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

Misc Appli 652 of 2005

IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF CERTIORARI

AND PROHIBITION

AND

IN THE MATTER OF: THE SURBODINATE COURT OF THE 1ST CLASS

MAGISTRATE AT CITY HALL NAIROBI IN CRIMINAL CASE NO. M867 (A) OF 2004

AND

IN THE MATTER OF: SECTION 119 AND 120 OF THE PUBLIC HEALTH

ACT CAP 242 OF THE LAWS OF KENYA AND

SECTIONS150,208,209,210,211,212,213,214,215,216 AND 217 OF THE CRIMINAL PROCEDURE CODE

CAP 75 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE SURBODINATE COURT OF THE 1ST CLASS MAGISTRATE

AT CITY HALL, NAIROBI ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

EX-PARTE

YOUGINDAR PALL SENNIK

C.G. RETREAT LIMITED

JUDGMENT

This is an application for judicial review. It is dated 17th May 2005 and seeks that an order for certiorari do issue to remove into the High |Court and quash the charge sheet dated 21st October 2004 and all proceedings and orders made in Criminal Case Number No M 867(A) of 2004 in the 1st Class Magistrate's Court at City Hall Nairobi. In addition the application seeks for an order of prohibition to issue directed to and prohibiting the First Class Magistrate at City Hall Nairobi from continuing with the prosecution of the said Criminal Case No M 867(A) of 2004 in its present form or in any intended variation thereof.

The facts are set out in the verifying affidavit of Mr Y.P. Sennik sworn on 6th May 2005 in support of the application for leave. The grounds upon which the application is grounded are set out in the Statement of Facts dated 6th May 2005.

The applicant further relies on skeleton submissions filed on 15th July 2005.

The 1st and 2nd respondent although served did not respond to the application.

The Interested Party relied on a replying affidavit sworn on 15th June 2005 by Mr G.CK Katsoleh who is the Assistant Town Clerk of the Interested Party. The Interested Party further relies on written skeleton submissions filed on 19th July 2005.

The material facts are as under:-

1) On 18th August 2004 the Public Health Officer from Nairobi City Council served a Notice upon the applicants under S 118 of the Public Health Act to rectify a nuisance within thirty 30 days failure to which the applicants and/or their employees would be liable to prosecution. The Notice is marked as Exhibit YPI in the Verifying Affidavit of the applicant sworn on 6th May 2005.

2) By a letter dated 12th October 2004 the applicants appealed to the Chief Health Officer of Nairobi City Council for an extension of six (6) months within which to comply fully with the Notice dated 18th August 2004. The letter is marked YP2 in the Verifying Affidavit.

3) By a letter dated 18th October 2004, the Chief Public Health Officer accepted the request and gave the applicants six (6) months within which to fully comply with the requirements of the Notice dated 18th August 2004. The letter is marked YP3(a)

4) The Applicants were charged in Criminal Case No M 867 (A) of 2004 vide a Charge Sheet dated 21st October 2004 with failure to comply with the Notice. The charge sheet is marked YP 4

5) On 12th November 2004 the Applicant appeared in court and a plea of not guilty was entered. While the plea was being taken the applicant produced before the trial Magistrate the letter of extension dated 18th October 2004 signed by the Chief Public Health Officer extending the time within which to comply with the Notice

6) Immediately after the plea the Magistrate called and heard evidence of five (5) witnesses which "witnesses" purported to give evidence on the validity of the letter of extension. Neither the applicant nor his counsel were given the opportunity to cross examine the said witnesses. Certified copies of the proceedings are marked YPS.

The applicant has raised the following objections

(a) The Notice given by the Chief Public Health Officer on 18th August 2004 is invalid. The charge is therefore invalid ab initio for want of notice as prescribed by section 119 of the Public Health Act Cap 242 of the Laws of Kenya.

