Republic v Tony Gachoka & another [1999] eKLR **REPUBLIC OF KENYA**

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Gicheru, Kwach, Omolo, Tunoi, Shah, Lakha & Owuor JJA

Criminal Application No. Nai 4 of 1999

Republic.....PLAINTIFF

VERSUS

Tony Gachoka.....RESPONDENT

JUDGMENT

August 20, 1999 the following Judgments of the Court were delivered.

Gicheru JA. *The Judicature Act* Chapter 8 of the Laws of Kenya came into operation on 1st August, 1967. *Section 5 (1)* of that Act is in the following terms:

"5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."

Besides the common law, as on 1st August, 1967, the only other law relating to contempt of court in England was contained in *sections 11, 12, and 13 of the Administration of Justice Act 1960* and the procedural law in the exercise of power to punish for contempt of court was expressed in *Order 52 of the Rules of the Supreme Court 1965*, hereinafter called the Rules, which came into operation on 1st October, 1966. That therefore is the law applicable to our High Court and the Court of Appeal in the exercise of their respective power to punish for contempt of court.

In a picturesque exposition on the law of contempt of court, Wilmot, J., as he then was, in Rex v. Almon, 97 E.R. 94 at page 100 expressed himself thus:

'The arraignment of the justice of the Judges, is the arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals; but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.

In the moral estimation of the offence, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the Court, for which attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal which fancy could suggest upon the Judges themselves. It seems to be material to fix the ideas of the words "authority" and "contempt of the Court", to speak with precision upon the question.

By the word "Court," I mean the Judges who constitute it, and who are entrusted by the constitution with a portion of jurisdiction defined and marked out by the common law, or Act or Parliament. "Contempt of Court" involves two ideas: Contempt of their power, and contempt of their authority. The word "authority" is frequently used to express both the right of declaring the law, which is properly called jurisdiction, and of enforcing obedience to it, in which sense it is equivalent to the word power; but by the word "authority", I do not mean that coercive power of the Judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity.

-------it is not the coercive power of the Court; but it is homage and obedience rendered to the Court, from

the opinion of the qualities of the Judges who compose it; it is a confidence in their wisdom and integrity, that the power they have is applied to the purpose for which it as
deposited in their hands; that authority acts as the great auxiliary of their power, and for that reason the constitution gives them this compendious mode of proceeding against all who shall endeavour to impair and abate it; and therefore every instance of an attachment for contumelious words, spoken of a rule of the court (of which there are great many) is a case in point to warrant an attachment in the present case where a rule of court is the object of the defamation; and it would be a very strange thing that Judges, acting in the King's Supreme Court of Justice in Westminster Hall, should not be under the same protection as a bailiff's follower, executing the process which those Judges issue: it is not their own cause, but the cause of the public, which they are vindicating, at the instance of the public; for I do not think that Courts of Justice are to take their complaints up of themselves: it must be left to His Majesty, who sustains the person of the public, to determine whether the offence merits a public notice and animadversion; and in this state of the proceedings, they are only putting the complaint into a mode of trial, where the party's own oath will acquit him; and in that respect it is certainly a more favourable trial than any other: for he cannot be convicted if he is innocent, which, by false evidence, he may be by a jury; and if he cannot acquit himself, he is but just in and the same situation as he would be in, if he was convicted upon an indictment or an information; for the Court must set the punishment in one case as well as the other: they do not try him in either case; he tries himself in one case, and the jury try him in the other.'

As was pointed out by Lord Diplock in the **Attorney-General v. Times Newspaper Ltd**., [1974] A.C. 273 at page 309 letter B:

"The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court."

But as Lord Cross of Chelsea in the same case observed at page 322 letters D,E and F:

' "Contempt of court" means an interference with the administration of justice and it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court. Nowadays when sympathy is readily accorded to anyone to defies constituted authority the very name of the offence predisposes many people in favour of the alleged offender. Yet the due administration of justice is something which all citizens…..should be anxious to safeguard. When the alleged contempt consists in giving utterances either publicly or privately to opinions with regard to or connected with legal proceedings, whether civil or criminal, the law of contempt constitutes an interference with freedom of speech, and ….we should be careful to see that the rules as to "contempt" do not inhibit freedom of speech more than is reasonably necessary to ensure that the administration of justice is not interfered with.'

and as Lord Simon of Glaisdale said in the same case at page 320 letters A,B,C,D,E,F,G and H and at page 321 letters A,B and C:

'The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democrat society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves. The public thus has a permanent interest in the general administration of justice and the general course of the law. This is recognized by Justice being openly administered and its proceedings freely reported, by public debate on the law and on its incidence. But, as regards particular litigation, society, through its political and legal institutions, has established the relevant law as a continuing code, and has further established special institutions (Courts of law) to make the relevant decisions on the basis of such law. The public at large has delegated its decision-making in this sphere to its microcosm, the jury or judge. Since it would be contrary to the system for the remit to be recalled pendente lite, the paramount public interest pendente lite is that the legal proceedings should progress without interference.

But once the proceedings are concluded, the remit is withdrawn, and the balance of public interest shifts.

It is true that the pan holding the administration of justice is not entirely cleared. The judge must go on to try other cases, so the court must not be scandalized.. Further juries must be empanelled, so the departing jurors must not be threatened. Witnesses

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in future cases must be able to give honest and fearless testimony, so witnesses in past cases must not be victimized. But these things conceded, the paramount interest of the public now is that it should be fully apprised of what has happened (even being informed, if appropriate, of relevant evidence that could not lawfully be adduced at the trial), and hear unhampered debate on whether the law, procedure and institutions which it had ordained have operated satisfactorily or call for modification.

……once a case is concluded but not until the, the balance of public interest shifts. The litigation being concluded, the public interest in freedom of discussion becomes paramount, since there are now unremitted decisions for the public itself to make – especially as to whether the law and its institutions need modification in the light of what has happened. The only legal rider is that the discussion of concluded cases must not be made a pretence for interference with pending cases. Professional responsibility may, over and above this, self-impose some limitation on the discussion of past cases when they may be relevant to pending cases, so as to ensure that individuals are not unfairly prejudiced. But the law itself must draw a line for general guidance – and it does this at the point when, in the general guidance – and it does this at the point when, in general, the balance of public interest shifts, namely at the conclusion of a case. It is true that thereby a litigant may be affected in his conduct of litigation by the knowledge that, once the litigation is over, his conduct of it will be open to public criticism. But the law has given him full protection during the pendency of the litigation. It cannot do more without jeopardizing the public's interest in matters which are of its general concern and as to which it is therefore, in a democratic society, entitled to influence the decision, which it cannot do intelligently without information and debate.

There is one particular situation where the law might strike the balance between the competing interests either way, but in fact strikes it in favour of freedom of discussion. This is where a matter is already under public debate when litigation supervenes which the continuance of the debate might interfere with. The situation of public debate involves that there is probably at stake some matter of which the public has legitimate interest to be informed; and the law, in pragmatic judgment, says that conditionally the debate may continue. This is how it was put in the Australian case of **Ex parte Danson** [1961] S.R. (N.S.W.) 573, 575:

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"The discussion of public affairs …….cannot as a incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant."

At the commencement of the hearing of the applicant's application on 14th July, 1999 which seeks that an order of committal for contempt of court be issued against the first respondent and such further orders ass may be appropriate in the circumstances against the second respondent, the first respondent withdrew his notice of objection to the said application, his grounds of opposition and his replying affidavit in respect thereof and thereafter the same no longer formed part of the record of the proceedings against the respondents. At the conclusion of the submissions by Mr. Chunga who appeared with Mrs Onyango, Miss Kimani and Mr. Okumu for the applicant on 15th July, 1999, the first respondent applied for witness summonses to compel the attendance of fourteen witnesses to testify in his defense to the applicant's application. Those witnesses were, according to him, to testify on the now notorious Goldenberg cases. This Court rejected his application for the reason that we did not see the relevance of the evidence the first respondent intended to call in relation to the contempt proceedings against him.

The publication complained of by the applicant and which the first respondent admitted to have been made by him were contained in two successive articles in the two issues of a Weekly News Magazine – The Post on Sunday – respectively dated January 31` - February 6, 1999 and February 7 – 13, 1999. The first respondent was at the material dates the publisher and Chief Executive of the said Weekly News Magazine. The offending publications are contained in paragraphs 3 and 5 of the affidavit of Isaac Okoth in support of the applicant's applicant whose grounds upon which these contempt proceedings have been brought against the respondents are encapsulated in paragraph 5 of the applicant's statutory statement pursuant to **section 5 of the Judicature Act**, Chapter 8 of the Laws of Kenya. That paragraph reads as follows;

"5. <u>THE GROUNDS UPON WHICH THE RELIEF IS SOUGHT</u> is that the publication of the said 2 Articles in the post on Sunday 31st January, 1999 and 7th – 13th February, 1999 contravene the 'sub-

judice' Rule; is scurrilous and unjustified attack upon this Honourable Court and is calculated to bring into disrepute and contempt the Administration of Justice in Kenya."

This, accordingly to Mr. Chunga, was the basis of the committal proceedings for contempt of court against the respondents which were criminal in nature.

Towards the close of his submissions in opposition to the applicant's application, the first respondent sought to be given an opportunity to press his case under the law by giving oral evidence for if he was denied that opportunity, then, the applicant will not have proved the case against him. This court gave no ruling in this regard.

In reply to the first respondent's submission, Mr. Chunga said that this Court had not blocked the first respondents from calling oral evidence and that although the order of committal for contempt of court sought against the first respondent was in the nature of a criminal offence, there were no rules of procedure in proceedings of the kind now before this Court save those contained in **Order 52 of the Rules**, which, according to him, the applicant complied with them coming to this Court. Mr. Chunga then said that the steps the first respondent took to respond to the applicant's application manifested his understanding of the matter against him and he cannot be heard to say that he has been disabled to put his case squarely before this court. Earlier in these proceedings, Mr. Chunga had submitted that it was necessary to prove beyond reasonable doubt that the respondents were in contempt of this Court when they published the articles complained of by the applicant. That burden of proof the applicant had discharge, Mr. Chunga concluded.

To Mr. Chunga's submission in reply, the response of the first respondent with the leave of the Court and which response was confined to **Order 52 of the Rules** was that under rule 6(4) of this Order he was entitled to give oral evidence and if he was denied that right, then he cannot have had a fair trial in these proceedings. This court then reserved its judgment today, 20th August , 1999 at 10.00 a.m. Order 52 rule 6(4) of the Rules provides that:

"6. (4) if on the hearing of the application the person sought to be committed expresses a wish to give oral evidence on his own behalf, he shall be entitled to do so."

In **Linnet v Coles,** [1986] 3 All E.R. 652 at pages 656 to 657 letters **j** and **a** respectively, Lawton, L.J. had this to say:

"Anyone accused of contempt of court is on trial for that misdemeanour and is entitled to a fair trial. If he does not get not get a fair trial because of the way the judge has behaved or because of material irregularities in the proceedings themselves, then there has been a mistrial, which is no trial at all. In such cases, in my judgment, an unlawful sentence cannot stand and must be quashed. It will depend on the facts of each case whether justice requires a new one to be substituted. If there has been no fairness or no material irregularity in the proceedings and nothing more than an irregularity in drawing up the committal order has occurred, I can see no reason why the irregularity should not be put right and the sentence varied, if necessary, so as to make it a just one."

In the application before us, failure to allow the first respondent to give oral evidence on his own behalf after having expressed his wish to do so would amount to a breach of one of the rules of procedure under which the said application was brought to this court. Such a breach would be a material irregularity disentitling the first respondent a fair trial in these proceedings with the result that in whichever way the final adjudication of the applicant's applications turns, a mistrial will have occurred. This Court being a court of last resort in this country, once that stage has been reached, there would be no way of re-agitating this matter. I shudder at the though that with clear provisions of the law entitling the first respondent to give oral evidence on his own behalf after he was expressed his wish to do so, this court would be blind to the obvious miscarriage of justice. As I think that the trial of the respondents for contempt of this Court is not concluded until the final decision of the Court is pronounced, I would correct the prejudicial error by allowing the first respondent to give oral evidence on his own behalf as he has expressed his wish to do so in terms of Order 52 rule 6 (4) of the Rules and thereafter I would finally adjudicate on the applicant's application for the issue of an order of committal against the first respondent and such other order as may be appropriate against the second respondent for their contempt of this court.

