REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 494 OF 2003

DOMINIC ARONY AMOLO……..……..……..PLAINTIFF

V E R S U S

THE HON. THE ATTORNEY GENERAL…....…….....…….DEFENDANT

R U L I N G

The Originating Notice of Motion dated 22.4.2003 is filed by a former military personnel who was Court martialed as a result of a failed military coup in Kenya in 1982. He brings this Motion under Section 60, 70, 72 and 84 of the Constitution to challenge the constitutionality of the trial and the legality of his dismissal. At the trial, the Attorney General, the Respondent here took a Preliminary Objection saying that the motion offends the Provisions of Order 1 Rule vi 12 of the Civil Procedure Rules and that the cause of action in this matter arose between 1982 and 1984 and so is already time barred by operation of Limitations Act Cap 22 Laws of Kenya.

In reply, Mr. Imanyara for the Applicant says that Limitation Act does not apply to the provisions of Constitution regarding Fundamental Rights and that the application as made under Section 84 of the Constitution renders Cap 22 inconsistent. Further he said that in matters touching on Fundamental rights the Constitution is supreme. He relied on the Malawian Case of STATE V. PRESIDENT OF MALAWI 4CHRLD 3 and on the Privy Council decision from Grenada GAIRY AND ANOTHER vs. ATTORENY GENERAL OF GRENADA (2002) AC 167.

Particularly where the Board had said that: -

> "The Constitution has primacy (subject to its provisions) over all other laws which so far as is inconsistent with its provisions, must yield to it. To read down its provisions so that they accord with PREEXISTENT RULES OR PRINCIPLES is to subvert its purpose. Historic Common Law doctrines restricting the liability of the crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights."

However, the part of this judgement quoting Lord Diplock's view in Jaundoo Case (JAUNDOO vs. ATTORNEY GENERAL OF GUYANA (1971) A C. 972 about the procedure of accessing Court on Constitutional applications is not relevant in Kenya any more as our Chief Justice has by L.N. No. 133 of 2001 provides rules of access under Section 84(b) of the Constitution being 'The Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001), as directed by our Constitution. The point to decide here is whether breach of Fundamental Rights and redress thereof can be brought to Court any time irrespective of the Provisions of Limitation Act. Like for example colonized persons seeking redress years after independence.

To put it in another way whether in interpretation of constitutionally entrenched provisions of Fundamental Rights, the Court is in any way circumscribed by legislative statutes like Limitation Act.

Section 3 of the Kenyan Constitution provides; -

> "This constitution is the constitution of the Republic of Kenya and shall have the force of law throughout Kenya and subject to Section 47. If any other law is inconsistent with this constitution, this constitution shall prevail and the other law shall to the extent of inconsistency be void."
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> Section 47 excepted here provides for procedure in Amendment of the Constitution.

It, therefore, becomes a matter of construction how to adjudicate Fundamental Rights. The Indian Emeritus Professor Dr. Mr. Pylee says that interpretation of the constitution..

> "must sub serve the object of the enactments of the law keeping in view the Supreme Law. The ground norm, the Constitution. Every law must accord with the Constitution otherwise it suffers the defect of invalidity or unconstitutionality and therefore even when construing statute law, one must always bear in mind the provisions of the constitution, the constitutional goals and the constitutional purpose which is sought to be achieved."

Adopting this view should this Court, faced with an enactment which bars access to Court on an issue of Human Rights prevail? Can it bar Constitutional Rights? If a statute is an Act of Parliament, and Parliament is Supreme, Can a law passed by Parliament curtail Constitutional Rights? Is Parliament the one to enact Acts that define the rights outlined in the Constitution?

Prof. Laski in his "Canadian Constitutional Law" Page 900.31 has surveyed this aspect with regards to Canadian Bill of Rights and says: -

> "There has been some concern that the judicial elevation of the Canadian Bill of Rights to the position of being a statute which can effectively sterilize other federal legislation, has abrogated the doctrine of parliamentary supremacy..

