REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

H.C. MISC. APPLICATION NO. 1269 OF 2002

BIWOTT KIPRONO ……...…
APPLICANT

V E R S U S

IN THE MATTER OF THE REPORT BY

THE JUDICIAL COMMISSION OF INQUIRY INTO TRIBAL CLASHES IN KENYA……. RESPONDENT

THE COMMISSIONS OF INQUIRY ACT

(Cap. 102)

Report of the Judicial Commission

Appointed to Inquire

Into

Tribal Clashes in Kenya

Presented to

His Excellency

Hon. Daniel T. Arap Moi, G.G.H., M.P.

President and Commander-in -Chief of the Armed Forces of the

Republic of Kenya

R U L I N G OF RAWAL J.

The Notice of Motion dated 1st November, 2002 initially sought several orders but at the time of hearing thereof the same was confined to two orders namely:

(1) A decision made in the Report dated 31 st July, 1999 by the Judicial Commission of Inquiry into Tribal clashes in Kenya to recommend that the Applicant should be investigated regarding his

role in the tribal clashes that occurred in Kericho District be remov ed into this Honourable court and be quashed,

(2) The costs of the suit (sic) be awarded to the Applicant.

The application arises out of the facts which are mainly undisputed or indisputable.

His Excellency, The President of the Republic of Kenya by Gazette Notices 3312 and 3313 appointed a Judicial Commission of Inquiry which comprised of Hon. Mr. Justice Akilano Malade Akiwumi, a Judge of the Court of Appeal as its Chairman and Hon. Mr. Justice Elkana Onderi Bosire a Judge of Court of Appeal as well as Lady Justice Sarah Chibai Ondeyo a Judge of High Court of Kenya as its members.

The Commission was so appointed under the provisions of the Commission of Inquiry Act (Cap 102). The terms of reference of the Commission were:

(a) To investigate the tribal clas hes that have occurred in various parts of Kenya since 1991, with a view of establishing and/or determining.

(i) the origin, the probable, the immediate and the underlying causes of such clashes;

(ii) the action taken by the police and other law enforcement agenc ies with respect to any incidents of crime arising out of or committed in the course of the said tribal clashes and where such action was inadequate or insufficient, the reasons thereof;

(iii) the level of preparedness and the effectiveness of law enforcement a gencies in controlling the said tribal clashes and in preventing the occurrence of such tribal clashes in future;

(b) To recommend-

(i) prosecution or further criminal investigations against any person or persons who may have committed offences related to such t ribal clashes; (ii) ways, means and measures that must be taken to prevent, control, or eradicate such clashes in future;

(iii) to do, inquire into or investigate any other matter that is incidental to or connected with the foregoing,

and in accordance with secti on 7 (1) of the said Act, to report thereon as soon as reasonably practicable, but not later than 31 st December, 1998 .

Initial life of the Commission which was up to 31st December, 1998 was extended severally by various Gazette Notices the final extension (thereof) up to 31st July, 1999 was made by a Gazette Notice No. 3930 dated 13th July, 1999.

The Report annexed to the application is dated 31st July 1999 and is specified as ‘secret ’ and shown to have been presented to His Excellency the President by the Commission through its letter dated 19th August, 1999 addressed to His Excellency the President.

The Report eventually was released to the public after a court order on 18th October, 2002. The Applicant after learning, through media, about recommendation made therein against him, obtained a copy thereof on 22nd October 2002.

The applicant was one of 189 persons who were in the list of persons adversely mentioned and notified. (Appendix G of the Report). He thereupon appointed a counsel to represent him who appeared at all relevant sittings and where appropriate cross-examined any witnesses who testified on matters touching the applicant. Exhibits 157 to 158 (Appendix 1 of the Report) were also produced.

The relevant observations and findings of facts of the Commission on the clashes which occurred in Kericho District are contained in paragraphs 142 to 195 of the Report. Undeniably, there is no reference of or remarks against the applicant in any of those paragraphs.

In the concluding parts of the report the Commission has made recommendations which are general as well as in respect of particular areas in connection with tribal clashes that took place there.

Under the recommendation in respect of the affected areas it was recommended that "the persons named should be investigated regarding their role in the tribal clashes *as recommended in this Report" (emphasis mine).* The name of the applicant appears under the heading "*Kericho District."*

The applicant was not a witness in the proceeding of the Commission.