As my brothers and sister Judges of Appeal, Kwach, Omolo, Tunoi, Shah, Lakha and Owuor, disagree with me, there will be a majority judgment of the Court that the first and second respondents are guilty of contempt of Court and are accordingly convicted. The first respondent, Tony Gachoka, is committed to prison for a period of six months and the second respondent, the Post Limited, is fined K.Shs. 1,000,000/-

and in default of immediate payment of the same in full, the second respondent shall forthwith cease the publication of its Weekly

Magazine, the Post on Sunday or any other publication by it until the said fine is paid in full. Njoroge Nani Mungai is hereby discharged. There shall be no order as to the costs occasioned by the applicant's application.

TUNOI, JA. In this matter the applicant is the Republic of Kenya. The first respondent, Tony Gachoka, is the publisher and Chief Executive of a weekly publication known as ***THE POST ON SUNDAY***, the magazine. The Post Limited, the second respondent, is the proprietor of the magazine. Njoroge Nani Mungai, is an advocate of the High Court of Kenya and had incorporated the second respondent and acted as its director.

In the magazine dated January 31st - February 6th, 1999, there appeared the first of a series of articles on the Judiciary and other matters. The article that made the cover story was entitled:-

"CHESONI IMPLICATED IN AN ORGY OF JUDICIAL ANARCHY AND A KSHS. 30M BRIBE"

The article complained of contains amongst other matters the following passages:

"Unfortunately for the country Chesoni has directed his considerable skills to subverting the judicial process rather than growing and enhancing it, particularly in the famous Goldenberg affair."

"Chesoni implicated in an orgy of Judicial Anarchy and a KShs. 30m bribe. The riddle is further enhanced into a conspiracy by the irregular conduct of High Court Judge, Judge Kuloba and some Court of Appeal Judges."

"This is where the prominence of Chesoni's hand in the protection of billionaire Kamlesh Pattni shone its first glaring light." "It is immediately prior to his visit to New York that Chesoni received a bribe of KShs. 30 million from Kamlesh Pattni from a Nairobi Bank. So by the time the Court of Appeal case No. 5 of 1999 came up for hearing on the 8th January, to determine its urgency before Court of Appeal Judge Tunoi, the Chief Justice had returned to Kenya and was in receipt of KShs.30 million from Kamlesh Pattni."

That the highest Court on the land was the Court of Appeal it could go outside the law and the procedures of Court of Appeal in hearing an application to stay an order that had already been effected instead of directing Pattni and his lawyers to file a substantive appeal against Keiwua to return World Duty Free to Ali." "Our investigations reveal that the Court of Appeal misused the irregular application before it to return the World Duty Free to Pattni illegally because of instructions and the insistence of Chief Justice Chesoni whom, the Post established, is under Kamlesh Pattni's pay roll."

In the publication dated February 7th - 13th, 1999, the cover story is ***JUDICIARY IN PANIC***. The magazine carried several articles critical on the persons of the Honourable the Chief Justice and some judges of this Court. Many pages of the magazine are adorned with the pictures of the judges named. The Attorney General complains of the following passages, amongst others:

"If in the case of Kamlesh Pattni you hand pick magistrates and judges to decide cases in his favour, are you not going to also hand pick a judge to decide this impending case in your favour?" "Chesoni continues to subvert the course of justice." "Some judges and magistrates have compromised their principles for short-term gains and promotions hence administration of justice has been denuded."

The Attorney General on February 16, 1999, obtained leave to move this Court for an order to commit the first respondent to prison for contempt of the Court and for such other orders as may be deemed just against the other respondents.

Under ***Section 5 of the Judicature Act Cap 8 of the Laws of Kenya*** the Court of Appeal for Kenya has power to consider, conduct a trial and make judgment on an allegation of contempt of itself. The cases of ***REPUBLIC V WANGARI MATHAI & OTHERS,***

Criminal Application No. Nai 53 of 1981 (unreported) and ***REPUBLIC V DAVID MAKALI & 3 OTHERS,*** **Civil Application NO. NAI 4 OF 1994 (unreported)** make the position clear. However, it is worthy of note that the first and the second respondents informed the Court that they were submitting to jurisdiction and would concede that there was jurisdiction in this Court to hear and determine the application relating to contempt.

The first respondent describes himself as an investigative journalist. He does not deny publishing the articles the subject matter of these proceedings. He avers that he wrote them pursuant to an investigation he carried out on the subject of corruption. Before Publication he sought and obtained considered legal

opinions from some legal luminaries and advocates whom he named as Hon. Paul Muite, M.P., Mr. Ochieng Oduol and Dr. Kamau Kuria. The first respondent stated that he stands by these articles and contended that he had not acted or sought in any way to ridicule, scandalise, abuse or bring into contempt this Court. He has acted in accordance with strict ethics of journalism, and, where he was in doubt on legal issues, he had always sought and received legal advice. The first respondent, therefore, vehemently justifies the publication of the articles. Simply put, he stands by them and has no apologies to make.

Assuming that it is true, as stated by the first respondent, that the articles complained of were sanctioned by advocates of vast experience who are also officers of the High Court of Kenya, then, it defeats reason as to why they should instigate the first respondent to publish such articles whose purport does not only scandalise the Court, but, also abuse and impute improper motives on the judges who constitute it.

However, in my view, one thing is certain. The articles were written with the direct object of vilifying the Court as a result of one litigant having been unsuccessful in the take over bid of the so-called Kenya Duty Free. Through the publication the dissatisfied litigant erroneously believed it could mount a sustained campaign to reverse the Court's ruling and secure the verdict in its favour.

As I said in ***DAVID MAKALI's case*** (supra) an absolute power for the press does not exist. Though its freedom is constitutionally guaranteed in this country under ***section 79 of the Constitution*** the press must above all act responsibly in all its publications. To abuse or

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scandalise any person or institution is indeed irresponsible and is outside the constitutional protection of freedom of speech.

To allege and publish without proof that the Honourable the Chief Justice:

"Chesoni has directed his considerable skills to subverting the judicial process" "... conspiracy by the irregular conduct of High Court Judge Judge Kuloba and some Court of Appeal Judges" "This is where the prominence of Chesoni's hand in the protection of billionaire looter" "Chesoni received a bribe of KShs.30 million"

"The Court of Appeal misused the irregular application before it;"

amount to scandalising the Court. The publications are acts done which are calculated to bring both the High Court of Kenya and the Court of Appeal into contempt, or to lower their authority. They also amount to a calculated attempt to interfere with the due process of justice.

An ordinary man on the streets reading these articles would conclude that the head of the Judiciary was engaged in subverting the rule of law in this country and that its courts were reckless and were issuing orders and decisions palatable to him left and right. The courts would be deemed to be acting illegally, helping and protecting some of the litigants to the detriment of others.

In these circumstances, it is the duty of the Court to punish for contempt so as to prevent interference with or obstruction to the administration of justice.

In my view, the first respondent has maliciously and without lawful excuse engaged in the publication of series of articles tending to interfere with the due process of the court and has repeatedly attempted to undermine or impair its authority.

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Further, he has systematically and scurrilously abused the Judges by imputing improper motives on their conduct. ***HALSBURY'S LAWS OF ENGLAND, Volume 9, 4th Edition at page 21*** sets out the law in that regard:

"27.Scandalising the court. Any act done or writing published which is calculated to bring a court or a judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court. Thus scurrilous abuse of a judge or a court, or attacks on the personal character of a judge, are punishable contempt. The punishment is inflicted, not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the attack, but of protecting thepublic, especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal is undermined or impaired. In consequence, the court has regarded with particular seriousness allegations of partiality or bias on the part of a judge or a court.

On the other hand, criticism of a judge's conduct or of the conduct of a court, even if strongly worded, is not a contempt provided that the criticism is fair, temperate and made in good faith and is not directed to the personal character of a judge or to the impartiality of a judge or court."

I agree and adopt the dicta in the above passages.

The import of these passages and the decisions in the cases already cited is that scurrilous abuse of a

judge in his capacity of a judge or of a court -- particularly attacks alleging lack of impartiality or imputing improper motives -- is a punishable contempt. It matters not and neither is it necessary nor a condition that such acts or writing should affect pending proceedings only.

The first respondent, like every other citizen of this country, is entitled and is free to criticise judges and their decisions, so long as he keeps within the limits of reasonable courtesy and good faith and so long as he abstains from imputing improper motives to them and is genuinely exercising a right of criticism and is not acting in malice, or attempting to impair the administration of justice. If he does this, he is immune from and will not be

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arraigned on a charge of contempt of court. ***AMBARD V ATTORNEY GENERAL FOR TRINIDAD & TOBAGO [1936] AC 323.***

The issues of ***sub-judice*** and the criminal liability of Mr. Mungai have already been ably dealt with by my brothers and sister Judges and I need not reconsider them. I fully endorse the conclusions reached by them.

I agree that the articles complained of by the Attorney General do constitute a contempt of this Court and that the first and second respondents cannot offer any lawful justification for their publications. The first and second respondents are guilty of contempt of this Court and I convict them accordingly.

In respect of the first respondent, I would propose that he be committed to prison for six (6) months. I would impose a fine of KShs.1,000,000/= against the second respondent and unless and until the fine is paid it must forthwith cease publication and sale of its magazine ***THE POST ON SUNDAY***. I make no order as to costs.

OWUOR, JA This criminal application has been brought to this Court by the Attorney General (hereinafter to be referred to as the applicant) against one Tony Gachoka and The Post Limited (hereinafter to be referred to as the 1st and 2nd respondents respectively).

The application was filed by way of a Notice of Motion under the provisions of **section (5) of the Judicature Act (Cap 8)** of the Laws of Kenya, pursuant to the leave of this Court granted on 16th of February, 1999. The motion was filed on 29th of April, 1999 and sought orders that:

"*An order of committal for contempt of court be issued* against Tony Gachoka and that further orders as may be appropriate in the circumstances against the Post Limited for their contempt of this Honourable Court in publishing:-

'The Post on Sunday' dated January 31st - February 6th 1999 an Article under the heading **CHESONI IMPLICATED IN AN ORGY OF JUDICIAL ANARCHY AND OF KSHS.30 MILLION BRIBE".**

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`The Post on Sunday' dated February 7th - 13th,1999 an article under the heading **JUDICIARY IN PANIC AS CHESONI FALLS OUT OF FAVOUR AND SUES…".**

Upon institution of the application, it was served on the 1st respondent after a certain amount of delay, the 1st respondent having been reported to be out of the country. He accepted the service as the publisher and Chief Executive of The Post on Sunday magazine and Chairman of the Post Limited proprietors of The Post on Sunday. He has accordingly been heard in these proceedings in that capacity and also as the alleged publisher of the offending articles.

The case of the service upon the 2nd respondent is not as clear cut. One Njoroge Nani Mungai, an advocate of the High Court of Kenya, was served with the application after a search of the 2nd respondent's file at the Registrar of Companies office. Mungai was shown as one of the directors. In his own words he accepted the service but explained that he was no longer a director of the Post. He had resigned. A notification of change of directors filed during the pendancy of these proceedings indicates that he resigned as secretary and director of The Post as far back as 13th of May, 1998 and one Emily Gitau appointed as a director. Neither Emily Gitau nor Tony Gachoka have objected to the proceedings going on, on account of "The Post Ltd." not having been served.

In the particular circumstances of this case I am satisfied that the 2nd respondent was sufficiently served and thereafter represented at the hearing of the application against it by at least one of its directors and Chief Executive. If there was indeed any other official of the company who felt that they should have been heard, they did not avail themselves after Mr. Mungai had redirected the application, as indicated in his affidavit. It also suffices to note that the Chief Executive's address and that of the company are at one and the same place.

The statement filed with the motion contains the grounds upon which the applicant seeks to have the respondents held in contempt of, and if found to be in contempt, punished by this Court in exercise of its

jurisdiction under **section (5) of the Judicature Act**. According to the applicant the publication of the two articles (exhs 101 and 102) in the 2nd respondent not only contravened the Sub-judice rule, but they were also a scurrilous and unjustified attack upon the Court, calculated to bring into disrepute and contempt the administration of justice in Kenya.