He continues; -

> It may perhaps be stated somewhat differently that the Canadian Bill of Rights provides prescriptive standard against which all federal legislation of past and future must be measured unless parliament chooses to avail itself of the exceptions in Section 2 of the Bill and declare otherwise."

The Judicial elevation talked of here sprang from the decision of the Canadian Supreme Court in the Case of THE QUEEN V DRYBONES (1970) S.C.R. 282 where the Court interpreted Section 2 of the Bills of Rights (similar to our Section 3 with regards to Fundamental Rights). The Court said that the Courts should refuse to apply any law coming within the legislative authority of Parliament which infringes the Bill of Rights unless the Parliament has declared that it should so operate. In Kenya, the contrast makes it more clear. Here, the Fundamental Rights are themselves in the Constitution and the Constitution says that any inconsistent provision of any law is void to the extent of its inconsistency. Is barring access or limiting time in an act a feature of inconsistency? Here unless the Constitution itself limits the prosecution of those rights no statute should by implication bar it. Here the law of limitation has not reserved for itself the liberty to circumvent the prosecution of these Fundamental Rights.

Our Fundamental Rights take their rightful place alongside all other national states of the world who have enacted them in their Constitutions albeit by different titles, like the Bill of Rights of the USA, Charter of Human Rights in Canada and other states Fundamental Rights, Fundamental Human Rights in other states.

In "The Bill of Rights in the Modern State" Edited by Geoffrey R. Stone & Others the writers say: -

> "Everyone agrees in the abstract that there are human Rights that no society should a bridge." pp

Again they say: -

> "It seems unlikely that anyone who believes that free and equal citizens would be guaranteed a particular individual right, unless constitutional history has rejected it. That is important fact about constitutional adjudication and argument."

I refer to these opinions to buttress my view that a claim based on Fundamental Rights require special consideration and as they are embodied in our Constitution, it is not permissible for the Court to whittle them away under considerations of historical civil liberties.

The learned state counsel says the Limitation of Actions Act applies, but he does not with respect say which legal wrong it is as would fit under Limitation Act. It is neither contract nor Tort. It is in actual fact simply a claim under the provisions of the constitution. It cannot be categorized with those wrongs and claims limited under Cap 22.

This Court, therefore cannot assume that the claim is a "cause of action" described under Cap 22 in the first place nor that it is either a tortious wrong or a contractual breach.

Our Constitution is still young but it is born behind older international siblings from whose steps she can align her movements. Therefore, we can subject our Constitution to progressive mode of interpretation like in USA to enable our Constitution also to guide destiny of a people and to do this, it must be made to change with time through its Judicial Constitutional Courts which are the vessels that bring it in her new attire to the shores of changed circumstances.

I feel statutes cannot bar adjudication on Fundamental Rights.

> Prof. M.V. Pylee in his Constitution of the World said; -
>
> "The US Supreme Court showed the way as to how the Constitution should be adopted to various crises of human affairs."

So that by applying progressive interpretation, US Supreme Court extended the dimension of the Bill of Rights.

> Pylee says: - "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time of the Constitution was framed but give a broader connotation to such words and connotation in the context of the changing needs of time."

I, therefore, think and I so hold that Section 3 of the Constitution excludes the operation of Cap 22 with regards to claims under Fundamental Rights and further that Fundamental Rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of action enunciated under the Limitation Act Cap 22.

Lastly my decision here may not be grounded on exhaustive argument, but the matter is obviously not a clear cut legal issue that justifies argument as a Preliminary Point.

Sir Charles Newbold in MUKISA BISCUITS vs. WESTEND DISTRIBUTORS LTD. 1969 EA 696 said: -

> "The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which Is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of

points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

Preliminary Point requires a clear cut legal point not one to be researched and extensively argued. It suffices to say that this was not a clear cut point for Preliminary argument although it was a matter founding on Limitation.

Preliminary Objection refused.

DATED this 1st August day of 2003

A.I. HAYANGA

JUDGE

Read to Mr. Makura for Applicant and

Mr. Kiura for Respondent

A.I. HAYANGA