I may be underplaying the object and role of the Commission when I state that the subject before the Commission was of a great public importance and it was inpublic interest that the Commission was to investigate and make recommendations on the sad chapter of our country. The Commission had a most formidable and responsible task before them.

It is also evident that the application herein involves and is based on public law.

The applicant is aggrieved by the mention of his name in the recommendations of the commission and hence this application.

Before I dwell on the merits of the application I shall go into the issues of law raised on behalf of the Attorney General which could be described as issues in limine.

Mrs Onyango the learned Chief Litigation Counsel submitted two issues of this nature.

First she submitted that the application which seeks for the grant of order of certiorari has to be filed within six months from the date of judgment, order, decree, conviction or other proceedings. She relied on Section 9 (3) of the Law Reform Act (Cap. 26) and Order LIII Rule 2 of Civil Procedure Rules. Both provisions are similarly worded and are in mandatory form which excludes any discretion on the part of the court. According to her the date of the report is the date on which it was presented but not later than 31st July, 1999. This application after the initial leave was filed on 1st November, 2002 which period is far more than stipulated six months. Thus the order of certiorari is not available to the applicant.

Mr. Oyatsi the learned Counsel contended that so far as this applicant is concerned, it is the date on which the report was published to the public, is the date when the time starts to run, thus he is well within the statutory period of six months. He relied on Order XX of Civil procedure Rules and on the case of Tsikata V. Newspaper Publishing P/C (1997) I ALL E.R. 655.

In the said case the report of a special inquiry was published by a newspaper with some additional comments which referred adversely to the plaintiff, who in turn filed a defamation case against the Newspaper. I shall not deal with other findings made therein except the two simply because of the facts and nature of the claim made therein. The first relevant finding is to the effect that the final report is in fact the judgment of the Special Inquiry Board. The final report of the board in this case was in the nature of a recommendation to prosecute ten people named in the report. The second relevant finding was to the effect that when the report was published by the Attorney General it was a proceeding conducted by the Attorney General and the same was the proceedings in public.

I shall by analogy adopt the holding by the Court of Appeal in Tsikata case that the final report was in effect the Judgment or decision of the Commission. The initial nature of the report was that of a secret document presented to the President. It cannot be gainsaid that no finding made in secret can be considered as the decision in law although signed. In effect it was published by the Attorney General on 18th October, 2002. Furthermore I do note that the Commission had no power to make its report public. It can only be published by the Attorney General and not by the Commission, and when so published it

became a part of the whole proceedings. In my humble view, the proceedings started with the appointment of Judicial Inquiry Commission, and the same culminated or ended when the report was published by the Attorney General. It was thus the Attorney General who concluded the proceedings with the publication report. The applicant only became aware of the report on its publication which ended the proceedings as aforesaid and I am in my humble view, satisfied that the application is filed within statutory period of six months from the culmination of the proceedings as aforesaid.

To peg the applicant's right of judicial review to the date of the report covered under secrecy, shall not only be unjust, but, shall defy all the fundamental concept of transparency in judicial system and rule of Law. I refuse to be a party to this seemingly innocuous submission but which is devoid of any legality. I advisedly say so as the Commission had no power or authority to publish the report which action was solely to be undertaken by the Republic of Kenya through the Attorney General. I must reiterate that I am aware that the statutory time to apply for certiorari cannot be extended and must make it clear that I an not extending the stipulated time limit herein.

The next issue is whether the Attorney General is rightly sued in this application. The Commission's statutory life expired on 31st July, 1999. The report was presented to His Excellency the President and Attorney General became the custodian thereof. In any event, he published the report as aforesaid in October, 2002.

The act of publication was not on behalf of the Commission, it was an act of the Attorney General. The matter under inquiry before the Commission was a matter of public interest and initiated by the Republic through the President. The application is conceded to be under the public law.

Under the Constitution the office of the Attorney general is an office in the public service. Needless to say that he is the Guardian of and represents the public interest as well as is the custodian of all the legal process.

In this unique situation, the Attorney General is the sole entity which can represent this legal process. It is more so when it is the Attorney General who published the report. As was the case in Tsikata's case, the proceedings of publishing the Report was conducted by the Attorney General.

I therefore find that the Attorney General is the proper person as cited in this application.

Now I can proceed on with the application on its merits.