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In support of his application, the applicant filed affidavits from a Senior Assistant Commissioner of Police and Provincial Criminal Investigating Officer in-charge of Nairobi area, a Mr. Isaac Okoth. Two other affidavits were sworn by Peter Mukanzi, an Executive Officer in-charge of registration of documents in the companies' registry in Nairobi and by Tom Luvuga the Deputy Registrar of this Court. Annexed to Mr. Okoth's affidavit is The Post on Sunday publication for the period 31st January to 7th February, 1999. The alleged offending words as alluded to in Paragraph (3) of his affidavit are contained in four full typed pages, consisting of extracts from the articles from The Post alleged. The offending article starts off by a letter from the publisher with his picture and is signed "Tony Gachoka Publisher and Chief Executive" while the whole edition is titled on the cover"CHESONI IMPLICATED IN AN ORGY OF JUDICIAL ANARCHY AND A 30 MILLION BRIBE".

I do not find it necessary to reproduce the whole article, which I have very carefully read and considered. I will however refer to some salient parts of it. The letter which serves as a preamble to the article states:

"Unfortunately for the country, Chesoni has directed his considerable skills to subverting the judicial process rather than growing and enhancing it, particularly in the infamous Goldenberg affair".

That sets the tenor of the article "Chesoni Implicated in an orgy of Judicial Anarchy and a Kshs.30m bribe".

These extracts are found in pages 9, 10, 11, 12 & 13. What I understand the publication to mean is that the Hon. The Chief Justice and various Judges of both the superior court and this Court are involved in the exercise of protecting one litigant as opposed to the other in the cases involving the Duty Free Shops and Goldenberg affair. The judges are doing so because they have been paid and have no moral authority in their duty to administer justice. Hence the illegal rulings that are being made by the court.

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Okoth's affidavit also deals with 2nd article contained in the next issue of the magazine published exactly one week after the first article. This one was entitled "JUDICIARY IN PANIC AS CHESONI FALLS OUT OF FAVOUR ... SUES TONY GACHOKA".

It would appear that by the 5th February, 1999 1st respondent had received a letter from M/S Archer & Wilcock Advocates acting on behalf of the Hon. The Chief Justice. The 1st respondent then wrote to the Chief Justice in a communication entitled "Letter from the Publisher".

He categorically stated that he stood by all he had said in the previous publication and went on to reaffirm the six particular incidences that he stood by. In reference to the determination of the impending case between him and the Hon. The Chief Justice, he had this to say:

"If in the case of Kamlesh Pattni you hand-pick Magistrates and Judges to decide cases in his favour are you not going to also hand-pick a Judge to decide this impending case in your favour"?

In the body of the article the publisher states what, according to his information, there is a collusion between the Chief Justice and some Court of Appeal Judges who want him arrested and charged in respect of his last publication. He said:-

"Taken in the context of what is now clearly a cosmetic report by Court of Appeal Judge, Richard Kwach where the Judiciary called for its own policing following widespread evidence of corruption, racketeering involving magistrates, advocates and judicial staff, the `expose' was just a tip of the iceberg. According to reports reaching the Post on Sunday, the reaction of the Chief Justice to the exposure last week was one of drawing some Court of Appeal Judges into a consensus of sorts that amounted to demands to the government for the arrest of the Publisher of the Post on Sunday, Tony Gachoka. Chesoni continues to subvert the course of Justice, and

"The Kenyan Judiciary has been on a downward trend from colonial era to the Kenyatta regime and worse in the Moi era".

"Its dignity has been eroded by magistrates and Judges who do not believe in democratic principles, human rights, fairness and the rule of law".

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The applicant's contention is that the tenor of the cover story in the two issues of the magazine and the alleged offending articles in both issues contravene the principle that no publication is made of matters that are still undetermined before the court. Secondly that the publications were a scurrilous and

unjustified attack on the judiciary calculated to bring into disrespect and contempt the administration of justice in Kenya.

On the issue of what was pending before the Court. Mr. Luvuga's affidavit is relevant, and according to him, Civil Application No. Nai. 321 of 1998 (**In the Matter of an intended Appeal Between Kamlesh Mansukhlal Damji Pattni and Nasir Ibrahim Ali and 2 Others**) was filed under a certificate of urgency on 16th day of December, 1998. On 17th December, 1998 it was placed before Gicheru, J.A who saw no urgency in the matter and declined to certify it urgent. On 23rd December, 1998 the application was fixed for hearing at the registry for 14th January, 1999. However, on 30th December, 1998 Mr. Rebello acting for the applicant, requested that the application be placed before a single Judge for hearing inter-partes on the issue of urgency. This was done and Gicheru, J.A directed that the same be heard by Tunoi, J.A.

In the meantime, Civil Application No. Nai. 5 of 1999 was filed at the registry on 8th of January, 1999. It was certified urgent and fixed to be heard in the normal way on 14th January, 1999. This was on the 8th day of January, 1999. On 12th January, 1999 Mr. Rabello once again wrote to the Court and indicated that he would be applying to consolidate the two applications as ordered by the Court. Both the applications filed under certificate of urgency were heard on 15th January, 1999. The Court allowed the application but specifically reserved the delivery of its reasons for the ruling to the 19th of February, 1999 at 10.00 a.m. By the time Mr. Luvuga swore his affidavit, the reasons for the ruling were still to be delivered.

That so far was the evidence adduced by the applicant to support its case within the perimeter he had set in his complaint that the two publications by the 1st and 2nd respondents were in contempt of this Court, on the ground that they were a scurrilous attack on the Court, offended the Sub-judice rule and were intended to bring into disrepute the administration of justice.

Neither Tony Gachoka the 1st respondent, The Post Ltd, the 2nd respondent nor its other director and secretary Mr. Mungai were represented. The 1st respondent explicitly

informed us that he had indeed sought legal advice before and during the publications. What then was the 1st respondent's defence? As I understood it, there was no dispute as to the publication of the alleged offending articles. 1st respondent emphatically and categorically stated that he published the articles as an "Investigating journalist". It had taken him four months to do the investigations and gather the information that he had published. He had the sources for his information and was prepared to bring them to Court.

Secondly, that he was interested in the "Goldenberg case" which according to him was the reason why the Duty Free cases have been decided the way they have been decided. In his quest to inform the public he had published the articles in order to encourage public debate.

Thirdly that it was his constitutional right to express himself in terms of section 79 of the constitution of Kenya and thereby publish that which he had been told since it involved a matter of great public interest, AND finally that he had been stopped by this Court from properly defending himself by not being allowed to give his evidence in the "witness box" and by not being allowed to call his witnesses.

We were referred to various local and international authorities and I am satisfied that "scandalizing the court" is a head of contempt that exists in our jurisdiction and punishable as a criminal offence although no specific provisions have been made in our laws.

To my mind, the law in relation to scandalising of the court cannot be put any more clearer than as stated in **Halsburys' Laws of England 4th Edition, Vol. 9 at page 21:**

"Scandalizing the court. Any act done or writing published which is calculated to bring a court or a judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court.

Thus scurrilous abuse of a judge or a court, or attacks on the personal character of a judge, are punishable contempts. The punishment is inflicted, not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the attack, but of protecting the public, especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal is undermined or impaired. **In consequence, the court has regarded**

with particular seriousness allegations of partiality or bias on the part of a judge or a court.

On the other hand, criticism of a judge's conduct or of the conduct of a court, even if strongly worded, is

not a contempt provided that the criticism is fair, temperate and made in good faith and is not directed to the personal character of a judge or to the impartiality of a judge or court".

The relief that the applicant seeks in this application is committal of the offender(s) to prison. It therefore behoves him to prove his case to the standard required in criminal matters. This is notwithstanding the fact that committal proceedings in respect of contempt do not fall exclusively in the realm of criminal justice.

First to deal with the issue of whether or not the respondents offended the Sub-judice rule? Did they publish the alleged articles while there was a matter or proceedings pending before this court? The publication of January 31st to 6th February, 1999 was under the heading "CHESONI IMPLICATED IN AN ORGY OF JUDICIAL ANARCHY".

The article then specifically referred to two matters that were pending before the court, that is "Appeal No. 321 of 1998" and "Appeal No. 5 of 1999". The correct position as deponed to by Mr. Luvuga is that the two matters were actually applications arising out of litigation going on in the "Duty Free case". The whole passage criticizes the manner in which the two applications were dealt with. The inaccuracies left aside, the publisher then conclusively states that the ruling made in the application by the three judges of this Court was as a result of the Chief Justice influencing the Judges upon his return from New York. There was "clear evidence of collusion and interest in the case" and that:

"The highest court on the land was the Court of Appeal it could go outside the law and the procedure of the Court of Appeal in hearing an application to stay an order that had already been effected instead of directing Pattni and his lawyers to file a substantive appeal against Keiwua to return World Duty Free to Ali".

These comments on the ruling were being made when the reasons for the ruling delivered by this Court were still to be delivered. The 1st respondent did not argue that he was not aware of

the order of the court that the reasons for the ruling it had made in the matter, filed under a certificate of urgency were to be delivered on 19th of February, 1999.

His argument was that as a lay man once the ruling had been made he was at liberty to criticize it as he did. He went to great length to draw a parallel between this situation and the situation where an order is made to demolish a building. Once a demolition is complete then there can be no use for any further action. What is left is a mere "administrative exercise".

To my mind that cannot be the position. Contempt of court under the Sub-judice rule is committed when comments are made on pending legal proceedings which purport to pre-judge the issues which are to be tried by the court. ***See AG vs Times Newspaper Ltd. [1973] 3 All ER at Page 64 & 65.***

The court had still to give its reason as to why it had taken the course it took and reached the finding it did. A judgment cannot be conclusive in deciding on the dispute before it, unless reasons are given for the finding. Going back to general principle that contempt of court is not punishable or meant to protect the judge, it becomes clear why the courts strenuously object to publications that prejudge the issues that are meant to be decided by them. In the matter before us, it cannot be said that what was published in the offending articles was fair criticism of the Court's judgment. One cannot comment on what one has not seen, read or considered. I am satisfied that the publication did offend the Sub-judice rule.

As to the 2nd limb, the applicant set out to prove that the two publications amounted to a scurrilous attack on the court and was calculated to bring the Court of Appeal and the various Judges into contempt.

The question to be answered is: how was this Court portrayed in the two publications? As far as Mr. Chunga was concerned, the articles were a scurrilous attack both on the Court and the various Judges that dealt with the matter of Duty Free or the "Goldenberg case", and the attacks were calculated to bring both the Judges and the Court into contempt. That is ahead of contempt that is punishable by the courts.

The courts have from time immemorial adjudicated over these kind of cases and have one clear directions as to how they should proceed and consider the matters before them. The

reason is simple and as stated by Lord Russell at the turn of the century in the case of ***REG vs Gray [1900] 2 QB at page 36 and 40***, and applied in many other cases in our jurisdiction. See ***David Makali & Others Vs Republic Criminal Application No. Nai. 4 & 5 of 1994 (unreported):***

"It is a jurisdiction, however, to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt".

Also as stated by Lord Denning M.R in ***Reg vs Commissioner of Police of the Metropolitan Ex-parte Blackburn Non. 2 [1968] 2 QB 150:***

"It is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise more particularly as we ourselves have an interest in the matter".

To my mind the caution is not without merit for two reasons: First that the offender if found at fault has more often than not faced imprisonment and secondly because, the matter is one that the court is directly involved in. For this reason, it must at all times appear that the main principle involved is the protection of the public interest that is paramount and not the protection of the Judge or court from "fair, temperate criticism" made in good faith however strongly worded it might be.

On my part I have carefully gone through the offending articles, weighed the contents of the article against the 1st respondent's claim that he was only publishing information gathered in his investigation on a matter that is of great public interest. The *innuendo* from the words used, the interpretation that an ordinarily reasonable person would attach to the language used in the publication is that the articles amount to scurrilous attacks on this Court. The attacks cannot be a fair criticism of this Court on any matter. I find the language insulting, abusive and derogatory. It is clear that the publisher's motive was to scandalise this Court, as one whose Judges were ready to be dictated to and influenced by the Chief Justice. They were a court and Judges who as he stated:

"Its dignity has been eroded… who do not believe in democratic principles, human rights, fairness and the rule of law".

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There is no doubt in my mind that those words in their natural meaning were made to scandalize the Court and thereby bring it into contempt.

I will very briefly consider the 1st respondent's defence that he was denied justice because he was prevented from giving his "evidence in the Witness Box" or by not calling his witnesses.

