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

RULING

RIMITA J. The application before us is for Judicial review. The same has been brought under Order LIII r. 3 of the Civil Procedure Rules.

The application is dated 1st November, 2002 and was filed in court, the same day.

There are three substantive prayers in the said application but prayer No 2 and 3 were abandoned at the hearing. The applicant was left to urge prayer 1 which in the following terms:

> "1. A decision made in the Report dated 31st 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 removed into this honourable court and be quashed.

The application is supported by 5 grounds on the body of the applications and an affidavit sworn by the applicant, Kipyator Nicholas Kiprono Biwott.

Although a single Judge has jurisdiction to hear and determine a matter brought under Order LIII of Civil

Procedure Rules, some applications which raise complicated and complex issues are fixed before more than one Judge.

This was such an application and it was fixed before me Rimita., Rawal J and M Ransley a Commissioner of Assize.

Mr Oyatsi appeared for the applicant and Mrs Onyango, the chief Litigiation Counsel appeared for the Honourable the Attorney General. Mrs Onyango vehemently and strenuously opposed the application.

The facts that led to the dispute before us can be briefly stated. By Gazzette Notices No 3312 and 3313 of 1998, His Excellency the president of the Republic of Kenya appointed a Judicial Commission of Inquiry compromising of Honourable Justice Akilano Molade Akiwumi then a Judge of Court of Appeal as its Chairman, Honouralbe Justice Elkana Onderi Bosire, a Judge of the Court of Appeal and Honouralbe Lady Justice Sarah Chibai Ondeyo a Judge of the High Court, as its members.

The said Commission was appointed under the provisions of the Commission of Inquiry Act (Cap. 102) Laws of Kenya.

The terms of reference of the commission were:

> (a) To investigate the tribal clashes 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 cases of such clashes;
> (ii) the action taken by the police and other law enforcement agencies 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 agencies in controlling the said tribal clashes and in preventing the occurrence of such tribal clashes in future:
> (b) To recommend
> (i) prosecution on further criminal investigations against any person or persons who may have committed offences related to such tribal 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 Section 7(1) of the said Act, to report thereon as soon as reasonably practicable, but not later than 31st December, 1998.

The initial life of the Commission which was up to 31st December 1998 was extended severally to allow it complete its work and the final extension gave the Commission life up to 31st July, 1999.

The commission had in its ranks two joint secretaries and an assistant counsel.

The commission did the work it was mandated to do and prepared its report which is dated 31st July, 1999. The Report which was a secret document was released to His Excellency the President on 19th August, 1999.

The report was kept secret by the Government but on 18th October,2002, the same was released to the public. The applicant learnt of this release of the Report to the public through the media and obtained a copy of the Report on 22nd October, 2002.

Upon reading the Report, the applicant found his name in the list of the persons who had been recommended for investigations in respect of the tribal clashes that occurred in Kericho District.

The applicant was aggrieved by this recommendation and on obtaining the mandatory leave filed the application before us.

Simply put, the applicant's case is that the recommendation by the Commission was made against the rules of natural justice in that the applicant was given no opportunity to deny or contradict whatever adverse evidence was against him. It is also the applicant's case that the recommendation is *Ultra Vires* the powers of the Commission in that it was made out of the blue with no backing evidence.

I will examine this later.

But it is instructive to mention at this stage that except for the different interpretation given to the facts before us there is no dispute on the facts as such.

Mrs Onyango, the learned Chief Litigation Counsel admirably, in my view, attacked the application on several legal basis. If I agree with any of the issues raised by Mrs Onyango, I would no doubt dismiss the application.

One of the points of objection raised by Mrs Onyango was that the Honourable the Attorney General is not a proper party in the application before us. Mrs Onyango relied on the provisions of the Constitution of Kenya and the Government Proceedings Act, Cap 40, Laws of Kenya, among other relevant provisions.

On this issue, it is important to look at the nature of the proceedings before the Commission in question. It is clear from the material before us, that after undertaking the hearings, and making its recommendations, the Commission had no authority to do the final act of reading the recommendations to the public. The document was submitted to his Excellency the President and it would appear it was handed over to the Attorney General who is the Principal Legal Advisor of the Government. The Attorney General published the Report on 18th October, 2002. In my view, the Attorney General was part and parcel of the Commission as far as the Report was concerned. Someone else and not the Commission was to publish the Report. In this case it was the Government through the Attorney General. I believe the Commissions Report was never meant to remain a "*secret*" document forever.

The Commission had no authority to make the report public. This means that further proceedings were necessary when the report was to be made public.

