been ...urged by the prosecutor...not to make any findings on the contradictions in the testimony of the witnesses as this would amount to taking the position of a trial court. What I understand him to be saying is: ‘take the evidence as it is...Do not analyse the credibility of my witnesses.’ [I] cannot agree with the prosecution.”

Counsel urged that evidence of identification was a sufficient basis for the learned Magistrate to make extradition orders: PW5, a credit officer at the Tanzanian National Bank of Commerce had identified 2nd respondent at the *locus in quo*, and he attended an identification parade in Kenya; PW6, a customer at the same bank, had also identified 2nd respondent. Counsel urged that there, indeed, was a *link* of the respondents to the robbery which took place in Tanzania; there was evidence of *recovery* of some Kshs.170 million from the house of 2nd respondent; and following the robbery, 2nd respondent had *acquired property* in Kenya, in the form of land and motor vehicle. This evidence, counsel urged, was sufficient to establish a link between the respondents and the commission of the offence.

Mr. Oriri urged that the learned Magistrate had misdirected herself as to the degree of “satisfaction” she should have, before making orders for extradition. Since, by s.7 of the relevant Act, the Magistrate’s powers were to be “as near as possible” to those exercised in a normal trial, it was urged, she was not to apply the standards of proof associated with the production of evidence in normal trial. The Magistrate had ignored, counsel submitted, the evidence that established a *connection* between the respondents and the criminal offence in question.

Mr. Oriri urged that there was no basis for the Magistrate to hold that fair trial for the respondents in Tanzania, if they were extradited, was not possible; there was no evidence to support her stand. The offences for which extradition was sought, counsel urged, were punishable under the law in *both* Kenya and Tanzania, and so these were *extradition offences*.

Counsel submitted that the learned Magistrate, in discharging the respondents, thought there was no evidence that could lead to a conviction; but this was an error of law, as the question that, in this regard, preoccupied her had to abide determination *at the trial itself*, in Tanzania.

Learned counsel noted that the extradition proceedings were commenced by the State, on the basis of provisional warrants issued by the Chief Magistrate, under s.13 of the Extradition (Contiguous and Foreign Countries) Act; and thereafter, original warrants duly endorsed were received from Tanzania, the requesting country; and the proceedings were then conducted before a Senior Resident Magistrate. Counsel urged that the applicable procedures had been complied with; action was commenced under Part III of the Act, by virtue of which the Minister in charge of Home Affairs had duly gazetted a Reciprocal Backing of Warrants Notice (Legal Notice No.95/1966); the United Republic of Tanzania too, had made a similar gazette (Extradition (Republic of Kenya) Order, 1965) – and consequently the extradition process in the instant matter had been conducted in compliance with the governing law.

IV. CONTESTING THE APPEAL

(i) *Questions of Form*

Learned counsel **Mr. Wandugi** contended that the appeal herein was an abuse of Court process, was

incompetent, and should be struck out. When the appeal had been filed, the proceedings and the ruling constituting the record of appeal, were not in typescript – and hence, counsel urged, certified copies were not available.

Mr. Wandugi also submitted that the appeal was inconsistent with practice, because it was lodged against two respondents instead of one. Although counsel referred to no authority, he urged that an appeal against two respondents in the same matter, was an incompetent appeal.

Counsel submitted that the appeal was incompetent for another reason: warrants of arrest “had automatically lapsed, at the point when my clients were discharged by the Subordinate Court”, and the warrants of arrest in respect of Miscellaneous Application No. 19 of 2004 could no longer be the basis of arrest. Counsel submitted that extradition proceedings can only be moved by instruments provided for under the Extradition (Contiguous and Foreign Countries) Act (Cap.76), and, without those warrants being in force, any arrest of the subjects would be in vain.

Mr. Wandugi submitted that Tanzania’s request for extradition was invalid – because the first letter carrying the request had been unsigned, even though the Magistrate still gave the State an opportunity to proceed with the extradition case. Counsel contended that the State had been in error, in approaching the extradition question through Part III of the relevant Act – because the request from Tanzania fell within the terms of Part II of the said Act. He called in aid a decision of the Court of Appeal, **Tanga Mundeke D.K. alias Allas Bende alias Jean Claude alias Iboro Barodo v. Republic**, Crim. App. No. 94 of 1994, which he submitted held that the said Part II and Part III of the Act provided different regimes and could not be confounded. Counsel urged that Part III of the Act was not applicable, because orders made thereunder had not been laid before the National Assembly, and so the requested extradition which is the subject of this appeal, was incompetent; and consequently the learned Magistrate was right, when she discharged the respondents. Counsel invoked s.11(2) of the Act (Part III) which provided that: “Every order made under this section shall be laid before the National Assembly.”

