



**Republic v SAO (Criminal Case 236 of 2003)
[2004] KEHC 2603 (KLR) (Crim) (9 November 2004) (Ruling)**

Republic v S.A.O. (a Minor) [2004] eKLR

Neutral citation: [2004] KEHC 2603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL CASE 236 OF 2003

KH RAWAL, J

NOVEMBER 9, 2004

BETWEEN

REPUBLIC PROSECUTOR

AND

SAO ACCUSED

Whether a child charged with murder could be admitted to bail

The application was filed under the Children Act, 2001, urging the court to comply with the Act in so far as it related to the treatment of child offenders. The application sought the release of the subject under rule 12(4) of the Child Offenders Rules or that alternatively, he be released on bail under rule 9(1). The court noted that section 4(3) of the Children Act, 2001, specifically enjoined all judicial institutions to take the interests of the child as the first and paramount consideration and to safeguard and promote the child's rights and welfare. The court released the subject released on free bond with two sureties.

Reported by Kakai Toili

Statutes - interpretation of statutes – interpretation of the Penal Code (cap 63) and the Children Act, 2001 - whether provisions of a later Act were presumed to amend an earlier Act where their provisions were in conflict - whether provisions of the Children Act, 2001 overrode the provisions of the Penal Code (cap 63)- whether a child charged with murder could be admitted to bail.

Brief facts

The subject was a child aged about 13 years who was charged with the offence of murder which was alleged to have been committed while she was of the age of 12 years. Her advocate filed an application under the Children Act, 2001, urging the court to comply with the Act in so far as it related to the treatment of child offenders. He prayed that the subject be released under rule 12(4) of the Child Offenders Rules or that alternatively, he be released on bail under rule 9(1).



The subject's advocate complained that the subject's rights under the Children Act had been violated in that she had been in police custody for more than six months and she had been questioned and her statement taken by a male police officer. He therefore urged the court to discharge the subject. While conceding that the court had to take the welfare and best interest of the subject into consideration, state counsel submitted that as a person charged with murder, the subject had no right to bail.

Issues

- i. Whether provisions of a later Act were presumed to amend an earlier Act where their provisions were in conflict.
- ii. Whether provisions of the Children Act, 2001 overrode the provisions of the Penal Code (cap 63).
- iii. Whether a child charged with murder could be admitted to bail.

Held

1. The Children Act, 2001 was enacted to make specific provisions in respect of children, who must be considered as special and vulnerable members of the society. The High Court was vested with special powers to safeguard those rights and under section 22(2), to make such orders, writs and directions as it may consider appropriate.
2. Section 4(3) of the Children Act, 2001, specifically enjoined all judicial institutions to take the interests of the child as the first and paramount consideration and to safeguard and promote the child's rights and welfare.
3. The Penal Code (cap 63) was a general Act dealing with all offenders and the Children Act was enacted on a date later than it. Under the principles of interpretation, the later Act was presumed to have amended the earlier one.
4. The subject's rights as a child had been violated and there was nothing to show why the court should not do what it was enjoined to do by the Children Act and the Child Offenders Rules.
5. The offence with which the subject was charged was a serious one and in the circumstances of the case, the court did not deem it fit to discharge her. She would be released on free bond with two sureties.
6. **[Obiter]** In view of the apparent conflicts between sections 18(2) and 190(2) of the Children Act on one hand and section 204 of the Penal Code (cap 63) on the other hand, it shall be appropriate for the Attorney General and the Law Reform Commission to look into these sections with a view to making appropriate amendments.

Subject released on free bond with two sureties.

Citations

Cases

United Kingdom

1. *Congreve v Home Officer* [1976] QB 629 - (Distinguished)
2. *Council of Civil Service Unions v Minister for Civil Service* [1995] AC 374 - (Explained)

Texts

1. May, J (Lord Retired) (2003), *White Book Service* London: Sweet & Maxwell Vol 1 page 80
2. Woolf, JJ., (Ed) (1995), *De Smith, Woolf and Jowell: Judicial Review of Administrative Action* London: Sweet & Maxwell 5th Edn p 566, 567, 568

Statutes

Kenya

1. Child Offender Rules (cap 141 Sub Leg) (Repealed) rules 3, 6(3); 9(1); 10(4)(a); 12(4)- (Interpreted)
2. Children Act (cap 141) sections 4(2)(3); 18(2); 22(1)(2); 190(2); part 2 - (Interpreted)
3. Constitution of Kenya (Repealed) section 70 - (Interpreted)
4. Criminal Procedure Code (cap 75) section 123 - (Interpreted)
5. Customs and Excise Act (cap 472) sections 15, 27(3); 124(1)(3); 127(3) - (Interpreted)