(b) By summoning and taking the evidence of several witnesses who are not then the witnesses of the prosecution or the accused the trial magistrate abused the due process of conducting a criminal trial as laid down under sections 208 to 217 of the Criminal Procedure Code Cap 75 of the Laws of Kenya thereby occassioning a substantial miscarriage of justice against the applicant

(c) The trial Magistrate fundamentally breached the provisions of sections 150 and 208 of the Criminal Procedure Code Cap 75 by denying the applicant the statutory and inherent right to cross examine the witnesses who adduced evidence adverse to the Applicants defence

(d) On the basis of the unchallenged evidence of the said witnesses, the trial Magistrate has made crucial findings within the proceedings which have substantially prejudiced the Defence of the Applicants and thereby occasioned a miscarriage of justice in the said trial

(e) The entire proceedings are otherwise fundamentally flawed and are bound to result in serious prejudice and miscarriage of justice. The Applicants cannot have a fair trial

(f) The prosecution of the Applicants is premature unfounded, unwarranted and therefore illegal and a violation of the Applicants right to freedom. It is obvious from the proceedings that the Applicants are victims of interest conflict and Administration wrangles between the various officers in the department of Public Health at the Nairobi City Council.

The Interested Party's written submissions summarized the points made in opposition and include:-

i. That the court ought to take into account that the subject matter relates to a matter of public health and there is considerable public interest in such matters and the orders sought ought not to be lightly given. Reliance was placed on the holdings of Mulwa, J in the case of ***KURIA & OTHERS v THE ATTORNEY GENERAL 2002 KLR 69***

ii. That the orders sought can only be granted if there is an abuse of the court process

iii. That as the charge sheet is dated 21st October, 2004 and leave was sought on 6th May 2005, the six (6) months limitation period for

certiorari had expired and thus the application ought to fail as it offends S 9(3) of the Law Reform Act Cap 26 of the Laws of Kenya

iv. That an offence has been committed under S 19 and 119 which is punishable under S 120 ad 121 of the Public Health Act Cap 242 and as contained in the Statute Law (Miscellaneous Amendment Act (No 2 of 2002)) in respect of Public Health Act Cap 242 and Criminal Case No M 867(A) of 2004 is about the offence as defined in the sections

v. On 18th August 2004 a 30 days notice to abate the nuisance on plot 201/8319 Dunga Road Nairobi was issued and following default the criminal case was instituted and filed on 13th October, 2004 ad was duly instituted following the due process

vi. The proceedings before the Subordinate Court are proper, procedural bon fide and lawful and the application would not be prejudiced if they were finalised

vii. That it was necessary for the court on its own motion to call the (5) five witnesses to clarify the issue of the alleged extension of the notice. And that the prosecution did not request to cross examine the witnesses and finally that applicant could still recall the witnesses and that there was no final judgment as yet

viii. The notice having taken effect it could not be extended after the institution of the criminal case.

I have agonized over this court's role and whether there are any good grounds for this court to intervene especially taking into account the arguable points as raised above and the fact that apart from the entering of the plea of not guilty and the giving of evidence by the five (5) witnesses called on the motion of the court the prosecution has not opened their case and the defence have not offered any evidence.

To me the first great question is whether this court has jurisdiction to interfere at this stage of the trial and for what reason. Has the lower court committed an error of law that would invite this court's intervention? Is this court entitled to pronounce on the merits of the error of law or is it to be concerned with the process followed by the lower court?

The answers to the above questions are not easy to find. But there is some light in the landmark case of ***ANISMINIC LTD v FOREIGN COMPENSATION COMMISSIONS*** [1969] 2 AC 147 where Lord Diplock in ***O'REILY v MACKMAN [1983] 2 AC 237-(278 D_F)*** explained his understanding of ANISMINIC in these words:

"The breakthrough that the Anisminic case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them it must have asked itself the wrong question, one into which it was not empowered to inquire and so had no jurisdiction to determination. Its purported "determination" not being a "determination" within the meaning of the empowering legislation was accordingly a nullity."

In the case before me was the lower court entitled to call 5 witnesses some of whom gave evidence that appears to prejudicial to the defence of the applicant? It is quite evident that the applicant Mr Sennik clearly intended to use the letter of extension in his defence and the court decided to deal upfront with the effect of the letter (contrary to the relevant provisions of the Criminal Procedure Code) and went on to give a ruling on its validity. By failing to follow the correct procedure intended to achieve a fair hearing in criminal proceedings it seems to this court the process followed gave rise to the following:

i. Error of law or the applicable legal procedure in criminal cases

ii. The lower courts action and ruling interfered with the principle of the presumption of innocence which is one of the constitutional rights of an accused person upon being charged and which presumption persists after charging until the final judgment. Because the accused clearly intended to rely on the letter of extension to show that he was not guilty of any offence known to law the lower court clearly shifted burden of proof of the accused to him whereas that burden is always on the prosecution except where a written law provides otherwise on any particular facts.

iii. Having poisoned her mind so early in the proceedings by calling the court's own witnesses can her court be said to have been an impartial and independent tribunal as contemplated under S 77(1) of the Constitution or did she immediately drop this mantle when she made a decision to unprocedurally call the five (5) witnesses. And were the proceedings to be allowed to go on would her court be an independent and impartial court? Would the proceedings result in a fair trial? It would appear she did so drop the mantle and became openly partial or would fairly be seen to have unconsciously taken sides by a reasonable observer

iv. Was the lower courts intervention prejudicial to a fair trial and did this violate any other trial to judgment rights of the accused and what are they?

