



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Application 841 of 2004**

**IN THE MATTER OF AN APPLICATION BY OBED OCHWANYI, JOSECK ASWANI,**

**BENJAMIN WAFULA MOMANAYI TOBIAS OMUSALE KHARENYI AND**

**JAMES MABINDA AKUONYA FOR JUDICIAL REVIEW ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CAP. 75 LAWS OF KENYA**

**AND**

**IN THE MATTER OF CRIMINAL CASE NO. 17770 OF 2002 (MAKADARA LAW COURTS)**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL..... RESPONDENT  
EX-PARTE**

**OBED OCHWANYI**

**JOSECK ASWANI**

**BENJAMIN WAFULA MOMANAYI**

**TOBIAS OMUSALE KHARENYI**

**JAMES MABINDA AKUONYA**

**JUDGEMENT:**

Pursuant to leave granted by this Court on the 9<sup>th</sup> July 2004 the Ex-parte Applicants commenced this Judicial Review Application and pray for the following orders:

1). That an order of certiorari be issued to remove into the High Court and to quash the decision of the Learned Resident Magistrate Mrs. Mbugua made on the 31<sup>st</sup> May 2004 in Criminal Case No. 17770 of 2002 (Makadara Law Courts).

2. That costs be provided for.

The Application is premised on the grounds that the Respondent commenced criminal proceedings against the 5<sup>th</sup> Applicant on a charge of creating disturbance contrary to Section 95 (1) (b) of the Penal Code in Criminal Case No. 16205 of 2002. That on the 31<sup>st</sup> July 2002 the Respondent commenced criminal proceedings against the 1<sup>st</sup> to the 4<sup>th</sup> Applicants on similar charge in Criminal Case No. 17770 of 2002. The two cases were later consolidated. That the Applicants pleaded not guilty to the charges. That the complainant together with 4 other witnesses testified for the prosecution but the investigating officer did not testify. That at the close of the prosecution case, the Learned Senior Resident Magistrate ruled that the Applicants had a case to answer. That the Applicants are aggrieved by the decision of the trial magistrate. They want that decision to be quashed.

The Applicants state that the Learned Magistrate took into account irrelevant considerations without taking evidence of the investigating officer. That there was breach of procedural due process, when the Learned Magistrate put the Applicants to their defence. That the learned magistrate acted in excess of jurisdiction. That the Learned Magistrate did not give reasons for her decision.

The Leave granted herein stayed the proceedings in Criminal Case No. 17770 of 2002.

The Attorney General filed a Preliminary Objection which raised 2 points. That the Application is bad in law and the Court lacks jurisdiction to grant the orders sought.

Counsels for the Parties presented their oral arguments before the Court.

Learned Counsel for the Ex-parte Applicants submitted that the Magistrature had a duty to give reasons for putting the accused persons on their defence. That the investigating officer did not testify. Counsel stated that he relies on the statements and the verifying affidavit on record. Counsel stated that the ruling was only one line:-

***“I have considered the evidence of the prosecution witnesses and I find all accused have a case to answer”.***

He further submitted that the judicial officer did not give reasons for the decision. That this was a violation of the Applicants’ rights to due process and fairness. Counsel quoted the case of ***Kibera Karimi V R.*** which stated that if reasons are available the accused will use it in their defence. That the witnesses were coming to say what they told the investigating officer. That the statements were not produced.

Counsel also contended that the principle of natural justice requires that reasons for the decision be given. That the Applicants are seriously prejudiced. That order of certiorari to issue.

Learned Counsel Kaigai on behalf of the Attorney General opposed the Application. He argued that he relied on the Preliminary Objection. He submitted that the Application is bad in law. That evidence was considered and the accused put to their defence. That it was an interlocutory stage of the proceedings and not a final decision after the close of defence case at which stage detailed reasons will be given.

Counsel further submitted that Section 211 of the Criminal Procedure Code does not require reasons to be given. That if the Magistrate gave reasons, it could as well prejudice the defence case. That the investigating officer is one of the witnesses.

The learned counsel asserted that as per Section 143 of the Evidence Act, a court can convict with evidence of only 1 witness. That there was no breach of rules of natural justice.

In reply learned counsel for the Applicant argued that Section 211 of the Criminal Procedure Code did not expressly exclude the magistrate to give reasons.

I have considered the Application and the respective submissions by counsels.

The Applicants case is that the Learned Senior Resident Magistrate in putting them to their defence did not give any reason for her decision. They further argue that the Investigating officer has not testified and that the failure to give reasons for her ruling prejudiced the preparation for their defence.

Counsel for the Respondent argues that under Section 211 of Criminal Procedure Code, there is no requirement for written reasons. That the ruling was interlocutory and reasons will be given at the conclusion of the case during judgment. He further submitted that if reasons were given at this stage it may prejudice the defence case.

In the case of ***Kibera Karimi v the Republic*** where the Court noted that the magistrate gave detailed reasons occasioned prejudice to the accused.

This Court does not have the benefit of going through the testimonies of the 4 witnesses who testified before the Magistrate gave her ruling to put the Applicants on their defence. There may or may not have been sufficient reasons to put the Applicants to their defence, it is a matter this Court may not answer as of now.

I agree with the submissions of counsel for the Respondent that Section 211 of the Criminal Procedure Code does not require written reasons to be given. As noted in the above case it may also prejudice the defence case if detailed reasons are given.

I find that there is nothing prejudicial to the Applicants that warrant an order of certiorari. Indeed an order of certiorari at this stage will be construed to stopping the prosecution from carrying out their duty under the law. The Applicants have all the opportunities to defend their case and their apprehension at this early stage is misplaced.

I therefore hold that the Application fails and is hereby dismissed with costs to the Respondents.

DATED AND SIGNED AT NAIROBI ON THIS 15TH DAY OF AUGUST 2012

**M. K. IBRAHIM**  
**JUDGE**

DATED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF OCTOBER 2012

**W. KORIR**  
**JUDGE**

In the presence of: