



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MISC. APPLICATION NO. 954 OF 2003**

**IN THE MATTER OF: AN APPLICATION BY MUKESH**

**MANSUKHLAL VAYA AND SANJAY**

**KESHAVJI VAYA FOR LEAVE TO APPLY**

**FOR ORDERS OF CERTIORARI AND**

**PROHIBITION; AND**

**IN THE MATTER OF: CHIEF MAGISTRATE'S COURT AT NAIROBI**

**AND**

**IN THE MATTER OF: CHIEF MAGISTRATE'S CRIMINAL CASE**

**NO. 1800 OF 2003**

**BETWEEN**

**MUKESH MANSUKHLAL VAYA.....1ST APPLICANT**

**SANJAY KESHAVJI VAYA.....2ND APPLICANT**

**AND**

**THE ATTORNEY-GENERAL.....1ST RESPONDENT**

**THE CHIEF MAGISTRATE'S COURT – NAIROBI.....2ND RESPONDENT**

**JUDGMENT**

This was an application by Notice of Motion brought under order LIII rules 3(1), (2), (3), 4(1) of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap 21, Laws of Kenya), section 8 of the Law Reform Act (cap 26, Laws of Kenya) and all enabling rules made thereunder and enabling provisions of the law and the inherent jurisdiction of the Court. It was a judicial review application and its specific prayers were five, namely:

(i) that an order of *certiorari* should remove into court the Charge Sheet in the Chief Magistrate's Court

Criminal Case No 1800 of 2003, for the purpose of being quashed;

(ii) that an order of prohibition should issue to prohibit the first respondent (the Attorney-General), his servants, officers or appointees from prosecuting the applicants with reference to Safariland Club Ltd or any matter related to that subject;

(iii) that an order of prohibition should issue to prohibit the Attorney-General, his servants, officers or appointees from prosecuting or further prosecuting the said Criminal Case No 1800 of 2003 in its present form or in any other form;

(iv) that an order of prohibition should issue to prohibit the second respondent (the Chief Magistrate's Court) or any other subordinate court, from hearing or further hearing or determining the said Criminal Case No 1800 of 2003 in its present form or in any other form, with reference to Safariland Club Ltd.

(v) that an order of prohibition should issue to prohibit the second respondent or any other subordinate court from trying the applicants in the said Criminal Case No 1800 of 2003 or on the basis of the Charge Sheet dated 21st July, 2003 in its present form or in any other form.

This application which was filed on 3rd September, 2003 came in the wake of a chamber summons application for leave dated 26th August, 2003. The Chamber Summons application was heard *ex parte*, by the honourable Mr Justice Hayanga, on 28th August, 2003. The learned judge ordered that leave be granted to the applicants to apply for judicial review seeking the Orders as set out in the applicants' Statutory Statement filed in respect of Chief Magistrate's Criminal Case No 1800 of 2003 and the Charge Sheet dated and stamped 21st July, 2003. Factual assertions in support of the application were set out in the Statutory Statement and in the verifying affidavit of the second applicant, Sanjay Keshavji Vaya.

The Statutory Statement sets out the grounds upon which the reliefs are sought. In summary these grounds are as follows:

(i) the applicants had been arrested on 19th July, 2003 and charged with the offence of "obtaining credit by false pretences contrary to section 316 (a) of the Penal Code", and this charge appeared in the Charge Sheet dated 21st July, 2003 in Chief Magistrate's Court Criminal Case No 1800 of 2003;

(ii) the applicants were alleged to have, on 19th October, 1997, obtained from Trust Bank Ltd the sum of Shs 60 million, by falsely presenting Safariland Club Ltd as security;

(iii) the applicants were initially charged with obtaining money from Delphis Bank Ltd by false pretences contrary to section 313(3) of the Penal Code, on 19<sup>th</sup> October, 1997, but a different charge under section 316 of the Penal Code was later substituted;

(iv) the charge sheet in the said Criminal Case, No 1800 of 2003 relates to matters referable to a time when the applicants were neither shareholders nor directors of Safariland Club Ltd;

(v) the second applicant has never been a shareholder, director, employee or agent of Safariland Club Ltd.;

(vi) the first applicant had at one time been a shareholder of the Safariland Club Ltd, but he had, on 24th February, 1997 transferred his share and was no longer a member;