ARE THE PROCEEDINGS LIKELY TO RESULT IN A FAIR TRIAL

The court is of the view that the circumstances pertaining to this case demand a proper definition of what a fair trial is in law. Although the constitutional right to a fair trial is contained in S 77(1) and S 77(9) of the Kenya Constitution an elaboration of what it means on the ground is a necessity. At international level Kenya has ratified the International Covenant on Civil and Political Rights 1966 (ICCPR) and at regional level it is a signatory to the African Charter on Human and Peoples Rights (ACHPR). Articles 14 and 7 of the two international instruments respectively contain the ingredients or requirements on what a fair trial is, and I intend to touch on this in a summary manner due

to the importance of the topic.

Article 14(1) states

"... in the determination of any criminal charge against him or of his rights and obligations in a suit at law everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law."

Article 7 of the African Charter imposes a legal duty on state parties to provide competent or impartial court or tribunal. At the same time Article 26 of the African Charter requires state parties to guarantee the independence of the courts Article 60 of the Charter permits the African Commission on Human and Peoples Rights to draw inspiration from other international instruments and for this reason Article 14 of the ICCPR does apply to Charter parties.

Turning to the provision of Article 14 in the case of ***GRIDIN v RUSSIA FEDERATION*** (Communication No 770 of 1997 adopted on 20th March 2000 in UN doc GAOR, A/52/40 (vol ii) p 176 para 8.2 it was observed that Article 14(1) was violated because the trial court failed to control the hostile atmosphere there and pressure created by the public in the court room which made it impossible for the defence counsel to properly cross-examine the witnesses and present the authors defence.

In the case of ***COMMUNICATION NO 535 OF 1993 L*. RICHARDS v *JAMAICA*** **(**views adopted on 31st March 1997, in UN doc GAOR A/52/40 (vik ii) p 43 para 7.2, the right to a fair trial under Article 14(I) was violated where the prosecutor entered a nolle prosequi plea in a trial after the author pleaded guilty to manslaughter. The Human rights Committee found that, in the circumstances the purpose and effect of the nolle prosequi was to circumvent the consequences of the authors guilty plea, in that, rather than using it to discontinue the proceedings against the author, it enabled prosecutors to bring a fresh prosecution against the author immediately on exactly the same charge.

It is also important to look at the case of ***R v ADAN KEYNAN WEHLIYE Criminal Case No 223 of 2003*** where a constitutional court quashed a nolle proseque entered by the Attorney General after 11 witnesses out of a possible 40 witnesses had testified. The court held that the entry of the nolle proseque at that stage in order to recharge the accused with other accomplices was prejudicial to the trial rights of the accused.

To summarise, the rights to a fair trial from trial to final judgment include:-

1) The right to equality before the law

2) The right to presumption of innocence

3) The right to be tried by a competent, independent and impartial tribunal established by law

4) The right to a fair hearing

5) The right to equality of arms and adversarial proceedings

There is no doubt that the right to a fair trial can be violated in many ways unless the court remains focused on the need to keep the right in focus from the beginning of the trial to judgment.

The principle which must borne in mind is that the accused person must at all times be accorded a genuine possibility of

(a) Answering charges

(b) Challenging evidence

(c) Cross examining witnesses and doing so in a dignified situation

Any of the above infringements does seriously jeopardize the right to a fair trial and also the right to be presumed innocent

In the JAMAICAN case COMMUNICATION 307/1988 ***J. CAMPBELL V JAMAICA*** (VIEW ADOPTED ON 24 March 1933 in U.N. doc BAOR A/48/40 (vol II) p44 para 6.4 the right to equality of arms has been described as:

"an essential feature of a fair trial and it is an expression of the balance that must exist between the prosecution and the defence."

