REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO.5 OF 2014

REPUBLIC ………………………………………………….APPLICANT

VERSUS

DOUGLAS PATRICK BARASA

QUEENS BOOKSHOP …...………………………………RESPONDENT

R U L I N G

1. This Court is moved under the Provisions of Articles 165 (6) and 165 (7) of The Constitution, 2010 and Section 364 of The Criminal Procedure Code for the following orders:-

1. **THAT the Honourable Court be pleased to reverse the decision of the learned Trial Magistrate (Hon. T.W. Cherere CM) made on 13th February, 2014 rejecting Count V and Count VII of the Charge sheet in Busia Chief Magistrate Court Criminal Case No.2157 of 2013:- R –vs- Douglas Patrick Barasa & Queens Bookshop.**
2. **THAT the trial court proceeds with the hearing of all the nine (IX) counts against the Respondents herein, in Busia Chief Magistrate Court Criminal Case NO.2157 of 2013 and thereafter make a finding in each of the counts in accordance with the law."**

2. Articles 165 (6) and (7) of The Constitution is in respect to the High Court's Supervisory Jurisdiction over the Subordinate Courts or any person, body or authority (other than a Superior Court) exercising Judicial or Quasi-Judicial function. While Section 364 of The Criminal Procedure Code provides for powers of the High Court in its Revisionary capacity over Subordinate Courts in Criminal matters.
3. The 1st Respondents is a Director of the 2nd Respondent Company. Both faced 9 counts of labour related charges in Busia Criminal case No.2157 of 2013 **Republic –vs- Douglas Patrick Barasa & Queens Bookshop.** Prior to taking plea, antecedent arguments arose as to the Jurisdiction of the Court to hear the matter and as to the propriety and legality of the charges they faced. The objection was set up by their Counsel.
4. After hearing and considering the arguments from both the Prosecution and Defence the Trial Court, in part, held that:-

"**3. There is evidence that by virtue of Gazette Notice 9399 of 12th July, 2013; the DPP in exercise of powers conferred on him by section 85(1) of the criminal procedure code and section 35(1) (k) of the labour institution Act 2007 appointed several labour officers including Mr. Pascal O. Opondo as public prosecutors for the purpose of all cases arising under the labour institutions Act, 2007.**

4. Under powers conferred on this court by section 89(1) (5) of the criminal procedure code, this court rejects count 5 and 7 which are brought under the Employment Act, 2007."

It is that part of the decision of the Trial Court that has attracted the controversy that founds the present Application.

5. The State which is the mover of the Application has urged this Court to find that the trial Court misapprehended the law in holding that counts V and VII were defective. This Court was asked to find that, vide Gazzette Notice No.9399, Mr Pascal Opondo was duly appointed to prosecute all offences arising from all Labour Laws. Mr. Kelwon for the State understood the Learned Trial Magistrate as holding that the Prosecutor was only competent to prosecute offences arising under the Labour Institutions Act, 2007. The view of the State Counsel was that the decision could not stand the scrutiny of Sections 35(1) (k) of The Labour Institutions Act, the definition of Labour Law under that Act and the definition of a Labour Officer in Section 2 of The Employment Act 2007.
6. The Respondents resisted the Application and doubted that this Court had jurisdiction to hear the Application for Revision in the first place. Mr. Omondi for the Respondents pointed out that the decision of the Learned Trial Magistrate rejecting the charges was Appealable to the High Court on a matter of law (Sections 89(5) and 348A of The Criminal Procedure Code read together). That the State Counsel having failed to Appeal against that dismissal could not invoke this Courts Revisionary Jurisdiction. Counsel had in mind the provisions of Section 364 (5) of The Criminal Procedure Code which provides:-

