



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 1355 & 1356 of 1998

(From original conviction (s) and Sentence(s) in Criminal case No. 3007 of 1997 of the
 Resident Magistrate’s Court at Nairobi (A.N. Ongeri – (Mrs.) SRM.)

KIRAN SHAH.....APPELLANT
VERSUS
 REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1356 OF 1998

(From original conviction (s) and Sentence(s) in Criminal case No. 3007 of 1997 of the
 Resident Magistrate’s Court at Nairobi (A.N. Ongeri – (Mrs.) SRM.)

ANUPI FASHIONS LIMITED.....APPELLANT
VERSUS
 REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellants in these appeals are **KIRAN SHAH** and **ANUPI FASHIONS LIMITED**. I consolidated both appeals for ease.

The Appellants were the 1st and 2nd accused respectively in the lower court. They faced five counts of **GIVING A FALSE INDICATION AS TO PRICE TO GOODS** contrary to **Section 4(1) (b)** as read with **Section 18** and **Section 15** of the **Trade Descriptions Act Cap 505 Laws of Kenya**.

The offences were preferred against the 1st Appellant as Director and 2nd Appellant as a Limited Liability Company. The offences were alleged to have been committed on 24th November 1997 at about 2.00 p.m. The appeal arises out of a Ruling made by the learned trial magistrate **Mrs. A. N. ONGERI, Ag. SRM** then, dismissing an application by **Mr. Muigua** then advocates for the Appellants in the lower court, made under **Section 67** and **Section 82** of the **Constitution** to have the matter referred to a Constitutional Court.

The Appellant filed a memorandum of appeal, erroneously so called, citing six grounds of appeal. These are as follows: -

1. *The Learned Senior Resident Magistrate erred in law and in fact in failing to properly direct her mind to the provisions of Section 67(1) of the constitution as regards referral of a matter to the High Court for interpretation on a constitutional question and thus arrived at an incorrect and erroneous*

Ruling.

- 2. The Learned Senior Resident Magistrate erred in law and in fact to have misdirected herself and to have taken erroneous considerations into account and acted on wrong principles of law to the prejudice of the Appellant.***
- 3. The Learned Senior Resident Magistrate erred in Law in holding that the matter arose from a simple Criminal matter and that no substantial question of law was raised in the application.***
- 4. That Learned Senior Resident Magistrate erred in Law in finding that the Appellants application had no merits and proceeded to dismiss the same.***
- 5. The totality of the Learned Senior Resident Magistrate ruling shows that she was wrong in presetting her mind to a disposition favourable to the Respondent and unfavourable to the Appellant.***
- 6. The Learned Senior Resident Magistrate erred in law and in fact in deciding the application against the Weight of the submissions made.***

The Appellant seeks the following prayers in this appeal.

- (a) Ruling be set aside***
- (b) The appeal be allowed with costs and this Honourable Court be pleased to substitute the subordinate courts ruling with one of its own as prayed in the original application***
- (c) The costs of the appeal be provided for.***

Mr. Onindo argued the appeal on behalf of the Appellants. **Mrs. Gakobo**, State Counsel, appeared for the Respondent and opposed this appeal.

Mr. Onindo submitted that the appeal was against the lower courts ruling to an application made before it under **Section 67(1)** and **Section 82** of the Constitution to have the matter referred to the High Court for interpretation by a Constitutional Court. **Mr. Onindo** submitted that a party had a right to apply to the court for the matter to be referred to a Constitutional Court where the party felt that there was a question that needed interpretation by such court. Counsel submitted that **Section 67(1)** contemplated two situations; one where the court on its own motion referred the matter to the High Court where it felt there was a substantive question of law needing interpretation and two, where a party applied to court for reference and in the latter circumstance such court must refer the matter to the High Court.

