



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
H.C. CRIMINAL APPLICATION NO. 820 OF 2002

STEPHEN GICHUHI & 30 OTHERS APPLICANTS

V E R S U S

THE REPUBLICRESPONDENTS

R U L I N G

This matter before us has come by way of reference from the Chief Magistrate's Court at Thika in Misc. Criminal Case No. 8 of 2001. As it raised an issue of interpretation of Constitution, the Hon. The Chief Justice constituted this Bench as per provisions of Section 67 (3) of the Constitution.

The issue which is referred before us to be determined is whether the right to institute Private Prosecution Conferred by *Section 88 (1)* of the Criminal Procedure Code contravenes or is inconsistent with *Section 26* of the Constitution.

For the sake of clarity we shall quote relevant parts of the aforesaid two provisions. Section 88 (1) of the Criminal Procedure Code stipulates:

*88. (1) A magistrate trying a case may
permit the prosecution to be
conducted by any person, but no
person other than a pu blic*

*prosecutor or other officer
generally or specially authorized
by the Attorney General in this
behalf shall be entitled to do so
without permission.*

Section 26 (3), (5) & (6) of the Constitution stipulates:

*26.(3) The Attorney -General shall have power in
any case in which he considers it
desirable so to do –*

*(a) to institute and undertake criminal
proceedings against any person before
any court (other than a court -martial)
in respect of any offence alleged to
have been committed by that person:*

*(b) To take over and continue any such
criminal proceedings that have been
instituted or undertaken by another
person or authority: and*

*(c) to discontinue at any stage before
judgment is delivered any such
criminal proceedings instituted or
undertaken by himself or another
person or authority.*

.....

*(5) The powers of the Attorney -General under
subsections (3) and (4) may be exercised by
him in person or by officers subordinate to*

him acting in accordance with his general or special instructions.

(6) The powers conferred on the Attorney - General by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority. Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

Mr. Karago the learned Counsel for the Applicant contended that because the right to institute any criminal proceedings is conferred only on the Attorney General as per *Section 26 (3) (a)* of the Constitution, the provisions of *Section 88 (1)* allowing a magistrate to permit institution of criminal proceedings is in direct conflict with the Constitutional Provision and thus is unconstitutional and should be declared as null and void.

He relied on two cases to substantiate his contentions namely:- (1) *Jopley Constatine Oyieng –V- Republic Criminal Appeal No. 45 of 1988* and (2) *Stephen Mwai Gachiengo and another –Versus- Republic Misc Application No. 302 of 2000.*

The first case was an appeal against the order of the High court where the appellant had gone to High Court under *Section 67* and *Section 84* of the Constitution. The application arose against the refusal by the Magistrate to admit a Complaint made under *Section 88 (1)* of the Criminal Procedure Code. The refusal was admittedly under *Section 89 (5)* of the Criminal Procedure Code.

The issue of Constitutionality of *Section 88 (1)* was not before the Court of Appeal which dismissed the appeal on the ground that question of interpretation under *Section 67* of the Constitution was neither before the Magistrate nor before the High Court. Similarly no matters were raised to bring the Application under *Section 84* of the Constitution. While determining these issues which were properly before the court, the Judges interalia (*emphasis ours*) observed and we quote:

“Only the Attorney General has the right under section 26 of the Constitution to institute criminal proceedings. No similar right is extended to a private individual and it is obvious that section 88 (1) of the Criminal Procedure Code does not override Section 26 of the Constitution.”

We think the aforesaid observations do not conclude that

Section 88 (1) of Criminal procedure Code is unconstitutional.

What is said is plainly that *Section 26* shall take precedence over the provisions of *Section 88* of Criminal Procedure Code.

We refrain from commenting further on those observations.

However, we also note that the court did not stop there.

The Judges went further and immediately after the above observation, they stated:-

“Section 26 (3) contemplates prosecutions by authorized parties in respect of which the Attorney General may act as provided in the sub -section.”

In our opinion, with these observations, the court has accepted the prosecutions by others, other than the Attorney General. Thus in our opinion, this authority does not help the Applicant to further his contention.

