



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

Petition 59 of 2007

IN THE MATTER OF: SECTION 77 AND 84(1) & 92) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS
AND FREEDOMS OF THE**

INDIVIDUAL UNDER SECTION 77 AND 84(1) & (2) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: RULES 11 & 12 & 15 OF KENYA (SUPERVISORY JURISDICTION
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)
HIGH COURT PRACTICE & PROCEDURE RULES 2006**

AND

IN THE MATTER OF: IMMIGRATION ACT CAP 172 LAWS OF KENYA

BETWEEN

HATAY ABDALLA..... 1ST PETITIONER

NURI AKASHA ABDALLA.....2ND PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL IMMIGRATION OFFICER2ND RESPONDENT

AND

STOJANOVIC MILAN.....1ST INTERESTED PARTY

JACKSON NG'ANG'A WAWERU.....2ND INTERESTED PARTY

RULING

The Chamber Summons dated 2nd February 2007 and filed on the same day seeks the orders the first one being the certification of urgency in order for the matter to be heard on a priority basis. The second prayer seeks the vacation declaration of nullity and/or the setting aside of a judgment delivered in the High Court Criminal case No. 153 f 2004 by my brother Mr Justice Ombija in which he acquitted the two interested parties. In the course of his submission the learned Counsel for the Applicant Dr Khaminwa gave indications that he was not pursuing this prayer. The third prayer seeks that the travel documents of the “IPs” in particular the passport should continue to be held in custody of the High Court pending the hearing and disposal of the Petition. And the fourth prayer seeks that the Principal Immigration Officer be ordered to ensure that the Interested Parties do not leave jurisdiction.

The Chamber Summons is based on a Petition of the same date which seeks almost similar declarations and orders as set out above.

I have considered the written submissions of Counsel including three oral submissions supporting or opposing the orders for interim relief.

The thrust of the application is that the judgment delivered by the High Court ought to be set aside because the lead Counsel for the IPs and the presiding judge in the criminal court had a teacher/student relationship during the period of the trial.

When the matter first came before me seeking interim relief the novelty of the application attracted my attention and for this reason I did grant timed interim orders to enable the parties to argue the application interpartes. When the matter came for hearing interpartes I directed that the matter proceeds on a priority basis because of the following:

- (1) Interim orders could affect the liberty of Interested Parties who had been acquitted by a competent court under our law
- (2) I recognized that there was an immediate issue of standing or loci standi
- (3) I further recognised that there is a serious issue of jurisdiction because the trial court and this court have concurrent jurisdiction
- (4) I was also not oblivious to the fact that there was also a serious jurisprudential issue raised by the proceedings which could not be wished away in a summary manner
- (5) It was also clear to the court that the Attorney General needed to be given an opportunity to consider his position in view of his special duties concerning appeal or review under s 77(5) of the Constitution.

Having considered the arguments and the authorities cited I have deliberately opted to say very little so as not to prejudice the hearing of the Petition. I shall therefore only confine myself to the merits or the demerits of granting the interim orders sought – strictly on a prima facie basis.

My tentative finding on the issue of standing is that under the current structure of our Constitution and the practice of criminal law in this country the parties in criminal cases are the state and the accused persons except where there is a private prosecution. And there is no such private prosecution here. Since the heart of the Petitioners case is that s 77 of the constitution has been contravened or is being contravened they would like this court to invoke the now recognized original jurisdiction of the Court under s 84(1) and (2) of the Constitution. The petitioners allege that in the light of their discovery of the student/teacher relationship they were not accorded an independent and an impartial court as set out in s 77 of the constitution. The provisions of s 77 of the Constitution concerning an independent and impartial tribunal relate to accused persons. By implication the State is equally entitled to an independent and impartial tribunal. My tentative view is that the Petitioners who because of the bereavement have the courts sympathy have no standing because the right is clearly secured to the accused/Interested Parties

and only the Interested Parties can enforce this part of the constitutional provision. The Petitioners have therefore failed to demonstrate that they are covered by any of the provisions of s 70 to 77 of the Constitution. The Attorney General is of course perfectly entitled to have any the rights under s 77 enforced but up to now he has not expressed any view in this regard – and he has all the cards close to his chest. He has said nothing about the chances of an appeal or a review as contemplated by s 77 (5) of the Constitution.