(vii) the arrest of the applicants had been effected by police officers attached to the Judicial Commission of

Inquiry into the Goldenberg Affair, and for the purpose of ensuring that they recorded statements pertaining to the enquires of that Commission;

(viii) it is asserted that there was an ulterior purpose to the arrest of the applicants, namely to pressure

them as part of a quest for objects not part of the administration of the criminal law;

(ix) when the applicants were arraigned in court, an advocate attached to the Judicial Commission Inquiry into the Goldenberg Affair appeared in court and sought leave to hold a watching brief notwithstanding the protests of counsel for the applicants;

(x) matters relating to Safariland Club Ltd were the subject of testimony by one Ketan Somaia, at the sitting of the Judicial Commission of Inquiry into the Goldenberg Affair;

(xi) the investigating officer dealing with the matters in the charge was attached to the Judicial Commission of Inquiry into the Goldenberg Affair;

(xii) the debt in respect of which the charges were brought, has since been repaid to the Bank which is the complainant in the criminal case and this would show that there was no theft, and the charge of the Safariland Club Ltd had been discharged on that account;

(xiii) it is asserted that the arrest, detention and charging of the applicants in the case No 1800 of 2003 tends to undermine the sanctity of the criminal justice system;

(xiv) it is asserted that, maintaining Criminal Case No 1800 of 2003 has the effect that the second respondent (must be the first respondent?) is abusing his prosecutorial powers as conferred upon him by the Constitution, and an abuse of the process of the Court is entailed.

This application was heard *inter partes* on 19th January, 2004. At the beginning, counsel for the respondents raised a preliminary objection on the ground that the greater part of the proceedings in the criminal case sought to be prohibited by the applicants, No 1800 of 2003, was already complete and it was desirable that the Chief Magistrate's Court be accorded a chance to complete the trial process and determine the matter on the merits. Counsel submitted that the trial court was properly seized of the matter and it would be inappropriate at this stage for an order of prohibition to issue. He stated that, to-date, the defence had fully participated in the trial and had, through their advocates, examined the prosecution witnesses and stated their case. He submitted that, in the light of the considerable amount of judicial time already taken up by the criminal trial, it would not be in the interests of justice that the case be terminated. Counsel for the applicants submitted that the present stage in the criminal trial in question had only been reached because progress in hearing the

Notice of Motion application has been delayed, and that as long as the proceedings remained pending, the court remained properly seized of the matter and could make judicial review orders as prayed.

My ruling on the, Preliminary Objection was that a just resolution of the matter required that the application be heard on the merits. I thus refused the objection and allowed Mr Kilonzo for the applicants to prosecute their application.

Counsel's main submission was that the Court should act to stop criminal proceedings by the State where, as in the present case, such proceedings are commenced for ulterior purposes but in the name of administration of criminal justice. All his other submissions turned around this central contention. This point, therefore, will be the critical factor in determining the success or failure of the application for judicial review orders. Mr Kilonzo submitted that the substitution of criminal charges against the applicants, from obtaining money from Trust Bank Ltd by false pretences contrary to section 313 of the Penal Code, to obtaining credit by false pretences contrary to section 316(1) of the Penal Code, was improper and showed lack of a clear intent to prosecute for an ascertainable criminal act. Counsel submitted that there was further evidence of irrelevant consideration in the commencement of prosecution, taking the form of the proceedings in the Judicial Commission of Inquiry into the Goldenberg Affair influencing the criminal case No 1800/2003. Counsel submitted that it was wrong for information coming from the Goldenberg Inquiry Commission to be used as a basis for arraigning the applicants in court, since that commission had not yet completed its inquiry and there is thus no authoritative finding as yet emanating from that commission. Counsel for the applicants stated that he had

conducted a search with the Registrar of Companies on 22nd August, 2003 for the purpose of determining who the directors of Safariland Club Ltd had been, at the time the credit the basis of the prosecution had been taken from Trust Bank Ltd. In response to a letter by the advocate's firm, the Registrar of Companies provides a list which did not include the names of the applicants. Counsel's argument was that it was wrong, in those circumstances, for the applicants to be linked to the credit that had been obtained from Trust Bank Ltd. He submitted that the Manager of the Trust Bank had stated that the whole credit in question had been repaid in 1997, and that on this account it was improper to prosecute the applicants for obtaining credit by false pretences.