The procedure for instituting contempt proceedings is now well settled and has been meticulously followed in other cases in our courts like in the `MAKALI' case. Although quasi-criminal proceedings, in accordance with **Order 52 of the Rules of the Supreme Court in England,** the proceedings are by way of an application brought after the requisite leave has been obtained. A Notice of Motion is then filed, grounded on affidavits to prove whatever charge that is laid in the statement. Being an application if the respondent wishes to reply to the allegations he does it in the normal manner of filing replying affidavits. If the respondent wishes to call any witnesses he does so by filing the affidavits of his witness subject, of course, to the usual procedure of any of the witnesses being called by the opposing side for cross-examination upon satisfying the court that such a course is necessary.

In the present case pursuant to the application being served upon the respondents, the 1st respondent elected the course he wanted to take and filed a replying affidavit. The matter came to court and Mrs. Onyango on behalf of the applicant sought an adjournment to enable her to study and file a further affidavit if necessary. Leave was granted to both Mrs. Onyango and the respondents to file further affidavit in reply if necessary.

In the meantime the applicant took a different course and indicated to the respondent that he would be arguing a preliminary point that parts of the replying affidavit be struck out. This point was never to be taken because the 1st respondent considered the matter and decided that he would offer no evidence by way of affidavit. The applicant was then heard in his application. The 1st respondent then demanded that the court do summon the Attorney General for cross-examination upon whom he blamed the second publication. This Court ruled against this and gave reasons. The 1st respondent's contention now is that he was denied in contravention of Rules of the Supreme Court **Order 52 rule 6(4)** to give his evidence on oath in his defence. The 1st respondent had elected from the beginning how he wanted to conduct his defence. His request that the court should summon his witnesses was clearly

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answered. He did not file any affidavits from these witnesses. He had all the opportunity to do so. He cannot be heard to say that once having elected to withdraw his affidavit he could come back on a second thought and ask to be heard.

Moreover, the evidence that the 1st respondent wanted to adduce from the intended witnesses that he wanted to call was indicated to the court. To my mind the evidence related to matters that are irrelevant to the issues in this application. I did not hear him say that he wanted to call anybody to prove that he did not publish the offensive and abusive articles and that they were not meant to bring this Court into disrepute nor that the publications were not meant to interfere with the administration of justice.

What was clear in these proceedings was that with or without the 1st respondent going into the "Witness Box", he had his day in Court, he was not at all at loss as to what allegations he was supposed to answer

to. In his own words he had during the collection of his information obtained counsel from his lawyers and indeed during the hearing he had been accorded sufficient time “to pour out his heart” to the Court. He cannot therefore say that he was in any way prejudiced.

For the reasons I have given above, I am satisfied that the 1st and 2nd respondents are guilty of the contempt alleged against them, and I convict the two of them of the same.

I will very briefly deal with the case of Njoroge Nani Mungai. I have considered his affidavit in that he was a director and secretary of the 2nd respondent at the formation of the company. His defence right from the time he was served with the application was that he no longer held and did not hold any position with the 2nd respondent at the time the two publications were made.

I accept his explanation that he was not a director and that he took no part in the publication of the scandalising material. On that basis, I would acquit him of the charge.

As for sentence, considering the circumstances of this case I would sentence the 1st respondent (Gachoka) to a term of six months imprisonment and the 2nd respondent (The Post Ltd.) to a fine of Ksh.1,000,000.00 (One million shillings) and further order that until

that fine is paid in full there shall be no publication of the ‘Post on Sunday’ or any other publication by it.

As for costs I make no orders.

SHAH JA. On 16th February, 1999 this Court granted leave to the applicant, Republic of Kenya, to institute proceedings for contempt of this Court against one **Antony Gachoka** and **The Post Limited**. It is common ground that Antony Gachoka is the Chief Executive of the weekly magazine known as **THE POST ON SUNDAY**, and that **The Post Limited** is the publisher thereof.

The alleged contempt arose out of two publications of **THE POST ON SUNDAY,** the first one being the issue dated January 31st to February 6th and second one being the issue dated February, 7th to February 13th, 1999.

The history leading to the institution of the said contempt proceedings is a simple one. On the 16th December, 1998 an application was lodged in this Court by one Kamlesh Mansukhlal Pattni seeking orders to stay further proceedings before the superior court (Ole Keiwua, J) pending the hearing and determination an intended appeal. The said application was filed under a certificate of urgency. When the issuance of the certificate of urgency came up before a learned single Judge of this Court, he declined to grant the said certificate and the applicant's advocate, pursuant to provision in rule 47(5) of the Rules of this Court applied for the matter to be placed before a learned single Judge of this Court for hearing inter partes. The inter partes urgency application came up for hearing before Tunoi, JA as directed by Gicheru, JA. Tunoi, JA heard the application inter partes and ruled on 8th January, 1999, inter alia, as follows:

"In the circumstances it is in the best interests of all the parties concerned and the public at large that the matters in issue in the litigation be disposed of without any further delay. Accordingly, I certify the application urgent and order that, subject to the direction of the Honourable the Chief Justice, the application and all others which are listed be heard by the Court of Appeal on 14th January, 1999. Costs of this application shall be in the cause."

On 8th January, 1999 yet another application was filed by Kamlesh Pattni. That is Civil Application No. NAI. 5 of 1999.

Although Civil Application No. NAI. 321 of 1998 was certified as urgent on 8th January, 1999, the hearing thereof which was already fixed for 14th January, 1999 was not brought forward presumably as the date was not too far off.

On 12th January, 1999 Mr. Pattni's advocate Mr. Rebello informed the Court, by his letter of that date, that he would seek consolidation of the hearing of **Civil Application NO. NAI. 321 of 1998** with **Civil Application NO. NAI. 5 of 1999**. He requested the Registry of this Court to place the file of **Civil Application NO. NAI. 5 of 1999** before the Court on 14th January, 1999 when **321 of 1999** was to be heard. He drew the Court's attention to the fact that **No. 321 of 1998** has been affected by the ruling and orders of Ole Keiwua, J made on 31st December, 1998 which were the subject matter of **No. 5 of 1999** and pointed out that **No. 321 of 1998** may be rendered nugatory if not heard alongside **No. 5 of 1999.**

When **No. 321 of 1998** came up for hearing before this Court Mr. Rebello applied for consolidation of the two applications for hearing. Such consolidation was not ordered; instead the court ordered as follows:

"Having considered the matter and in exercise of the power given under rule 100 of the Rules of this court, we order that these two applications be heard immediately one after the other starting with **Application No. 321/98. Application NO. 5/99** will be heard tomorrow Friday 15th January, 1999 at

11.00 a.m."

On 15th January, 1999 this Court, after hearing counsel for both sides, ordered that the Receiver appointed by court be re-instated. Effectively this Court took away the management of World Duty Free Limited from Ali which management was restored to Ali by orders of Ole Keiwua, J made on 31st December, 1998. The reasons for this ruling were reserved for delivery on 19th February, 1999. It must be remembered that this Court was sitting in Mombasa during the last two weeks of January, 1999. The reasons for ruling dated 15th January, 1999 were delivered separately by all 3 Judges who heard the matter. I said during the course of my ruling:

"Effectively and clearly the orders of Tunoi JA were directed to, hearing of all pending applications at the earliest. At that time, **Civil Application No. Nai. 5 of 1999** was also pending. Mr. Oduol for the respondents was aware of the pending application, **No. Nai 5**

of 1999. On 9th January, 1999 Mr. Nowrojee and Mr. Oduol were told to be prepared to argue out all pending applications.

On 14th January, 1999 when the parties' counsel assembled in Court Mr. Oduol said he was not ready to proceed with the hearing of **Civil Application No. Nai. 5 of 1999.** He opposed Mr. Nowrojee's application for consolidation of hearing of **Civil Application Nai. 321 of 1988** and **Nai. 5 of 1999.** He was not quite overruled on that issue but the Court ordered both applications to be heard one after the other on 15th January, 1999. On that day, Mr. Oduol was ready to proceed and fully argued out the matter".

The central issue in **Civil Application No. Nai. 5 of 1999** was whether the learned judge (Ole Keiwua, J) was correct in taking away the management of World Duty Free Limited from the court appointed receiver and granting it to one of the contestants, namely Mr. Ali, even when such an order was not sought. The order sought was for removal of the court appointed receiver. Another issue was as to whether or not a fresh application in that behalf can be heard when the first one was still pending.

It is in this background of affairs that Gachoka published the first of the two above-mentioned issues of **The Post on Sunday**. The passages therein which Mr. Chunga for the Republic relied on to found contempt of this Court are set out in the affidavit of Mr. Isaac Okoth a Senior Assistant Commissioner of Police who is also the Provincial Criminal Investigations Officer in charge of Nairobi Area.

I need not set out all the passages referred to by Mr. Okoth. I will however set out what in my view, is germane to the present application.

"The matter does not stop there. On the fateful 14th day of January, 1999, the judges of the Court of Appeal Justices Kwach, A.B. Shah and Tunoi ceded (sic) that application No. 321 of 98 had been overtaken by events and disposed of it (the application for Ole Keiwua to disqualify himself) but ordered Ali's lawyer Ochieng Oduol to be ready to proceed with No. 5 of 1999 the very next day 15th January at 9.00 o'clock.

Ochieng Oduol's objection that he had not even had time to file a replying affidavit was met with an order that he do so in two hours that was the remainder of the day!

Interestingly according to our investigations, the Court of Appeal did not break for lunch but proceeded to bombard Ochieng Oduol for what was clearly a determined effort to clear the matter in favour of Pattni.

Even more interestingly, and according to impeccable sources, the same afternoon at Hotel Intercontinental, there was a two hour luncheon of three giants in one camp working for one man, protecting one man Kamlesh Pattni: self declared total man - Nicholas Biwot, Attorney Gengeral, Amos Wako and Chief Justice Zaccheaus Chesoni. Immediately after the luncheon, Chesoni proceeded to the chambers of the presiding judge Richard Kwach where he sat for one and half hours immediately after the session that ordered a hearing the next day (of No. 5 of 1999). So that on 15th January, 1999, three eminent judges of Court of Appeal were hearing an application to stay the order returning the World Duty Free to Nasir Ebrahim Ali, who had already taken possession on 31st of December, 1998, some 14 days earlier.

1 That the highest court on the land was telling the Kenyan people that because it was the Court of Appeal it could go outside the law and the procedures of the Court of Appeal in hearing an application to stay an order that had already been effected instead of directing Pattni and his lawyers to file a substantive appeal against Keiwua to return World Duty Free to Ali.

In other words, the Court of Appeal could have within procedure and within the Law have heard an appeal against the ruling of Ole Keiwua or any other judge but they could not hear an application to stay

the demolishing of a building that had already been demolished.

Our investigations reveal that the Court of Appeal misused the irregular application before it to return the World Duty Free to Pattni illegally because of instructions and insistence of Chief Justice Chesoni whom, the **Post** established is under Kamlesh Pattni's pay roll"

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What I have reproduced above becomes more relevant in the light of what the first respondent printed of and concerning the Honourable the Chief Justice in the same issue of the **Post on Sunday**:

"The Court of Appeal had previously declined to mark as 'urgent' appeal No.321 of 98 at a time when the Chief Justice was in New York. According to thorough investigation by the **Post on Sunday**, it is immediately prior to his visit to New York that Chesoni received a bribe of Kshs.30 million from Kamlesh Pattni from a Nairobi Bank.

So that by the time the Court of Appeal Case No. 5 of 1999 came up for hearing on the 8th January, 1999 to determine its urgency before Court of Appeal Judge Tunoi, the Chief Justice had returned to Kenya and was in receipt of Kshs.30 million from Kamlesh Pattni".

I agree with Mr. Chunga when he argued that whether or not an article is contemptuous of court can be properly ascertained by looking at the article itself without looking into or calling extrinsic evidence. The article clearly suggests that the Honourable the Chief Justice was allegedly corrupted by Pattni to influence Judge of Appeal Kwach and by extension Judges of Appeal Tunoi and Shah to give a decision in favour of Pattni and against Ali. The suggestion itself is an abominable untruth and in my view amounts, clearly, to scandalizing the court. The article is venomous and was clearly meant to bring into disrepute the administration of justice in this country. The ordinary person reading this article would conclude that the judiciary including the highest Court in the land is not only corrupt but is weak-kneed enough to lend itself to manipulations by the Honourable the Chief Justice. The article itself constitutes a scurrilous attack on this Court.