6. Law Reform Act (cap 26) section 8- (Interpreted)
7. Penal Code (cap 63) section 204 - (Interpreted)
8. Sugar Act, 2001 (Repealed) (Act No 10 of 2001) sections 27(1); 33 - (Interpreted)

Instruments

1. African Charter on the Rights and Welfare of the Child (ACRWC), 1990
2. Common Market of East and Southern Africa (“COMESA”) Treaty articles 3(a); 45; 49(1)(2); 61
3. Convention on the Rights of the Child (CRC), 1990

RULING

1. The accused person before me is a child of about 13 years of age. She is alleged to have committed the offence of murder when she was 12 years old.
2. When the case came for trial before the court, Mr Onyango the learned counsel for the accused made an application under the *Children Act, 2001* (hereinafter referred to as ‘The Act’).
3. He urged the court to comply with the provisions of the Act. In short he prayed for directions that: (a) The High Court is the court which is enjoined to follow provisions of the Act, (b) The court shall construe the spirit of the Act while interpreting the provisions of laws applicable, (c) The accused be released as per the provisions of rule 12(4) of the *Child Offender Rules*, the rule made under the Act and (d) In the alternative the accused be released on bail as per the provisions of rule 9(1) of the aforesaid rules.
4. There is no dispute that the Act came into force on March 1, 2002 and the accused is alleged to have committed the offence of murder on February 5, 2003. Hence the Act was in operation when the offence is alleged to have been committed.
5. It is submitted on behalf of the accused/applicant that her rights and welfare have been blatantly violated while conducting this trial, to wit;
 - (1) She had been questioned and her statement was taken by a male police officer.
 - (2) She has been in custody of the police for a period far exceeding six months.
 - (3) Total disregard of the provisions of the Act and of the Rules have taken place.
6. It is contended that the application is provided under sec 22(1) of the Act and the court should make orders as provided under sec 22(2) of the Act.
7. Part II of the Act provides safeguards for the rights and welfare of the child and section 4(2) of the Act stipulates that:

“In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.
8. It is gratifying to note that the learned state counsel Mrs Oiyie has conceded that this court has to take welfare and best interest of the accused being a child into consideration.



9. But she added that the same can be met by fixing an earliest date of hearing of the case.
10. She further submitted that a person charged with murder has no right to bail as per the provisions of section 123 of the *Criminal Procedure Code* (cap 75) and the provisions of the Act or rules made thereunder cannot override the former specific provisions. The court is thus barred from making an order of bail, as per her submissions.
11. The Act was enacted to make specific provisions in respect of children who, in my humble view, must be considered as special class of the society. In addition they are undisputedly the vulnerable members of the society. The Legislature, to give effect to the principles of the *Convention on the Rights of the Child* and *The African Charter on the Rights and Welfare of the Child* has enacted this Act.
12. It has vested the High Court with special powers to safeguard those rights under part II of the Act and has empowered the High Court under section 22(2), which provides:

“The High Court shall hear and determine an application made by a person in pursuance of sub-section (1) and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 19 (inclusive)”
13. Section 4(3) further specifically enjoins all judicial institutions to take interests of the child as the first and paramount consideration and to safeguard and promote the rights and welfare of the child.
14. Section 18(2) of the Act furthermore provides that:

“Notwithstanding the provisions of any other law, no child shall be subjected to capital punishment or to life imprisonment”
15. Section 190(2) repeats the above by stipulating that the child shall not be sentenced to death.
16. To pronounce clearly and put in effect the spirit of the Act, the Legislature has provided for specific rules in the schedules of the Act.
17. The relevant rules for this case is *Child Offender Rules* which is in fifth schedule of the Act.
18. Rule 3 of the said rules stipulates that these Rules shall apply to the proceedings with respect to a child who is charged with an offence.
19. Rule 6(3) provides that the female child, while detained, conveyed or waiting, shall be under the care of a woman officer. This rule seems to have been contravened as the learned state counsel has not responded to the specific issue thereon raised by the defence counsel.
20. Rule 9 of these rules makes provisions for the bail of a child offender.
21. Rule 10 of these rules make provisions as to remand and bail in respect of the child offenders.
22. Rule 10(4)(a) thereof specifically stipulates that remand in custody of a child offender shall not exceed six months in the case of an offence punishable by death.
23. As per *Penal Code* only two offences are punishable by death, ie murder and treason.
24. In view of the above mentioned provisions as well as those of section 4(2) and 4(3) of the Act, the submissions of Mrs Oiye that the provisions of the Act do not apply to the murder trial falls by the way and has to be firmly rejected.