Counsel for the applicants challenged the Replying Affidavit of Joseph Henry Ashimala dated 18th September, 2003, filed on behalf of the respondent on 18th September, 2003. The deponent is a Senior Superintendent of Police in the Criminal Investigation Department and is currently attached to the Judicial Commission of Inquiry into the Goldenberg Affair. Counsel considered the role of Mr Ashimala in this matter to be a violation of the Commissions of Inquiry Act (cap 102, Laws of Kenya) which provides that no person giving evidence shall be compellable to incriminate himself. The submission is made that the entire prosecution process is intended to harass the applicants, and is in aid of the goals of the Judicial Commission of Inquiry into the Goldenberg Affair rather than of the process of criminal justice. In his affidavit, Ashimala states at paragraph 48 that in his investigations, he "became aware of the fact that the first applicant acted as a guarantor when Safariland was purporting to charge its property to Trust Bank Ltd." Counsel for the applicants argued that such a position should not lead to charges against the first applicant, as the matter would belong to the domain of civil claims rather than criminal prosecution. Counsel argued that the logical inference was that criminal proceedings had been brought for an ulterior purpose, and this was wrong and unacceptable in law.

On the authority of *Crispus Karania Njogu v Attorney General*, Crim Application No 39 of 2000, counsel invited the Court to intervene in the exercise of prosecution powers by the Attorney General and to terminate the criminal trial for being an abuse of the criminal process. The *Njogu* case was a constitutional reference from a magistrate's court, by virtue of section 67 (1) of the Constitution, and arising from the criminal proceedings in Criminal Case No 707 of 1998. In that case the constitutional Bench set up to hear the matter (Oguk, Etyang and Rawal, JJ) held that:

"Under section 123(8) and section 65(2) of the Constitution, the Court may declare that the exercise by the Attorney-General of his powers under section 26(3) of the Constitution is an abuse of court process and is detrimental to public policy." Counsel for the applicants also referred to the case of *Republic v Attorney-General & Another, ex-parte Kipngeno arap Ngeny* Misc Civil Application No 406 of 2001, The two Judge Bench (Aluoch, Visram, JJ) stated as follows:

"This court will ..... in a proper case interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court or because it is oppressive and vexatious." Counsel also relied on another judicial review case Re an application by *Kamlesh M D Pattni, Bernard Kalove and Lionel Smith for Prohibition*, Misc Application No 1296 of 1998, where the honourable Lady Justice Aluoch issued an order of prohibition directed to the Principal Magistrate at Kibera, prohibiting her and other magistrates from proceeding with a criminal trial, on the ground that there was an abuse of the process of the court.

Other cases of the same category were cited too. One of these was *Emmanuel Kuria Gathoni & Another v Attorney-General* HC Misc

Application No 1384 of 2001, in which a specially constituted constitutional Bench (SO Oguk, OM Rimita and KH Rawal, JJ) stated:

"The Constitution has not and could not have envisaged the intervention of this court in (the) prosecution process only on the ground of the non-sufficiency of the evidence. .... We shall always intervene ..... when the predominant or ..... apparent purpose of the institution of a criminal proceeding was based on extraneous purpose or when the prosecution was vexatious, oppressive or was initiated and maintained with a view to harass and intimidate the accused person."

In similar mode, in *Samuel Kamau Macharia and Another v Attorney-General and Another*, Misc Application No 356 of 2000, a three-Judge Bench (Mwera, Mitey and Rawal, JJ) prohibited criminal proceedings in the Magistrate's Court:

“ ..... we are satisfied, and we declare that the institution, prosecution and maintenance of the Kibera Senior Principal Magistrate's Criminal Case No 2560 of 2000 against the applicants ..... was and is for a purpose other than upholding the criminal law, that the said prosecution is meant to bring pressure to bear upon the applicants to settle (two) civil disputes; that the prosecution of the applicants is an abuse of the criminal process of the Court; that the prosecution of the applicants amounts to harassment and is contrary to public policy and that the prosecution of the applicants is a contravention of their rights under (section) 77 of the Constitution.”

