



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APP. NO. 968 OF 1998

IN THE MATTER OF THE CONSTITUTION OF KENYA AND THE
ARMED FORCES ACT, CAP 199 THE ARMED FORCES RULES OF PROCEDURE

AND

IN THE MATTER OF COURT MARTIAL CONSTITUTED AND
CONVENED TO TRY LT. COL J.K. GATOBU, COL. LT. D.A MUKARA

BETWEEN

THE REPUBLIC.....APPLICANT

AND

THE CHIEF OF GENERAL STAFF ARMED

FORCES OF KENYA.....1st RESPONDENT

COMMANDER KENYA ARMY.....2nd
RESPONDENT

PRESIDING OFFICER, COURT

MARTIAL.....
.....3rd RESPONDENT

RULING

On 2nd December, 1998 this court ordered the release of the
applicants on bond upon terms set out in the ruling delivered on the same date.

The state was aggrieved by the said order and there is now an application before me for orders that:-

(1) the order releasing the applicants on bail be reviewed; and

(2) the order releasing the applicants be set aside.

The said application is based on the grounds set out therein and supported by an affidavit sworn by Colonel Abdul Majid Ahmed. Both learned counsel have also addressed the court on the application and their submissions are on record.

I have had to revisit the proceedings that led to the applicants release on 2nd December, 1998 in view of the grounds relied upon by the Republic in this application and the averments contained in the affidavit of Col. Ahmed aforesaid.

In my ruling of 2nd December, 1998, I said, inter alia that:-

"The jurisdiction conferred upon the High Court by section 65(2) (of the Constitution) is supervisory and extends to court-martial. Read together with section 60(1) of the Constitution, I have no doubt that this court has jurisdiction to entertain the present application..... Further to the foregoing, I have related the provisions of the Armed Forces Act, the Rules and the Standing Orders aforesaid to the conditions under which the applicants are being held....."

It is clear to me that the court never exercised its jurisdiction under section 72(5) of the Constitution but under section 60 (1) and 65(2) of the Constitution. In so doing, I addressed the Armed Forces Act Cap. 199, the Rules and the Standing Orders.

I know that, when the court martial adjourns; the accused persons are placed under the authority of the Commanding Officer under Chapter 12 orders 18 and 19 of the Armed Forces Standing Orders. However, that authority applies only when the court martial adjourns overnight. In the instant case, the proceedings have been adjourned sine die pending the outcome of the application for Judicial Review lodged by the applicants. In the circumstances, it cannot be said that the High Court has usurped the powers of the Commanding Officer. With respect, the authority of the commanding officer during the trial whether in session or adjourned, is subject to the direction of the court martial. Since the said court martial is subject to supervision by the High court under section 65(2) that chain cannot be broke.

Be that as it may, the Republic has not presented anything new to warrant a review. All that has been canvassed in this application was addressed in the previous application. Above all, if I were to set aside the order upon which the applicants were released on bail, I would have in effect, sat on appeal against my own ruling.

And therefore in the end, I find that the application lacks merits and therefore stands dismissed.

Orders accordingly

Dated and delivered at Nairobi this 24th day of February, 1998

A. MBOGHOLI MSAGHA

JUDGE