I am aware that I must tread carefully when a citizen is accused of contempt of court and he appears before the Court to defend himself. The jurisdiction to punish for contempt must be exercised very cautiously as Judges themselves may appear to have an interest in the matter. The jurisdiction to punish for contempt is not for the protection of the Judges. It is for the protection of the public; to see to it that the general public do not lose confidence in the judiciary; to see to it that the ordinary people of this Country look up to Judges as men and women of integrity and honesty who could therefore be trusted to judge the disputes before them judicially, judiciously and impartially. But when someone, particularly a journalist,

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without proof and guided by motives other than fair, attacks the very integrity of the court the power to punish for contempt is the only weapon at the disposal of the Court to put the matters right.

I must hasten to add that if any litigant or a journalist were to tell me that I am ignorant or that my judgment is wrong or that my judgment is not based on sound principles of law I would not even blink an eye-lid. I expect some criticisms of my judgments. Such criticisms would actually spur me on to do better next time. I have not flinched at saying that I could be wrong but I would feel injured if I am told wrongly, that I am dishonest, corrupt or manouverable, and the crux of the matter is that the general public may loose confidence in me when I am wrongly so accused.

Mr. Gachoka attempted to justify his venomous attack on this Court but was unable to do so. He himself opted to withdraw the affidavit he had filed in answer to the complaint against him. Although Mr. Chunga had notified him that he wanted only certain portions of his replying affidavit struck out Mr. Gachoka chose to withdraw the whole affidavit. He said he did it under protest but he did not explain what exactly was his protest.

Mr. Gachoka's response to Mr. Chunga's submissions on fact was simple. He acknowledged that he was the author of the articles in question; that he was the Chief Executive Officer of **Post on Sunday**; that he was a director of **The Post Limited**; that he stood by what he wrote and published. He renewed his attack on the Honourable the Chief Justice and referred to a letter written by Ole Keiwua, J to Kuloba, J as showing interference by the Honourable The Chief Justice. How he obtained a copy of that letter is not clear. He (Gachoka) hedged when asked how he obtained a copy thereof. The said letter, dated 31st December, 1988 is addressed by Ole Keiwua, J to Kuloba, J and is copied to Honourable The Chief Justice. There is no suggestion therein of any interference by Honourable The Chief Justice. The letter shows some sort of tug of war between the two Judges.

Mr. Gachoka said that this court returned **World Duty Free** to Mr. Pattni illegally. When asked what he

meant by "illegal" his answer was that the ruling was illegal because - to use his own words -" where corruption exists and judges take directions, money is the part of the consideration. The word illegal was used in terms of result of bribery." I have quoted Mr. Gachoka's exact words simply to demonstrate the objective he had in mind when

he termed the ruling as "illegal". There can be no doubt in my mind that Mr. Gachoka was accusing the court of bribery and being influenced. The use of such word "illegal", in the context that Mr. Gachoka put it, quite clearly amounts to scandalizing the Court, imputing improper motives to the Judges, imputing impropriety. The words in question were used deliberately and calculatedly.

Mr. Gachoka said that during the course of his investigative journalism, he came across, through hearsay evidence, the 'facts' which he printed. Let it be said here and now that it is no defence (to a contempt charge), that the author (publisher) was told by Mr. A or Mr. B or Mr. C of the 'fact'. Mr. A or Mr. B or Mr. C could have sworn affidavits to confirm what they told Mr. Gachoka. He was clearly advised to file affidavits from his alleged informants. He did not do so. It is quite probable that those gentlemen could have declined to swear any such affidavits. If what they told Mr. Gachoka was the truth they could have easily deponed to those facts on affidavits.

It is for that reason that, in my view, Mr. Gachoka half-heartedly sought leave to give evidence **viva voce**. This he did when the hearing was over and even final submissions had been concluded and I am of the view that that was a red-herring sought to be introduced by Mr. Gachoka. He was really not serious about it. He was basking in the 'glory' of the publicity that he thought he was getting as a result of this application. Had he made the application for giving evidence viva voce after Mr. Chunga first finished his arguments he could have had the benefit of 052 rule 6(4) of the English Rules of The Supreme Court.

Mr. Gachoka argued that the court having given its initial verdict on 15th January, 1999 there was nothing **sub-judice** left. Although he was aware that the Court was yet to deliver its reasons for the ruling of 15th January, 1999 he chose to ignore the same and went ahead to publish the 31st January to 6th February, 1999 issue of **The Post on Sunday**. Reasons for any decision are the most important part of the decision and any one who rushes to print falsehoods with malice in regard to such a ruling is quite clearly in contempt of Court.

Quite obviously thinking of himself as a hero, Mr. Gachoka, not satisfied with what he had printed earlier, went on to publish in the issue of the February 7th, to 13th February, 1999 the following words of and concerning Honourable the Chief Justice.

"If in the case of Kamlesh Pattni you hand-pick magistrates and judges to decide cases in his favour, you are not going to hand-pick a judge to decide this important case in your favour."

He went on to say further

"According to reports reaching **Post on Sunday**, the action of the Chief Justice to the exposure last week was of drawing some Court of Appeal judges into a consensus of sorts that amounted to demands to the government for arrest of the publisher of the **Post on Sunday**, Tony Gachoka on charges of Criminal Libel in the absence of repealed sedition laws."

These are not the words of a responsible journalist. False bravado is very different from objective reporting. No court would mind even wrong criticism of the quality of its judgment but when the judgment is said to be a product of corruption and influence the realms of fair criticism are exceeded and contempt of Court takes place.

What Mr. Gachoka was telling Kenyans was that the Court had succumbed to interference by Honourable the Chief Justice; that it had become subservient to the dictates of a Chief Justice who was in the "pay-roll" of Pattni. He was clearly in contempt of Court.

I find Mr. Gachoka guilty of the offence of contempt of court and I hold that the two articles in question, more so the earlier article is a scurrilous and unjustified attack on this Court and the articles are calculated to bring into disrepute and contempt the Administration of Justice in Kenya.

It was not in dispute that the second respondent was served with the application in question. Mr. Gachoka spoke for **The Post Limited** at length. I find **The Post Limited** guilty of the contempt of court as Mr. Gachoka is. A publication in the print media is a powerful weapon and could be used to destroy reputations built over a number of years. If wrongly used (as was the case here) the magazine must be punished.

I come to the case against Mr. Mungai. At the time he was served with the application, he was, as per records held by the Registrar of Companies, a director of **The Post Limited.** He deposed that he had

earlier resigned but Mr. Gachoka who took over from him as

secretary did not notify the Registrar of Companies of the fact of his resignation. If he was truly an active director of **The Post Limited** at the material time I would have found him as guilty as I have found the first respondent. But once he swore to the fact that he had resigned as a director the onus of proving that he was an active director, at the material time, shifted to the applicant and that onus was not discharged sufficiently. I would therefore discharge Mr. Mungai.

I would make no order as to costs.

As regards the punishment to be meted out to Mr. Gachoka and **The Post Limited,** I would sentence Mr. Gachoka to six months in prison. I would impose a fine of Kshs.1,000,000/= (One Million Shillings) on **The Post Limited** and I would order that there shall be no publication of **The Post on Sunday** or any other publication by it, until payment of the fine in full.

Kwach JA, The Attorney-General brought these proceedings seeking an order for committal for contempt of court against Tony Gachoka, publisher and chief executive of a magazine called The Post on Sunday; The Post Limited, the proprietor and publisher of the Post on Sunday; and Njoroge Nani Mungai, a director of The Post Limited.

The grounds upon which the committal of these respondents were sought are that in the issues of The Post on Sunday to which I shall hereinafter refer as "the magazine" (31st January – 6th February and 7th February – 13th February 1999) they published two articles which contravened the sub-judice rule; were a scurrilous and unjustified attack upon this Court and were calculated to bring into disrepute and contempt the administration of justice in Kenya. The affidavit in support of the application was sworn by Mr. Isaac Okoth, a Senior Assistant Commissioner of Police and the Provincial Criminal Investigations Officer in charge of Nairobi Area. He swore the affidavit after reading the two articles published in the magazine. The first article was entitled "Chesoni Implicated in an orgy of Judicial anarchy and a 30 million bribe." In the first article it was alleged that the Chief Justice received Shs 30m bribe from one Kamlesh Pattni; that the Chief Justice interfered with the Judges of this Court who were hearing an application for stay of execution filed by Pattni, and influenced them to reach a

decision favourable to Pattni, and against Nasir Ibrahim Ali; that the Court used an irregular application to return the Kenya Duty Free to Patni on the instructions of the Chief Justice; that Tunoi JA acted irregularly when he certified as urgent the application for stay filed by Pattni; that the ruling by the Court given on 15th January, 1999 returning the Duty Free Complex to the Receiver was illegal. In the second article Tony Gachoka went ballistic and abused the Chief Justice in the most derogatory and offensive language. I do not need to repeat here what exactly he said about the Chief Justice, except to say that they were not the sort of things a young man, who claims to have been properly brought up by his parents, can say in polite society about a man who is old enough to be his father.

The case which led to this outburst was heard in this Court by myself, Shah JA and Tunoi JA on 15th January, 1999. It concerned a dispute between two Asian tycoons, Nasir Ibrahim Ali and Kamlesh Pattni, over the ownership of Kenya Duty Free Complex. Ole Keiwua J had on 31st December, 1998 made an order returning the Complex to Nasir Ibrahim Ali the effect of which was to set aside an earlier order made by Owuor J (as she then was) and confirmed by this Court, placing the Complex in the hands of a Receiver pending the hearing of Pattni's application for an interim injunction and appointment of Receiver inter partes. The Court delivered its ruling on 15th January, 1999 and returned the Complex to the Receiver and reserved the reasons for the ruling to Friday, 19th February, 1999. It will be immediately apparent from this chronology that the two articles were published after the delivery of the ruling but before the reasons for the ruling were given by the Court.

The Law to be applied.

The power of this Court and other courts to deal with cases of contempt of court is given by section 77 (8) of the Constitution of Kenya, the proviso to which states that nothing in the subsection shall prevent a court from punishing any person for contempt notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefore is not prescribed. And section 5 (1) of the Judicature Act (Cap 8) provides that the High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

It is clear from these statutory provisions that this court has power to deal with contempts committed in

relation to it or its business and is not required to refer these to the superior court so as to give a contemnor a right of appeal. It is true that under Rules of the Supreme Court, Order 52 6(4) (1991 edition), if on the hearing of the application the person sought to be committed expresses a wish to give oral evidence on his own behalf, he shall be entitled to do so. In the present case the Court made an order for evidence by affidavits and both Tony Gachoka and |Njoroge Nani Mungai filed affidavits. At the commencement of the hearing, faced with a preliminary objection from Mr Chunga, learned Director of Public Prosecutions, for the Attorney-General, Tony Gachoka applied Director of Public Prosecutions, for the Attorney-General, Tony Gachoka applied to withdraw his affidavit and he was allowed to do so. After |Mr Chunga had closed his case, Tony Gachoka applied to give oral evidence in relation to certain events which transpired between him and Mr Amos Wako, the Attorney-General, and the Court rejected his application. The Court was perfectly right to disallow his application because the format for the trial had been set in advance and the respondents had submitted to it and the Court was also satisfied that the oral evidence Tony Gachoka wished to give was irrelevant to the charges against him. Accordingly, there was no breach or Order 52 rule 6 of the Rules of the Supreme Court.

Attorney General's Case against the Respondents

The Attorney-|General's case against all three respondents is, first, that they breached the sub-judice rule by commenting on a case which was still pending and yet to be finalised, and secondly, that they made a scurrilous attack on the Judges of his Court. Mr Chunga submitted that although the Court delivered its ruling in Civil Application No Nai 5 of 1999 on 15th January 1999, the reasons for the ruling were reserved to be given on 19th February 1999, and the matter was therefore still sub-judice. Tony Gachoka countered this submission by saying that once the ruling had been delivered, and only reasons were left to be given at a later dater, the case was for all practical purposes finished and therefore the sub-judice rule did not apply. This submission cannot be correct because the ruling was not complete until the reasons were given. He was therefore clearly in breach of the subjudice rule when he launched his blistering attack on the court before the reasons were given.