The learned counsel for the Appellants submitted that the Appellant applied to the subordinate court to refer the matter for Constitutional reference and that the same was denied. Counsel submitted that the substantive question of law was whether the Appellants were being discriminated against by a person acting by virtue of written law as provided under **Section 4(1) (b) of Cap 505 Laws of Kenya**. That it was the said section of the law which made the Appellants feel that they were being discriminated against. Counsel submitted that the basis of such feeling was the fact that whereas other enterprises carrying out similar trade as the Appellants had also reduced their prices, those enterprises had not been charged. **Mr. Onindo** submitted that the learned trial magistrate misdirected herself and acted on wrong provisions of law and therefore acted to the prejudice of the Appellants against the Constitutional right.

Mr. Onindo submitted further that under **Section 82** of the Constitution, no person shall be treated in a discriminatory manner by a person acting by virtue of any written law. That by charging the Appellants, the Appellants contend, they were being discriminated against.

Mrs. Gakobo opposed the appeal. Counsel submitted that the court did not misdirect itself nor act on wrong principles when it dismissed the Appellants' application. Learned State Counsel submitted that the Court had to form an opinion that there was a question involving a matter of law needing interpretation by

the High Court before it could refer the matter to the High Court. Counsel submitted that the Appellants did not indicate to the lower court what question needed interpretation by the High Court.

Mrs. Gakobo drew the courts attention to the submissions by the prosecutor of the case before the lower court. Learned counsel urged this court to note that the lower court was asked to take Judicial Notice of the fact that the Appellants' competitors, Uchumi Supermarkets and KWAL had been charged for similar offences and therefore that the discrimination alleged by the Appellants did not arise or exit.

Mrs. Gakobo submitted that there was no discrimination against the Appellants and further that none arose when the duo was charged in the lower court. Counsel submitted that there was no question of law which needed to be interpreted. Counsel submitted finally that the appeal was only made in order to delay the trial before the lower court. The learned State Counsel urged this court to dismiss the appeal.

I will start with where **Mrs. Gakobo** ended. That the intention of the Appellants in filing this appeal was to delay the trial in the subordinate court. That seems to be the case judging by the length of time it took the Appellants to prosecute this appeal. The appeal was lodged on 16th November 1998 and admitted by Hon. Justice Osiemo on 24th November 1998. The Appellants seem to have gone to sleep until this year when on the courts' own initiative the appeal was set down for hearing. The learned counsel for the State seems to have a point because what happened is that having lodged the appeal, the hearing in the lower court stalled.

Going now to the merits of the appeal, the Appellants have submitted that the learned trial magistrate was wrong not to refer the matter to the High Court as a Constitutional Reference. The basis of their application for the Constitutional Reference made in the lower court was that the Appellants had been charged for violating certain sections of the **Trade Descriptions Act** whereas they were not the only ones who had committed such offence. Those cited in the submission of **Mr. Muigai**, a Counsel for the Appellants, as having similarly violated parts of the **Trade Descriptions Act** were Uchumi supermarket and KWAL. **Mr. Muigai** had alleged that unlike the Appellants, the two other enterprises had not been charged. In the circumstances, the Appellants cried fowl and asked the lower court to refer the case to a Constitutional Court for reference. In the submissions by **Mrs. Gakobo**, learned State Counsel observed that in the response by the lower courts prosecutor, an inspector with Weights and Measurers Department of Government, **Mr. Kamau**, he informed the court that Uchumi and KWAL both parastatals then, under the Ministry of Commerce had already been charged in court in Chief Magistrate's Court **Criminal Case No. 5677 of 1993** and Mombasa **Criminal Case No. 4192 of 1995** respectively. **Mr. Kamau** had submitted that both parastatals had been convicted and sentenced for similar offences. **Mrs. Gakobo** submitted that in the circumstances, since the discrimination alleged was based on a non existent fact, the learned trial magistrate was right to disallow the Application.

Section 67(1) of Constitution provides: -

“67(1) where a question as to the interpretation of this Constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involved a substantial question of law, the court may, and shall if a party to the proceedings so requests, refer the question to the High Court.”