To illustrate the point in ***ACHPR, ADVOCATES SAN J FRONTIER (ON BEHALF OF GAETAN BWAMPANYE) v BURUNDI, COMMUNICATION NO 231/99*** decision adopted during the 28th Ordinary session 23 October – 6th November 2000 para 26-27, the Ngozi Court of Appeal in BURUNDI refused to accede to the accused person's plea for an adjournment of the proceedings in the absence of a lawyer, although it had earlier accepted an adjournment requested by the prosecutor, the African Commission concluded that the Court of Appeal had violated the right to equal treatment, one of the fundamental principles of a right to a fair trial.

Similarly the European Court has in the case of ***LOBO MACHADO v PORTUGAL EUR. COUNTHR of 20th February 1996 Report*** 1996 – 1 para 31 at p 206 has defined the similar right to adversarial proceedings in both criminal and civil proceedings to mean in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service with a view to influencing the courts decision.

Stated differently the right to equality of arms or the right to truly adversanal proceedings in civil and criminal matters forms an intrinsic part of the right to a fair hearing and means:

"that there must at all times be a fair balance between the prosecutor/plaintiff and the defence. At no stage of the proceedings must any party be placed at a disadvantage vis-à-vis his or her opponent."

This court has no doubt, using the above as a standard, the taking of evidence upfront by the court of the five (5) witnesses on the court's own motion without even giving the unrepresented accused an opportunity to cross examine them was a clear denial of the right to equality of arms. In addition it clearly prejudiced the accused's right to produce the letter of extension as part of this defence after the prosecution's case. The ruling on the validity of the letter of extension before the commencement of the case for the prosecution seriously eroded the impartiality of the court and placed unnecessary burden of proof on the defence, even if on the facts the court could have been right in taking the issue of the extension of the notice to abate nuisance, to have been an afterthought on the part of the accused.

The right to call, examine or have examined witnesses

Article 14 3(e) of ICCPR states that in the determination of any criminal charge against him, everyone shall be entitled

"to examine against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"

Again it is as clear as the light of day that the calling of the five witnesses without according the right to cross examine them was a violation of this right as well.

Although section 150 of Kenya Criminal Procedure Code gives power to the court at any stage of the trial to call any person as a witness in the rare cases where this becomes necessary both the prosecution and the defence must be given equal opportunity to cross-examine such witnesses. The lower court in this case did not do so and it is not even explained why the court had to resort to calling the witnesses. The court did not also bother to explain the accused rights. Whether on not there was a valid notice or a valid extension was in fact the heart of the case before the court. The procedure the lower court followed contravenes S 208 to 217 of the Criminal Procedure code. Such violation in turn must have caused prejudice to the conduct of the trial and also the defence and further lacks the important safeguards set out above which are aimed at achieving a fair trial. The witnesses having been called upfront concerning vital evidence for the defence i.e the letter extending the statutory notice regardless of whether it was valid or not has in the view of the court occasioned a serious miscarriage of justice even at that stage of the proceedings and such a trial should be stopped forthwith.

It is for the above reasons that the court does not consider it important to go into the other issues raised because the issues of the unfairness of the trial at the initial stage overshadowed everything else. For example whether or not the letter of extension was issued when the proceedings had commenced could only be properly addressed at the commencement of the case for the defence because even if it could be regarded as contempt of court the principles of contempt of court are not for satisfying the ego of the court but to protect, and maintain the good administration of justice. In addition arguments could have arisen as to whether the letter of extension would constitute a representation capable of being a legitimate expectation by the accused. This is a possible defence which was extinguished by the unprocedural conduct of the case by the lower court to the detriment of the accused. The milk is spilt and cannot be recovered. The other reason why it is not important to touch on the other issues raised is that S 107 of the Evidence Act of Kenya provides that whoever desires any court to give judgment as to any legal right or liability must prove that those facts exist. When a person is bound to prove the existence any fact it is said that the burden of proof lies on that person. It is only where a law provides to the contrary pursuant to S 109 of the Evidence Act can the burden be shifted. Contrary to popular belief Parliament can by law shift the burden of proxing particular facts and the shifting of the burden is not a constitutional issue where any such other law provides – see S 77(12)(a) of the Constitution.

THE RIGHT TO EQUALITY BEFORE THE LAW AND EQUAL PROTECTION OF THE LAW

Section 77 of the Constitution of Kenya states:

"If a person is charged with a criminal offence then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Subsection (2) of this section provides inter-alia for the right of the presumption of innocence to those charged and the section makes various provisions as to the secure protection of law.