25. The record of this case is very clear. The accused took plea on December 11, 2003 and now we are in October 2004. Apparently the rule 10(4) of the *Child Offender Rules* is violated and this Court has to take due notice of the said fact.
26. The Act makes special provisions in respect of children as has been mentioned hereinbefore. *Penal Code* is a general Act dealing with all offenders. Furthermore, the Act is enacted on a later date than the *Penal Code*. With these two facts before the court, the well ingrained principles of the interpretation, ie the specific overrides general and latter Act is presumed to have amended the earlier one unless specifically stated, must take effect.
27. In this case in my view, it is irrelevant who is responsible for the delay occasioned. What matters is that the accused has been in remand for longer time than prescribed by the law. Her rights are violated and the same should be redressed.
28. The child before this court is charged with serious offence and hence, looking to all circumstances of this case I shall not deem it right to discharge her even though very passionately urged by Mr Onyango. I may add here that in an appropriate case this court would not have hesitated to do so. I also find that rule 12(4) of the *Child Offender Rules* which is relied by Mr Onyango, is not applicable to the case just as yet, as 12 months have not lapsed since plea was taken.
29. Mrs Oiyee has also not put forth before me any reasons why this child should not be released on bail. Presently the court has no reason before it not to do what is enjoined by the Act and the *Child Offender Rules*.
30. I direct, in the premises, that the accused be released on free bond with two sureties.
31. Lastly, in view of apparent conflicts between provisions of section 18(2) as well as section 190(2) of the Act on one hand, and section 204 of the *Penal Code* (cap 63) on the other hand, It shall be appropriate if Hon Attorney General and Chairman of Law Reform Commission can look into the above sections and make appropriate amendments in the relevant laws.

Republic v Kenya Revenue Authority ex parte Aberdare Freight Services Ltd & 2 others

November 9, 2004, Nyamu J delivered the following ruling.

1. The application dated 27/7/2004 and brought under order 53 and section 8 of the *Law Reform Act* seeks the following order:
 - (a) An order of mandamus to compel the respondent to release a consignment consisting of 124 x 20 freight containers of sugar belonging to the applicant and currently detained by the respondent at the Port of Mombasa.
 - (b) An order of prohibition to prohibit the respondent, its servants and/or agents from obstructing the applicant or its agents and servants from taking delivery of the applicants sugar consignment aforesaid.
 - (c) An order committing the Commissioner-General of the respondent to jail for contempt of court.
 - (d) Costs of and incidental to this application be provided.



2. The application is supported by a statement which recites the relief sought as above. However in order for this court to separate the wheat from the chaff at the earliest opportunity it is important to set out in full the grounds upon which relief is sought as they appear in the Statutory Statement.

(i) the decision by the respondent to obtain the applicants sugar cargo after this honorable court ordered that such sugar consignment be released to the applicant amounts to contempt of Court and is an abuse of the respondents power.

(ii) The decision by the respondent to detain the applicants sugar consignment or cargo is illegal and contrary to the Customs and Excise Act (cap 472) of the Laws of Kenya, The Free Trade Area COMESA rules and the COMESA Treaty to which the Republic of Kenya is a party.

(iii) The applicant has paid all lawful levies, taxes and charges in respect of the sugar consignment and the respondents refusal to release the consignment to the applicant is therefore unlawful capricious, oppressive, malicious and an abuse of the respondents statutory powers and authority.

(iv) The respondent is acting in excess of its powers by continuing to detain the applicants sugar consignment contrary to a court order recorded in High Court Miscellaneous Application Number 646 of 2004 and in spite of the fact that the applicant has paid all taxes, levies and /or duties required by law. The respondent accepted all the entry documents, levies, VAT and cleared the said consignment under the COMESA tariff rate.

(v) The continued detention of the applicants sugar consignment by the respondent in violation of the court order issued by this honourable court in Misc Application No 646 of 2004 on 10th June, 2004 and in spite of the payment by the applicant of all lawful duties, levies and taxes, is unfair and unjust exercise of the respondents powers and Authority.

(vi) Unless compelled to release the applicants sugar consignment, the respondent will persist in the detention of the applicants said property.

(vii) The applicant continues to incur storage costs at the rate of kshs 500,000/- or 20 US \$ per day per container on account of the aforesaid unjust, illegal and wrongful action by the respondent.

(viii) The applicants property which is a perishable commodity could be rendered unfit for human consumption and occasion immense loss and damage to the applicant unless the respondent is compelled to release it to the applicant.