The operative words here are subordinate court has to form an opinion that a question involving a substantial question of law exists before it can refer the matter to the High Court for interpretation. **Mr. Onindo** submitted that the subordinate court's discretion to refer or not refer a question of interpretation to the High Court is ousted by the provisions of **Section 67(1)**. That in fact is not the correct position. The discretion whether or not to refer a question to the High Court for interpretation is ousted only after two situations arise. These situations are conjunctive and not disjunctive and are: -

- 1. The court must itself form an opinion that a question needing interpretation in the High Court has arisen in the proceedings before court.**
- 2. A party before the court has applied for the matter needing such interpretation be referred to**

the High Court.

The subordinate court ceases to exercise any discretion in the matter only after and not before forming an opinion that there is a substantive question of law needing interpretation in the High Court. Where such an opinion has been formed, the subordinate court will have no option but to refer the matter to the High Court if any party before it applied to such court to do so. The reverse is also correct that if the subordinate court has not formed an opinion that there is a question which needs interpretation by the High Court, the court is not obligated to send the matter to the High Court even where a party has applied to the court to do so. The learned trial magistrate acted within her power to dismiss the application to send the matter for constitutional reference to the High Court having not formed the opinion that there was a need to do so. That is not to say that the party against whom the court declines to refer a case to the High Court for constitutional reference is left without redress if he feels such a question arose. Such a party can directly file a constitutional reference to the High Court on its own motion.

The other issue which arises is whether a question actually existed which needed interpretation in the High Court? In other words, did the learned trial magistrate err in dismissing the application?

Mr. Onindo did not attempt to demonstrate in what manner if any the learned trial magistrate erred neither were there any submissions made to the effect that the learned trial magistrate either misapplied the law or applied wrong principles of law or took erroneous or extraneous matters into consideration. This court cannot speculate what the wrong principles of law are or what law was misapplied or what extraneous matters were considered. The Appellants did not also demonstrate the manner or way in which the refusal by the learned trial magistrate to send the matter for a constitutional reference prejudiced them.

The only attempt the Appellants made was to claim that the learned trial magistrate had no option but to refer the matter to the High Court upon the Appellants applying to the court to do so under **Section 67(1)** of the Constitution. As I have already stated herein **Section 67(1)** does not oust the courts discretion in determining whether a substantive question of law has arisen needing interpretation by the High Court. The Appellants were misled to believe so.

It has been demonstrated both before me and before the court below that the basis of the Appellants' claim that they were being discriminated against in contravention of **Section 82** of the Constitution in fact arose out of a misconception that only the 2nd Appellant among the enterprises that had committed similar offences was charged. It was demonstrated before the court below before the court below that the Appellants were misled in their belief and that other companies had also been charged with similar offences at around the same time.

I do not think that even if it was shown that the Appellants were the only ones charged and that other enterprises in similar business had not, would justify an invocation of **Section 82** of the **Constitution** and a finding that there was discriminative action. That cannot be a correct position to take since the prosecuting agent would not have closed office and stopped working. To take such a position would amount to intimidation of government agencies from carrying out their duties at a comfortable pace without being hurried or harassed for the decisions they take. The Appellants were proved wrong in this case when it was proved that in fact the prosecution had taken similar action against other enterprises and that such other enterprises had in fact already been charged in court and punished for their action. Clearly the Appellants had not demonstrated that a question involving a substantive question of law as to the interpretation of the constitution had arisen both before the subordinate court and also before this court. The subordinate court's decision declining to refer the matter to the High Court was therefore correct. The Appellants appeal against the subordinate court's ruling has no merits and is dismissed in its entirety with costs to the Respondent.

Following this judgment the Republic through the Weights and Measurers Department of the Ministry of Commerce and Trade may consider whether or not to prosecute the Appellants for the offence charged before the lower court.

Dated at Nairobi this 18th day of October 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellants

Mr. Onindo for the Appellants

Mrs. Gakobo for State

CC: Tabitha

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LESIIT, J.

JUDGE