In the course of Tony Gachoka's submissions I did inquire from him if he had subsequently taken the trouble to study the reasons given by the Court. His response was that he did not find it necessary to read the reasons since he was convinced that the decision was illegal because the believed it had been obtained corruptly, and also because he had been so advised by two prominent advocates whom he named for the record. He did not produce any evidence to prove his outrageous and malicious allegation that the Judges who heard the matter or some of them had been bribed to return a verdict favourable to Pattni. |It seems to me that regardless of the intellectual superiority of the Advocates who gave Tony Gachoka this reckless advice, they had no basis in law or fact for their belief that the ruling was illegal. They acted in vacuo and in complete ignorance of the true factual position because they did not have the benefit of the reasons for the ruling given by the Court. Tony Gachoka did not suggest that those reasons were not sound in law nor could he. Having made up his mind that the ruling had been procured corruptly, he regarded the reasons as irrelevant and did not condescend to read them I am accordingly satisfied that the publication of the articles complained of constituted a breach of the sub-judice rule for which Tony Gachoka and the Post Limited are answerable.

As regards the charge of making a scurrilous attack on the Judges and scandalizing the court, Mr Chunga submitted that the language used in the articles was not only excessively violent but also scornful, which gave rise to an inference of malice and lack of good faith on the party of the publisher and the proprietor of the magazine.

The contempt of scandalizing the Court is defined in Halsbury's Laws of England, Volume 9 (4th edition) paragraph 27 thus –

"27. Scandalising the Court

Any act done or writing published which is calculated to bring a court or a judge into contempt , or to lower his authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court. Thus scurrilous abuse of a judge or court, or attacks on the personal character of a judge, are punishable contempts. The punishment is inflicted, not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the attack, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the

mischief they will incur if the authority of the tribunal is undermined or impaired. In consequence, the

court has regarded with particular seriousness allegations of partiality or bias on the part of a judge or a court.

On the other hand, criticism of a judge's conduct or of the conduct of a court, even if strongly worded, its not a contempt provided that the criticism is fair, temperate and made in good faith and is not directed to the personal character of a judge or impartiality of a judge or court."

Anyone reading the articles complained of will not fail to notice that the language used was needlessly violent, even vulgar. That attack was directed at the personal character of the Chief Justice. The judges of this Court were accused of partiality and bias and of receiving bribes from one party. The clear intention must have been to deride and vilify the Judges involved.

Tony Gachoka submitted that he was entitled to use violent language because as a good and honest citizen, he is under a duty, in the pubic interest, to expose what he termed as massif corruption in the judiciary. But even a crusader for good governance and clean judiciary cannot be allowed to scandalize judges without producing evidence to support the allegations he makes against them. His other submission was that he published the articles in the course of exercising the freedom of the press, which he seemed to think is not subject to any qualification. He alleged the Chief Justice had received a bribe of shs. 30 m; that after the Chief Justice has had lunch with the Attorney-General and Honourable Nicholas Biwott, the Chief Justice had a long meeting with the Judge of this court who was presiding over the Kenya Duty Free Complex case on 15th January, 1999 during which Tony Gachoka alleged the Chief Justice dictated to the Judges what decision to reach on the application by Pattni. He also alleged that Tunoi JA had a personal interest in the case, and because of this he irregularly issued a certificate of urgency. None of these outrageous allegations was supported by any evidence. In the course of his lengthy and flamboyant submissions Tony Gachoka maintained that all these allegations were true but he tendered to evidence in substantiation. After listening to him patiently and watching him for several days, I was convinced that he has greater faith in fantasy than the truth.

In the case of Andre Paul Terence Ambard v The Attorney General of Trinidad and Tobago [1936] 1 All ER 704, the Judicial Committee of the Privy Council (JCPC) held that to justify

a committal for contempt of court, there must be evidence in the article itself taken as a whole, that the publisher has acted with untruth or malice, or that he imputed improper motives to those taking part in the administration of justice. Taking the material published by the respondents as a whole, it is plain beyond a peradventure not only that the authors acted with untruth but also with malice and their intention was plainly to deride and vilify the Judges. If indeed he had the evidence to prove these allegations as he kept on hinting throughout the hearing, he could have obtained affidavits from his sources.

Tony Gachoka sought to justify what he did by saying that he was, as an investigative journalist, exercising the freedom of the press. Even assuming that that was what he was doing, he was still under a duty to verify and cross-check the information he obtained from his sources. Freedom of the press is not a licence to malign others or regurgitate unsubstantiated falsehoods just to make a good copy. It is a freedom to be exercised responsibly and with great care so that the reputations of innocent people are not needlessly injured. As Watkins |LJ said in his judgment in the case of Attorney-General v News Group Newspapers Ltd [1988] 2 All ER 906 at page 0921-

'The need for a free press is axiomatic, but the press cannot be allowed to charge about like a wild unbridled horse. It has to a necessary degree, in the public interest, to be curbed."

Thus, for the reasons I have explained, I hold that the Attorney-General's complaint was fully justified and I find Tony Gachoka and the The Post Limited guilty of contempt of court for making a scurrilous attack on the Judges and scandalizing the Court and liable to be punished accordingly.

Njoroge Nani Mungai was still a director of the Post Limited at the time the articles complained of were published in the Post on Sunday. He swore an affidavit in which he deponed that he resigned his directorship by a letter dated 13th May 1998 addressed to Tony Gachoka, the chief executive of The Post Limited, but the latter neglected to notify the Registrar of Companies of the change. He said he became a director only for the purpose of incorporating the company but was otherwise not involved in the day to day running of the company. More significantly, he said Tony Gachoka did not consult him about the offending articles, and having read them subsequently he does not wish to be associated with them.

Because of Tony Gachoka's default, Njoroge Nani Mungai was still shown as a director of the

Post Limited when a search was conducted by the Attorney-General prior to the commencement of these proceedings. According to a supplementary affidavit sworn by Njoroge Nani Mungai on 14th July, 1999,

the notification of change was filed on 13th July 1999. It sayd that Njoroge Nani Mungai resigned as a director and secretary of the company with effect from 13th May, 1998 and Emily Gitau was appointed as a director with effect from the same date. It also says that Anthony Muiruri Gachoka was also appointed as secretary of the Company with effect from 13th May, 1998. According to this late notification, Emily Gitau is the person who should be facing charges together with Tony Gachoka and the Post Limited, not Njoroge Nani Mungai. She has had alucky and a narrow escape.

On this evidence I find that although Njoroge Nani Mungai was in law still a director of Post Limited when the articles complained of were published, he was not a party to the scheme hatched by Tony Gachoka to attack the Judges and scandalize the court. I find him not guilty of contempt of court.

Punishment.

The charge against Tony Gachoka and the Post Limited has been proved beyond reasonable doubt. In deciding whether a contempt is serious enough to merit imprisonment, the court is required to take into account the likelihood of interference with the administration of justice and the culpability of the offender. The intention with which the act complained of is done is a material factor in determining what punishment, if any, is appropriate. In the present case the intention of Tony Gachoka and the Post Limited was to bring the Judges and the Court into contempt by scurrilous abuse of the Judges. There is no limit to the length of the term which may be imposed but the punishment should be commensurate to the offence. Although Tony Gachoka did not place before the Court any evidence to support his defence of justification, he maintained throughout that the ruling of the Court was illegal and had been obtained corruptly. Put another way, he repeated and persisted in the contempt. He struck to his guns. I think Tony Gachoka deserved a stiff custodial sentence with no option of a fine. I would send him to prison for 6 months. I would impose a fine of Shs. 1,000,000/- on the post Limited and forthwith stop publication of the Post on Sunday unless and until the fine has been paid in full. I would make no order as to costs.

Lakha JA. In this matter, the attorney General with the leave of this Court given on 16th February, 1999 moves for an order of committal for contempt of court Against Tony Gachoka as the publisher of the Magazine " The Post on Sunday" and against the Post limited as the publisher and proprietor of the said magazine for their several contempt in publishing or causing to be published in the issues of the said magazine for 31 January – 6 February, 1999 an article under the heading "Chesoni implicated in an orgy of judicial anarchy and a Kshs. 30 m. bribe" an fro 7 – 13 February, 1999 an article under the heading "Judiciary in panic as Chesoni falls out of favour and sues…" on the grounds that the articles were a scurrilous and unjustified attack upon this court and were calculated to bring unto disrepute and contempt the administration of justice in Kenya and, secondly, they contravened the 'Subjudice' Rule.

Before I proceed any further let me at the outset state my understanding of the role of the Attorney-General in these proceedings as I believe this to have been a source of some confusion in the law about contempt of court. He has a right to bring before the Court any matter which he thinks may amount to contempt of court and which he considers should line the public interest be brought before the court. The party aggrieved has the right to bring before the court any matter which he alleges amounts to contempt but he has no duty to do so. So if the party aggrieved failed to take action either because of expense or because he thought it better not to do so, very serious contempt might escape punishment if the Attorney-General had no right to act. But the Attorney-General is not obliged to bring before the court every prima facie case of contempt reported to him. It is entirely for him to judge whether it is in the public interest that he should act. If he does he does not do as a Minister of the Government putting the authority of the Government behind the complaint – but as 'amicus curiae' bringing to the notice of the court some matter of which he considers that the court shall be informed in the interests of the administration of justice. It is, |I think, most desirable that in civil as well as criminal cases anyone who thinks that a criminal contempt of court has been or is about to be committed should, if possible, place the facts before the Attorney-General for him to consider whether or not these facts appear to disclose a contempt of court of sufficient gravity to warrant his bringing the matter to the notice of Court. Again, the fact that the attorney declines to take up the case will not prevent the complainant from seeking to persuade the court that notwithstanding the refusal of the attorney to act the matter complained of does in fact constitute a contempt of which the court should take notice. Yet again, of course, there may be cases where a serious contempt appears to have been

committed but for one reason or another none of the parties affected by it wishes any action to be taken in respect of it. In such cases if the facts come to the knowledge of the attorney from some other source he

will naturally himself bring the matter to the attention of the court.

The Attorney-General's case was that the first article alleged, inter alia, that the judges of this Court had an improper interest. Improper motive was imputed to them and that they wanted to give advantage to one of the parties. It was alleged that the Chief Justice was on the pay-roll of one of the litigants and there was irregular conduct by the judiciary under the Chief Justice's instructions and insistence. There was an imputation that the judges were not independent but acted merely as a rubber-stump of the Chief justice. In the second article, it was alleged that the Chief Justice continued to subvert the course of justice. The following passage was also published:-

"Its dignity has been eroded by magistrates and judges who do not believe in democratic principles, human rights, fairness and the rule of law. Some Judges and Magistrates have compromised their principles for short term gains and promotions hence administration of justice has been denuded".

It was also complained that reference in the second article to Court of Appeal Civil Application No. NAI 5 of 1999 was a reference to a pending case and infringed 'the sub-judice' rule.

I have carefully considered the two articles in question and construed them as a whole. The words used are violent, scornful and not temperate. They impute to the judges impropriety, improper motives, bias, corruption and lack of independence. It is not and cannot be disrupted that giving the words their natural ordinary and popular meaning anything more calculated to bring the administration of justice in |Kenya into disrepute and contempt of court cannot be imagined. In my judgment, it is clearly a scurrilous and unjustified attack on this Court and is prima facie a contempt of Court. This Court is clearly scandalized. As was said by Mr. Justice Wilmot in a judgment which was never delivered until forty years later published in a volume of Wilmot's cases under the title R v Almo (1765) Wilm. 243-271:

"If their authority (ie of the Judges) is to be trampled upon by pamphleteers and newswriters, and the people are to be told that the power, given to the Judges for their protection, is

prostituted to their destruction, the Court may retain its power some little time, but I am sure it will instantly lose all its authority; and the power of the Court will not long survive the authority of it; is it possible to stab that authority more fatally than by charging the court and more particularly the Chief Justice, with having introduced a rule to subvert the constitutional liberty of the people? A greater scandal could not be published."

I also refer to the case of Sutherland v Stopes [1925] A.C. 47 as narrated by Lord Dening in "the Due Process of Law". The New Statesman denounced the case. Proceedings were taken against the editor. They are reported in R. V NEW STATESMAN (1928) 44 TLR 301. On the one side was the Attorney-General, Sir Douglas Hogg K.C. On the other, Mr. William Jowitt K.C. Each was a brilliant advocate. Each was afterwards Lord Chancellor. But how different. Jowitt, tall and distinguished with a resonant voice and clear diction. Hogg looked like Mr. Pickwick and spoke like Demosthenes. Jowitt put it well for the New Statesman. He quoted a judgment by a strong Board of the Privy Council in 1899 in McLEOD v ST. AUBYN [1899] AC 549 at 561:-

"Committals for contempt of court by scandalizing the Court itself have become obsolete. Courts are contented to leave to public opinion attacks or comments derogatory or scandalous to them."

