



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCCA NO. 75 OF 2009

REV. E. KIGEN APPELLANT

=VERSUS=

REV. JOSEPH MURPUS 1ST RESPONDENT

MOSES KIRISWA SAE 2ND RESPONDENT

THE REFORMED CHURCH OF EAST AFRICA 3RD RESPONDENT

JUDGMENT

The Appellant, **Rev. ERIC K. KIGEN**, had instituted legal proceedings seeking to stop the intended ordination of the 2nd Respondent, **MOSES KIRISWA SAE** as a Church Minister.

The ordination was due to have been carried out by the 1st Respondent, **REV. JOSEPH MURPUS**, and the same would have enabled the 2nd Respondent to be a church Minister in the 3rd Respondent, **THE REFORMED CHURCH OF EAST AFRICA**.

The main reason why the Appellant was objecting to the ordination of the 2nd Respondent was that the process was being undertaken in a manner that was violating the constitution of the Church.

At the time when the Appellant instituted the proceedings, he was the Minister of the Reformed Church of East Africa. He was not involved in the process of preparing for the ordination in issue. He was effectively excluded from the process.

It was his case that the said exclusion constituted a violation of the Constitution of the Church.

In particular, the Appellant felt that process of excluding him from the exercise was equivalent to having one congregation lording it over another congregation.

The Appellant was the Overall Overseer at the Racecourse Parish. Therefore, he deemed himself to be an integral player in the process of ordination of other Ministers in the Church.

When he was not consulted or involved in the preparations for the ordination of the 2nd Respondent, the Appellant considered that to be an act of the Respondent's lording it over other church ministers.

As at the material date, the Appellant had served the church for 42 years. Therefore, when he was excluded, he suffered extreme embarrassment, dishonour, and mental anguish, as he would have been forced out of his church position in a dishonourable manner.

It was for that reason that the Appellant sought and was granted an injunction to restrain the Respondents from proceeding with the ordination.

After the Court granted the injunction, the Appellant extracted the order, and he served it upon all the 3 Respondents. That was the Appellant's contention.

Although the Respondents were served, they proceeded to have the 2nd Respondent ordained. In the light of that development, the Appellant sought orders to have the Respondents committed to jail, for having acted in a manner that was in contempt of the court.

Having given consideration to the Application, the learned trial magistrate sentenced the 1st Respondent to two (2) years suspended sentence.

The Appellant holds the view that the learned trial magistrate was wrong to have declined the prayer to have the 1st Respondent imprisoned for 6 months, or to have his property attached.

The other position taken by the Appellant was that the learned magistrate should not have exonerated the other 2 Respondents. It is his submission that all the 3 Respondents were in contempt of the court, and that they all ought to have been punished.

The Appellant pointed out that on 22nd May, 2007, **Hon. Njage** had made a finding that all the 3 Respondents had disobeyed the orders of the Court.

Therefore, the Appellant believes that **Hon. Alego** erred when, on 2nd June, 2009, she punished only one of the 3 Respondents. The learned magistrate is said to have made a serious mistake. She is said to have sat on appeal on the decision of another magistrate, of concurrent jurisdiction.

In any event, as the actions of all the 3 Respondents were completely intertwined, the Appellant submitted it was not possible to exonerate 2 of them, whilst holding 1 liable.

In the result, this court was called upon to allow the appeal, set aside the orders made on 2nd June, 2010, and commit the 3 Respondents to Civil Jail for a period not exceeding 6 months.

In answer to the appeal, the Respondents submitted that appeal had been overtaken by events. That contention is founded upon the fact that the 1st Respondent had already completed serving the sentence of 2 years suspended sentence. The said sentence was said to have lapsed on 2nd June, 2011.

In any event, the learned magistrate is said to have properly exercised the discretion vested on her by law. She is said to have had the option of sending the Respondents to jail, or of attaching their properties, or of handing down a suspended sentence.

The Respondent's position was that the Appellant cannot direct the Court on the nature of the sentence which the court ought to impose.

In this case, the court is said to have given due consideration to all the submissions before determining the appropriate sentence.

As regards the 2nd and 3rd Respondents, their position was that the orders made on 2nd June, 2009 did not touch on them at all. It is their understanding that on that date, it was only the 1st Respondent who had been required to show cause. Therefore, even if there should be a reversal of the orders made on 2nd June, 2009, the 2nd and 3rd Respondents believe that such reversal cannot result in their arrest and incarceration.

There is no doubt that the court granted an order restraining the 1st and 3rd Respondents' from conducting the ordination of the 2nd Respondent.

The 1st Respondent, **Rev. Joseph Murpus**, acknowledged that the order was served upon him personally. Notwithstanding the fact that the order was of an injunction, **stopping the ordination**, **Rev. Murpus** and the Church went ahead to conduct the ordination.

The 1st Respondent explained to the Court that the only reason why he proceeded with the ordination is that the Plaintiff, **Rev. Eric K. Kigen** had told the Church that the ordination could proceed, provided that his grievances were solved thereafter.

Indeed, **Rev. Murpus** emphasized that **Rev. Kigen** actually participated in the ordination of the 2nd Respondent, **Moses Kiriswa Sae**.

Rev. Murpus said that, as a religious leader, he would be the last person to disobey an order of the Court. He was therefore surprised that although **Rev. Kigen** had consented to the process of ordination going on, and that even though the said **Rev. Kigen participated** in the ordination, he later asked the Court to punish the Respondents, for their alleged contempt of Court.