In *David Kiptoo Tirop v The Attorney-General*, Misc Application No 1201 of 2001, the honourable Mr Justice Mbiti allowed an application on the ground that the prosecution being challenged was too belated:

“..... the only complaint being made against the Attorney General's action of resurrecting old matters for reasons not in the interest of the administration of justice as speedy justice can no longer be obtained after a lapse of such (a) lengthy period from the date the offence was committed ...”

In *Republic v Attorney-General ex-parte Justry Patrick Lumumba Nyaberi*,

Misc Civil Case No 1151 of 1999, the Honourable Mr Justice Oguk terminated criminal proceedings in the Subordinate Court, saying as follows:

“I believe that given the lack of sufficient evidence to mount the criminal charges against the applicant, as I have already shown, I am satisfied that these criminal proceedings must have been taken for ulterior purposes or (were) motivated by or directed more to (a) securing of private vengeance or vindictiveness, than (the) securing of justice or public order, or was due to some *mala fides* or merely to malign or ridicule the Applicant.”

In *Paul Gachanga Ndarua v Republic*, Misc Application No 508 of 2001, another judicial review application, a two judge bench (Rimita, Ombijah JJ), made the following remarks:

“The evidence ..... does not disclose any fault on the part of the applicant. Such prosecution in our view is against public policy, and (an) assault (on) the individual's freedoms and rights and (an) outright abuse of the process of the Court. The prosecution of the applicant must therefore be halted.”

In *Sailesh Shah v Republic* Crim Revision Case No 25 of 2002, the Hon Mr Justice Ouna remarks:

“The criminal law is not to be used as an instrument (for) wreaking vengeance. Therefore revisional interference is justified in the interest of justice as in this case where there appears to be an abuse of the law. The Court's process and the police officer's acts are clearly unlawful.”

On the basis of these decisions counsel for the applicant submitted that the proceedings in the Chief Magistrate's Court were brought for the purpose of coercing the applicants and to intimidate them to cooperate with the Goldenberg Commission of Inquiry, and that this was inconsistent with the design of the criminal process, and that, therefore, the Court should grant orders prohibiting the on-going criminal trial.

To this case for the applicants, counsel for the respondent responded as follows:

The applicants' case is one of judicial review and claims on its face to be brought as such under order LIII of the Civil Procedure Rules; and yet constitutional issues such as those relating to the prosecutorial powers of the Attorney-General are being argued, without a constitutional application being brought. It was submitted that proceedings brought under order LIII should address the decision-making process, but not the merits of the decision taken which can only be addressed under a constitutional application. It was

submitted that the Attorney-General, by virtue of constitutional authority granted to him by section 26 of the Constitution, had already taken the decision to prosecute the applicants; the applicants had already been arraigned in court and the trial process was in progress, so that the critical decision had taken its correct legal momentum and ought to proceed to completion. Counsel submitted that no evidence had been placed before the Court to show that the Attorney-General had been motivated by malice or ulterior motives in taking the decision to commence prosecution. He submitted that there was no affidavit sworn by the applicants indicating wrong or misguided decision by the Attorney-General when he initiated prosecution by virtue of his constitutional powers. Counsel submitted that the Court can only act on evidence and not on bare claims of existence of malice. Counsel for the respondent cited a Court of Appeal judgment, *Republic v Communications Commission of Kenya & another, ex-parte East African Television Network*, Civil Appeal No 175 of 2000, to support his submissions on the scope for judicial review. The relevant passage from the decision of the Court runs as follows:

“..... proceedings under order LIII are concerned with the decision-making process and not the merits or otherwise of a decision.”

This was in aid of the argument that the applicants, by judicial review proceedings, could not challenge the merits of the decision to prosecute, though they could challenge the trial process - and do so before the trial court itself. Counsel argued that an ordinary statute, or indeed subsidiary legislation, was in effect being invoked by the applicants to stop the Attorney-General from exercising constitutional authority. Counsel submitted that for such a challenge to be tenable, it ought to have been pursued within the framework of section 84 or 123 (8) of the Constitution.

To support the same argument counsel cited the case of *Crispus Karanja Njogu v Attorney-General*, Criminal Application No 39 of 2000 in which a constitutional Bench (Oguk, Etyang and Rawal, JJ) made the following determination:

(i) “under section 123 (8) of the Constitution the Court has the authority to inquire into the manner and legality of the Attorney-General’s exercise of his power and discretion under section 26(3) of the Constitution.”