Hogg replied by quoting a passage from Wilmot's undelivered judgment upholding the offence on the ground that "to be impartial, and to be universally thought so, are both absolutely necessary".

It is, I think right at this stage to deal with the submissions made to the court by the First Respondent. If in doing so, as will be inevitable, I refrain from doing justice to the skill and care with which these arguments were presented, I trust that I may be forgiven, if only in the interest of conciseness. Before doing so, I remind myself that it is not challenged that the First Respondent published the words complained of and indeed the words used are his own words. Nor is it challenged that the second respondent is the proprietor and publisher of the magazine in question and that the First Respondent was at all material times a director of the Second Respondent.

The First Respondent's answer to the motion is that he had interviewed several person and had learnt of the details of the articles from them. It was said that much of the material published in the article was based on what he was told. While it may be unnecessary for the purposes of these proceedings to decide on the truth of falsity of this explanation, there is no evidence before me by way of affidavit evidence to enable me to find support for this explanation. It was said that the intention of the two articles was to expose corruption in the public interest. But intention is not relevant.

The test is whether the matter complained of is calculated to interfere with the course of justice, not

wether the authors and printers intended that result, just as it is no defense for the person responsible for the publication of a libel to plead that he did not know the matter was defamatory and had no intention to defame. I would refer to the emphatic statement of the law by a judge of great eminence whose judgments are always received with the highest respect, PALLES, C.B. In R v Dolan 260), having posed the question whether a speech the subject of the motion would have a tendency to prejudice the fair trial of an indictment, the learned chief baron said (ibid)., at p. 284);

"As to the law applicable to the case there is no doubt. Actual intention to prejudice is immaterial. I wholly deny that the law of this court has been that absence of an actual intention to prejudice is to excuse the party from being adjudged guilty of contempt of court, if the court arrives at the conclusion which I have arrived at, that there is a real danger that it will affect the trial; or that absence of intention is to excuse the party of punishment. Such a circumstance as that ought, no doubt, to be taken into consideration in considering the nature of the punishment to be awarded, as, for instance, whether it should be imprisonment."

It is then said that in writing the two articles, as he admittedly did, the First Respondent was exercising his undoubted constitutional right of freedom of speech as enshrined in section 79 of the Constitution. In my judgment, the law on this subject is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should in my judgment be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not

be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of Justice.

In AMBARD V ATTORNEY-GENERAL FOR TRINIDAD AND TOBAGO [1936] A.C. 322 AT 335, Lord Atkin said:

"But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not to cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

I think that these words have an application beyond the particular type of contempt in that case. In my judgment, it is the purpose of the law of contempt to protect the public in the proper administration of justice and in those circumstances that interest outweighed the public interest in the discussion of the issues raised by the respondents in the articles which are the subject of these proceedings.

Finally, the First Respondent complained that he did not have a fair trial as his application to give oral evidence from the witnesses box was refused. The Court did not in any way block him but the refusal was the result of his own act. When the motion, statutory statement and affidavit were served upon him he understood them, consulted legal experts and received opinions as a result of which he filed Grounds of Opposition, an affidavit and notice of preliminary objections. He then applied for witness summonses and he was informed in writing by the Deputy Registrar of this Court that he had been directed that he should have his witnesses swear affidavits in support of his opposition to the application. The mode of giving evidence, a matter of discretion for the Court, was clearly specified and communicated to him. Yet he withdrew all the papers he had filed and persisted in seeking to give evidence not by affidavit as directed but by oral testimony. This course or mode of evidence was clearly not available to him. In my judgment, this complaint has neither any basis nor any merit. I may

perhaps add that restraint of contempt of court is a restriction on freedom of speech. The remedy of contempt of court after it has been committed is punitive; it may involve imprisonment yet it is summary; it is generally obtained on affidavit evidence and it is not accompanied by those special safeguards in favour of the accused that are a feature of the trial of an ordinary criminal offence. The courts have therefore been vigilant to see that the procedure for committal is not lightly invoked. But the court's discretion in dealing with a motion for committal is wide such that it entitles the court to dismiss the motion with costs despite the fact that a contempt has been committed if it thinks that the contempt was

too venial to justify its being brought to the attention of the Court at all.

Lest it is thought that |I have overlooked it I now turn to mention that there is also a second ground relied upon by the Attorney-General for the relief which he claims, namely, that the respondents contravened the 'sub-judice' rule. In view of my other findings and, particularly on the first ground, it is not necessary to answer this issue for the determination of the application before us. "The golden rule" for judges in such circumstances is that "silence is always an option."

As for Mr. Mungai, the advocate, who was served with the motion in his capacity as a Director of The Post Limited, I have carefully considered his affidavit and I am satisfied that he was not a director of the company at the time of the publication of these two articles. No case was put before me which directly decided that a director who was otherwise passive, in the sense that he neither procured, nor aided, nor abetted, nor sought to interfere with the administration of justice was liable for contempt. I am satisfied that there is nothing in the material available before me to show that |Mr. Mungai was aware of the making of the offending publications that can make him liable for contempt. Accordingly, I have reached the conclusion without any reluctance that, in the circumstances of this case, Mr. Mungai does not become liable in contempt by virtue of his office if he held one. He could not be liable in the absence of mens rea or an actus reus.

For all the reasons above stated, I find the First Respondent TonyGachoka and the Second Respondent the Post Limited guilty of contempt of Court but acquit Mr. Mungai.

As for sentence, having regard to all the circumstances of this case, I would sentence the First Respondent to a term of imprisonment of six months and impose a fine of Kshs. One million

on the second Respondent and until that fine is paid in full there shall be no publication of the Post on Sunday or any other publication by it. I would make no order as to costs of these proceedings.

Omolo JA. This Court decided the case of REPUBLIC V DAVID MAKALI & 3 OTHERS, Civil Application No. Nai 4 of 1994 (unreported), hereinafter called "THE MAKALI CASE", IN JUNE, 1994 (unreported), hereinafter called "THE MAKALI CASE", IN June, 1994. Exactly five years down the line, the Court is once against called upon, on application by the Attorney-General on behalf of the Republic, hereinafter called "the applicant", to determine whether Tony Gachoka, the Post on Sunday Ltd, and Njoroge Nani Mungai are guilty of contempt against it (the Court). I shall hereinafter refer to these persons as the 1st, 2nd and 3rd Respondents respectively.

From the outset, one must admit that the situation in Kenya is now different from what it was in 1994. Kenyans now have a far better understanding of their civil rights than ever before. Expressions like transparency in and accountability of public institutions are the order of the day. New expressions such as "stake-holders" have been coined with a view to helping the ordinary citizenry assert their legal and political rights. The media, print, electronic and broadcast are the obvious stakeholders in the freedom of expression guaranteed by section 79 of the Constitution. Not only are the media stake-holders in that freedom but also claim to exercise it on behalf of for the benefit of a citizenry who, as never before, is ever curious and eager to know how the public institutions supposed to serve it are discharging that mandate on its behalf. It does not matter that the principal reason for the existence of the media is commerce. Even lawyers who assert that they fight for the rights of others will only do so if they are paid. The press have always asserted, and I think they are entitled to assert, that they must act as a watchdog on behalf of the public on matters pertaining to the discharge of functions by public bodies. In support of this propositions, I can do no better than to quote Mr Justice Frankfurter of the Supreme Court of the United States of America. Speaking on the concept of the freedom of the press, that learned Judge said way back in the case of PENNEKAMP V FLORIDA, 328 US 331 (1946):-

"Without free press, there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society……."

These words are still true to-day as they were in 1946 when Mr Justice Frankfurter spoke them. Freedom of the press is now universally accepted as one of the pillars of a free society. A free society must, of course, be based on the law or, put another way a society, which observed the Rule of law. What then is the RULE OF LAW?

I can only talk about that concept as I understand it in the circumstances of our nation, Kenya. It implies several concepts. The first and principal concept, as far as I understand it, is that those seek to exercise authority over us must have our consent to do so. Consequently after every five years all qualified Kenyans elect their representatives to our National Assembly and those representatives, assembled

together in Parliament, make on our behalf the laws by which we are to be governed. To enforce the observance of the laws so made Parliament has created "the Executive" and not only has Parliament has created "The Executive" and not only has Parliament created the Executives to enforce the laws but it [Parliament] has also invested it with the wherewithal to enforce the laws. What happens when it is alleged either by the Executive or the private citizen that the laws made on our behalf by Parliament have been violated? Parliament has for the purposes of determining whether there has been a violation of the law – and the violation can be very Executive or the private citizen – created the Judiciary and clothes it with the power and authority to interpret the laws and say if there has been a violation. So that the rule of law, as far as I understand it, implies that a parliament constituted by us and known to us, makes laws which we are generally agreed with; that those laws apply equally to all of us and are enforced by an executive constituted and known by us all and lastly that those laws, in the event of an alleged violation are interpreted by courts constituted by us and known to us all. I have said that the laws must apply to all of us, to the individual members of Parliament who make them, to the individual members of the executive who enforce them, to the individual members of the Judiciary which interprets the to the press, the citizenry and all who reside in the state except that Parliament ahs our authority to exempt any particular person or group of persons from the obligation to comply with a particular law. I do not think that even members of the press would want to contend that because we cannot have a free society without a free press, they are not bound by the ordinary laws which apply to other Kenyans.

Why do I find it necessary to go into this background discussion of the concept of the rule of Law?

I do so, and I have no apology in doing so, for the reason that if we are to remain a free society under the law, with a free press, we all, without exception, must continue to uphold the principle of the rule of law and if it is necessary to continue to uphold that principle, then we must also continue to maintain the institutions that go with it. That does not and cannot mean that the individual members serving in those institutions cannot be changed.

If we have no confidence in our members of Parliament, we vote them out after every five years and if we change the composition of Parliament, we are likely to have a changed Executive, at least at the top levels. The Judiciary is, however, slightly different. The individual members of the Top Judiciary can be removed but only for specified defaults and only by or through a specified method or process.

The change in personnel, however, does not affect the existence of the institution, whether Parliament, the Executives or the Judiciary. The institutions continue and they must continue because we need them in order to maintain a free society under the law. How do I connect these principles to the case before us? As in the MAKALI CASE we are once again dealing with the emotive crime of contempt of court and as I said in my judgment in that case:-

"We are more at ease when adjudicating upon issues which everybody knows we could entertain no conceivable personal interest in the outcome of the dispute before us. The position is different in contempt of Court matters as people perhaps, only too naturally, tend to view such disputes as being between the courts and the person or persons alleged to be in contempt……."

So, what is a contempt of court? Is it a dispute between the individual judges constituting the Court and the person or persons alleged to be in contempt?

There are of course, numerous decisions of the commonwealth courts defining what amounts to a criminal contempt of court and the principle or philosophy underlying the necessity for the existence of the offence. By section 5 (1) of the Judicature Act, we are obliged to apply the law which was being applied by the High Court of Justice in England, in 1967 when that Act was passed. I do not myself intend to go into the definitions which have been given by the

courts in England; they are wellknown enough and for my purpose, I only wish to cite the case of the QUEEN V GRAY [1900] 2. Q.B 36 in which the philosophy underlying the necessity for the existence of the offence was set out as follows:-

"The punishment is inflicted, not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the attack, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from mischief they will incur if the authority of the tribunal is undermined or impaired. In consequence the court has regarded with particular seriousness allegations of partiality or bias on the part of the Judge or Court."

This explanation might be easily understood by a lawyer but it might not as easily be understood and accepted by a non-lawyer such as a journalist. It says that in contempt of court matters, the dispute is not

between the court or the judge or judges of the court and the alleged contemnor and if punishment is inflicted it is done, not for the purpose of vindicating the judge or the court, but rather for the protection of the public. In the **MAKALI CASE** I tried to explain this as follows:-

"Thus in our own jurisdiction Professor Mathai was punished not for the purpose of protecting either Mr. Justice Chesoni, as he then was whom she called corrupt or incompetent, or the High Court of which the Judge was a member, from a repetition of her attack but to protect the administration of justice. If the public were to be made to believe that judges were corrupt and incompetent, then their confidence in the administration of justice would be greatly undermined or impaired and those who come to courts or are compelled to come to the courts will have little or no faith at all that they could ever get justice from the system. The result would be each man for himself and God for us all."