According to **Rev. Murpus**, he never had any intention of undermining the authority of the Court. His understanding was that the participation of the Appellant, in the ordination, meant that the Appellant had removed his opposition to the ordination. Upon realising that the court order was still effective, notwithstanding the personal participation of the Appellant in the 2nd Respondent's ordination, the 1st Respondent tendered his unreserved apology to the Court.

It is noteworthy that the 1st Respondent emphasised that the Plaintiff attended a two-hour meeting, on the date when the ordination was due to take place. **Rev. Murpus** said that at that meeting, all the parties agreed to proceed with the ordination, provided that the issues raised by the Appellant would be addressed thereafter.

It is also important to note that after the application for committal of the Respondents was filed, the parties informed the Court, (on 29th April, 2008), that they had agreed on all the issues, save one.

Miss Chege, the learned advocate who appeared for the Appellant on that date, told the Court that the parties were willing to meet again on that very day, to talk.

The appellant, then canvassed his application, seeking to have the Respondents jailed for acting in contempt of Court.

Meanwhile, the Respondents asked the Court to set aside any orders for their committal to jail.

On 21st April, 2009, the Learned Magistrate held as follows:-

“I believe the law of equity has a reason in place. The Plaintiff was seeking for orders restraining the Defendants from infringing on some of their rights in their church constitution. It is not deemed otherwise, but evidently so, that the 1st Applicant/Defendant herein defied court orders. The court again is guided by the fact that it is the 1st Defendant who ordained 2nd Defendant. The 2nd Defendant is a victim of circumstances, as deponed in his affidavit. The Rev. Jonathan Kangogo's affidavit confirms that he was in Nairobi on 1-10-2006. The same is supported by 1st Defendant.”

Based on those findings, the learned magistrate held that the 1st Respondent was in contempt of court. He was therefore required to show cause why he should not be punished.

Meanwhile, **Rev. Jonathan Kangogo** and **Rev. Moses Kiriswa** were found not to have been in contempt. Although the court did not state so categorically, it found that **Rev. Kangogo** was not at the ordination ceremony, whilst **Rev. Kiriswa** was described as a victim of circumstances.

On 28th May, 2009, the parties ventilated on the issue. And on 2nd of June, 2009, the learned magistrate delivered her Ruling.

It is very clear from the Ruling that the matter which was for determination was the Notice to Show Cause, against the 1st Defendant.

The court gave consideration to the mitigation, and proceeded to hand down a 2 year suspended sentence. That punishment was handed down on 2nd June, 2009.

The trial court did not make any other findings or holdings on that date. It only passed sentence.

Therefore, if this appeal were to be allowed it would only extend upto the sentence handed down against the 1st Respondent.

Had the Appellant been aggrieved with the Ruling dated 21st April, 2009, he would have lodged an appeal against that Ruling. If that had been done, this court would have been obliged to address its mind to the question as to whether or not it was open to **Hon. Atieno Alego** to excuse **Rev. Kang'ogo** and **Rev. Kiriswa**.

The appeal before me does not seek to challenge the Ruling dated 21st April, 2009.

It is thus not open to this court to delve into the propriety or otherwise of the orders made on that date.

Accordingly, this court declines the Appellant's invitation, to determine an issue which has not been placed before me, for determination.

As regards the sentence which was handed down to the 1st Respondent, **Rev. Joseph Murpus**, I find that, pursuant to order 40 Rule 3 (1) of the Civil Procedure Rules;

***“ In case of disobedience, or of breach of any such terms,

the Court granting an injunction may order the property

of the person guilty of such disobedience or breach to be

attached and may also order such person to be

detained in prison for a term not exceeding six (6) months

unless in the meantime, the court directs his

his release.”***

The sentences provided for are either imprisonment or the attachment of the property of the person

who disobeyed or breached the order of an injunction.

It therefore needs to be asked whether or not the trial court had a right to exercise its discretion as it did.

First, it is evident that if the contemnor was sent to jail, the maximum period for which he could be incarcerated was six (6) months.

Secondly, even after the court sends the person to jail, it is still open to the same court to direct that he be released earlier than the period ordered. It is easy to appreciate why the same court is given that power. The reason is that the proceedings in issue are not of a criminal nature, in the strict sense. Therefore, the law gives a window of opportunity to the offender to purge his contempt. If the contempt was purged whilst the person was still in jail, it would be open to him to ask the court to release him.

In the ordinary course of legal proceedings, when the law provides the sentence, it would be within the court's discretion to hand down any sentence that was lesser than the said sentence, unless the law stipulated that the sentence prescribed was the least available for that offence.

In this case, the position is very clear. The Maximum prison term would be six (6) months in jail. That therefore implies that the court could hand down a prison term of even one day.

Does that mean that the court could only hand down a prison sentence? Or to put the question in a different format; did the court have the discretion to hand down a suspended sentence?

Pursuant to the provisions of Section 15 (1) of the Criminal Procedure Code,

“Any court which passes a sentence of imprisonment for a term of not more than two years for any offence may order that the sentence shall not take effect unless during the period specified by the court (hereinafter called “the operational period”) the offender commits another offence, whether that offence is punishable by imprisonment, corporal punishment or by a fine.”

That section was repealed by Act No. 17 of 1967. However, by Act No. 7 of 1990, the said section was re-introduced into the Criminal Procedure Code.

Therefore, the learned trial magistrate acted well within her authority when she sentenced the 3rd Respondent to the suspended sentence.

In the final result, there is no merit in the appeal. It is dismissed with costs to the Respondents. For the avoidance of any doubt, the costs of this appeal shall be payable regardless of the outcome of the substantive proceedings.

DATED, SIGNED AND DELIVERED AT ELDORET,

THIS 6TH DAY OF MARCH, 2014.

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FRED A. OCHIENG

JUDGE.