(ii) “Under section 123(8) of the Constitution, the court has power to prohibit the Attorney-General from exercising his powers under section 26(3) of the Constitution in a capricious, unfair or oppressive manner.

(iii) “Under section 128(8) and section 65(2) of the Constitution, the court may declare that the exercise by the Attorney-General of his powers under section 26(3) of the Constitution is an abuse of court process and is detrimental to public policy.”

Counsel for the respondent submitted that such authority over a prosecutorial decision of the Attorney-General could not be exercised by virtue of o LIII of the Civil Procedure Rules. He submitted that the application in hand was not a constitutional application and could not be transformed into one. It was submitted that the application fell outside the scope of judicial review as defined by the Court of Appeal, went beyond the basic questions that could be taken up in a review, and consequently was misconceived.

Counsel for the respondent went on to dispute some of the arguments made for the applicants on points of fact - though this was unnecessary as such were matters that should have been raised before the Magistrate’s Court conducting the trial. Counsel maintained that the first applicant was one of the directors of Safariland Club at the material time when the credit which is the subject of the criminal charge was taken. Counsel showed annexure No JHA 8 as the proof for this. it was argued that the first applicant had been truly answerable for the operations of Safariland Club Ltd.

Counsel for the respondent, however, did acknowledge that the submission on such evidence as would justify the criminal trial was unnecessary. He made reference, in this regard, to High Court Miscellaneous Application No 1384 of 2001, *Emmanuel Kuria Gathoni and Another v Attorney General* in which a Constitutional Bench (Oguk, Rimita, Rawal, JJ) stated as follows:

“..... as a Constitutional Court, it is not within our province to look into the evidence ..... and see whether there is sufficient evidence to charge and prosecute the applicants before us.

“.....The Constitution has not and would not have envisaged the intervention by this Court in the prosecution process only on the ground of nonsufficiency of the evidence.”

Counsel submitted that any interface between the working of the Judicial Commission of Inquiry into the Goldenberg Affair and the arraignment before the Chief Magistrate’s Court of the applicants would not in anyway subtract from the merits of the prosecutorial decision taken by the Attorney- General. The submission was, in effect, that it was not possible to dictate to the Attorney-General what mode of securing prosecutorial information he should adopt, and that the matter entirely depended upon the Attorney- General exercising his power by virtue of section 26 of the Constitution. Counsel for the applicants had also argued that the trial of the applicants before the Chief Magistrate’s Court should be terminated because prosecution had not taken place soon enough following the alleged commission of the offence in 1997. In the *Kipngeno arap Ngeny* case, Misc Civil Application No 406 of 2001, a period of nine years had elapsed between the alleged commission of the offence and arraignment, in court, and the Court terminated the prosecution. But counsel for the respondent drew a distinction; in the present case stating that the alleged offence came to light only on 9th July 2003, thanks to the turn of events at the Judicial commission of Inquiry into the Goldenberg Affair, and it is thus from this date that time should begin to be counted. This was disputed by counsel for the applicants who maintained that time should begin to run from the time the offence was committed.

Counsel for the applicants argued as well that the reason the application was brought under order LIII is that it is this order that governs the procedure of invocation of the Court’s jurisdiction, but that the gravamen of the application is a constitutional issue which the Court is competent to deal with, by virtue of its jurisdiction as given by section 60 of the Constitution. Counsel submitted that many cases of this nature have come up, and judicial review Orders have been made without limitations raised by any technicalities of the law. He submitted further that the limitation to the powers of the Attorney-General, in a case such as this, was not the Civil Procedure Act or Orders, but the authority of the High Court founded upon the provisions of the Constitution. He submitted that the application went beyond matters of evidence, to extraneous reasons taken into account in commencing the impugned prosecution.

