REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Misc Civ Appli 59 of 2002

REPUBLIC …… APPLICANT

VERSUS

THE ATTORNEY GENERAL …… RESPONDENT

AND

STEPHEN SIVU MITAU …… INTERESTED PARTY

R U L I N G

The Notice of Motion dated 18/4/02 is brought under Order 53 Rule 3 and 4 of the Civil Procedure Rules seeking orders of certiorari to quash the proceedings of the Principal Magistrate Kitui in Criminal Case 448/01 made on 12/3/01 and prohibit the said magistrate from proceeding with the hearing of the said case. Chamber Summons had been filed on 17/3/02 accompanied by statement of facts which contains the grounds upon which the application is based, and the relief sought. The relevant affidavits are filed including the proceedings of the lower court which are challenged.

The main ground upon which this application is brought is that the applicant is charged with the offence of Grievous harm before the Principal Magistrate's court. During the hearing of the case the magistrate accepted evidence of a purported reconciliation between the applicant and the complainant in the case to which the defence objected but the magistrate ruled that the evidence was admissible. The decision of the magistrate was made on 19/3/02 and the applicant's contends that it is irrelevant and inadmissible and the proceedings should be quashed and that the magistrate should be prohibited from continuing with the hearing of the case as it may prejudice the applicant. In his submissions counsel for the applicant went into great details as to the inadmissibility of the evidence on reconciliation, as such evidence does not go to show how the offence was committed, can lead to manufacture of evidence and that it was not a confession as by law provided and that no reconciliation was allowed under Section 234 of the Penal Code.

The application was opposed with grounds of objection being filed and an affidavit filed by the Interested Party Stephen Mitau. The Respondents argue that the application is anticipatory, offends provisions of Order 53 Rule 2 and 3 and was meant to delay the disposal of the Criminal case 448/01. It is argued that evidence on reconciliation was only meant to show the conduct of the applicant after the alleged offence but not prove that he was guilty and that the process of judicial review is improperly invoked as there are other suitable remedies available that the applicant should have sought.

Before going to the merits of the application, the Respondent raised the issue of nonservice of the application to the Respondents, all parties affected and interested party. I have perused the file and there are two Return of services filed in court on 13/7/02 and 11/2/03 in which the Attorney General, the

prosecutor Kitui and the court were allegedly served. The affidavit is vague, does not show which prosecutor was served, evidence of service and acknowledgement as deponed in the said affidavit. Even the interested party was never served. Apart from the Attorney General who has appeared, it seems all the other parties were not served and that offends provisions of Order 53 Rule 3. It means that these parties have not been properly represented in this matter as they are not aware of this matter. Had the Attorney General notified the court of this, the court would have adjourned the matter to have these parties served.

To consider the merits of the application, the court has to look at the scope of Judicial Review. The ***SUPREME COURT PRACTICE 1997 Vol. 53/1-14/6*** states:

"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.

It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judgments for that of the authority constituted by law to decide the matters in question."

An order of certiorari is issued by the court to quash a decision already made and it will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. Similarly, prohibition is a discretion remedy. What does it do and when does it issue. ***HALSBURYS' LAWS OF ENGLAND 4TH EDITION VOL 1 Page 37 Para 128*** states:

> ***"It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings thereon in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings."***

When these principles are applied to the present case, the magistrate obviously had the jurisdiction to hear the case. He was taking the evidence when the issue of admissibility of evidence arose. He made a ruling admitting evidence of a purported reconciliation between the applicant and the complainant. Judicial review will not lie to correct the course, practice or procedure of a subordinate court or a wrong decision on merits. It is my considered view the applicant is challenging the merits of the magistrate's decision to admit the said evidence. I further agree with the Respondent's counsel that the application is anticipatory in nature in that the applicant fears that the magistrate may base his final decision on that evidence and he would be prejudiced. He has not shown that there is no other evidence to be adduced in the case to lead to such a scenario. The application is premature. The right course for the applicant is to appeal if the magistrate reached a wrong decision in the end. On the other hand, if the applicant had wanted the matter dealt with expediently, an order of review should have been sought.

Of an Order of certiorari, Halsburys' Laws of England 4th Edition Vo. II Page 805 Paragraph 1508 states this:

> ***"Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing after another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one, must be exercised on the basis of evidence and sound principles."***

In the present case, though certiorari is not merited, I would like to state that even if it were the court's discretion to issue an order of certiorari, the circumstances of each case would dictate whether or not the order can issue. In the present case, the court would be hesitant to quash or issue a prohibitory order to the magistrate just because he had wrongly admitted particular evidence during the hearing of the case. Such orders would open a door to a multiplicity of applications of this nature and it would totally jam and stall the court process. I have read the case of ***SULHA SINGH BHOLAL versus CMC Nairobi*** which

decision I ascribe to. Like in that case, I find that the necessity for the orders sought must be shown and it has not been shown. For the reason that all the parties were not served and the orders are not merited, the application is dismissed and the applicant will bear costs of the application.

Dated at Machakos this 25th day of January 2005

R.V. WENDOH

JUDGE