



REPUBLIC OF KENYA

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IN THE HIGH COURT AT NAIROBI  
CRIMINAL APPLICATION NO. 701 OF 2001, 760/2001 &  
63/2001

1. ANTONY RITHO MWANGI )
2. LAWRENCE WAMBUGU KARUGA )
3. GICHUI NJOROGE CHAI )
4. JOHN NJOROGE CHAI )
5. DANIEL MUGO NGANGA )
6. STEPHEN NDEGWA KAMANGU )
7. STEPHEN NJOROGE KANIARU )
8. PATRICK JOHN MAKAU )..... APPLICANTS

- V E R S U S -

ATTORNEY GENERAL ..... RESPONDENT

H.C. CRIMINAL REVISION NO. 47 OF 2001

REPUBLIC – VERSUS - ANTHONY RITHO MWANGI

LAWRENCE WAMBUGU KARUGA

GICHUI KIRUTHU

JOHN NJOROGE CHAI

DANIEL MUGO NGANGA

STEPHEN NDEGWA KAMANGU

STEPHEN KANIARU

PATRICK JOHN MAKAU

**INTRODUCTION: R U L I N G**

Our Constitution is a Citadel where good governance, under rule of Law by all the three organs of the state machinery is secured. The very structure of separation of powers and Independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs namely executive and Legislative. The Judiciary though seems to be omnipotent it is not so as it also is obligated to sub-serve the spirit and majesty of the Constitution.

### **Background**

The facts of this reference are not complicated. Although the reference was originally initiated under both Section 67 (1) and Section 84(2) of the Constitution, due to technical defect the application under Section 84 was not urged and for all practical purposes it was deemed to have been withdrawn. What is before this Bench is the reference under Section 65(1) of the Constitution.

This reference is born from a Criminal Case being Criminal Case No. 2250/2000. The eleven accused persons were charged with offence of robbery with violence on two counts. They were arraigned before the court on 21st August, 2000 after they were allegedly arrested on 31st July, 2000.

After several adjournments on the scheduled hearing dates, the trial commenced on 13th June, 2001. After 13 prosecution witnesses had given their evidence, the Hon. Attorney General presented a Nolle Prosequi on 14th September, 2001. It was opposed by the counsel representing several accused persons and those who were unrepresented on the ground that the said action was in violation of the fundamental rights of the accused persons as enshrined in Section 77 of the Constitution. The Prosecuting State Counsel submitted that the Trial Magistrate had no other option but to receive and accept the Nolle Prosequi as per the provisions of Section 82 of the Criminal Procedure Code. The learned Magistrate thereupon made a ruling on 17th September, 2001 and referred the matter to the High Court.

He also stayed the Criminal Proceedings pending the determination of this reference before the High Court.

The Misc. Civil Applications and the Criminal Revision application were placed before the Hon. The Chief Justice for his administrative directions and under his Ruling of 29th July, 2002 he empanelled this Bench.

### ***The Issues for determination.***

As stated earlier this reference was confined to the issues raised as regards the interpretation of the Constitutional Provisions mainly, the Sections involved are Section 26 (3) (c), Section 26(8) and Section 123(8).

However we shall be referring to various provisions of the Constitution and also those of Criminal Procedure Code in this ruling.

The Hon. Chief Justice has very succinctly crystalised the issue before this Bench on pages 12 to 14 of his ruling from the questions which have been framed and filed by the counsel of the applicants.

If we may paraphrase the issue before us, it should read as under:-

***“whether the word ‘a court’ mentioned in section 123(8) of the Constitution includes the subordinate court and if so, whether the sub -ordinate court can question the legality or validity of a Nolle Prosequi presented to it by Attorney Gen eral under his powers conferred by Section 26 (3) © of the Constitution and by Section 82 of the Criminal Procedure Code.”***

We shall reiterate in short the powers of the Attorney General under the Constitution as well as under the Criminal Procedure Code.

The Attorney General has given wide powers to discontinue any Criminal proceedings under Section

26 (3) (c) of the Constitution which reads:-

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

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

Corollary to the above powers section 82(1) of the Criminal Procedure Code (which was retained after the Constitution) provides:

***“In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Attorney General may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Republic intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged; but discharge or an accused person shall not operate as a bar to subject proceedings against him on account of the same facts.”***

In addition to the above provisions Section 26(8) of the Constitution further provides:

***“section 26(8) : In the exercise of the functions vested in him by subsections (3) and (9) of this Section and by Sections 49 and 55 (emphasis ours ). The Attorney General shall not be subject to the direction or control of any other person or authority .”***

Armed with the above provisions the Attorney General had been exercising unfettered and wide powers in the matters of Criminal Proceedings until a Constitutional Bench of this court in the case of Crispus Karanja Njogu V. Attorney General Criminal Application No. 39 of 2000, made an inroad in the absolute powers of the Attorney General. Considering and interpreting Section 123 (8) of the Constitution the three Judges in that case found that the powers of the Attorney General in presenting Nolle prosequi are not absolute and that are under the control and supervision of the High Court which can decide upon the validity or otherwise of a Nolle Prosequi as per the provisions of the Constitution and any other law.