3. The application is supported by a verifying affidavit of Abduleiman Hemed Mohammed sworn on 21-7-2004 which substantially reinforces the position as set out above with some additional matters such as the application in HC Misc NRB646/2004 which has been exhibited including the supporting annexures, the order made in HC Misc Application No 495/2004 between the applicant herein and the Kenya Sugar Board (KSB), the press statement by the respondent dated 26-5-2004, the order made in HC (MSA) Misc 192/2004 between a third party, MAT International, the Kenya Sugar Board (KSB) and the Attorney General, a letter dated 6-7-2004 written to the respondent by the applicants advocate concerning the consignment in question and the Import/Warehousing Declaration Form 63 - Entry 5091, a letter from the Shippers dated 28-6-2004 and a Miscellaneous Receipt S No 019040 for kshs 21,258,196 being evidence of payment of duty and other charges in respect of the consignment.

4. There is also a replying affidavit by one Ismail Jillo Dajissa sworn on 18-12-2004 with annexures "IJD" 1 to 3 and finally Mohammed's affidavit sworn on 7-10-2004 with annexures.



5. In reply there is replying affidavit by the respondents Commissioner of Customs and Excise, Francis M Thurania sworn on 14-9-2004 with annexures and a notice of preliminary objection dated 19-9-2004.
6. On behalf of the 1st interested party there is a replying affidavit sworn by one Yusnalis Okubo on 14-10-2004.
7. On behalf of the 2nd interested party, KRISH commodities there are grounds of opposition dated 18-10-2004. Preliminary objection dated 19-10-2004 and written submissions with authorities dated 20-10-2004 which their counsel highlighted.
8. On behalf of the 3rd interested party - Mumias Sugar Company, the learned counsel made submissions on law only.
9. The respondent and interested parties have raised the following important points:
 1. Are these proceedings *res judicata* and/or are abuse of the court process taking into account the contents of the statement and the verifying affidavits.
 2. Is the applicant guilty of misrepresentation, concealments or non disclosure of material facts which would warrant denial of the relief sought. In particular the applicant's reliance on entry No 5091 of 30-4-2004 which inter alia reflected Mitchell Cotts as the Warehouse where the goods had been stored, or that the consignments was already in the country whereas it reached Port of Mombasa on 2-6-2004. Investigations by the 1st interested party revealed that there was no sugar in the country as at 30-4-2004 as indicated in the Entry. The 1st respondent contend that it was the regulator of the quota for importation gazetted by the Minister of Finance and that the applicant was not gazetted as an importer and allocated any quota vide Gazette Notice of 7-5-2004 published by the 1st interested party.
 3. That the respondent is entitled to retain the consignment for the purpose of raising additional duties and also the purpose of ensuring that all the laws affecting the consignment and administered by other bodies such as the 1st interested party as regulators were complied with.
 4. That in the face of the misrepresentation the applicant had to perfect or amend the Entry, the name of the ship having changed and the date of arrival having changed.
 5. That duty is payable as per the Act and that the rate is as per the prevailing rate at the date of arrival.
 6. That there is no breach of the COMESA Treaty in the circumstances.
10. The applicants contend that there was no misrepresentation:
 - (a) Because the sugar had been cleared in advance in April 2004 although cleared under Entry 5091
 - (b) Misc HC646/2004 was commenced on 27-5-2004 before the arrival of the consignment on 2-6-2004 and the judgment was given on 10-6-2004.
11. Taking the above positions into account the following points call for determination arise:
 - (i) What law applies to the consignment and has the sugar been detained.
 - (ii) What is the effect of the payment of duties and taxes in advance - in April?
 - (iii) What is the applicable law concerning the rate of duty?



- (iv) Does the advance payment preclude the respondent from raising 100% duty as opposed to zero rating.
- (v) Has the advance payment created a vested right which the respondent cannot take away.
- (vi) Is there a misrepresentation on the part of the applicant and what is the effect if any on the rate of duty payable and the respondents right to raise additional duties and taxes?
- (vii) Are these proceedings an abuse of the court process and should they be struck out and on this ground alone. (viii) Is the 1st interested party entitled to regulate the quota in law.
- (ix) Has the COMESA Treaty been violated?
- (x) What remains to be done if any and by whom in respect of the consignment?

12. Issue i - The declaration contained in the Entry 5091 clearly brings out the following:

- (a) The Shippers are MAERK VERONA
- (b) The date of arrival 8-5-2004
- (c) The location of goods Mitchell Cotts
- (d) Duties kshs 21,258,196.

There is a receipt for payment of duties dated 30-4-2004.

13. However, on the ground the evidence points to the following:

- (a) The goods in question/or this particular consignment/was not at M/ Cotts as at the time of the alleged clearance ie 30-4-2004.
- (b) The goods had not arrived as at the expected date of arrival 8-5-2004
- (c) The Shipper's letter dated 28-6-2004 confirmed the late arrival and the reason for it ie 2-6-2004.