A similar argument arose in the case of *Tsikata v/s Newspaper Publishing*, reported in (1977) 1 All ER 655. A special Board of Inquiry had been appointed to inquire into the murder of three High Court Judges in Ghana. The Board had no authority to publish the report to the public. It was published by the Attorney General.

Lord Justice Neill said the following at P.666-667 at paragraph (j) and (a);

> "One starts with the status and procedure of SIB. The SIB was charged with investigating a matter of great public concern in Ghana. The Chairman was a High Court Judge. The proceedings took place in public and save for a few witnesses whose evidence was held in Camera the oral evidence was heard in public. It is true that the final report was submitted to the Attorney- General, but this circumstance did not in my view prevent the final report, as being in effect the judgment of the SIB, forming part of the proceeding in public.

What was held here is that the inquiry was a special inquiry and not an ordinary trial. The proceedings by the Attorney General were part of the proceedings of the special Board.

In my view the status of the Attorney General in relation to the Republic of Kenya, the appointing authority and the fact that he was part and parcel of the commissioner's proceedings make him a proper and necessary party in the application before us.

Having found that the Attorney General is a proper party in the application before us, I will look into the other point of objection raised by Mrs Onyango. It was Mrs Onyango's contention that the application before us is time-barred in view of the provisions of Order LIII r. 2.

Order LIII r. 2 of the Civil Procedure Rules reads as follows:

> "LIII r. 2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date the proceeding or such shorter period as may be prescribed by any Act ……"

Although leave was granted *ex-parte* before the Notice of Motion before us was filed, it is my view that Mrs Onyango was right to challenge the grant of leave at this stage of the proceedings.

It was Mrs Onyango's case that both Order LIII and Section 9 of the Law Reform Act Cap 26, are clear on the limitation and time for applying for *certiorari*. With this sub-mission I agree and also add that as the law stands the court has no jurisdiction to extend the time prescribed. What I do not think is right is the way Mrs Onyango sought to apply the law to the matter before us.

I have already mentioned Gazzette Notices Nos 3312 and 3313 of the 1st July, 1998. In Gazzette Notice No 3313 of 1st July 1998, His Excellency the President directed the following among others:-

> "And I do direct that the said Commissioners shall execute the said inquiry with all diligence and speed and make their report without undue delay".

On my part I would read from this directive to the Commissioners to mean that the Commissioners were to make their Report to the relevant Authority. In this case it was to the Government through the President and of course the Attorney General. In my view the inquiry and the Report by the Commissioners were of public concern and interest in Kenya. No one would under the circumstances have expected the Report to end up in the drawers of the Government and deny the public its right to the contents of the Report.

The Commission prepared its report and dated the same the 31st July, 1999.

The Commissioners did not present its Report within the period of its life as extended by Gazzette Notices but presented the same on 19th August, 1999. This could affect the validity of the whole report but that is not our concern here.

To come to the issue of limitation of time raised by Mrs Onyango, it is clear that when the Report was presented to his Excellency the President the same was marked "SECRET" and remained so until it was published to the public by the Attorney General on 18th October, 2002.

Like in *Tsikata's* case (supra), the publication of the Report by the Attorney General formed part of the proceedings by the Commission. The Commission prepared the Report but it was read by the Attorney General to the public. What the Attorney General did formed part of the proceeding by the Commission.

It is therefore my humble view that the final proceeding on the inquiry ended with the Attorney General when he made the report public in the ordinary course of events.

In *Tsikata's* case the Court of Appeal refused to agree with the submission that the proceedings by the Attorney General in making the report of Special Board of Inquiry public were separate proceedings from those of the Special Board of Inquiry.

Indeed Lord Justice Ward said the following.

> "Proceedings should be widely enough construed to cover the culminating act of the board if those findings are made public in the ordinary course of event."

To borrow the words of Lord Justice Ward, we should construe widely, the proceedings of the Commission to include the proceedings of the Attorney General when making the Report public.

It is therefore my view that the judgment or report of the Commission was read on 18th October, 2002. The application before us is not time barred.

Mrs Onyango raised another point of law which in my view is very interesting. Mrs Onyango submitted that the recommendations by the Commission are not a decision subject to Orders of judicial review.

It is common ground that what the Commission is saying is that the applicant should be investigated in respect of criminal cases committed in Kericho District during the infamous tribal clashes. People died in the said clashes and property was destroyed. The applicant would therefore be subject to arrest and according to the current law could be placed in police custody for about 14 days as the investigations continue. The recommendation has the effect of taking away the applicant's liberty. There is no right of appeal against the recommendations.. It is final. The applicant is aggrieved by that recommendation.