Although counsel had at an earlier stage submitted that “extradition proceedings can only be moved by instruments provided for under the Extradition (Contiguous and Foreign Countries) Act (Cap.76)”, and although he had ‘contended that the State would have to choose between Part II and Part III of that Act (and in this regard he had relied on the **Mundeke** case), he later, in effect, took a radically different position, when he asserted:

“Cap.76 is not the applicable legislation. We believe Cap.77 [Extradition (Commonwealth Countries) Act] was the applicable legislation. The whole matter has been conducted in relation to Cap.76. No Court has ever resolved that question – not the Court of Appeal, not the High Court. The appellants argue that Cap.76 is the applicable law. If so, then gazettelement would have been unnecessary, for [the implementation of] specific provisions. My considered view is that Cap.76 is inapplicable; if it is, then [I will raise the question] of failure to lay L.N. 95 before the National Assembly; it was fatal.”

On the foregoing point, **Mr. Wandugi** submitted that the learned magistrate had rightly found the State’s case to be flawed. The following passage occurs in the Magistrate’s ruling:

“...[C]ounsel has taken this Court through the provisions of Part III of Cap.76. He contends that under s.11(1) of Cap.76, the [instrument] has to be [laid] before the National Assembly. In his view, the prosecutor failed to discharge this burden placed on him by law, and theeffect is that the Legal Notice has failed the test under Cap.76, and to that extent is null and void. That failure to comply with s.11\92) is fatal and incurable.....”

The learned Magistrate had upheld the respondent’s contentions on that point; in her words:

“On the issue whether [the] Legal Notice of 1996 was laid before the National Assembly, this Court has been urged to find that the same was not laid before the National Assembly...The defence counsel having made the allegation,...it was incumbent upon the prosecution to rebut the same. The prosecution...therefore has failed to discharge a burden imposed on it by law. It is beyond

peradventure that the law has been flouted in these proceedings...On the basis of this [finding], the requirements of s.14 of [the Extradition (Contiguous and Foreign Countries) Act (Cap.76)] have not been complied with, and I find it unsafe to order extradition.”

From the foregoing passage, it is apparent that the one factor that weighed most heavily in the mind of the learned Magistrate, when she refused the application for extradition orders, was the supposition that Legal Notice No. 95 of 1966, the Extradition (Application of Part III) (Tanzania and Uganda) Order made by virtue of the Extradition Act (Act No. 7 of 1966), upon which the State was relying in seeking extradition orders, *had not been laid before the National Assembly* after it was published.

Thus, even as I assess the merits of the main arguments for and against this appeal, I shall pay special attention to the law governing the laying of legal instruments before the National Assembly, before making my findings.

(ii) Respondents’ Substantive Case

Mr. Wandugi contended that there was no extradition treaty between Kenya and Tanzania, and that the State had sought extradition purely on the basis of an executive instrument, without any statutory foundation. Counsel also contested the applicability of the Extradition (Continuous and Foreign Countries) Act (Cap.76, Laws of Kenya) in the context of the instant matter; these are his words:

“[The Act] has a schedule, under which there is a list of countries with whom Kenya has an extradition treaty. The first country listed is Germany. The extraditable offences are listed. It is a complete list. Tanzania doesn’t appear. I urge that even as of today, there is no extradition law [as between] Kenya and Tanzania.”

Learned counsel then considered s.2(1) of the Extradition (Contiguous and Foreign Countries) Act, and submitted that the Chief Magistrate, who had dealt with certain formalities in the extradition matter, lacked jurisdiction. On this point, counsel relied on the Court of Appeal decision in **Tanga Mundeke**, Cr. App. No. 94 of 1994, in which it had been held that extradition proceedings held before a Senior Principal Magistrate, by virtue of s.14(1) of the Act (Cap.76), were a fatally flawed.” On that basis, on account of the appearance of the Chief Magistrate on certain occasions, in the instant matter, **Mr. Wandugi** submitted that the proceedings had become “a nullity” – “hence there was a basis for discharging the subject.”

Mr. Wandugi submitted that no *link* had been shown between the respondents and the alleged criminal incident in Tanzania; that the witnesses had told lies in Court; and that the learned Magistrate had rightly determined that there could be *no fair hearing* in the Tanzanian Courts.