14. The Entry Form clearly indicates the location of goods as at 30-4-2004 or as at 8-5-2004 was or would be Mitchell Cotts yet there was no such sugar until 2-6-2004 a fact that is not in dispute and which is borne out by documentary evidence.

15. The goods were zero rated at the point of payment on 30-4-2004. The press release states that as at 26-5-2004, the raw sugar quota of 81,000 M/tons were exhausted save for 4.15 tons.

16. The respondent has deponed that it did include the consignment in its assessment when considering whether or not the quota had been exhausted and that other importers were sent away or prevented from selling or importing sugar at zero rate due to the consignment in question.

17. The applicant claims that it had done everything necessary to have the sugar released.

18. It has not filed an amended entry setting out the change of shipper and the date of arrival among other things.

19. Neither has it applied for any amendment of the entry 5091.

20. In addition it is also clear that in HC Misc 646/2004 - Nairobi the pleadings and the subsequent order proceeded on the basis that the consignment or the subject matter of these proceedings were also the subject matter of those proceedings and that the respondent Commissioner was in contempt of court. However, in the course of his submissions the learned counsel abandoned the prayers on committal



- against the Commissioner, obviously because that prayer could not be sustained in the face of a change of mind in these proceedings that the subject matter is a new consignment.
21. The reason for the abandonment was not difficult to explain because it became quite clear to the court that in his submission the learned counsel was treating the consignment as a new shipment which was lying at the Port of Mombasa and not at Mitchell Cotts.
22. The question which then arises is whether on the basis of the facts as set out above Entry 5190 can be regarded as a valid entry in law.
23. S 27 of the Customs and Excise Act cap 472 which deals with the Entry of Cargo states.
- (1) Save as otherwise provided in this Act, the whole of the cargo of an aircraft or vessel which is unloaded or to be unloaded shall be entered by the owner between such period after the commencement of discharge as may be prescribed or such further period as may be allowed by the proper officer either for:
- (a) Home area
 - (b) Warehousing
 - (c) Transshipment or
 - (d) Transit
- (2) Where an entry is delivered to the proper officer, the owner shall furnish full particulars supported by documentary evidence of the goods referred in the entry.
- (3) Entries for goods to be unloaded may be delivered to the proper officer for checking before arrival at the Port of discharge of aircraft or vessel in which the goods are imported and in that case the consignee may permit goods to be entered before the arrival of the aircraft or vessel.
24. Further entry 5190 was prepared and delivered pursuant to s 27(3) above well in advance of the arrival.
25. But the entry having been so delivered what is the legal position concerning the rate of duty?
26. S 124(1) and (3) of the Customs and Excise Act does provide for the situation in these terms:
- (1) Subject to section 74 and subsection (3) of this section, import duty or dumping duty shall be paid at the rate in force at the time when the goods liable to duty are entered for home use.
27. This means that the consignment attracted duty at the zero rate on 30-4-2004 because the consignment was entered in advance on 30-4-2004 being the date of entry. As at 30-4-2004 as regards the COMESA based sugar quota at the zero rate. However all the goods were entered pursuant to s 27(3) as outlined above. What does the law state as regards the incidence of duty.
- (3) “Where in accordance with s 27(3) goods are entered before the arrival at the port of discharge of aircraft or vessel or when the goods are imported, the import duty, suspended duty or discharging duty upon the goods shall be paid at the rate in force at the time of arrival of the aircraft or vessel at the port of place of discharge.”
28. It is not in dispute that the date of arrival of the goods was 2-6-2004. On the other hand the COMESA quota had been exhausted by 26-5-2004 and this has not been disputed and that the applicant had not been allocated any quota under COMESA.



