



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC CIVIL APPL 1519 OF 2004

**IN THE MATTER OF THE PARLIAMENTARY SELECT COMMITTEE
INQUIRING INTO THE DISAPPEARANCE AND DEATH OF THE LATE
HONOURABLE DR. ROBERT OUKO EGH, MP.**

AND

**IN THE MATTER OF AN APPLICATION UNDER SECTION 84(1) OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA FOR THE ENFORCEMENT
OF FUNDAMENTAL RIGHTS AND FREEDOMS.**

AND

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA SECTION 60,
70, 72, 74, 75, 76, 77, 82 AND 84**

AND

GEORGE ODINGA ORARO.....APPLICANT

VERSUS

THE SPEAKER OF THE KENYA NATIONAL ASSEMBLY ..1ST RESPONDENT

THE PARLIAMENTARY SELECT COMMITTEE

INQUIRING INTO THE DISAPPEARANCE AND THE DEATH OF THE LATE

HON. DR. ROBERT OUKO, EGH, MP.....2ND RESPONDENT

HON. GOR SUNGUH.....3RD RESPONDENT

HON. OBURU ODINGA.....4TH RESPONDENT

HON. KIAMA KILONZO.....5TH RESPONDENT

HON. PAUL MUIITE.....	6TH RESPONDENT
HON. ABDULAHI ALI.....	7TH RESPONDENT
HON. RAPHAEL WANJALA.....	8TH RESPONDENT
HON. JOE KHAMISI.....	9TH RESPONDENT
HON. (PROFESSOR) CHRISTINE MANGO.....	10TH RESPONDENT
HON. SAMWEL MOROTO.....	11TH RESPONDENT
HON. AMINA ABDALLA.....	12TH RESPONDENT

.RULING

The Applicant filed an application in court on 18th May, 2005 seeking inter alia the following orders:-

(a) THAT this Honourable Court be pleased to issue an order of committal to prison of ERIC GOR SUNGUH who is the third Respondent herein, for such period as this Honourable court may determine for his disobedience of the order of the court granted on the 10th day of May, 2005.

(b) THAT, this Honourable court be pleased to issue an Order of Committal to prison of JOHN ORIRI ONYANGO who is counsel on record for all the respondents, for such period as this Honourable Court may determine for the disobedience of the Order of the court granted on the 10th day of May, 2005.

(c) THAT this Honourable Court be pleased to issue an order that the said JOHN ORIRI ONYANGO do pay a fine , for such quantum as this Honourable court may determine for breach of the undertaking he gave to this court on the 10th day of May 2005.

(d) THAT this Honourable court be pleased to issue any other order or relief as the court shall deem fit to grant in the circumstances of this case to protect the authority and dignity of this Honourable court.

..... “

The application was opposed by the Respondents and Mr. John Oriri Onyango. However the application for leave to file contempt proceedings was heard on 16th May 2005 and granted. The matter was fixed for hearing of the application for contempt on 7th July, 2005 and subsequently on 11th October 2005.

At the resumed hearing on 11th October, 2005, Mr. Ushwin Khanna, a counsel for the Respondents in the main application and also the third Respondent in the present Notice of Motion stood up to raise an important matter as instructed by his clients. Mr. Khanna referred to the “Daily Nation” of 15th September, 2005 in which was published a speech by the Honourable Chief Justice, Hon. Mr. Justice Gicheru which was presented to a Meeting of Judges. According to Mr. Khanna the said presentation was to the entire Judiciary and gave directions on matters of contempt of court. Mr. Khanna said that at the said meeting, the three Judges constituting the bench hearing this matter, Justices Nyamu, Ibrahim and Makhandia were present. He said that while the statements relating to contempt of court and how the judiciary should deal with it was long overdue, his clients took issue and were raising complaints in respect of p.33 of the “Daily Nation” where the Chief Justice was quoted as saying:-

“..... There are clear similarities between the facts in M. v. Home Office Supra and the recent position taken by the Speaker of the National Assembly in the matter of the Late Dr. Ouko Parliamentary Probe Report. While a suit was pending before the High Court a State Counsel gave an undertaking on behalf of parliament that it would not deliberate on the Report pending further hearing of the matter in court. The Speaker took the view that no express instructions were given to the State Counsel to give the undertaking on behalf of Parliament and proceeded to have the Report tabled, discussed and adopted by Parliament in breach of the undertaking

given to the court. This was a clear case of contempt of court by the speaker and Parliament as an institution of government.....”

Mr. Khanna submitted that the said Statement have compromised and prejudiced his clients’ case and position in the present proceedings. He said that it was with deep regret that such an opinion was given particularly when the present application for contempt of court was “sub judice”. He added that the significance and repercussions of the said statement and its publication were clear.

