



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL (REVISION) CASE NO 25 OF 2002**

**SAILESH SHAH.....APPLICANT**

**VERSUS**

**REPUBLIC.....STATE**

**RULING**

In an application dated 25/6/2002 brought under sections 362 and 364(1) (b) of the Criminal Procedure Code Cap 75 of the Laws of Kenya Sailesh Shah, the applicant herein seeks orders *inter alia* that:

1. The proceedings in the Chief Magistrate's Court be stayed pending the hearing of determination of this application.
2. That the charges or complaints accepted by the Chief Magistrate's Courts under section 89 of the Criminal Procedure Code in Criminal case Nos:

	Criminal	Procedure	Code	in	Criminal	case	Nos:
(a)		1561/2002			Mombasa		CMC
(b)		1790/2002			Mombasa		CMC
(c)		1213/2002			Nairobi		CMC
(d)		403/2002			Nairobi		CMC
(e)		419/2002			Nairobi		CMC
(f)	1635/2002 Nairobi CMC be rejected for being <i>res judicata</i>						
3. That the chief magistrate or any other Magistrate's Court lacked the jurisdiction to revisit or to accept any complaint or charge or to undertake any proceedings in respect of cheques numbers: 2649, 413355, 013170, 013173, 26117, 63860, 012075, 012093, 014407, 413139, 413684, 26549, 360348 and 360349 or any offence relating to evasion of duty thereof allegedly by Muchiri Ndirangu t/a Frank Freighters, Kingsway Tyres and Automart Ltd; Creative innovations (K) Ltd, Megna Holdings, Brand Imports or nay of their directors.
4. That any criminal charges emanating from the allegations touching on the cheques subject of HCC Misc application No 114/2001 which has already been decided by the High Court are unlawful and unconstitutional.
5. That neither Sailesh Shah, Sanjay Shah, Shah Dilpun, Jaydeep Kata, William Gitau or any other person is to be charged with criminal offences in respect to the fact touching on cheques Numbers – 26349, 413355, 013173, 26117, 03860, 012093, 014407, 413139, 413684, 26549, 360348, and 360349.
6. That from the facts before the court cheques numbers 26549, 413355, 013170, 013173, 26117, 03860, 012075, 012093, 014407, 413139, 413684, 26549, 360348 and 360349 had never been stolen from the possession of the drawer or the Customs & Excise Department and that their proceeds were correctly credited to the account of the payee, being the Customs and Excise Department.
7. That none of the Directors of Creative Innovations (K) Ltd, Kingsway Tyres & Automart Ltd, Megna Holdings Ltd, or Brand Imports or Orbit Express Ltd, should be charged thereof with the

- offence reflected in the Charge Sheets, and that where the charges are already before the Magistrate's Court the same be rejected and dismissed.
8. That the accused be set to liberty forthwith.
  9. That the Court should declare that the Chief Magistrate's Court lacks the jurisdiction to revisit criminal cases No 1790/2002, 1561/2002, 1213/2002, 403/2002, 419/2002 and 1635/2002.
  10. That cheques numbers 26549, 413355, 03170, 013173, 26117, 03860, 012075, 012093, 014407, 433139, 413684, 360348, and 360349 were not and have never been stolen from anybody or by anybody.
  11. That any genuine document issued by the Commissioner of Customs & Excise is valid and *prima facie* evidence as provided under Section 208 of the Customs & Excise Act Cap 472 of the Laws of Kenya.
  12. That were there is a valid receipt being payment of duty, evasion of duty does not arise.
  13. And lastly the applicant asks that the costs of this application be provided for.

The application is opposed by State Counsel, Mr Gumo who has raised a Preliminary objection on the grounds that the application has been made under a wrong provisions of the Law ie section 362 and 364 of the Criminal Procedure Code. He has submitted that the applicant should have come by way of Judicial Review under order LIII of the Civil Procedure Rules. He stated that the lower court has made no orders which this court can revise. Mr Gikandi for the applicant on the other hand was of the view that once a complaint is filed under Section 89 of the Criminal Procedure Code and the charge filed is contested as is the case herein, a party or a person so aggrieved has a right at the earliest instance to seek a High Court intervention by way of review so that the charge is rectified *ab initio*.