V. REJOINDER ON SPECIFIC POINTS, BY THE APPLICANT

(i) Part II and Part III of the Extradition (Contiguous and Foreign Countries) Act (Cap.76)

Mr. Oiri submitted that the extradition proceedings had been conducted in accordance with the procedure defined in the said Act. The Attorney-General had moved under ss.12 and 13 of the Act – which are concerned with the reciprocal backing of warrants. Under the two sections, the Attorney-General had declared Part III of the Act to be applicable, and Legal Notice No. 95 of 1966 had been published, to give effect to that decision.

Counsel contested the argument adopted by the learned Magistrate, that there was any defect with Legal Notice No. 95 of 1966 – on the grounds that it was not *laid before the National Assembly* after it was published. This is on the basis that **Mr. Wandugi’s** contention on the point lacked validity: any party who alleges a fact, must prove it, and **Mr. Wandugi** had made a bare allegation without any proof. Counsel urged that “the laying [before the National Assembly] did, indeed, take place.”

(ii) Two Statutes – The Extradition (Contiguous and Foreign Countries) Act (Cap.76); and The

Extradition (Commonwealth Countries) Act (Cap.77)

Counsel submitted that there was a major distinction between the two enactments. Section 3 of Cap.77 empowers the Attorney-General to designate a country as a *Commonwealth Country*, and the term “Commonwealth Country” is not defined for all purposes. Indeed, Tanzania, for the limited purposes of s.3 of Cap.77, is not a Commonwealth Country. In a schedule to Cap.77, the Attorney-General has designated certain countries, for the purpose of extradition; and Tanzania, and indeed, even Kenya, is not one of those countries designated as belonging to “Commonwealth.”

Thus, the only statute currently governing extradition between Kenya and Tanzania is the *Extradition (Contiguous and Foreign Countries) Act (Cap.76, Laws of Kenya)*. Consequently, learned counsel urged, the State had in this instance, quite rightly proceeded under Part III of this statute (Cap.76).

(iii) *Mode of Filing Record of Appeal*

Learned counsel showed documentation indicating that the applicant had sought the Magistrate’s record of proceedings early, but this was not ready. A successful *request* was then made to the registry to lodge the appeal using hand-written records, pending preparation of the typescript, which was supplied later. Counsel urged that failure to lodge appeal with certified copies was not fatal to an appeal: “It is only a technical point which does not go to the root of the appeal.” Counsel submitted that no authority had been cited, showing such an omission to be fatal.

(iv) *Did the Arrest Warrants lapse, with the Discharge?*

Learned counsel stated that the appeal herein was an appeal against the discharge of the respondents by the learned Magistrate; and on that account, the warrants are still in force, and no new warrants are required. In the event the appeal succeeds, counsel urged, then the warrants of arrest shall remain in force.

(v) *Linkage of Respondents to Incident of Crime*

Mr. Oriri submitted that the evidence placed before the Magistrate’s Court, had gone far enough to link the respondents to the offence committed at Moshi, in Tanzania. Firstly there were persons at the *locus in quo* who identified the respondents; and secondly, a large amount of money had been recovered from the respondent’s house soon after the robbery incident.

(vi) *Contesting the Magistrate’s Findings*

Learned counsel submitted that the Magistrate’s court had gone far into the arena of the trial Court, contrary to law, coming to the conclusion that the respondent had not been identified at the *locus in quo*, in Tanzania. The governing legal principles on the scope of inquiry by a Magistrate, in extradition proceedings, had been defined by the Court of Appeal in the **Torroha** case (op.cit.), and, counsel urged, this precluded a partaking in the trial Court’s role, by the Magistrate.

(vii) *The Chief Magistrate’s Role, and the Question of Jurisdiction*

On the point raised by **Mr. Wandugi**, that the extradition proceedings became a nullity once the Chief Magistrate performed any role therein, **Mr. Oriri** urged the point that this issue was not raised as an objection, at the time a *different* Magistrate *heard* the extradition application, even though the respondents were represented by counsel.

Mr. Oriri submitted that, even though jurisdiction is always a highly important issue in any conduct of proceedings, the Chief Magistrate in question had *not* dealt with matters of merit; he only dealt with preliminary issues; and thereafter he assigned the matter to a Magistrate with jurisdiction, who heard the entire evidence, and delivered a ruling. In these circumstances, counsel urged that the part played by the Chief Magistrate could not render the proceedings a nullity.