Mr. Khanna argued that his clients, the Respondents believe that they cannot get an impartial trial in respect of the application before the court and that the court ought to consider the gravity of the matter. Counsel asked the court to rule that a fair trial cannot be undertaken by this court and declare that the application for contempt of court against the named Respondents cannot obtain or receive a fair hearing. Mr. Khanna referred to Section 77 of the Constitution which enshrines provisions to secure the protection of the Law.

Section 77 (1) reads:-

“If a person is charged with a criminal offence, 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... “

Mr. Khanna said that contempt proceedings as that facing the Respondents are of a criminal nature although in this case they stem from civil proceedings and that once leave is granted to institute the same, this amounts to a charge of the offence of contempt of court. Further, he suggested that in view of the Chief Justice’s statement this court could not be expected to be an “impartial court”. He said that the matter was a sensitive one and goes to constitutionalism.

Counsel said that the court is a pillar of justice and must ensure fairness. While counsel had no doubt on the impartiality of the court itself, he said that it is the Respondents’ apprehensions which are of more importance. He said that the Statement complained of was made by no lesser than the Honourable Chief Justice and who enjoys high regard and his influence cannot be questioned. Finally he submitted that the test is the perception of the parties and the members of the public – that the Chief Justice has made a finding without giving a chance for the Respondents to be heard. Mr. Khanna urged the court to declare the proceedings a mistrial as proceeding with it would lead to unfair proceedings.

Mr. Ombwayo, Senior Principal State counsel who appeared for Mr. Oriri Onyango Deputy Chief State Counsel, one of the named Respondents in the contempt of court application supported Mr. Khanna’s application. He added that the Chief Justice was aware of the existence of these proceedings. That as a Judge of the High Court and the Head of the Judiciary, his comments were likely to influence the findings of the court. The Applicants, represented by Mr. Waweru Gatonye opposed the application and submissions by the Respondents for declaration of mistrial of the application and in effect termination thereof at this stage. He submitted, inter alia, that:-

- The Chief Justice cannot direct judges on how to deal with contempt proceedings. · It was a wrong assumption that the Chief Justice gave directions to the Judges. · The chief Justice was not involved in the present proceedings and his comments were made extra-judicially at a gathering of judges and they do not bind the three judges sitting in this matter at all.
- The court is seized of the matter and is capable of making an independent decision.
- The members of the Bench in this case did not make any comments themselves.
- The respondents would have an impartial trial. · The Applicant also has constitutional rights which should not be taken away just

because of comments by the Chief Justice who is not before the court or involved in the case.

- The court has jurisdiction to hear the matter and is competent to do so.
- There is no proof of prejudice to the Respondents.
- The Respondents will have a fair trial.
- Empanelling of the bench by the Chief Justice will not influence the decision of the present panel of Judges.

We have carefully considered the Application by the Respondent and the submissions by all Counsel in this matter. First and foremost, we think that it is pertinent to deal with the background to the Chief Justice 'making the statements complained of. Between 30th August and 3rd September, 2005 the Judges of the court of Appeal and the High Court attended this year's Judges' Colloquium at the Mount Kenya Safari Club, Nanyuki. This is an important annual meeting of Kenya Judges at which the Judges have an opportunity to meet, share their experiences, discuss the problems and challenges facing the Judiciary and the administration of justice in general and to make recommendations as to how to improve the delivery of judicial services to the people of Kenya and our country. At these meetings, selected members of the Judiciary and other resource persons would be called upon to deliver papers on various topics of interest and relevance to the Judges' meetings. Often the Colloquium is opened by the Chief Justice who also attends as a member of the Judiciary i.e as a Judge. At this year's gathering the Honourable chief Justice delivered a paper titled "Independence of the Judiciary, Accountability and Contempt of Court."

In normal proceedings in court Judges and magistrates presiding over or hearing the cases or applications do not participate in the proceedings as parties or witnesses. Accordingly, the said judicial officers are not expected or required to say anything in such capacities. They do not testify or make statements of fact as to their involvement in respect of the matters in dispute.

However, the present application by the Respondents is not a "normal" case or proceedings. It is unique and unusual. Since it is our perceptions understanding and reactions to the Honourable Chief Justice's statement or comments which are in question, it is necessary that we state and declare our respective positions with regard to the matters raised.

We do hereby, confirm that we, the three Judges constituting this bench attended the Nanyuki Judges Colloquium and were present when the chief Justice delivered his paper. We heard the chief Justice present his paper and received copies thereof. It is clear that the publication in the "Daily Nation" of 15th September, 2005 contained the entire contents of the said paper.