Section 89 of the Criminal Procedure Code states that:

1. Proceedings may be instituted either by making of a complaint or by bringing before a magistrate of a person who has been arrested without a warrant.
2. A person who believes from a reasonable and probable cause that an offence has been committed by another person; may make a complaint thereof to a magistrate having jurisdiction.
3. A complaint may be made orally or in writing but, if made orally shall be reduced to writing by the magistrate, and, in either case shall be signed by the complainant and the magistrate.
4. The Magistrate upon receiving a complaint, or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of subsection (5), draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged unless the charge, is charge signed and presented by a police officer.
5. Where the Magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and record his reasons for the order.

The accused's contention is that the Magistrate's acceptance of the charge was made through misrepresentation bad faith and by failure to disclose material facts. If the said material facts had been disclosed to the Magistrate no offence would have been disclosed and the said Magistrate would have refused to admit the complaint or formal charge.

In my view, an accused is not precluded from raising a preliminary point going to the very root of the case. Further, the accused person is entitled to raise an objection to maintainability or sustainability of the complaint at the earliest opportunity either on the ground of jurisdiction or any other ground. I concur with counsel for the accused that it is desirable for such preliminary points when raised at the outset so that the time for the Court is saved and the accused person is protected from unnecessary expenditure and unwarranted media publicity. I find that this is one case where the objection goes to the very root of the maintainability of the complaint and since the objection has been raised at the earliest opportunity, it is important that it be decided so that unnecessary waste of time of the court and that of the accused is avoided. An accused person has the right to raise a preliminary objection to the maintainability of the complaint and to have it decided so that the necessity of undergoing a trial in case he succeeds on the preliminary objection does not arise.

I am of the view that if the police officer who presented the complaint to the Magistrate that the matter of allegations of theft and evasion of tax relating to the accused and his company in respect to cheques Numbers 26549, 413355, 013170, 013173, 26117, 03860, 12075, 012093, 014407, 413139, 413684, 26549, 360349, and 360349 had been deliberated upon and decided by the High Court, the Magistrate would have taken cognizance.

I have had the liberty of perusing HCCC (Mombasa) Miscellaneous Application No 114 of 2001 and the present application and all the affidavits, the annexures. The applicant has invoked the inherent jurisdiction of this court on the grounds *inter alia*, of harassment, unlawfulness, ill will and bad faith on the part of the police officers. It is not in dispute that Sailesh Shah was charged in Nairobi and Mombasa, the case was covered by all the mainstream electronic and print media as evidenced by annexed newspaper reports. Further it is not in dispute that Sanjay Shah was arrested at some ungodly hour before dawn, detained in police cells till the next day when he was taken to the Chief Magistrate's Court on February 13th, 2002. Since then, the police officers are no longer in a hurry to prosecute, they keep asking for more time and mentions purporting that investigations are not complete. Similarly, however as in Sailesh's case all major newspapers have been giving undue prominence to this case at every single occasion. The accused argue that this is done by the police officers. However no evidence was adduced to support that allegation other than copies of the coverage made by the newspapers.

The object of the criminal process is not character assassination and where this happens, the High Court may be led to exercise its inherent jurisdiction under section 65 of the Constitution and sections 362 and 363 of the Criminal Procedure Code either *suo motu* or on information which otherwise comes to its knowledge either by a third party, newspaper reports anonymous letter or an application of the person who is aggrieved as in this particular case. The applicant avers that some police officers in order to prosecute him and others, made charges and complaints before the Chief Magistrate in Nairobi and Mombasa contrary to the law thereby violating their fundamental rights or cause them prejudice.

The High Court's inherent powers under section 65 of the Constitution and sections 362 and 363 of the Criminal Procedure Code are for the purpose and necessity of preventing the abuse of the Court's process or otherwise to secure the ends of justice where, there is danger and or reason to believe that the process of law is being misused.