"364(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

7. The Respondents further submitted that the Application could not find a home under the Constitutional provisions of the High Court's Supervisory jurisdiction in Articles 165 (6) and (7) of The Constitution 2010. Counsel urged that where, like here, there is specific Supervisory Power provided by legislation, the supervisory authority of The High Court should be exercised within that framework and not in the general ambit provided by the Constitution.
8. On the substance of the Application the Court was asked to find, just like the trial Court, that Pascal Opondo was not competent to draw up and prosecute Counts V and VII which related to offences under The Employment Act. This Court was urged to read Gazette Notice No.9399 as it is. Emphasis was made that the officer was appointed to be a Public Prosecutor "**for the purpose of all cases arising under the Labour Institutions Act, 2007.**" It was pressed that the wording of the notice was strict and limited and could not be stretched to include cases arising under other Labour Laws. While Counsel appreciated that statute empowered the Director of Public Prosecution to appoint Public Prosecutors for purposes of all Labour Laws, he argued that the Director of Public Prosecution had in Gazette Notice No.9399 made restricted use of his power.
9. The debate as to the implication of Section 364(5) of The Criminal Procedure Code is, in my view, a settled matter. Considering an argument similar to that posited by Mr. Omondi, the East African Court of Appeal in **Republic –vs- Ajit Singh s/o Vir Singh** [1952]EA 822 held,

"We are of opinion that sub-s (5) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s.361 and s.363 (1). To hold that sub-s.(5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect – for instance in the case of a conviction where no offence known to the law has been roved – merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can, in its discretion, act suo moto even where the matter has been brought to its notice by an aggrieved party who had a right of appeal. In our view Chhgan

Raja v. Gordhan Gopal (1) (supra) merely decided that, on the facts of that particular case, the court should not make an order in revision. It emphasizes that the exercise of jurisdiction in revision is discretionary." (my emphasis)

That decision was followed by the Court of Appeal in **Wahome –vs- Republic** [1981] EKR 497.

10) Recently, in **Busia Criminal No.112 of 2011 Republic – vs- Gayatri Deep Enterprises & 2 others,** I made the following observations in respect to those decisions:-

"**Those decisions are binding on this Court. The Decisions make the point that the use of the word insistence in Section 364 (5) is not idle. Whilst a party who would have exercised its right of appeal cannot insist on proceeding by way of a Revision, the Court can in appropriate instances still entertain the Revision. On the converse the Court will not do so where the Applicant is abusing the process. Mabeya J. in Bungoma Criminal Revision No.4 of 2004 Republic –vs- Sadaq Dahir Maalim thought that the Section was to bar a multiple exercise of Rights given by the Law i.e. the Right of Appeal and that of Revision. That would be one way of abuse of process. Another that comes to mind would be where the Applicant is hopelessly out of time in the exercise of his Right to appeal and uses the process of Revision to circumvent the need to seek leave to Appeal out of time."**

It would be incumbent upon this Court to satisfy itself that the Application is not an abuse of process before entertaining it.

11) The decision that this Court is asked to revise was made by the Trial Court on 13th February 2014. If the State was to Appeal against that decision then it should have done soon or before the 27th February 2014 (Section 349 of The Criminal Procedure Code). Clearly then, the Application for revision which was filed on 22nd May 2014 came 3 months or thereabouts after the Appeal period had expired. I would have declined to hear this Application if it had been demonstrated to me that this avenue was chosen merely as a way of defeating that limitation of time or that the delay has prejudiced the Respondents. This I was not told and for that reason I will entertain the Application.

12) This Court reaches a decision that it has jurisdiction to hear the present Application even without considering the scope of its Supervisory Jurisdiction under Article 165 (6) of TheConstitution. But I will make some observations in that regard. Article 165(6) of The Constitution provides:-

"**The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."**

That Article must necessarily be read together with Article 165 (7) which provides:

"(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

13) No doubt, it is a wide power. The High Court can invoke its Supervisory Jurisdiction in circumstances where it deems itnecessary to safeguard and promote the fair administration of justice.That said, some statutes provide specific instances for the exercise of supervisory authority by the High Court over Judicial or Quasi Judicial bodies subordinate to it. The power of Revision under Section 349 of the Criminal Procedure Code and the High Court's authority in Judicial Review are examples that readily come to mind. So are such provisions to be shunted and Article 165 (6) to be deployed at all times? I have to agree with Counsel for the Respondents that where there is specific and alternative remedy then a party seeking supervisory redress must use that

avenue unless it can be demonstrated that the alternative remedy is not efficacious. To invoke the use of Article 165(6) of the Constitution even where there is specific and effective statutory framework would be to diminish the importance of both the Constitutional and statutory provisions.