What is the relationship of the Chief Justice and other Judges of the High court of Kenya? Section 60 of the Constitution is the law that establishes the High Court. It reads, inter alia, as follows:-

"60 (1) There shall be a High Court which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdictions and powers as may be conferred on it by this constitution or any other law. (2) The judges of the High Court shall be the Chief Justice and such number, not being less than eleven, of the other judges (hereinafter referred to as Puisne Judges) as may be prescribed by Parliament.
 "

It is our view that the powers and jurisdiction of Judges of the High Court is conferred by the provisions of the Constitution, the Supreme Law of the Land. The Chief Justice is the head of the Judiciary as an arm of government and he holds this office purely for administrative, organizational and operational functions. The Chief Justice is both a Judge of the High Court and under Section 64(2) a Judge of the Court of Appeal. While sitting as a judicial officer in either of these courts, he is either a Judge of the High Court or a Judge of the Court of Appeal. For our purposes, the Chief Justice is a Judge of the High Court and is of equal jurisdiction, power and authority as any other High Court Judge. All Judges of the High Court enjoy equal ranking in terms of jurisdiction, powers and authority and they are required by law to perform their judicial functions independently and without fear or favour from all quarters including from

themselves. For instance, while the Chief Justice in his administrative functions and duties may empanel benches of more than one judge to hear certain cases e.g. Constitutional cases, which may require such empanelling and while he can direct at which station a judge will be based from time to time, his role stops there. He cannot in law direct any Judge of the High Court or Court of appeal as to how to decide cases being heard by the said Judge or in respect of any other matter where the Judge is carrying out his judicial functions. This is so, even where the Chief Justice is sitting as a member of a panel of judges in proceedings.

We have considered the application of the Respondents with great seriousness, gravity and humility. We wholly understand the Respondents apprehensions and fears which have been presented with Utmost respect, decorum and civility by Mr. Khanna. We have no doubt whatsoever that the application was made with all sincerity and bona fides.

We now deal with the crux of the application – did the Honourable Chief Justice by his statements in his paper in respect of the present case give any directions or make any suggestions to the Judges hearing the matter as to how to decide the matter before the court or deal with it? We were present when the Chief Justice read his paper and we have had the opportunity of reading the entire paper. The paper was a long and detailed one on the subjects of Independence of the Judiciary, accountability and contempt of court. We are of the view that at no time did the Chief Justice give any direction or suggestion to the Judges sitting in these proceedings as to how to determine these proceedings. It is necessary that one reads the entire paper and the context in which it was presented. We do not believe that the Chief Justice ever intended to influence the minds of the three Judges or give them any directions when he specifically mentioned the said case. On our part, we do not know exactly whether the Chief Justice was aware that any contempt proceedings had been instituted and was pending before us when he presented his paper. With all due respect, we wish to state that it was truly unfortunate that the Honourable Chief Justice made the comments or gave the opinion that he did regarding actions of the Speaker and parliament when the matter was “sub judice” and pending in court.

It is our duty to disclose and state that after the presentation of the said paper by the Chief Justice, the Honourable Justice Nyamu informed the gathering that the issue of the Dr. Ouko Parliamentary Probe Report was “sub judice” and no single person thereafter discussed or referred to the said matter though other areas of the paper were generally discussed as topical matters.

In view of the nature of this application, we wish to declare that it is our humble view that that the Chief Justice may have made the statements complained of due to inadvertence and/or ignorance of the possible existence of contempt proceedings in this matter. What we can say with conviction is that it is our experience and knowledge that the Honourable Chief Justice, Mr. Gicheru is not one to interfere with the work of other Judges or attempt to influence their decisions. With all sincerity, whatever one may think about the Chief Justice’s tenure to date, he has never on any one occasion spoken to, called or written to any one of the three Judges in this matter to discuss any pending matters with a view of obtaining a certain decision or influencing the outcome thereof. All communications are always purely administrative and in performance of his functions as Head of the Judiciary.

On our part as Judges of the High Court, we still stand by the Oath we took under Section 63 of the Constitution and we intend to continue doing so. We intend to discharge our duties as Judges and to hear and determine all cases in accordance with the Law and without any fear or favour and to uphold the Rule of Law and the Constitution of Kenya.

We have not been influenced by the statements, comments and/or opinions of the Honourable Chief Justice as published in his paper and the newspapers. We believe that we are capable of and shall hear and decide the application on its pure facts, merits and the applicable law. We believe that there was no attempt at any undue influence. Of greater importance, we were not and shall not be influenced by the said statements which we consider to be matters of personal opinion which in any event ought not have been made or published to anyone. That is why we said that the whole situation was wholly regrettable and unfortunate. To demonstrate that there was no inappropriate intention on the part of the Chief Justice, in his paper when discussing the Independence of the Judiciary he quoted and relied on the Bangalore

Principles of Judicial Conduct and United Nations Basic Principles of the Independence of the Judiciary. He said in his paper inter alia:- “..... At the micro-level, the Individual judges similarly have obligations under the Bangalore Principles of Judicial Conduct to uphold and express judicial independence in both its individual and institutional aspects. The application of the principle of judicial independence in relation to individual judges is as follows:-

1.1 A Judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect from any quarter or for any reason.

.....
.....