The critical issues the resolution to which will lead to the outcome of this matter are as follows:

a) Has the Attorney-General, by exercising his discretion to initiate the prosecution of the applicants, been so misguided in the conduct of his constitutional functions as to be amenable to the charge of abusing the process of the Court?

b) Have the ongoing proceedings of the Judicial Commission of Inquiry into the Goldenberg Affair played any part in the constellation of factors leading to the initiation of the trial process, in the Chief

Magistrate’s Court against the applicants? If they have, should this lead to a prohibition of the trial process?

c) To what extent should the line of recent High Court decisions influence the determination of the present application?

d) The factor of public policy features quite prominently in the recent High Court judicial review cases in which prohibition to trial process in lower courts was called for. What is the essence of public policy, and to what extent should it be a factor in the determination of the present application?

e) Is it right that the applicants should look to the motions of full hearing before the Chief Magistrate, as their opportunity to obtain justice, or ought the High Court to determine the matter without taking evidence? Counsel for the respondents has argued that the discretion entrusted to the Attorney-General in relation to the prosecutorial process, is a broad one carried in the public interest. It was submitted, quite correctly, that the task of collating all the information such as would justify the commencement of a

prosecution, lies with the Attorney-General. It was in the premises submitted that the Court should not be quick to countermand the prosecutorial process when it was in progress; only in clear instances of apparent disregard for the law, or abuse of the prosecutorial discretion vested in the Attorney-General, should the Court entertain an application for prohibition of a trial contemplated or in progress.

This reasoning by counsel is, with respect, correct. The professional management of the administration of justice entrusts specific tasks to different agencies in the machinery of justice: the prosecution to collect and organize the evidence against the accused, and to present it before the trial court; the defence to test and rebut this evidence in open court; the trial court to ensure fair trial, and to decide the case in accordance with principles of justice, by convicting or acquitting; the Superior Courts to provide an appellate opportunity where a party is aggrieved with the outcome of the trial.

Such is the general course of events in all trial matters taken in the

‘Magistrates’ courts. There may, however be exceptions, where the accused challenges the unfolding process of trial itself, owing to a constitutional or related public - law- type objection. Obviously it cannot be said that every trial must be stopped because it will limit the liberties of the accused.

Where the accused is reasonably suspected of committing an offence, it is quite right that he be prosecuted, and indeed a duty is placed on the Attorney-General to initiate prosecution. Where does the Attorney-General get his evidence from? From a large and virtually unlimited variety of informants whose statements and information lead to a suspicion of the accused. It then follows that even if the Attorney-General, in this particular case, got his information from the hearings at the Judicial Commission of

Inquiry into the Goldenberg Affair, this fact by itself could not render the trial before the Chief Magistrate a nullity. Counsel for the applicants submitted that it was improper for the Attorney-General to rely on the evidence of Joseph Henry Ashimala who is at present attached to the Judicial Commission of Inquiry into the Goldenberg Affair. This submission is not tenable, as Mr Ashimala, besides, is the Senior

Superintendent of Police at the Criminal Investigations Department, and must obviously in this capacity be continuously involved in the investigation of crime, including that with which the applicants have been charged.

Counsel for the applicants challenged the manner in which the applicants had been charged with one offence and then later a different charge was substituted. It has, however, not been shown that such substitution of a charge has the colour of impropriety or illegality, or that there is something intolerably oppressive about it.

It follows that no cogent submission has been made that the Attorney- General in commencing the prosecution process was so misguided in his exercise of discretion that his act must be quashed at this stage and the accused persons set free even before the trial process before the Chief Magistrate is completed. Considering the specific complaints raised regarding the evidentiary foundation of the prosecution, the Court has not been convinced that those are not matters that the trial court has a competence to dispose of, in the best interests of justice.

Counsel for the applicants laid out a relatively long line of recent decisions of the High Court:

*Crispus Karanja Niogu v Attorney General*, Crim Application No 39 of 2000; *Republic v The Attorney General & Another ex-parte Kipngeno arap Ngeny*, Misc Civil Application No 406 of 2001; *In Re An Application. by Kamlesh M D Pattni and Others*, Misc Application No 1296 of 1998; *Emmanuel Kuria Gathoni & Another v Attorney General*, HC Misc Application No 1384 of 2001; *Samuel Kamau Macharia Another v Attorney-General & Another*, Misc Application No 356 of 2000; *David Kiptoo Tirop v The Attorney General*, Misc Application No 1201 of 2001; *Republic v Attorney General. exparte Justry Patrick Lumumba Nyaberi*, Misc Civil Case No 1151 of 1999; *Paul Gachanga Ndarua v Republic*, Misc Application No 508 of 2001; *Sailesh Shah v Republic*, Criminal

Revision Case No 25 of 2002.