29. Pursuant to s 27(3) the respondent cannot in the opinion of the court be prevented from raising the duty stipulated by the section which is 100%. The fact that the applicant was not to blame for the late arrival would not in the view of the court change the position nor the fact that payment at zero rate were made on 30-4-2004 because the Act clearly stipulates that it is the date of arrival which determines the rate to be charged.
30. In law the respondent cannot be estopped from performing its statutory duty. I shall revert to this aspect in greater detail later on in the judgment.
31. While still on this point I would like to touch on the 1st interested parties' position.
32. Under s 27(1) the *Sugar Act* No 10/2001 the Kenya Sugar Board (KSB) is vested with the power to control imports in order to safeguard the national interest concerning the importation of sugar.
33. The section reads:
- S 27(1) subject to such regional and international trade agreements to which Kenya is a party, all sugar imports into the company shall be subject to the prevailing import duties, taxes and other tariffs and imports shall be controlled by the Board.”
- S 27(2) The government shall introduce other safeguard measures as may be necessary to protect the industry from unfair trade practice.
34. S 33 of the *Sugar Act* reads:
- The Minister may, in consultation with the board, make regulations generally for the better, carrying out of the provisions of this Act and without prejudice to the generality of the foregoing such regulations shall provide for:
- (a) The regulation and control of the production, manufacturing, marketing, importation/or exportation of sugar and its by-products.
- (b) The forms of licences to be issued under this Act, and the form and manner of application therefore.
- (c) The fees which may be charged for any activity relating and incidental to the development , marketing and for direct distribution of sugar and its by-products.” It is not in dispute that the COMESA Treaty does apply to the quota imported.
35. Article 3(a) of the [COMESA Treaty](#) reads.
- The aim and objectives of the Common Market shall be to attain sustainable growth and development, of the Member States by promoting a more balanced and harmonious development of its production and marketing.”
36. Article 45 provides for a 10 year Scope of Cooperation in Trade Liberalisation Development. Article 49(1) provides of elimination for Non Tariff Barriers for Common Market goods.
37. Article 49(2) empowers a Member State for the purpose of protecting an infant industry to take all reasonable steps for a specified period by the council quantitative or like restriction or prohibitions on similar goods originating from the other member states, provided that the measures are applied on a non discriminatory basis and that the member state shall furnish to council prove that it has taken all reasonable steps to overcome the difficulties faced by such infant industry.



38. Finally under article 61 a Member State in the face of serious disturbance in her economy after informing the Secretary-General, may take necessary safeguard measures.
39. After considering the provisions of the *Sugar Act* and the [COMESA Treaty](#), I find no contravention of the [COMESA Treaty](#) in the powers conferred in the KSB by the Act and the regulations for importation. On the contrary, the provision to allocate the available quota and to licence are clearly covered by the objectives of the Act and are also aimed at achieving equity in importation and licensing. Surely the applicant seems to advocate a free for all in a situation of a zero rate for only 88,000 metric tones. What would prevent one importer from taking up the entire importation while other able and willing importer look on. This would lead to unfair and an unjust monopolistic tendencies.
40. Provided there is no discrimination, and in these regard I note that KSB did advertise for tenders, I cannot think of a fairer system in terms of equity and fairness.
41. It follows therefore that the respondent and KSA have to work closely on all imports the respondent in order to raise the required duty and the KSB in order to control marketing and importation.
42. The applicant has contended that there is no known law or positive law which empowers the respondent to detain the goods.
43. However, rule 1 of the Part B of the 8th Schedule to the [Customs and Excise Act](#) which deal with restricted imports does give the respondent authority to detain the goods until such other laws in force are complied with - this in the view of the court covers compliance with the provisions of the *Sugar Act* and the regulations.
44. The schedule is made pursuant to S15 of the [Customs and Excise Act](#) and regulations 24 and 25 provide for possible amendments of reports where circumstances have changed eg date of discharge and the date of entry and arrival.
45. In view of the above analysis of the legal position and the applicable law, I find that the respondent has not detained the goods at all although it is statutorily empowered to do so both under the [Customs Act](#) s 127(3) under s 27(4) and also pursuant to the attainment of objectives by the KSB under s 27(1) and s 33 of the *Sugar Act* - until compliance and payment of the correct rate of duty and compliance of the *Sugar Act*.
46. Issue ii The effect of payment of duty on 30-4-2004 does not in the view of this court preclude or prevent the respondent from invoking s 127(3) in demanding payment of duty which was applicable on the date of arrival on 2-6-2004 and the respondents are not estopped from performing their statutory duty.
47. Issue iii The applicable law covering the rate of duty is s 127(3) for the reasons set out in issue i above.
48. Issue iv No, the respondent is not precluded on the reasons set out in i above and for the reasons which will become apparent shortly.
49. Issue v The payment of duty in advance did not create a vested right because the respondent is statutorily entitled to further payment of duty in terms of s 127(3) of the [Customs Act](#).
50. Issue vi Yes, there is a clear misrepresentation. The grounds of statutory statement relied on See C(i), C(iv) and C(v) are clear misrepresentation when they are repeated in these proceedings. The above grounds purport to urge that the court orders in HC Misc 646/2004 did cover the consignment in these proceedings whereas the learned counsel for the applicant has stated that this is a new shipment