(viii) Will there be Fair Trial in Tanzania?

Learned counsel urged that the offence in question is to be found in the law of both Kenya and Tanzania, and it is by no means a political-type offence. As between Kenya and Tanzania, and with regard to the principle of fair trial, counsel urged, reference should be made to the Court of Appeal's decision in **Torroha Mohamed Torroha v. Republic**, Crim. App. No. 163 of 1988. The words of the Court, in that case, may be quoted:

“Section 16 [of the Extradition (Contiguous and Foreign Countries) Act (Cap. 76, Laws of Kenya)] was complied with and in the entire circumstances of the case, we entertain no doubt whatsoever that in the neighbouring Republic of Tanzania, the appellant will receive a fair trial.”

(ix) Of Evidence, and Technicalities

Learned counsel, **Mr. Oriri** urged that “the technicalities raised do not go to the root of the appeal”; and “there was enough evidence to make orders for extradition.” He urged that the respondents be returned to Tanzania, to face trial in that country.

VI CONCLUDING ANALYSIS

(i) Preliminary Matters

The foregoing account has laid bare the paths of reasoning which should lead this Court to its final decision. The analytical structure defined by the headings, gives the order in which I will make my determinations; but I will begin with the issue of laying subsidiary legislation before the National Assembly, which is stated to be the reason the learned Magistrate refused to make orders of extradition.

(ii) The Requirement for Laying Executive Instruments before the National Assembly: Its Legal Import in Dispute Settlement

As learned counsel **Mr. Oriri** submitted, the respondent's counsel had made a bald statement, that Legal Notice No. 95 of 1966 which laid the basis for the State's application for extradition, had not been laid before the National Assembly as required by law. **Mr. Wandugi** had no proof of any sort that the “laying” procedure, in the history of the subsidiary legislation, had not taken place; but he wanted the State to prove that it did take place, failing which it must be presumed not to have taken place. It is on such a controversial proposition, largely, that the learned Magistrate rejected the application for extradition orders.

Such a contentious proposition, in my opinion, does not provide a foundation of law upon which the Magistrate could have acted, quite apart from the fact that her role, by the terms of the governing statute, was to *verify* certain matters, to ensure *regularity*, and to satisfy herself that there was *some evidence* connecting the respondents to the offence in question. I hold that the learned Magistrate misdirected herself, by anchoring her decision on a controversial point which was not the question placed before her to decide. Since Legal Notice No. 95 of 1966 had been duly published, and it was duly stated to have the backing of the relevant statute, the learned Magistrate should have proceeded on the basis of the maxim, *omnia praesumuntur rite et solemniter esse acta* – all acts are presumed to have been done rightly and regularly.

In a judicial review matter, in **Republic v. The Minister for Transport & Communications & Others, ex parte Gabriel Limion Kaurai**, Nairobi High Ct. Misc. Application No. 109 of 2004, I had the opportunity to give detailed consideration to the question of the laying of subsidiary legislation before the National Assembly, for the purpose of “negative sanction”, and I thus held:

“...I was not convinced that if ministerial instruments are not laid before the National Assembly they become utterly void. It is clear at the very least, that all things done under such rules will not become void, even if the National Assembly were to revoke the rules in question. General national practice is

a highly relevant consideration in such a matter. If it were to be found that routinely, the Executive rarely lays regulations before Parliament, and Parliament itself does not regularly call upon Ministers to comply with the requirement, so that large amounts of ministerial rule-making has gone on without Parliament raising a finger, then the Court would have to take judicial notice of that practice. Although in the present matter, there was no positive evidence that Legal Notice No. 161 of 2003 had been or had not been laid before the National Assembly, the appearances are that it was not laid. Yet much activity on the ground has taken place, during times when the National Assembly has indeed been in session; and yet the point has, apparently, never once been raised at that forum. I think the practical judicial attitude in such a situation is to look to fundamental issues only.”

In my opinion, the learned Magistrate in the instant matter did not look at the *fundamental issues* only; she, instead – with much respect – pursued a largely inconsequential point, and wrongly used it as her reason for rejecting the application for extradition which was placed before her.

The Governing Statutes

The scheme of the Extradition (Contiguous and Foreign Countries) Act, as contrasted with that of the Extradition (Commonwealth Countries) Act, was in my view, correctly explained by learned counsel *Mr. Oriri*, and I am in agreement with him that the State’s case for extradition was properly brought under the former.