I consider it prudent to deal with the contention raised by Mrs Onyango that the Commission's recommendation was not a decision. According to her they are mere recommendations subject to further action and thus they do not affect or determine any party's legal right and in extension no legal right of the applicant is affected. If so, the order of certiorari does not lie although she grudgingly agreed that this investigatory proceedings could have a colour of fair hearing and she readily conceded that before the Commission the parties who are alleged to have committed some wrong are entitled to be heard.

It is a fundamental rule of advertial jurisprudence that all the cases should be judged as per their own individual facts. I shall do the same in this case.

T he Commission had before it a herculean and very arduous task to fulfill. One of their terms of reference was to recommend prosecution or further criminal investigations against any person or persons who may have committed offences related to such tribal clashes. (emphasis mine).

The culmination of their elaborate and protracted inquiry was the recommendation that the applicant be criminally investigated in his committal of offences related to tribal clashes in Kericho District. So far as the report and recommendation of the Commission are concerned they are final in their nature and the recommendation is a determination to the prejudice of the applicant in law. The recommendation is supposed to have been arrived at after an exhaustive judicial inquiry and there is no doubt in my mind that it is substantially a decision of the commission and has necessarily affected, the applicant's legal right,

status as well as situation.

If I look at the question in another way, one can simply ask; can the applicant come before this court for this remedy if a Criminal investigation is initiated against him in pursuance to the recommendation? In my view the answer is no.

In the background of the above findings and observations, I shall now consider the grievances of the applicants and relief sought.

Under the Law Reform Act (see Section 8) the High Court, although prohibited to issue, for obvious reasons, writs of Certiorari, Mandamus and Prohibition, it is empowered to issue *orders* of Certiorari, Mandamus and Prohibition. Order LIII of Civil Procedure Rules provides for the procedure for grant of such orders.

Considering the vast jurisprudence evolved on the subject, it is now well established that Certiorari will issue against a decision of judicial or quasi-judicial nature to quash a determination for excess or lack of jurisdiction, error of law on the face of the record, breach of the rules of natural justice, etc. to mention a few. The Certiorari also can issue only against the determinations or decision or proceedings made *in the past it.* It cannot unlike the order of prohibition seek restraining remedy in future.

The grievances of the applicant can be summed up like this. He was one amongst many persons generally mentioned adversely and notified accordingly. He appeared through a counsel and also produced some exhibits through his counsel (Ex. 157 and 158 in app. A). He was not called as a witness to appear before the Commission to adduce any evidence in any way. The Report is now published. It is evident that in the elaborate and all comprising findings of the Commission on the clashes in Kericho District, his name is not mentioned at all. Yet a recommendation, to investigate him for offences related to the clashes in the said district, is made by the Commission in their conclusion. Thus he contends through his counsel that the said conclusion should be quashed being made wrongly and improperly and in breach of rules of natural justice.

The Commission observed, rightly so in my view, at paragraph 7 of the Introduction page 4 of the Report), that and I quote:

> *It is obvious and natural justice demands, that as far as persons who may be implicated by evidence to be given before the judicial commissi on or concerned, they should be given notice of the general nature of the evidence to be adduced against them so as to enable them to decide to appear..……...……………………………… ……………………………………………………………..*
> *Notice should also inform people who may be implicated i n matter under inquiry of their right to adduce evidence in rebuttal."*

I pause here and state that, what I perceive from the last observations made by the Commission is, that, apart from the notice of general nature to be given, the Commission also undertook, so to speak, to issue notice to those persons who were implicated in the matter under inquiry to adduce evidence in rebuttal. I have no evidence that such notice was given to the applicant. In my view the Commission was not immune from challenge that it breached rules of natural justice, after declaring that it shall adopt the provisions of section 3 of the Commission of Inquiry Act. I say, with or without that declaration, they are bound by and are obliged to follow fundamental rules of natural justice.

Be that as it may, it is also clear from the Report that the Commission has not recorded or found any involvement by the applicant in the clashes in Kericho District. I have gonethrough the relevant portion of the Report to confirm the contention of the applicant.

I think the aforesaid facts and observations can and should destroy the submissions stressed by Mrs Onyango that because the applicant was represented by a counsel, the latter could have called the applicant to adduce evidence.