14) Having determined that it is properly seized of this matter, the Court now turns its attention to the core business. Whether counts V and Vll were incurably defective turns on whether or not the drawer of the charges Pascal Opondo was a lawfully appointed Public Prosecutor in respect to those charges.The controversial Gazette Notice that is said to have appointed him is reproduced below:-

> "**GAZETTE NOTICE NO.9399**
>
> **THE CRIMINAL PROCEDURE CODE**
>
> **(Cap.75)**
>
> **THE LABOUR INSTIUTIONS ACT**
>
> **(No.12 of 2007)**
>
> **APPOINTMENT**
>
> **IN EXERCISE of the powers conferred by section 85(1) of the Criminal Procedure Code and pursuant to section 35(1) (k) of the Labour Institutions Act, the Director of Public Prosecutions appoint-**
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> **…..**
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> **…..**
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> **…..**
>
> **…..**
>
> **…..**
>
> **Pascal O. Opondo**
>
> **…..**
>
> **…..**
>
> **…..**
>
> **to be Public Prosecutors for the purpose of all cases arising under the Labour Institutions Act, 2007.**
>
> **Dated the 5th July, 2013**
>
> **KERIAKO TOBIKO,**
>
> **Director of Public Prosecutions"**

15) The position of the Respondents is that the Gazzette Notice is not ambiguous and must be read as it is. In essence thisCourt is asked to give a literal interpretation to that notice. This Court is invited to find, without hesitation, that the officers named therein were appointed to be Public

Prosecutors only in respect to cases specifically created by the Labour Institutions Act and not under other Labour Laws.The Court is urged to give a restrictive interpretation to the words, "**to be Public Prosecutors for the purpose of all cases arising under the Labour Institutions Act, 2007**."

16) The alternative view taken by the Applicant is that those words should be construed in the context of the entireGazette Notice and the provisions of Section 35 (1) (k) of the Labour Institutions Act, 2007 which are cited in the Notice. That Section provides:

"**35. (1) A Labour Officer may, for the purpose of monitoring or enforcing <u>compliance with any Labour law</u>,**

a)…………….

k) without prejudice to the powers of the Attorney-General, institute proceedings in respect of any contravention of any provision of this Act or for any offence committed by an employer under this Act or any other labour law," (my emphasis)

That if this Court were to do so, then it would assign a different meaning to the words "**for the purpose of all cases arising under the Labour Institutions Act, 2007**."That Section gives power for the enforcement of any Labour Law. The words can therefore be plainly read to cover the cases specifically created under The Labour Institutions Act and the cases under any other Labour Law which are referred to by the Act in Section 35.

17) I would therefore find that, read as a whole, the wording of the Gazette Notice is problematic. In order to unlock this impasse, it would be helpful to understand the legal character of Gazette Notice No.9399. By dint of Section 2 of The Interpretation and General Provisions Act Chapter 2 a transfer or delegation of powers or duties made in exercise of a power allowing that transfer or delegation conferred by a written law is Subsidiary Legislation. Section 2 of that Act defines Subsidiary Legislation as follows:

"subsidiary legislation"means any legislative provision (<u>including a transfer or delegation of powers or duties</u>) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument;" (emphasis mine)

18) Given that Gazette Notice No.9399 is Subsidiary Legislation, this Court falls to the law in respect to the construction of Subsidiary Legislation so as to interpret that Gazette Notice. While one of the principles of Statutory Interpretation is that words of statute must be given their plain and ordinary meaning, that approach may not be helpful if, like here, the words used are indefinite. It may not help to be literal centric. In instances like this it is permissible to, in construing the Subsidiary Legislation, to have regard to its context. In respect to this tool of interpretation, Leonola J said in **<u>Charles Omanga & Another –vs- Independent Electoral and Boundaries Commission & AnotherNairobi</u>**. Petition No.2 of 2012 (unreported).