Dr Khaminwa has strongly argued that the court's jurisdiction in securing the rights under s 84 is not limited especially in terms of the reliefs which can be designed by the court to serve fundamental rights but it is also equally true that unless the Petitioner can bring themselves under any of the provisions of s 70 – 83 the High Court would have no basis whatsoever to invoke the original jurisdiction. The original jurisdiction is only triggered off by the existence of an applicant with standing and a threatened or real violation or contravention of Chapter 5 rights and freedoms which the Petitioners have on a prima facie basis failed to demonstrate.

I have been urged to recognize the Petitioner as “victims” of a crime and being victims they are entitled under the International human rights law to ventilate their claim under Chapter 5, but the court's finding on this is that the court's first duty or fidelity is to the Constitution of the country and the second duty or fidelity is to the international human rights law where the Constitution is silent or vague. In this case the provisions of s 77 are as clear as the day and I cannot strain their meaning in order to prevent any new ground. If I dared do so I would not break any jurisdiction under the Kenyan law.

The court does however recognize the force and the persuasiveness of the learned Counsels arguments concerning the rights of victims of crime. Victims of crime have in past few years gained a position not hitherto given to them by the Municipal Criminal laws of many jurisdictions including Kenya. Thus the expanding international jurisdictions in this area recognizes their rights to right of hearing by prosecutors, Compassion, their right to damages, compensation and restitution. In addition the Covenants on civil and political rights and in particular Article 7 does demand that the States would in certain cases have responsibilities to the victims of crime. It is therefore still unsettled as to what the Petitioners' rights under international law could be as against the State in the situation before me but that is perhaps the realm of another court or courts on a different plane.

It is with the above in view that I am unable to give the reliefs as sought except one – namely the preservation of the court file until the Petition is heard. The passports are not covered by this order unless they are otherwise lawfully held in court. The reason for this is that a constitutional court when approached should not adopt an attitude of infallibility – it should always be jealous of its jurisdiction and in particular in preserving its jurisdiction. For this reason I grant this order only. The other reason is that the order does not prejudice any of the parties including that of the Interested Parties “the IPs” who are perfectly entitled to plead the plea of *autofoi* acquit all the way and whose liberty cannot prima facie be denied on the basis of the victim's case under the Constitution and in the light of the clear provisions of s 77 and s 84 – the right of an applicant under the sections except habeas corpus must be in relation to him and not to anybody else. Victims of crime are not prima facie covered by s 77 and s 70 of the Constitution.

I order that the file be preserved until the determination of the Petition but I disallow all the other prayers sought.

Having ruled as I have may I take this opportunity to emphasise on one point – state responsibility from the standpoint of international conventions which the country has ratified including the two Covenants on Civil and Political Rights and Economic Social and Cultural Rights all of 1966. Without in any way prejudging this matter the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Resolution No 40/34) defines victims as:

“persons who individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that are in violation of criminal laws operative within member states including

those laws prescribing criminal abuse of power.

It is therefore possible for the State to be held internationally culpable for inaction for instance by improperly invoking the law under the banner of equal protection of law guarantees to all persons. Any lapse by the Attorney General would in my tentative view fall under this provision and the fact that international jurisprudence has recognized victims of crime in the criminal jurisprudence.

All I am saying is that this is a novelty the courts have not come across and it will be interesting to watch what jurisprudential points emerge at the hearing of the Petition on merit. I am greatly indebted to counsel for this novelty.

I make the orders as above.

DATED and delivered at Nairobi this 14th day of February 2007.

J.G. NYAMU

JUDGE