- not covered in the order yet leave was clearly obtained on the basis of the grounds of relief as per the chamber summons and the statutory statement relying on the same grounds.
51. In addition Entry Form 5091 clearly stated that the goods were located at M/Cotts whereas they were not, and had not in fact arrived in the country and when they did arrive they were hopelessly out of time and the reasons for the delay were not known until the letter of 28-6-2004.
 52. This state of affairs notwithstanding the applicant never perfected the entry in terms of the Act or applied to amend the entry to reflect the correct situation on the ground as at 2-6-2004. The respondent has not therefore detained any sugar.
 53. It is up to the applicant owner to take the necessary steps to pay duty and to collect the goods.
 54. Under order 53 rule 4 the applicant cannot legally argue the new position that the consignment is a fresh shipment. This is not one of the grounds set out in the statement and no leave was sought to include this ground.
 55. I find that there is both a factual and legal misrepresentation especially in the applicants persistence in prosecuting this application in the circumstances described herein. I repeat that the rate of duty is pegged to the date of arrival and the respondents are entitled to recover it notwithstanding the advance payment.
 56. Issue vii Yes, I find that these proceedings do constitute an abuse of the court process in that the grounds relied and final orders in HC Misc 646/2004 are again being relitigated in these proceedings.
 57. It is apparent that there is no factual entitlement to sue on the orders obtained in HC Misc 646/2004 and if any deserved orders needed to be sought the applicant should have sought them in those proceedings.
 58. The applicants admission in the submission made on its behalf that the consignment hereof was a new shipment not covered in the earlier order in HC Misc 646/2004 does reveal to this court an unfair use of the court process and intellectual dishonesty.
 59. The applicants cannot and should not be allowed to approbate and reprobate.
 60. In the *English White Book Service* 2003 Vol 1 page 80 abuse of the court process has been in this context:

Using that process for a purpose or in a way significantly different from its ordinary and proper use" (*Attorney General vs Barkea*) The Times March 7, 2000 Lord Bingham and Cornhill Lord Chief Justice. It is an abuse to bring vexatious proceedings ie two or more set of proceedings in respect of the same subject matter which amount to harassment of the defendant in order to make him fight the same battle more than once with the attendant multiplication of costs, time and stress. In this context, it is immaterial whether the proceedings are brought concurrently or serially. The facts in these case are clearly caught by this defendant of abuse.
 61. (Issue Viii) Yes KSB is entitled to regulate the importation in terms of Sections 4,6 of s 27 and 33 and the regulations made thereunder.
 62. Issue ix This was analysed in issue i and I find no violation of the *COMESA Treaty*. The articulation of the national interest in the allocation of quota and the safeguards aimed at protecting the local industry and the endeavour to achieve equity in allocation are not inconsistent with the Treaty.
 63. What remains to be done in that duty has to be imposed in terms of the Act and paid before the release of the goods and the owners have to take the necessary steps as required under the Act.



Respondent's Role

64. It is clear to the court that the advance payment or clearance as the applicant prefers to call it did cause confusion and it is clear to the court that it could have been intended to give the applicant an upper hand in the importation of the duty free quota. It is not clear to the court why the respondent allowed this in view of the respondents subsequent acknowledgement of the 1st interested party's role as a regulator under the *Sugar Act*.
65. The court finds that the two parties did not at the material time coordinate properly and the respondent should not have accepted payment in advance of the arrival of the goods - whether entitled to do so in law or not - in view of the fact that the gazetted duty free quota needed to be equitably allocated and there were many interested importers who had applied and tendered for the same. The respondents action was detrimental to any equitable allocation which was in turn the statutory duty of the 1st interested party. It is apparent that the release of the consignment at zero rate after the exhaustion of the quota would in the opinion of the court, be detrimental to the local industry and also to able and willing importers. I therefore find that the interested parties had a sufficient interest to establish standing or locus standi in these proceedings and are not busy bodies or meddlers.
66. Their study could also be based on legitimate expectations that they could qualify to import or had qualified.

Duty to act fairly and reasonably

67. It is now an accepted principle in this field of law that statutory powers and duty must be exercised and performed reasonably and fairly. In the circumstances of the case before me there is nothing in the *Customs and Excise Act* or the *Sugar Act* which suggests even remotely that the powers vested in the two bodies were not exercised fairly and reasonably and in particular the allocations of the zero quota and the demand for additional duty.

Estoppel

68. One important aspect of this matter which was not addressed by counsel and which the court cannot overlook is the effect of advance payment in law. Did it create any estoppel or any enforceable right? What is the applicable principle?
- De Smith Woolf and Jowell *Judicial Review of Administration Action* 5th Edition has brought out the principle very well at pages 567 and 568.

In these words

"The general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties".