"(unreported). It is also a Rule of interpretation as I understand it, that the "context" of a Statutory Provision must be explored to get its real meaning-see S vs Makwanyane & Others OCCT/3/94 (Constitutional Court of South Africa). That context includes the purpose and scope of a Statute and within certain limits, its background."

19) In its preamble, The Labour Institutions Act proclaims that it is an "**Act of Parliament to establish Labour Institutions, to provide for their functions, powers and duties and to provide for other matters connected thereto.**" In its interpretation Section (Section 3), The Statute defines Labour Law to mean "**any Act dealing with Labour matters**."These Statutes would include The Employment Act Chapter 226, The Labour Relations Act Chapter 233, The Occupational Safety and Health Act Chapter 514 and The Work Injury Benefits Act Chapter

20) In making the Appointments in Gazette Notice No.9399, the Director of Public Prosecution avows that he does so pursuant to Section 35(1) (k) of The Labour Institutions Act. A purposive interpretation of that notice cannot be made without having regard to purpose and spirit of Section 35 of The Labour Institutions Act. The opening words of Section 35 (1) reads:

"1) A Labour Officer, may, for the purpose of monitoring or enforcing compliance wth any other Labour Law..."

That Section enumerates the powers to be given to the Labour Officer for purposes of monitoring and enforcing compliance with any Labour Law.

21) Subsection (k) of that provision gives prosecutorial power to the Labour Officer **"in respect of any contravention of any provision of this Act or for any offence committed by an employer under this Actor any other Labour Law**". A plain reading of that subsection is that a Labour Officer would have prosecutorial power in respect to contraventions of the provisions of the Labour Institutions Act and offences committed by an employer under all Labour Law. To suggest that the Director of Public Prosecutions restricted the appointment made vide Gazette Notice No.9399 only to contraventions or offences in respect to the Labour Institutions Act would be to suggest that the Director of Public Prosecutions can appoint a Labour Officer to prosecute in respect to some Labour Law and not others. And that proposition could find support in the provisions of Article 157 (9) of The Constitution of Kenya 2010 which reads:

"**The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions**."(my emphasis)

There would be further support in the provisions of Section 29 of The Office of The Director of Public Prosecutions Act, 2013 which reads:

"**29 (1) The Director may appoint any qualified person to prosecute on his or her behalf.**

(2) A person appointed under subsection (1) shall be known as a Public Prosecutor.

(3) A Public Prosecutor appointed under subsection (1) shall be responsible to the Director and shall be bound to comply with all guidelines and instructions issued by the Director in respect of prosecutions."

(my emphasis)

22) That said the spirit of the opening words of Section 35 is to empower a Labour Officer to monitor and enforce compliance with any labour Law. It is my view, and I so hold, that if it was the intention of the Director of Public Prosecutions to limit a Labour Officer's power, in respect to Prosecution, to only one Labour Law then the Director of Public Prosecutions would have to use unequivocal language. This Court does not find the words used in Gazette Notice No.9399 to be unequivocal. It is for this reason, and others stated above, that I hold that the words "**for the purpose of all cases arising under the Labour Institutions Act, 2007**" used in Gazette No.9399 should be construed to mean all cases arising under any Labour Law.

23) Being of that persuasion, I do hereby hold that Pascal Opondo is a competent Public Prosecutor for the purpose ofdrawing and prosecuting any offence committed by an employer under The Employment Act. For this reason I set aside the order of the Learned Trial Magistrate made on 13th February 2014 rejecting count l and count VII of The Charge Sheet in Busia CMCC Criminal case No.2157 of 2013 **Republic –vs- Douglas Patrick Barasa & Queens Bookshop**. Trial shall proceed with the hearing of all nine (9) counts.

23) The debate as to whether Pascal Opondo is a duly appointed Public Prosecutor for the purpose of The Employment Act results from the rather imprecise wording of Gazette Notice No.9399. And although this debate has been resolved in favour of the State, this decision should be brought to the personal attention of the drawer of the said notice, that isThe Director of Public Prosecutions.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 3RD DAY OF JULY, 2014.

IN THE PRESENC OF:

KADENYI …………………………………………..COURT CLERK

……………………………………………………FOR APPLICANT

………………………………………………..FOR RESPONDENT