Although these cases fall in different categories, some being straightforward judicial review cases, others constitutional rights cases, yet others criminal review cases, they were guided by the same principle: prohibitory orders being issued to halt prosecution where it is claimed that the decision to prosecute arose from ulterior motives. The application of this principle had the effect that allegations of corruption and/or misapplication of funds were not tried and fully ventilated in court. Hardly any information of public interest, therefore, came fourth, as counsel had all the disputes concluded within the framework of chamber applications restricted to technical submissions.

It is important that each case falling in the class enumerated above, and it is in this category that the present application falls, should be considered on its own facts.

One recurrent element in the earlier line of High Court cases aforementioned is public policy, as a principle forbidding the prosecution of cases commenced after prolonged periods of time since the occurrence of the alleged criminal acts, or cases in which ulterior motives for the arraignment before the court of applicants are alleged.

“Public policy” is a concept that has had a place in English law, the family of law that was bequeathed to this country; and its mark is traceable to both private and public law. The scope of public policy is considered in *Chitty on Contracts* 27th ed (London: Sweet & Maxwell, 1994) (P 773):

“In many respects the discussions on the nature of the doctrine of public policy is a matter of temperament and it often appears to be nothing more than a verbal dispute. Although it is not something about which can be dogmatic, the following seems reasonably clear.

First, it is inevitable that some doctrine of public policy would evolve with respect to the validity of contracts.

As was stated by Sir William Holdsworth,

‘In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them’.”

Specifically with reference to public law issues, *De Smith, Woolf and Jowell, in judicial review of Administrative Action, 5th ed* (London: Sweet & Maxwell, 1995) write as follows (p 329):

“Associated with the presumption of implied human rights is the presumption that Parliament intends the powers it confers to be exercised in accordance with ‘public policy’. Public policy is an ‘unruly horse’ which must be ridden with care, but it is the public law equivalent of private law equitable principles, such as that which states that no person may benefit from his own wrong. Thus the courts will presume that Parliament did not intend to imperil the welfare of the state or its inhabitants.”

So, public policy as it should be understood, dictates a taking of the position that the Kenya Parliament did not intend to imperil the welfare of the country’s inhabitants. This is fertile ground for creativity in ideas, as the welfare of the Kenyan people is in certain respects not the same as the welfare of people in the affluent, industrialized countries where social priorities have evolved progressively over the centuries, as shaped by the economic structures of these countries and their dominance in the world markets for technology, goods and services. I have to take judicial notice that the main constraint to social progress in Kenya and in other developing countries, is poverty and lack of access to food, water, decent dwellings, education, health and essential services. In the light of those shortages, it should be considered that the welfare needs of Kenya’s people dictates good husbandry over national resources, and efficiency in detecting misuse of these resources and in bringing before the courts of justice persons suspected of crimes involving damage to public resources. One critical custodian of this public policy is the Attorney-

General in his prosecutorial role; and in a matter such as the one in hand, this Court ought not to hold that no prosecutions may be brought against persons suspected of committing offences touching on rational resource use. Accordingly I hold that there is no public policy to limit the competence of the Attorney-General to prosecute persons in the position of the applicants.

Finally, it is the decision of this court, taking into account all the circumstances, that the application must be dismissed. The applicants have no tenable grievance, as they are right now going through a process of trial in which the Chief Magistrate is affording them all opportunity to prosecute their defence, to the intent that a just result be arrived at. The

Attorney-General, having conducted certain investigations and received information that is to him plausible, has exercised his constitutional discretion to prosecute, and the trial process ought to proceed to its logical conclusion.

I do make the following Orders:

- 1) The five prayers in the application by Notice of Motion dated 3<sup>rd</sup> September, 2003 are dismissed.
- 2) The respondents' costs in this application shall be paid by the applicants.

Dated and delivered at Nairobi this 2<sup>nd</sup> day of February, 2004

**J.B. OJWANG**

.....

**Ag JUDGE**

**Coram: Ojwang, Ag. J.**

**Court clerk – Mwangi**

**For the Applicants: Mr. Kilonzo, instructed by**

**M/s. Mugambi Imanyara & Co. Advocates.**

**For the Respondents: Mr. Okumu, instructed by the Attorney General's Office.**