I am not in agreement with the distinction sought to be drawn by *Mr. Wandugi* between Part II and Part III of the Extradition (Contiguous and Foreign Countries) Act (Cap.76), notwithstanding his endeavours to seek validity for the argument in the *Mundeke* case. On the facts of the instant matter, it is apparent to me that what counsel was drawing from the *Mundeke* case was largely *obiter dictum*; the statute, which bears the long title, “An Act to amend and consolidate the law relating to the extradition of criminals and for matters connected therewith and incidental thereto”, is to be taken to operate integrally, and to have but one core purpose. The attempt to make two parts of the Act mutually exclusive, therefore, is unlikely to serve any constructive purpose.

(iii) Mode of filing the Appeal

I have carefully considered the respondent’s challenge to the integrity of the appeal, on the ground that it was not filed with certified copies of proceedings. The record, however, was so substantial in length, this Court would take judicial notice that the preparation of a typescript was bound to take a long time. I would commend the applicant for acting promptly and with due diligence, to ensure that an appeal was lodged. Therefore any want of form in the appeal papers, cannot be held to nullify the appeal.

(iv) Arrest Warrants

I am in agreement with counsel for the appellant that, as the appeal was promptly lodged, thus expressing a trust that this Court would justly dispose of the matter, the warrants cannot be held to have lapsed, during the pendency of the appeal.

(v) Linkage of Respondents to Criminal Incident

From the full text of this judgement, it should emerge clearly that the mandate of the Magistrate during the extradition hearing, was to ascertain merely that a *prima facie* link existed between the respondents and the criminal incident; full ascertainment of that linkage belonged to the arena of *trial*, which would result in conviction or acquittal. From the record of the extradition proceedings, it could not be doubted that a certain number of witnesses had said they did see the respondents at the *locus in quo*. The veracity of those statements must await determination, after a full evaluation of all the evidence, before the trial Court. Similarly, the *demeanour of witnesses* must await determination by the trial Court.

From the record, it is also clear that large amounts of money were recovered from the 2nd respondent very soon after the criminal incident in question; and there was cause to suspect that the monies thus recovered were proceeds of the robbery which took place at Moshi in Tanzania. Whether or not that suspicion was based on truthful evidence, is a matter to be determined by the trial Court.

(vi) The Question of the Chief Magistrate's Jurisdiction in the Extradition Proceedings

Learned counsel *Mr. Wandugi* attributed nullity to the extradition proceedings, because the Chief Magistrate had given certain case-management directions in the matter, even though he conceded that the Magistrate who heard and disposed of the matter was possessed of jurisdiction.

I would not accept this argument. There is always a certain essential minimum administrative direction which conveys a cause to the table of the right judicial officer. That role could not, I think, be performed by anyone except the Chief Magistrate.

(vii) The Question of Fair Trial

The learned Magistrate declared that there would be no fair trial in the Tanzanian Courts – because the witnesses before her, whom she perceived as wrong-headed persons, would still be witnesses in those Courts. With respect, the learned Magistrate, on this point, misdirected herself. Trial and the dispensation of justice, in the first place, is the remit of the *Courts*, and not of *witnesses*. Such witnesses are themselves subject to Court procedures, and stand checked by the Court's exercise of the contempt jurisdiction, in a proper case; and at the very minimal level, the Court is bound to determine, during the hearing, which witnesses have told the truth, from those who may have lied.

The foregoing principle is buttressed by the fact that the Tanzanian Courts, sister-courts which for many years in the past, shared one appellate structure in the shape of the East African Court of Appeal, have always been guided by the principles of *common law* and *equity* which are the heritage of the common law countries, as well as by constitutional and legal principles associated with membership of the Commonwealth. I have no doubts in my mind that the trial procedures adopted in the Tanzanian Courts are in the same mould as those applicable in the Kenyan Courts.

I have considered all the objections raised by counsel for the respondent, and I find them not to match the fundamental argument of the applicant, in favour of setting aside the learned Magistrate's decision on the extradition application.

VII. ORDERS

- 1. *The applicant's appeal is hereby allowed.***
- 2. *The ruling of the Senior Resident Magistrate of 21st February, 2005 in Miscellaneous Application No. 19 of 2004 is set aside.***
- 3. *The arrest warrants originally issued against the respondents shall remain in force.***
- 4. *Each one of the respondents shall be extradited to the United Republic of Tanzania, to be tried in a criminal court, in***

accordance with the laws of that country.

DATED and DELIVERED at Nairobi this 17th day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Oriri

For the Respondents: Mr. Wandugi