In my view the recommendation by the Commissioners that the applicant be criminally investigated is a decision which would be subject to orders of *certiorari*.

I have considered all the relevant material placed before us. It will not be necessary for me to go to each one of them.

The applicant before us was among the persons generally notified that adverse evidence would probably be given against them during the inquiry and that he should be represented during the inquiry. He consequently appeared through an advocate who produced newspaper cuttings to exonerate his client the applicant. The applicant was not called as a witness to adduce any evidence but when the report was published the applicant found that the Commission had recommended that he be criminally investigated. The applicant therefore submits that the said recommendation had no basis on the facts before the Commission and if it had, then it was wrongly and improperly made as he was not called to contradict any evidence against him.

I do not have to emphasize that the proceedings before the Commission was not of the nature where we have a plaintiff and a defendant or a prosecutor and an accused person. All the proceedings were in control of the Commission. It was the responsibility of the Commission to call or not call witnesses.

I have perused the Commissioner's report and especially the part of the report on Kericho District. The Commission has not uttered a single adverse note against applicant in the relevant part concerning Kericho District. The recommendation appears to have come out of the blue.

Except that the Commission was headed by imminent Judges I would be tempted to think that the recommendation is a typing error. Be that as it may, two things come out for consideration.

The first one is that if there was no evidence against the applicant and this is supported by the Commission's findings, then the Commission acted outside its mandate, and jurisdiction. Its recommendation as concerns the applicant is *ultra vires*.

The Commission's mandate was to investigate and to recommend ……. If the investigation of the Commission did not come up with any evidence against the applicant then it overstepped its statutory powers and acted *ultra vires* and in excess of jurisdiction by recommending that the applicant be investigated. In *Republic v/s Nat Bell Liquors* (1922) 2 AC 128, it was said:

> "If a public authority steps outside its statutory powers, it acts *ultra vires* or in excess of jurisdiction and the courts may interfere."

The Commissions mandate was to investigate ……..to recommend prosecution or further criminal investigation basing such recommendation on facts. It therefore exceeded its jurisdiction by basing its recommendation on no evidence or finding of facts.

The second issue is that of natural justice. Assuming that there was adverse evidence given against the

applicant, then, the Commission was duty bound to call the applicant to give evidence to contradict or comment on the evidence.

See *Halsbury's Laws of England*, Third Edition, Volume II, p. 64 to 66, paragraph 122.

There is not dispute that the applicant was not called as a witness. In my view it was not enough that he had been represented by counsel.

The issue of calling the applicant and some other persons was raised by the representative of the Law Society of Kenya during the inquiry.

According to a letter by the Law Society dated 18th June 1999, the Law Society had requested for summons to call the applicant and others to testify but the request was turned down by the commission.

It is not clear as Mrs Onyango put it, whether the Law Society wanted to advance its case by calling the applicant to testify or whether they wanted to advance the applicant's case.

But what is important now is that the Law Society appears to have sensed lapse of fairness in the proceedings in that important witnesses were not given opportunity to testify.

The effect of the whole exercise is that the refusal by the Commission to call the applicant to testify and contradict, comment or deny any evidence, against him was deliberate and not an oversight.

The applicant was condemned without being given full opportunity to articulate his case. This was against the rules of natural justice.

From what I have said it is clear that I find merits in the application dated 1st November, 2002. I would allow the same.

As Rawal J agrees, the application dated 1st November, 2002 is allowed.

The Report of the Judicial Commission of Inquiry on tribal clashes in Kenya dated 31.7.1991 is ordered removed into this court and quashed as far as it recommends that the applicant be further investigated regarding his role in the tribal clashes that occurred in Kericho District.

I also agree with Rawal J. that the matter before us is such that we should make no order as to costs. The result is that each party will naturally bear its own costs.

Orders accordingly.

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

D.M RIMITA

JUDGE.

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 <u>who may have committed</u> <u>offences</u> 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.

RANSLEY CA (DISSENTING). I have had the advantage of reading the rulings of my Learned Bother and Sister but respectively take a slight different view. The Appellant brings this application by way of Judicial Review to obtain the following orders.

1. A decision made in the Report dated 31st 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 removed into the Honourable Court and be quashed.
2. A declaration that the said decision is wrong, unreasonable, unfair and perverse having been made without any factual basis and/or in the absence of any evidence in the Report in support thereof.
3. A declaration that the said decision was contrary to natural justice.