It is important to note that there is no derogation whatsoever to S 77 of the Constitution concerning the secure protection of law even when the country is under emergency situation under S 83 of the Constitution.

On the six months limitation for certiorari I adopt the reasoning in the ***JUDICIAL COMMISSION INTO THE GOLDENBERG v HON*** MWALULU & OTHERS Misc Civil Application No. 1279 of 2004 and hold that this being a continuing trial the court has the jurisdiction to intervene.

Article 7 of the Universal Declaration of Human rights 1948 stipulates as under:-

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

Article 26 of the International Covenant on Civil and Political Rights 1966 is worded in almost identical terms with article 7 and provides an autonomous right of equality and prohibits discrimination in law or in fact by public authorities. Article 14(1) provides that all persons shall be equal before the courts and tribunals.

Obviously where a court starts off by calling its own witnesses whose evidence results in demolishing the defence as happened in this case even the principle of equality as set out in S 82 of the Constitution and the International Instruments described above are violated. The calling of such witnesses subverts the essentials of fair court proceedings. There is no room for a court of law to depart from the principles of equality as set out above. In the conduct of a case especially a criminal case such as the one under scrutiny equality means identical treatment of the prosecution and the defence throughout the trial. The derogation to the principles of equality is only allowed where differentiations are legitimate and hence lawful provided they pursue a legitimate aim and to deal with factual inequalities and are reasonable in the light of their legitimate aim and must also comply with the principles of legality proportionality and democratic practice. Obviously this type of derogation has no relevance whatsoever to the conduct of a criminal trial.

THE PRESUMPTION OF INNOCENCE AND RELATED MATTERS

So important is the right to a fair trial that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception. Thus Article 7 of the African Charter on Human and People's Rights does not allow derogation in respect of this right even in situations of public emergencies. In our case derogation is only allowed under S 83 and must comply strictly with the principles outlined above.

At some point in the advance proceedings the trial magistrate did express her intention or wish to refer the matter to the Town Clerk. Firstly a court of law should never ever transfer or threaten to transfer the exercise of its judicial function which is the sole duty of the court only. Secondly an invitation to other people or authorities outside the court to comment or assist in an ongoing court case or for that matter a contemplated criminal proceedings does compromise the impartiality and the independence of the court. Indeed any pronouncements by any such public authorities is highly irregular and prejudicial to a fair trial. Thirdly the very act of attacking the defence case in advance of the actual criminal proceedings as provided or laid down in the Criminal Procedure Code and more so without affording the accused the right to cross examine the witnesses who challenged his defence in advance does in a way interfere with an accused's right to presumption of innocence. To illustrate this point and the other one where the magistrate purported to want to refer the matter to the Town Clerk just because the public health officials were contradicting themselves concerning the validity of the notice on the first point I wish to refer to the Nigerian case of ***A C HPR, INTERNATIONAL PEN & OTHERS (ON BEHALF OF KEN SARO WIWA Jr AND CIVIL LIBERTIES ORGANISATION) v NIGERIA COMMUNICATION*** Nos 137/94, 139/94, 154/97 decision adopted on 31st October 1998 para 94-96 by the Africa Commission. The Commission held:

"That the right to be presumed innocent until proved guilty by a competent court or tribunal" under Article 7 1(b) of the African Charter on Human and People's Rights was violated in a case where a leading representatives of the Nigerian Government had pronounced the accused persons guilty of crimes during various press conferences as well as before the United Nations. The accused were subsequently all convicted and executed following a trial before a court that was not independent as required by article 26 of the Charter. The presumption of innocence will thus, be violated for example if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law and it is sufficient even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty.

And to illustrate the second point of the magistrate wanting or suggesting that she could refer the matter to the Town Clerk and also the unhappy Kenyan practice by public authorities and personalities including Parliament in commenting on live matters going on in court – it is important to warn that such pronouncements could infringe on the presumption of innocence. One illustration which comes to mind in the ruling on the point by the European Court on Human Rights in the case of ***ALLENDE BIBENOIT v FRANCE*** judgment of 10th February 1995 Series A No. 308 p 16 para 35 - In this case the applicant had just been arrested by the police, when a press conference was held implicating him in the murder of a French Member of Parliament. The press conference was attended by the French Minister for Internal affairs and Director of Paris Criminal Investigations Department among other personalities. The court held that the presumption of innocence was infringed not only by a judge or court but also by other public authorities.