Section 123 (8) of the Constitution stipulates:

***“(8)No provision of this Constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law.”***

Similar wordings as those of Section 26(8) are also used in part 3 of the Constitution in respect of Judicial Service Commission.

***Section 68(2) of the Constitution under that part reads:***

***“ Section 68(2) In the exercise of its functions under this Constitution, the commission shall not be subject to the direction or control of other person or authority.***

The commission comprises (as per Section 67(1) of the Chief Justice, the Attorney General, a Judge of the Court of Appeal, a Judge of the High court and the Chairman of the Public Service Commission.

The other provision providing similar power is section 106 (12) in part VIII relating to Public Service Commission whose members are appointed by the President and its Chairman is a member of Judicial Service Commission which is responsible for appointment and removal of the members of the sub-

ordinate Courts.

We shall revert to the aforesaid provisions and observations made by use in later part of our ruling.

The submissions for the applicants (which were adopted wholly by the four accused applicants appearing in persons) are to the effect that the court as per the Constitution comprises of the Court of appeal, High Court, Court martial and subordinate courts established by the Parliament.

The Constitution whenever wanted to give exclusive powers to the High Court has mention the very words i.e the High Court. It is only in Section 123(8) that a word 'a court' is used, and taking the literal plain and natural meaning and giving it a strict interpretation the court should include sub-ordinate court.

The counsel from both the sides relied on the decision of Crispus Njogu's case (*supra*). However, the counsel for the Applicants urged us to extend the powers of supervision, checks and control over Attorney General's power to enter *Nolle Prosequi* to the Subordinate courts also. Mr. Okumu on the other side said the decision should be followed to the tilt, that is to say, the Constitution did not envisage to give that jurisdiction to the Sub-ordinate Courts.

Under Section 67(1) the substantial questions of Law and issues on the interpretation of the provisions of Constitution squarely rests with the High Court. It cannot be denied that the question posed before us is a substantial one.

There are several rules on interpretation of any legal instruments, statutes and Constitution. We need not dwell on all of those rules and tenets.

In some breath there are several exception to the rule of interpretation that the word used in a legislation should be given its plain and natural meaning. As opposed to that primate rule there is an equally fundamental rule that the words should be interpreted or construed according to the intent of the makers of law.

Applied to a Constitution the rule means that in case of ambiguity or difficulty that Constitution will be adopted which is in harmony with the general scheme of the Constitution. We shall go one step further that the provisions of the Constitution, shall be construed as per the spirit, purpose and vision of the makers thereof. Where there is any doubt respecting the extent and scope of any power conferred by the Constitution, the object for which such power was bestowed are to be considered in the interpretation of the Constitution. This though has given birth to the doctrine of purposive interpretation.

While interpreting a provision of a Constitution we have to remember that it is a Constitution, a mechanism under which laws are made and not a mere Act which declares what the law is to be. Recognising the status of the Constitution, there is room for excluding the general rules of interpretation to see that the purpose, spirit and vision of Constitution are kept intact and in harmony.

With the above observations we shall deal with the issue on hand and go through all the relevant provisions of the Constitution (*mostly detailed herein above*).

We shall start with provisions relating to the establishment of courts under the Constitution.

The High court and Court of Appeal are established under the Constitution. Section 65 (a) then talks about courts subordinate to the High Court and Court Martial. These courts are to be established by parliament and these subordinate courts shall subject to this Constitution, have such jurisdiction and powers as may be conferred on it by law. Thus the subordinate courts although recognized by the Constitution are in effect the creatures of the statutes of Parliament. The definition of the subordinate courts thus excludes High Court, appellate Court and Court Martial.

Section 60 confers upon the High Court unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and power conferred by the Constitution or any other law.

Thus section 84(6) of the Constitution confers original jurisdiction to hear and determine an application complaining of violation of fundamental rights and to give such orders, issue such writs and give such directions as it may consider appropriate for the purpose. In the same breath if any question of such contravention arises before the subordinate court, unless that question is *merely frivolous and vexatious*, it shall refer the question to the High Court.