The complaint springs from a report of a Commission of Enquiry duly convened to enquire into Tribal Clashes in Kenya which appointment was Gazetted in Gazette Notice No 3312 of 1998 and dated the 1st July, 1998. The relevant of this gazette notice is as follows:- The terms of reference shall be:

(a) To investigate the tribal clashes 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 agencies with respect to any incidents of crime arising out of or committed in the course of the said clashes and where such action was inadequate or insufficient, the reasons therefore:

(iii) The level of preparedness and effectiveness of law enforcement agencies 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 which may have committed offences related to such tribal 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 section 7(1) of the said Act, to report thereon as soon as reasonably practicable, but not later than the 31st December, 1998.

The Act referred to is the Commission of Inquiry Act (the Act). It will be seen that it was the duty of the Commissioners to carry out the inquiry and make recommendations with regard to *inter-alia* further criminal investigations against any person or persons who may have committed offences relating to such clashes. It is to be noted that the report is to be made to the President in writing.

There is nothing in the Act so far as I can see states that it should be made public.

It is not in dispute that as a result of orders made in the High Court and the Court of Appeal the Attorney General was ordered to make the Report Public which he did by releasing the same on the 18th October, 2002.

In the statutory statement of facts filed with this Application, the applicant in Part C relied on the following grounds:-

i. It was the duty or function of the Commission to receive evidence given by witnesses and weigh or evaluate this evidence in order to ascertain facts.
ii. (ii) In the discharge of its functions as stated above, the Commission was required to act Judicially.
iii. The recommendations or decision of the Commission affecting the rights of any person were to be based on the facts so ascertained by the Commission.
iv. In its report of the incidents that occurred in Kericho District as contained in paragraph 142 and 195, both inclusive of the said report there is no mention of the applicant.
v. The decision is contrary to natural justice as the applicant was not informed by the Tribunal that he was involved in the clashes in Kericho District and was not called as a witness for the purpose of inquiring into any fact or ascertaining any fact in connection with the said clashes.
vi. The Commissioners acted unreasonably or perversely when they recommended in paragraph 526 of the report that the applicant should be investigated regarding his role in the tribal clashes in Kericho District.

The duty of the Commission is contained in section 3(3) of the Act, which is in the following terms.

(a) That the Commissioner shall conform with the following instructions:-

(i) That evidence adversely affecting the reputation of any person, or tending to reflect in any way upon the character or conduct of any person, shall not be received unless the Commissioner is satisfied it is relevant to the inquiry, and that all reasonable efforts have been made to give that person prior warning of the general nature of the evidence, and that, where no such warning has been given, the general nature of the evidence has been communicated to that person.

(ii) That that person shall be given such opportunity as is reasonable and practicable to be present either in person or by his advocate, at the hearing of the evidence, to cross-examine any witness testifying thereto, and to adduce without unreasonable delay material evidence.

(iii) That hearsay evidence which adversely affects the reputation of any person, or tends to reflect in any way upon the character or conduct of any person, shall not be received;

(iv) That no expression of opinion shall be in evidence of the character, conduct or motive of any person, except in as far as the Commissioner considers it essential, for ascertaining the truth of the matter into which he is Commissioned to inquire, to depart from these instructions; and

(c) That in the event of any such departure from these instructions, the Commissioner shall record his reasons therefor in the record of the inquiry, and shall report thereon, with his reasons therefor, in his report of the inquiry.

In my view this is a mandatory provision and must be observed. Mr. Oyatsi for the applicant preferred to base his case upon what he submitted were breaches of the rules of natural justice. The mandatory requirements in section 3 above are in all respects similar to the principles to be observed in the doctrine of natural justice.

The applicant is mentioned in the Report twice by name. The first mention appears at page 287 paragraph 526 which says

> "the following people should be investigated regarding their role in the tribal clashes as recommended in this report."

On Page 286 under the sub-heading" Kericho District (F) the name of the applicant appears. His name also appears in Appendix G in item 89 as being a person adversely mentioned and notified in the Report.

It is alleged the Commissioners acted unreasonably or perversely when they made their recommendations at page 526 of their report.

The only evidence before us was that contained in the said statutory statement where at paragraph D the applicant relies on the following facts.