Second authority relied by the applicant is a famous case popularly known as ‘KACA case’ (*Misc. Criminal Appeal 820/2002.*) The Constitutional Court comprising of three Judges declared *Section 11B of Prevention of Corruption Act (Cap 65)* void being inconsistent with *Section 26* of the Constitution. Their reasons for such finding are on page 8 of the unreported Judgment and we deem it fit to quote the same:

“When Section 11B was inserted into Cap. 65 the Provisions of Section 26 of the Constitution remained unamended. Under Section Section 26 of the Constitution the Attorney General is the Principal Legal adviser to the Government of Kenya. He has powers under the Constitution to institute and undertake proceedings against any person and to take over or discontinue criminal proceedings instituted or undertaken by any person or authority. Under Section 26 (4) the Attorney General may require the Commissioner of Police to investigate a matter as relates to any offence. Section 11 B(5) provides that the Director of KACA may assume responsibility for any investigation or prosecution commenced by the police. Section 10 of Cap 65 gives powers to the Director of KACA to cause a police officer to investigate any bank account, share account or purchase account of any person (underlining ours)”

It is clear from the above passage that the KACA by the said Act was usurping the Constitutional powers vested in the Attorney General and that the provisions were made in the Act to take over the powers of the Attorney General which the

Constitution itself has not allowed to be delegated.

Does Section 88 of the Criminal Procedure Code take over the powers of the Attorney General which are not supposed to be carried out by anyone else except the Attorney General?

In our considered opinion, it does not.

We do not have to go further to substantiate our opinion but only to look at the provisions of *section 26* of the Constitution.

26. (3) (b) and (c) do postulate that the criminal proceedings can be instituted or undertaken by another person or authority or sub-ordinate officers are allowed to exercise powers of Attorney General in accordance with his general or special instruction which the Attorney General can take over, continue or discontinue at any stage before the Judgment is delivered.

Similarly the language of *Section 26 (6)* does postulate that the proceedings can be instituted or undertaken by any person or authority.

It was argued by the learned counsel for the Applicant that any person or authority stipulated in those provisions have to be those on whom the Attorney General has delegated those powers.

We do not agree to that contention in the face of the clear provisions of *Section 26 (5)* of the Constitution if that was the intention of the makers of the Constitution, as contended by the Respondent it could have been specifically provided as has been done in respect of *Section 26 (5)* of the Constitution. It has to be noted that all these provisions are contained in one section.

Further more, we do note that the proceedings can not be instituted without following the provisions of *Section 89* of the *Criminal Procedure Code* which provides for the institution of proceedings culminating in issuance of summons or warrant against the accused persons. The said

section Vis - a- vis *Section 26* of the Constitution was scrutinized by the Constitutional Court in the case of *Raila Odinga V. Professor George Saitoti (Misc application No. 3 of 1995 (Unreported)*. The Court cited the case of *Shah V. Patel (1954) 21 E. A. C. A. 236* with approval and specifically the following passage Viz

“Even in private Prosecution, the prosecutor in law is the crown (that is the Republic) at the instance of the private prosecutor whoever he may be. That must be so flows directly from Section 82 of the code which gives the Attorney General a residural control over every Criminal proceeding at any stage thereof.”

We agree with the reasoning of the said case and reaffirm that the Attorney General has over all control on all Criminal proceedings including a private Prosecution at any stage thereof before a verdict or judgment is pronounced.

We also reiterate that the provisions of *Section 26 3 (b) & (c)* coming after *Section 26 3 (a)* make the provisions of *Section 88* of the Criminal Procedure Code in complete harmony with *Section 26* of the Constitution, and not to the contrary.

In the premises, we find that *Section 88* of the Criminal Procedure Code (Cap. 75) does not contravene provisions of *Section 26* of the Constitution.

This reference thus fails and we direct that the matter i.e Misc. Criminal Case No. 8 of 2001 be referred back to Chief Magistrates' court at Thika to proceed as per law.

Applicant shall pay costs of this reference.

Dated and delivered at Nairobi this 18th day of May, 2004.

.....

K. H. RAWAL

JUDGE.

.....

M. G. MUGO

Ag. JUDGE

.....

L.K. KIMARU

Ag. JUDGE