



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO. 522 OF 2004

PUBLIC CORRUPTION, ETHICS

AND GOVERNANCE WATCH.....APPLICANT

VERSUS

HON. ALI CHIRAU MAKWERERESPONDENT

RULING

MR. OKUMU, learned counsel for the State had raised a Preliminary Objection (hereinafter referred to as P.O.) to the Application. The Application is a Notice of Motion dated 30.8.2004 and brought under Section 81 of the Criminal Procedure Code and filed by the Republic through Public Corruption, Ethics and Governance Watch as against **HON. ALI CHIRAU MAKWERE**. In the Application, the Applicant seeks: -

1. That Hon. Ali Chirau Makwere the accused person in Criminal Case No. 25 of 2004 be committed for trial to the High Court itself;

Alternatively,

2. That the Private Prosecution proceedings in Criminal Case No. 25 of 2004 be removed from the Nairobi Chief Magistrate Aggrey Muchelule and be transferred to any other court of equal or superior jurisdiction for trial.

On the first prong of the **P.O. OKUMU** submitted that the Applicant before the Court has filed a complaint before Chief Magistrate, Nairobi, where he is seeking to be granted permission to prosecute the Respondent herein. That as of the time the Application was filed, the permission had not been granted. That therefore, under Section 81 of the Criminal Procedure Code, which envisages such an Application once the permission has been granted and the Applicant is a Prosecutor, the Applicant is incompetent.

Section 81 of the Criminal Procedure Code gives power to the High Court to change venue of a trial. Subsection (2) of the said section provides for persons who may make an Application to the High Court for the exercise of its powers under the Section as follows: -

“(2) The High Court may act on the report of the lower court, or on the Application of a party interested, or on its own initiative.”

It was **WAKAHU**'s submission that they have filed this Application as 'party interested' and therefore, the Applicant had locus standi to bring this Application and access to the High Court by virtue of that subsection. That in the circumstances there was no need for the Applicant to have qualified as

Private Prosecutor as argued by OKUMU for the Respondent. **OKUMU** had cited two cases in support of his argument. SHAH vs. PATEL and OTHERS (1954) XXI E.A.C.A 236. In that case the court held that a Private Prosecution was not entitled to be heard on Appeal even where the Attorney General had intimated that he did not wish to be heard.

WAKAHIU sought to distinguish the cited case with the instant case on the grounds that the Application before this court was not an Appeal and so the cited case did not apply to this one. **WAKAHIU** is quite right. The case of **SHAH vs. PATEL** cannot apply to this court for two reasons. The one mentioned by **WAKAHIU** was the only reason that the Private Prosecutor had not right of Appeal to the High Court in a matter heard and dismissed by the Magistrate Court, without the consent of the Attorney General as of then. There is a second reason which I will not state here as it is of no consequence to this case. The other authority **OKUMU** sought to rely on was RUFFUS RIDDLES BARGER vs. BRIAN JOHN ROBSON 1959 E.A. 841 holding 1 and 2. The two holdings deal with Section 367 of the Criminal Procedure Code and Section 360 of the Criminal Procedure Code.

Having read both holdings, it is my view that the case cannot apply to the instant case. **WAKAHIU**'s submission was the case cannot apply because it related to an Appeal from an acquittal by the subordinate Court following a privately prosecuted case.

That is quite correct. However, in addition to the reason given by **WAKAHIU** that the facts of the two cases do not fit, there is a further reason. Section 367 and Section 360 of **Criminal Procedure Code** discussed in that case have since been amended.

The case was decided in 1959. At that time **Section 367** of the Criminal Procedure Code provided for "case stated" and the procedure to be followed when the matter involves a Private Prosecution. The current Section 367 of Criminal Procedure Code deals with the power of the High Court to be certified to the lower court. **OKUMU** did not seem to notice the disparity between the section quoted as it was in 1959, when the decision was made, and as it is now. He therefore, did not address the court on whether after the amendment of the provisions of Section 367 of Criminal Procedure Code as were in 1959, they were adopted in any form under any of the current provisions of the Criminal Procedure Code.

Likewise Section 360 of the Criminal Procedure Code has been amended to provide for "Abatement of Appeals". Having read the cited authorities, Section 360 of the Criminal Procedure Code as of 1959 seems to have concerned the provisions of a 'second appeal'. Again no reference was made to the disparity between the sections then and now and whether was there any reference to current provisions similar to the Criminal Procedure Code as it was in 1959. Even then it is quite clear that the recidendi of the case does not apply to the facts of the current case.

The other submission by **OKUMU** in regard to the provision of Section 81 of the Criminal Procedure Code seem to me to go into the merits of the Application itself.

WAKAHIU seems to have been dragged into the issue and submitted on the merits of the Application before the court. I chose not to make any reference to those issues.

In conclusion, it is my belief that the Applicant has a right of audience before this court under Section 81 (2) of the Criminal Procedure Code. The Preliminary Objection has no merit and therefore dismissed.

Orders accordingly.

Dated at Nairobi this 6th October 2004.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

Wakahiū for Applicant

Kaigai for Respondent

LESIIT

JUDGE