I am further fortified, in my observations made hereinbefore and those I shall make hereinafter, by the fact that the Commission's attention was drawn as to the necessity of calling the Applicant as a witness by none other than Law Society of Kenya. However, its application was rejected contemptuously, so to say, by the Commission. If I can put it this way, Commission was made aware that some one wants to call the applicant as a witness. It does not matter whether that application was to place before the Commission the issues either in favour or against the applicant.

With these facts summarized by us, can an order of Certiorari lie as prayed for?

The applicant states that it can and the Attorney General contends, it cannot, as sufficient opportunity was given to the applicant to vindicate his grievance.

I can and should observe that the Commission has not uttered a single adverse note or comment against the applicant in the relevant part concerning the clashes in Kericho district. Nothing can dissuade me to observe or surmise that there was nothing worth mentioning in the evidence before the Commission so far as the applicant was concerned and that is why the total silence in its finding. Yet out of blue, in the recommendation, which is in the nature of its substantial decision, his name appears. This decision seems to have come as a blot from the sky when the applicant was not given any hint thereof.

In my view the case of Ridge V/S Baldvin (1963) 2 ALL E.R. 66, pauses similar analogy to the case. It is an anchor case from which the rule of natural justice took its roots. In present case, although the Commission seemingly did not make any finding in fact against the applicant, went ahead and made a conclusive finding against him when it was leastexpected and that in my view is improper and can be considered as an error apparent on the face of the record.

The said conclusion without notice to the applicant is also against the rules of natural justice and I adopt with approval the holdings in the case of Mahon v. Air New Zealand Ltd & others (1984) 3 ALL E.R. at 201and 202 and I quote:

> "A t*ribunal making a finding in the exercise of an investigative jurisdiction (such as royal commission) was required to base its decision on evidence that had some probative value, in the sense, that there had to be some material that tended logically to show the existence of facts consistent with the finding and that the reasoning supporting the finding, if disclosed, was not logically self contradiction"*
>
> and
>
> *"A tribunal exercising an investigative jurisdiction was also required to listen fairly to any relevant evidence conflicting with, and any rational argument against, a proposed finding that a person represented at the inquiry whose interests (including his career and reputation) might be affected wished to place before the inquiry. Accordingly a person represented at the inquiry who would be adversely affected by a decision to make a finding was entitled to be informed that there was a risk of the finding being made and to be given the opportunity to adduce additional material of probative value which might deter the tribunal from making that finding."*

I agree wholly with the above findings and can say that I should not and cannot add anything useful to the above observations so far as the same relate to this application.

Once it has become obvious that the Commission was a judicial commission the distinction sought to be drawn by Mrs Onyango between Statutory Tribunal and the Commission on hand cannot hold water and I reiterate that there cannot be different sets of rules of natural justice to be applicable in respect of two tribunals.

I need not quote the authorities cited to restate the principle that the finding or decision made in breach of the rule of natural justice is a nullity. It is a trite law that it is.

I therefore hold that the recommendation made by the Commission to the effect that the applicant be investigated for the tribal clashes in Kericho District was wrong in law, was made in breach of the rules of natural justice and hence is a nullity. I further reiterate that the Attorney General culminated the proceedings by publishing it on 18th October, 2002 and that the recommendation was substantially a decision of the Commission which prejudiced the right of the applicant.

I also observe, although none of the counsel, brought to the court's attention that the covering letter by the Judicial Commission of Inquiry was dated 19th August, 1999. It is signed by the chairman and two members as the Chairman and member of the said Commission. The letter is addressed to His Excellency the President. The letter is entitled as letter of Transmittal in the table of contents of the report. That means the report was transmitted to the President as a report of the Commission on the day the Commission was not in existence in law. There was no authority in law to the Commission to transmit the report on that day. This court thus can also take a view in law that the report transmitted was an ultra vires act of the Commission and was without jurisdiction. Any act undertaken without jurisdiction is obviously a nullity.

The upshot of all the above is that I order that the decision made in the Report of the Judicial Commission of Inquiry into Tribal clashes in Kenya to recommend that the Applicant should be investigated regarding his role in the tribal clashes that occurred in Kericho District be brought before us and the same is hereby quashed.

The inquiry on hand being an inquiry in the nature of the public interest shall not make any order as to costs of this application.

Dated and delivered at Nairobi this 10th day of December, 2002.

K. H. RAWAL

JUDGE.