69. In the same authoritative book (*supra*) at page 566 the following principle is also brought out

"Purported authorization, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims"



70. It is therefore clear to the court that the advance payment of duty and clearance cannot be a ground for estoppel against the respondent or any other statutory body.
71. If full duty have not been paid and is legally due a public authority cannot bind itself to accept anything other than full duty.
72. The respondent and the 1st interested parties cannot be prevented from enforcing the statutory duties given to them by an Act of Parliament.

Legitimate Expectation

73. This is the other principle which has some relevance here because it is a principle based on fairness. The court considers that it is a principle which the court ought to recognize in view of the nature of the claim being based on advance payment of duty.
74. Legitimate expectation is founded upon a basic principle of fairness that legitimate expectations ought not be thwarted - that in judging a case a judge should achieve justice, weigh the relative “ strengths of expectation” of the parties.
75. For example in this case the advance payment did create some expectations on the part of the applicant. Should those expectations be thwarted and the applicant asked to pay more?
76. This principle was considered in the English case of *Council of Civil Service Unions v Minister for Civil Service* [1995] AC 374 where Lord Diplock defined the principle as follows:

For a legitimate expectation to arise the decision:

must affect the other person by depriving him of some benefit or advantage which either

(i) he had in the past been permitted by the decision maker to enjoy and which can legitimately expect to be permitted to continue to do until there has been committed to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or

(ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advance reasons for contending that they should not be withdrawn”

77. In the case in question a majority of the judges rested much conclusion on the fact that but for implications of national security, there would have been a duty for the Minister to consult on the ground that the Civil Servants had a legitimate expectation that they would be consulted before trade union rights were taken away.
78. A representation giving rise to legitimate expectation must however be based on full disclosure by the applicant. Thus, where as in this case he does not put all his cards face up on the table see (*supra* pages 572-573) like completing the required format and correctly stating the proper location of the goods on the Entry Form or stating that the goods form part of another consignment the subject matter of another suit only to change its position in the subsequent proceedings, it would not be entitled to rely on the representation. Moreover, in the circumstances of this case there is no representation at all. Payment was made pursuant to a specific provision in the Statute and additional payment is similarly demanded by the same Statute.
79. In the circumstance of the case I find that any legitimate expectation not to be charged more than what was accepted by the respondent has clearly been taken away firstly by the conduct of the applicant



and the provisions of the Statute Act and for this reason I cannot properly hold the respondent to their bargain in accepting payment in advance. In this matter the respondent has a clear Statutory duty under s 127(3) to charge duty. It is not a discretion and therefore this is clearly distinguishable from the cited case of *Congreve v Home Officer* I QB 629 which was a case touching on the Minister's discretion and in which the licensee was placed in double jeopardy.

Discretion

80. Finally it must not be forgotten that the court has a discretion in giving or granting judicial review orders. In the circumstances described herein, I find myself unable to exercise that discretion in favour of an applicant who has contributed greatly in adding to the confusion in having the duty free quota equitably and fairly managed by the relevant authorities. Granted that freedom of commerce is a right to be freely exercised by all even this has some limits ie the right of others and the public interest see s 70 of the *Constitution of Kenya*. I would therefore deny relief on this ground as well.

Mandamus and Prohibition

81. It is clear to the court that the order of mandamus sought does not and would not lie because there is no public duty or statutory power which the Respondent has failed to exercise. Similarly, prohibition operates as to the future to prohibit unlawful acts on the part of approved body. I find no unlawful acts to be prohibitory.

82. In addition this court is entitled to disregard the change of heart that this is a new shipment since this is not borne out by the Statutory Statement.

83. This fails in the face of order 53.

Summary

- On the facts and in law these proceedings are an abuse of the court process.
- *Mandamus* does not lie for the reasons given. Prohibition does not also lie for the reasons given.
- There is misrepresentation for the reasons given and for the attempt to have the goods cleared at zero rating in spite of the late date of arrival which is the determining factor in the determining duty.
- Clear provisions of the *Sugar Act* allow allocation of quota and control . S 127(3) of the *Customs & Excise Act* allows the charging of 100% duty.
- There cannot be estoppel against a public authorities exercise of their Statutory powers even in the face of error.
- There were no legitimate expectation because there was no representation at all by the respondent in view of s 127(3) of the *Customs Act*.
- There is no proof that any of the Statutory duties or powers were not exercised or are not being exercised fairly and reasonably.
- Judicial remedies are also discretionary and the applicant's conduct and the assertions made in the proceedings disentitle it from benefiting from any such discretion.
- On the facts the applicant has not been prevented from collecting the consignment but as owner it has to perfect the entry in terms of the Act and the regulations.

In the result and for the above reasons either singly or cumulatively this application deserves to fail and the same is dismissed with costs to the participating parties.



It is so ordered.