While the African Charter decision does apply to us the European Court's decision is in my view extremely pursuasive and I would also prohibit the intended trial on these principles as well.

CONCLUSION

For the above reasons I hold that allowing the trial to proceed would be prejudicial to the defence, would be an unfair trial, could be illegal, unconstitutional and a clear violation of international instruments to which Kenya is a party. Indeed this is a case which has engaged this court to some considerable examination of the principles which could have been violated in terms of constitutional and International law although the courts intervention was only sought under its judicial review jurisdiction. The reason of the extensive review of the constitutional law on the point is that the case could also have been alternatively brought under the fundamental rights and freedoms Chapter 5 of the Constitution. The other reason is that in administering justice every court is a constitutional court because S 5 of our Judicature Act demands that we exercise our jurisdiction firstly in accordance with the Constitution and secondly in accordance with the written laws. The third reason is that anything touching on human rights does acquire a universal dimension because of the almost general application of the International instruments.

While the constitutional development in some of the States including Kenya has not brought the constitutional provisions in line with some of the International instruments and in particular the International Covenant on Civil and Political Rights (ICCPR) reference to them in this judgment is deliberate in that I consider that the Covenant as applicable to Kenya by virtue of it being part of the International customary law. Indeed, there cannot be any doubt that the wide usage and application of the Covenant by the state bodies and the monitoring body i.e. the Human Rights Committee of the United Nations clearly establishes the Covenant as international customary law.

In the case of Kenya the application of the African Charter as part (regional) customary law can best be illustrated by the case of ***ACHPR, JOHN D. OUKO v KENYA COMMUNICATION NO. 232/99*** decision adopted during the 28h Ordinary session 23rd October – 6th November 2000 para 30 where the Commission under the African Charter found the Kenya Government to have violated Article 10 of the Charter. The brief facts are that Mr Ouko was a student union leader in Kenya, a country he had to leave because of his political opinion after being arrested and detained for ten months without trial – the Kenya Government did not defend and the Commission concluded that the persecution of Mr Ouko and his flight abroad greatly jeopardized his chances of enjoying his right to freedom of association as guaranteed by Article 10 of the Charter.

Although the case is not on the requirements of a fair trial it illustrates that both the Human Rights Committee of the UN and the Commission being the respective monitoring bodies of the Covenant and the Charter respectively expect Kenya as a signatory party to adhere to the requirements of a fair trial under the Covenant and the Charter respectively as the country is further required to report as per the monitoring provisions.

The court has a responsibility to interpret the municipal law in a manner consistent with the International Instruments where the country is a party and more so where the Instruments constitute part of International customary law.

While in some cases seemingly guilty persons may agonizingly walk free at times due to unprocedural lapses which disregard the hearing to judgment rights of such accused persons, it is far more important for the court to acknowledge, uphold and highlight the pillars of a fair trial which are the only sure safeguards that the innocent are never ever condemned in unfair trials. It is a price which any fair and respectable justice system must always be prepared to pay because a fair trial does satisfy the greater or higher interest of the system.

This application has presented to the court a very strange coincidence of the same remedies which could have been issued under S 84 of the Constitution for infringement of fair hearing provisions of the Constitution and also under Judicial review in respect of what to me are horrendous serious statutory and procedural improprieties. The third option which could be invoked in appropriate circumstances is the supervisory jurisdiction of the High Court as per S 65(2) of the Constitution. It should be noted that the Hon. The Chief Justice has published rules to regulate this important jurisdiction which has remained dormant and unused for a long time. An application under S 62(2), and S 362 of the Criminal Procedure Code as read together with S 18 of the Magistrate's Court Act where appropriate could be used to check infringements as they occur so as to ensure that the subordinate courts are always on track in the enforcement of the rule of law.

I have no doubt in my mind that one of the greatest setbacks to any justice system is ignorance of the law or inaction of those charged with the responsibility of managing the system namely the practicing lawyers, magistrates, Law professors in the Universities and Judges. The challenge is that at least one of them must get up and blow the whistle in good time.

In the result I order the immediate removal of the charges and proceedings into this court and further order that an order of certiorari does issue and both the charge and the proceedings are hereby quashed. It is further ordered, the order of prohibition shall forthwith issue to prohibit any further proceedings in the criminal case as prayed.

In the circumstances the court makes no order as to costs.

DATED and delivered at Nairobi this 28th day of April 2006.

J.G. NYAMU

JUDGE