> (1) The applicant was served with a notice of the general nature of the evidence to be adduced against him in the Judicial Commission or Inquiry to decide whether to be represented by Counsel or not.
> (2) Pursuant to the said notice, the applicant appointed Counsel to represent him at the hearing and to crossexamine witnesses who may give adverse evidence against the applicant.
> (3) Counsel for the applicant appeared at all these relevant sittings where the applicant's name was mentioned and, where appropriate, cross-examined any witnesses who testified on matters touching on the applicant.
> (4) The Commissioners did not at any time inform the applicant that he was involved in the clashes in Kericho District or call the applicant to appear before it as a witness for the purpose of inquiring into any fact or ascertaining any fact in connection with the said clashes in Kericho District.
> (5) There is no evidence at all in its report dated 31st July, 1999 touching on the applicant in connection with the tribal clashes that occurred in Kericho District and the applicant's name does not appear anywhere in connection with the events that occurred in the District.

Although I do not intend to take the point, which was not mentioned by either Counsel; in the case of *Kenya Revenue Authority verse Owaki* Civil Appeal No. 45 of 2000, the Learned Court of Appeal stated that under order 53 rule 1, it was important for the facts to be set out and sworn to in the supporting affidavit and not merely be verified when set out in the statutory statement. At page 3 of the report the Learned Court of Appeal stated.

> "We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for Judicial Review. That appears to be meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from *Supreme Court Practice 1976* Volume 1 at paragraph 53/1/7.
>
> The application for leave "By statement"– The facts relied on should be stated in the affidavit (see *R V Wandsworth JJ Exp Read* (1942) 1 KB 281). –"The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit."

It was admitted that the applicant's Counsel did appear and examine witnesses who gave evidence on matters where the applicant was mentioned. We do not know what the nature of this examination was or what if anything else was alleged against the applicant.

In order to succeed in application for *Certiorari* the applicant must show that his rights have not been observed in some particular manner so that he has been unfairly treated. The principles on which a court will act contained in paragraph 8 on page 104 *Atkins Court Forms*.

> "Wherever any body of persons has legal authority to determine questions affecting the rights of subject and, thus having the duty to act Judicially, act in excess of its legal authority, it is subject to the controlling jurisdiction on the Queen's Bench Division by *certiorari* provided the irregularity or error appears on the face of the record. If the record is incomplete the court can compel the tribunal to complete it. If, however, irregularity appears on the face of the complete record, certiorari will not lie unless it can be shown that the tribunal has no jurisdiction, or that for some other reasons (for example, fraud, real likelihood of bias or prejudice or a breach of some principle of natural justice) the decision should be quashed where it is alleged that the tribunal has erred in law whilst acting within its jurisdiction".

It appears that the Commissioners were acting properly within their mandate in considering which persons it was necessary to investigate further in connection with tribal clashes. The question arises were they wrong in naming the applicant or did they ignore the procedures set out in section 3 of the Act set out above and if so what remedy if any does the applicant have.

Before considering the matter on its merits I will deal with the question of the jurisdiction of this court.

In the first place the court will only act where a decision has been made by a Judicial or quasi-judicial body. Firstly is a Commission of Inquiry a body, which can be the subject matter of a Judicial Review? I am of the view that it can if a decision is made by it, which a person is, aggrieved by. Support for this view is to be found at page 286 of in "*Royal commissions and Boards Inquiry*" by Leonard Arthur Hallett (1982) in which under the heading""Affecting the Rights of Subject's, the following appears.

> "The main difficulty in applying the prerogative writs to Commissioners and Boards is that such bodies do not make decisions which alter the legal relationship of person ie they do not affect rights. The availability of the prerogative writs against Commissions and Boards because of the"rights" question, is a most confused area of the law. It has already been seen that the courts have adopted a more liberal approach to when "rights" are affected. However, there are important decisions where it has been held and the prerogative writs do not apply to merely advisory bodies because "rights" are not affected, such as *Ex parte Walker, Testro v Tait and R. v. Collins ex parte ACTU Solo Enterprises pty Ltd*. On the other hand there is also a very important decision of the New Zealand High Court in the present context where it was held that *dicta* in early cases to the effect that a Commission of Inquiry is immune from *certiorari* and prohibition are of out of date. The fusion of the concept of a power to affect "rights" with the requirement that the power must be exercised "judicially"– so that in essence it is necessary to examine what is actually being done by the body in question – opens the possibility that the writs may be available against Commissions and Boards. Nevertheless, the expression–"determine questions affecting rights", at least up until the decision in *Thomas*' case, had hidden within it almost superable difficulties for the person who would seek to have a writ of *certiorari* or prohibition issue against a Commission or Board, Reference has also been made to *Thomas*' case in Chapter X. In that case the New Zealand High court took the view that the remedies of *certiorari* and prohibition were applicable to any tribunal carrying out investigative functions which were likely to affect individuals in relation to their personal civil rights to expose them to prosecution under the criminal law"

The question is was the recommendation of the Tribunal at page 286 and 287 of the Report a decision which is capable of being quashed. I incline to the view that if a person has been unfairly named this court would have power to quash such a recommendation.