1.4 In performing judicial duties a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.....”

Through his paper, there can be no doubt that the Chief Justice cherishes the aforesaid principles and is desirous that all judges adhere to and apply them religiously. It is for these reasons, we believe that in Kenya we now have our own Judicial Service Code of Conduct and Ethics established under Section 5(1) of the Public Officer Ethics Act, 2003 with which every judicial officer is on appointment supplied and expected to observe co-extensively with his holding of judicial office. One needs to read the entire paper presented by the Chief Justice for one to appreciate the high standards of judicial independence and integrity that he expects from judicial officers and wishes for the Kenya judiciary.

We wish to assure the Respondents and the applicant in these proceedings that we intend to apply the aforesaid principles when considering the present application before us and in respect of the entire case.

The Applicant has presented his application before the court and it is partly heard now. It is an application for contempt of court. By its nature it is a very serious application with serious allegations and ordinarily must be heard on its merits. For the court to declare a mistrial in this case, there must be substantial material to prove actual misconduct or serious likelihood of bias, prejudice or misconduct. It is not like the usual cases of disqualification of a particular judge or judges for specific subjective reasons. In those cases, the Applicant has the opportunity of being heard and his matter determined by another judge or judges not tainted with the allegations of bias, Prejudice or misconduct. In this case, the entire body of High Court Judges with the exception of a few were present at Nanyuki. The rest are deemed to have read the paper subsequently or at the very least the Daily Newspapers. If there is a declaration of a mistrial, the Applicant has no opportunity of seeking to be heard by a judge who has not read the paper or the newspaper. In such circumstances, it would be a miscarriage of justice if the Applicant’s application is thrown out due to matters he had no control over and due to statements by a Judge who is not sitting on the bench hearing the matter. The Chief Justice is not one of the Judges in the present panel and the three Judges also had no control or involved in the making of the statement. As a result, we hold that there must be some concrete evidence of some bias, prejudice or misconduct for the court to declare a mistrial, otherwise, such a decision would equally violate the rights of the Applicant unfairly and the possible protection of a fair trial and the administration of justice could be at stake considering that it involves allegations of contempt of court.

According to Black’s Law Dictionary, 8th Edition, a MISTRIAL is defined as:-

“A trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during proceedings.”

In the present application there is no allegation of any procedural error. Is there any serious misconduct which has occurred during the proceedings? There are no allegations that there have been any serious misconduct during the proceedings in this case. There are no allegations that any of the 3 judges have acted improperly or are guilty of any misconduct. There are no allegations that anything untoward

happened within the proceedings. As stated earlier the allegations or complaints are against statements made by the Chief Justice outside the proceedings herein. We have already stated our position regarding this aspect.

In conclusion, it is probably apt to refer to the observations of Justice Nyamu in R-V The Chief Justice & others, Ex parte Lady Justice Nambuye, High court Misc. 764/2004 (unreported), at p.17 when he said:-

“Although the Chief Justice does occupy the pinnacle of the Judicial hierarchy in the administrative structure, as a Judge he is one among equals because the concept of independence of the Judges does encompass the principle that judges are independent of each other. In some cases a determination by the Chief Justice of Certain questions , and his liberty to ply into judges affairs would compromise that independence.”

Upon consideration of the facts and circumstances of this case we are of the view that there has been no interference, or undue influence as a result of the Chief Justice’s statement. It is plain that this was not intended. And on our part as the Judges hearing the matter there is no real or serious risk of any bias or prejudice or even likelihood thereof. Such possibility of influence if anything is remote.

We take this opportunity to give our sincere and firm assurance to the Respondents that the aforesaid statement by the Honourable Chief Justice shall not be of any consequence in our deliberations, and performance of our judicial functions as judges in this matter. We shall remain true to our Judicial Oath and ensure that the proceedings herein are conducted fairly and that all the rights of the parties are respected.

As a result of the foregoing, we hereby do dismiss the application for a declaration that the proceedings herein amount to a mistrial and for the termination of the application before us. There shall be no order as to costs.

Dated and delivered at Nairobi on this 27th day of October, 2005.

J.G. NYAMU

JUDGE

M. K. IBRAHIM

JUDGE

M. A. MAKHANDIA

JUDGE