Section 77 of the Constitution is one of such fundamental rights and question of the contravention of rights of the accused persons during criminal trial shall have to be considered by the High court unless it is merely frivolous or vexatious.

The question involving *Nolle Prosequi* shall always arise in Criminal proceedings. The relevant provisions of Constitution and Law are Section 26 (3) and (8) of the Constitution and Section 82 of the Criminal Procedure Code we have specified them in earlier parts of this ruling.

Section 82 of Civil Procedure Code obviously is worded in mandatory terms so is Section 26(8) of the Constitution.

We shall pause here and note that Section 26(8) of the Constitution does not restrict itself to Section 26(3) or Section 26(9) but also includes in its scope section 44 and 55 of the Constitution as well.

We shall quote those Sections herein.

Section 44&55

44. (1) The High Court shall have jurisdiction to hear and determine any question where:

(a) a person has been validly elected as a member of the ; or

(b) the seat in the National Assembly of a member thereof has become vacant.

(2) An application to the High Court for the determination of a question under subsection (1)

(a) may be made by any person who was entitled to vote in the election to which the application relates, or by the Attorney General.

(3) An application to the High Court for the determination of a question under subsection (1)

(b) may be made-

(a) where the National speaker has declared that the seat in the National Assembly of a member has by reason of a provision of this Constitution become vacant, by that member; or

(b) in any case, by a person who is registered as a voter in elections of elected members of the Assembly, or by the Attorney General.

(4) Parliament may make provision with respect to

(a) the circumstances and manner in which, the time within which and the conditions upon which application may be made to the High Court for the determination of a question under this section; and

(b) the powers, practice and procedure of the High court in relation to the application.

**55. A person who sits or votes in the National assembly knowing or having reasonable grounds for knowing that he is not entitled to do so shall be liable to a penalty not exceeding five hundred shillings, or such other sum as may be prescribed by Parliament, for each day on which he so sits or votes, and that penalty shall be recoverable by action in**

***the High Court at the suit of the Attorney-General.***

The aforesaid sections clearly states that the High Court is the court who shall have power to hear and determine the issues specified.

We have also specified the other provisions in the Constitution i.e. Section 68(2) and Section 106(2) which are similarly worded as Section 26(8)

The exercise of their powers and functions by all these three Constitutional entities are meant to be checked or controlled by a court under the provisions of section 123(8) of the Constitution which is for interpretation by us.

The question before us is very restricted and that is the check supervision of the Attorney General's power to enter Nolle Prosequi in Criminal Proceedings. Even under Section 26(8) it is only a part of the powers of the Attorney General.

Under Section 44 and 55 are specifically High Courts are given jurisdiction to hear the applications made. Obviously, one they are before the High Court no other court can question the function of the Attorney General. The Establishments and structure and functions of Judicial Service Commission and Public Service Commission are specifically mentioned. By their sheer nature their functions could not have been meant to be supervised or checked by the sub-ordinate court.

If we give the interpretation of the word 'a court' to include the subordinate court as urged or contended by the applicants' counsel, it shall result in disharmony and absurdity. Understandingly, we cannot restrict the interpretation sought by the application in the matter of entry of Nolle Prosequi only. That shall be absolute travesty of all the norms of interpretation.

The makes of the Constitution could not have intended to create this absurd situation in their widest dream.

We are, in our opinion, justified to adopt the purposive interpretation and take the interpretation which advances the purpose and spirit of the Constitution.

In short, in view of the observations made hereinbefore, considering the spirit of the Constitution gathered from looking generally at the whole Constitution and specifically the relevant provisions thereof as enumerated in this ruling and considering that Section 123(8) of the Constitution does not exclusively provides for the exercise of a Court's jurisdiction in the matter of the Attorney General's powers to enter Nolle prosequi, we are of an opinion that the word 'a court' used in Section 123(8) of the Constitution means the High court and does not include the subordinate courts.

Sections 77 and 84(3) provide sufficient guidance as to the steps to be taken by the accused persons or the court in those occasions where it is felt that the exercise of the Attorney General's power in entering of the Nolle Prosequi in given case is unconstitutional. We may not go further in this respect for obvious reasons.

As the questions raised before us were reduced to one point, we do not intend to deal with individual questions.

We therefore dismiss the application and refer the matter back to the Trial Magistrate for appropriate actions.

Dated and delivered at Nairobi this 20th November, 2002.

**K. H. RAWAL**

**JUDGE.**