Secondly if the remedy of certiorari is available when can it be obtained? Part VI of the Law Reform Act deals with the courts powers on prohibition and certiorari and Sec. 9 (3) states as follows:-

> "In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

This is also re-enacted in Order 53(2) of the Civil Procedure Rules, which is as follows:

> "Leave shall not be granted to apply for an order of certiorari to remove any Judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

Mr. Oyatsi submitted that the application had been made within the time limit as the Report was not published until the 18th October, 2002 and this application was submitted within the six months period. He relied on *Tsikata v Newspaper Publishing plc* holding (1) where it is states.

> "Further, the expression 'proceedings in public' was wide enough to encompass the final report of the special inquiry because even though that report was submitted to the Attorney General and not made public by the inquiry, the states and procedure of the inquiry was such that its final report, being in effect its judgment, formed part of the proceeding in public"

The importance in that case of the words "proceedings in public" was that if the words the subject matter of a libel case were words, which had been stated in proceedings in public, the defence of qualified privilege applied. The court held that the report of the inquiry which had been reached some 10 years after it had been made nevertheless entitled the defendants to rely on the defence of qualified privilege. No question of time limit was raised in that case merely whether the privilege could be relied on after 10 years from the report having been made.

Mr. Oyatsi also submitted that the report in this case was analogous to a judgment of the court, which only becomes effective when delivered. I do not accept that that is the case. The decision to be quashed was the recommendation made not later than the 31st July 1998 when the report was concluded. In my view the six months period runs from that date. The fact that the report was not published until the 18th August 2002 does not alter that fact. I appreciate that the applicant says he was not aware that he was adversely mentioned in the report until it was published but that cannot alter the date on which the decision was made. In the case of *Osolo v Ochola & Another* C.A. No. 6 of 1995 the question of extending the time for filing an application for certiorari was considered. The learned Court of Appeal states as follows:

> "When the application for such leave came up for hearing before Porter AG J (as he then was) the learned Judge declined to grant the leave as the application was filed out of time. Under Order 53 rule 2 as it stood in 1982 no such leave could have been granted unless the application for such leave was filed within six months of the date of the order sought to be quashed. The said rule was worded in mandatory terms as follows:
> "2 Leave shall not be granted to apply for an order of certiorari to remove any Judgment, order, decree, conviction or other proceedings for the purpose of it being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act…….

> Mr. Niare then in a separate suit (H. C Miscellaneous Civil Case No. 35 of 1983) applied for extension of time to file the application for such leave: That application was heard *ex-parte* by Platt J (as he then was) and was granted. There was quite clearly a fundamental error on the part of the Superior Court in granting such extension of time as Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya, quite clearly shows that an application for leave to apply for an order of *certiorari* cannot be made six months after the date of the order sought to be quashed".

I will now deal with the merits of the case as to whether or not the Tribunal acted unfairly. In my view they had a duty to enquire into the nature of the clashes and name persons who they thought required investigation. I cannot see that they breached the provisions of section 7 of the Act as Mr. Oyasti submitted. Did they breach the provisions of sec 3 (a) (i) (ii) (iii) (iv) and (b) of that section?

The Appellant admitted in his statement that he had appointed counsel to represent him. There is nothing on the record before us to show what was done and said. It would appear that the matters referred to in Sec 3 (a) (i) and (ii) were observed. It is not possible to say if sub clauses (iii) or (iv) were observed. We do not have a report from the Commissioners in their report that they had departed from the instruction given as required by subsection 3 (b). The onus is on the applicant to show that these instructions were not obeyed or in some other way the rules of natural justice were flouted. I do not see that he has discharged that onus.

Mrs. Onyango who appeared for the Attorney General submitted that the Attorney General was not a proper party to the dispute as it did not involve a Government body, which the Attorney General represented. I find it a difficult question as to who should represent the Commission whilst alive. Now that it is dissolved it is even more difficult to see how proceedings can be brought against it when it does not exist. In my view Mrs. Onyango appeared, having been served, as *amicus curiae*.

For the reasons I have given, I would dismiss the application.

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

P.J RANSLEY

JUDGE.