*Sarkar on Criminal Procedure* 7th edition, states:

“Judicial process should not be an instrument of oppression or needless harassment. The Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration issuing process lest it would be an instrument in the hands of a complainant as vendetta to harass the person needlessly.”

It is my considered humble opinion that this is one of the very exceptional cases where there are glaring defects in the law, procedure, and there is an obvious manifest error of the point of law and consequently there is a flagrant miscarriage of justice which if allowed to continue, shall cause prejudice to the accused, the applicant herein. The criminal law is not to be used as an instrument of 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. Depending on the circumstances of this case and in order to see that justice is done and the subordinate courts do not or are not, through misrepresentation and non-disclosure of material facts, exceed jurisdiction or abuse their powers, then the charges forming the basis of this application are hereby rejected and are dismissed. The High Court, having decided in HCCC Misc. Application No 114 of 2001, that no offence of theft and or evasion of duty has or had been committed by the companies, or the subjects, mentioned herein and or in respect of the cheques mentioned herein above, no criminal charges shall emanate and or be accepted by any magistrate's court.

The High Court has power to dismiss a complaint even after the Magistrate has taken cognizance. The Magistrate could only have applied his judicial mind on the basis of materials of facts placed before him and in this particular matter, I must point out that there is enough evidence to confirm that the police

officer presenting the complaint or charge sheets before the magistrate, failed to disclose the fact that the High Court had dealt with and decided the matter and held that no theft or evasion of duty had been committed. In the circumstances thereof, it is unfair to the High Court and an abuse of its jurisdiction, authority and dignity by the police officers if they are to be allowed to be taking High Court decisions on appeal to the Magistrates Courts. This is one case where such abuse is evident. We have police officers who were involved and were aware of the issues and proceedings in the HCCC Misc Application No 114 of 2001 as well as the ruling of the High Court by Hon Osiemo, J how then did they find it lawful and proper to draw charge sheets and take them before a magistrate with particulars and issues therein which had been fully decided and concluded by the High Court?

It cannot be said to be in the interest of justice, permissible or lawful for the police officer to arrest the applicant and or the other accused after a decision has been given against complainant in HCCC Misc. Application No 114 of 2001. Having considered the matter fully I do hold that the acts of police officers in this matter were a gross abuse of the process of this court.

*Res judicata* is defined in K J Aiyar in *Judicial Dictionary* – 12th edition as:

“A matter already decided by an authority: No court shall try and suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between parties under whom they or any of them claim ..... or suit in which such issue has been heard and finally decided by such court.”

On this point the matter and issues in Miscellaneous Application No 114 of 2001 are substantially the same with those which form the proceedings complained of herein. Therefore those issues having been canvassed and decided, I find that the said criminal cases stated herein are *res judicata*. I so hold. The Law recognizes certain well defined principles and limits within which the police powers and authority vested in the police officers should be exercised. These powers and authority must be exercised fairly, impartially, honestly and not for corrupt purposes or unlawfully.

They must at all times act reasonably and not capriciously or arbitrarily. The Constitution of Kenya provides that only a person whom there is reasonable suspicion of having or about to commit a criminal offence can be brought before a magistrate. The accused person in matters touching on cheque numbers: 26459, 413355, 03170, 013173, 26117, 03860, 012075, 012093, 014407, 413139, 413684, 26549, 360348 and 36049 are therefore not to be arrested or taken before any magistrate’s court thereof and I so hold.

The applicant succeeds, orders are granted and further that criminal charges at the Mombasa Chief Magistrate’s Court cases 1561 of 2001 and 179 of 2002 are hereby struck out. Court cases at the Chief Magistrate’s Court in Nairobi – Cases numbers 403 of 2002, 419 of 2002, 1213 of 2002 and 1635 of 2002 are similarly hereby struck out and terminated. No further criminal charges shall be instituted in respect of the issues facts and parties hereof.

It is so ordered.

There shall be no orders as to costs.

**Dated and delivered at Nairobi this 21st day of August, 2002**

**L.P OUNA**

**JUDGE**