Now, why is it the public which is being protected and not the individual judge or the court itself? I think the explanation lies in the fact that the individual judge can, like any other offended citizen, sue for redress in the courts and if necessary seek an order prohibiting a repeat attack. That remedy, however, is not for the benefit of the public which has an interest, or to use the current parlance, is a stake-holder in the system or institution which administers justice on its behalf. I stated earlier that for the principles of the rule of law to continue to apply, we need the courts, just as we need Parliament and the Executive. The citizen has a

stake in the continued existence of these institutions as opposed to the existence of any individual member of the institutions. If unjustified claims are made that the personnel manning the Judiciary are corrupt, incompetent, subservient or biased and so on, then the public faith or confidence in the institution is impaired or undetermined, and once that has happened, each person will resort to their own remedy for the redress of what they may conceive to be a wrong done to them. Once each one of us resorts to personal measures for the vindication of alleged breached of the law, the concept of the rule of law would collapse and that would not be good for society as presently constituted. That is my understanding or appreciation of the philosophic or juridicial basis for the existence of the offence of contempt of court? What then constitutes a contempt, or has the lawyers would put it, what are the elements of the offence? For my part, I shall cite only Halsbury's Laws of England, Volume 9, 4th Edition at page 7 under the heading:-

"3) CONTEMTPS COMMITTED OUTSIDE THE COURT

(i) In general

Conduct amounting to contempt. In general terms, words spoken or otherwise published, or acts done, outside court which are intended or likely to interfere with or obstruct the fair administration of justice are punishable as criminal contempt of court. The commonest examples are:

(1) publications which are intended or likely to prejudice the fair trial or conduct or criminal or civil proceedings;

(2) publications which prejudge issues in pending proceedings;

(3) publications which scandalise, or oth erwise lower the authority of the court;

(4) acts which interfere with or obstruct persons having duties to discharge in a court of justice;

(5) acts which interfere with persons over whom the court exercises a special jurisdiction;

(6) acts in abuse of the process of the court;

(7) acts in breach of duty by persons officially connected with the court or its process.

Perhaps it may be useful if I were to give a few contemporary examples to illustrate some of these categories:-

"(i) Publications which are intended or likely to prejudice the fair trial or conduct of a criminal or civil proceedings. An example would be where an accused person "A" is charged with an offence of robbery and a newspaper "B" publishes the fact that "A" has in the past been to prison ten times on charges of theft or robbery. This kind of publication would qualify as one intended or likely to prejudice the fair trial of A on the current charge of robbery because newspaper B obviously wants its readers to conclude that if A has gone to prison ten times in the past then he must be guilty on the current charge.

(ii) Publications which prejudice issues in pending proceedings. An example would be where newspaper "B" makes a detailed analysis of the evidence so far presented before the court and from that analysis concludes that the case of such and such a party must succeed before the court. I would include here an opinion poll published by a newspaper showing that 90% of its readers are of the view that an accused person is guilty of the offence for which he is being tried, by a competent court.

(iii) Publications which scandalize, or otherwise lower the authority of the court and the obvious examples of this are to be found in **MAKALI CASE** where the allegation was that the court was subservient to the executive and the case of **REPUBLIC V WANGARI MUTA MATHAI & 2 OTHERS, Criminal Application No. Nai 53 of 1981 (unreported**) where the allegation was that the judge was either corrupt or incompetent."

I think I have given enough examples and I must now move to another area which I am minded to deal with and that is this. Is the law of contempt inimical to the freedom of speech guaranteed by section 79 of the Constitution?

I earlier on quoted from the speech of Mr Justice Frankfurter in **PENNEKAMP V FLORIDA.** There the judge expressed the view that without free press there can be no free society, but he was quick to add that the freedom of the press is not and end in itself but a

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means to the end of free society. In other words, freedom of the press is not to be put on a pedestal for the purpose of its being admired and worshipped by the society. Otherwise the freedom might turn into a dictatorship by the press and it would be no less a dictatorship because it is exercised by the press. It is useful to the society because it helps to create a free society. Here at home while **section 79 of the Constitution** provides that:-

"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is, to say, freedom to hold opinions without interference,. freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (without the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence",

the proviso to section 77 (8) of the same Constitution lays it down that:-

"Provided that nothing in this sub-section shall prevent a court from punishing a person for contempt, notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty is not so prescribed."

So that even the constitution itself which guarantees freedom of speech recognizes the power of a court to punish for contempt. I have already attempted to set out what I understand constitutes contempt. If the power to punish for contempt is inimical to the freedom of expression, the Constitution would not have provided for the existence of both. But having said that, I would now repeat what I said in the **MAKALI CASE**. The courts and the press must learn and accept to live with each other. Both are necessary to ensure the freedom of Kenyans under the law. The judges must not fear truthful and fair criticism from the press and we must not allow ourselves to be seen as standing in the way of a free and vibrant press. Her Majesty's judges in the United Kingdom once allowed themselves to be seen as standing on the way of free trade unionism and did no good to the image of their lordships. We ought not and must not resort to the laws of contempt stand in the way of fair and legitimate criticisms.

"… So long as the criticism is not meant or intended to vilify us, so long as the criticism is directed tat the subject in issue in a given litigation and not to the person of the judge deciding the matter, so long as no improper motives are imputed to the judge deciding the mater, then the courts must accept that their judgments, being public documents, are and must be subject

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to public criticism, however robust, however vigorous, and I may add however discourteous……."

Per Omolo, JA in the **MAKALI CASE** at page 7. I would reassert these principles in this matter. How do the principles I have endeavoured to set out in this judgment apply to the issues raised before us in the present application?

The 1st respondent freely admitted before us that he is the publisher and chief executive of the a weekly publication called the post on Sunday which is the 2nd Respondent herein. IN its issue covering the period 31st January to 6th February, 1999, the 1st Respondent published in the 2nd Respondent an article bearing the heading **"**CHESONI IMPLICATED in orgy of judicial anarchy and a 30 million bribe". Mr Justice Chesoni is the Chief Justice of the Republic. As an opening to the main article in the publication, and under the heading "LETTER FROM THE PUBLISHER – THE POST ON SUNDAY" the 1st respondent said of Chief Justice Chesoni, among other things:-

"Unfortunately for the country, Chesoni has directed his considerable skills, to subverting the judicial process rather than growing and enhancing it, (sic) particularly in the infamous Goldenberg affair."

Chief Justice Chesoni, by virtue of **Section 64 (2) of the Constitution**, is a member of the Court of Appeal and whenever he chooses to sit in the Court, he presided over it. That fact alone, however, does

not entitle him to any superior rights over the other judges sitting with him. In matters judicial, the Chief Justice carries only one vote like all the other judges. The significance of this assertion will in due course become apparent.

The burden of the article written by the 1st Respondent was that one Pattni who is involved in a litigation in the courts against one Nasir Ibrahim Ali, has given to Chief Justice Chesoni a bribe of Kshs. 30 million and that because of that bribe Chief Justice Chesoni:-

"….has directed his considerable skills to subverting the judicial process rather than growing and enhancing it, (sic) particularly in the infamous Goldenberg affair."

It was further alleged in the article that the Chief Justice was in league with other persons such as one Nicholas Biwott, and the Hon the Attorney-General Amos Wako, and that in pursuant of their conspiracy to defeat justice the triumvirate had met at Hotel Intercontinental, Nairobi, that Chief Justice Chesoni had straight away from the meeting, walked to the chambers of a judge of this court who was presiding in one aspect of the dispute between Pattni and Ali and pursuant to the meeting between the Chief Justice and The judge presiding, Ali's case was doomed to failure and it was merely a formality when the case of Ali failed before a bench of this court. The court gave its order, reserving its reasons to be delivered at a later stage, but according to the 1st Respondent, those reasons were irrelevant because the three judges before whom Ali had lost, had either been bribed or ordered by Chief Justice Chesoni to find for Pattni and against Ali. I hope that the relevance of the statement I made earlier that in this court, the Chief Justice carries only one vote has now become apparent. The 1st Respondent freely admits he published all these matters. What is of relevance to this Court is this.

The 1st Respondent was alleging in the publication that either through bribery or some other unlawful pressure the Chief Justice made the court decide a case in favour of one party and to the disadvantage of the other party. If that is what happened in that case, then we would have no business sitting as judges in these courts and the public would have every right not to have any confidence or trust in the judicial system. The whole article, on the face of it is clearly contemptuous and it would only cease to be so if the 1st Respondent was able to place before us concrete evidence showing that the substance of his story in the article was in fact true, and if the story is in fact true, then we really ought to be in jail.

What did the 1st Respondent tell us about the story? At first when the 1st Respondent was served with the motion and the other accompanying documents, he filed a replying affidavit and grounds of objection to the motion. Mr Chunga who conducted the case on behalf of the Applicant then intimated that he would ask the court to strike out some portions of the 1st Respondent's replying affidavit. The 1st Respondent's reaction to that was a letter to the court withdrawing all the documents he had filed and informing the court that he would be calling certain witnesses. The Deputy Registry of the Court instructed him to get affidavits from whoever he wanted to call as a witness. He declined to do so and in court the 1st Respondent repeatedly applied to us to be allowed to call witnesses to give oral evidence and also to be

allowed himself to give oral evidence in his defence. The Court as many times as the 1st Respondent made the applications rejected them.

I have said that in matters of contempt the High Court and this Court are obligated to apply the law applied by the High Court of Justice in England. In England applications for contempt are made under Order 52 of the Rules of the Supreme Court. In the end, the 1st Respondent pointed out to us Order 52 rule 6 (4) of the Rules of the Supreme Court which provides that:

"If on the hearing of the application the person sought to be committed expresses a wish to give oral evidence on his own behalf, he shall be entitled to do so.

The 1st Respondent told us that we were bound to give him the opportunity to do so. Were we so bound? It is true we are to apply the law applicable in the High Court of Justice in England and the rule I have cited is part of that law. But I do not myself understand **section 5(1) of our Judicature Act** to prevent the local courts from developing its local jurisprudence on the matter. This is not the first contempt of court charge to be dealt with in our courts. The first was the case of Wangari Muta Mathai, supra. No oral evidence was given by anyone in that case; the matter was solely decided on affidavit evidence. The second case was the **Makali** case, supra. Again no oral evidence was given there by anyone and the matter was decided solely on affidavit evidence. So that when the Deputy Registrar of this Court wrote a letter to the 1st Respondent, asking him to file whatever affidavits he wanted to file, the Deputy Registrar was obviously basing himself on the practice previously established by the High Court and this Court in such matters. On the every first day when the 1st Respondent appeared before the court, the Court itself

gave all the parties to the dispute leave to file whatever affidavits they wished to file.
In all these circumstances, I do not think the 1st respondent was entitled
to ignore all the directions given to him and basing himself as a last resort on **Rules of the Supreme Court 52 (6) (4)** compel us, as it were, to hear him orally. I did not understand the 1st Respondent to contend that affidavit evidence is not evidence at all. Such evidence has been used before in similar proceedings and with respect to the 1st Respondent, I do not think

he was entitled to tell us, as he is effect did, that if we did not hear him from the witness box, then we would not hear him at all. The position would have been different if he had placed affidavit evidence before us and then we had turned around to say that such evidence was not proper evidence in an application such as this. I repeat that the 1st Respondent was not entitled to compel us to hear him only from the witness stand.
That is not to say that the 1st Respondent did not put up any defence to the allegations made against him. He addressed for several days and he clearly disclosed what he would have said from the witness stand if we had allowed him to take the stand. What would have been the nature of that evidence? If I understood the 1st Respondent correctly, what he maintained throughout before us was that he is an investigative journalist. Thus he took six months of investigations to piece together the information he published in his magazine. On the issue of bribery of the Chief Justice with Kshs. 30 million, he had been told that some lady called Terry Ndungu had, in the Company of Nasir Ibrahim Ali, visited the house of a member of this court and that it was in that house, Terry Ndungu and Ali had been told about the allegation of bribery.
On the issue of the Chief Justice meeting the Attorney General and Biwott, he had been informed about such a meeting by a Mrs. Murgor who had seen them at the hotel already stated. On how he came to know of the Chief Justice coming from the hotel to the chambers of one our members, the 1st Respondent said he had been given that information by one Ochieng Oduol who is the lawyer of Ali. On the issue of how the Judiciary is being the stumbling Block to Ali ever getting justice in the courts, he said he met the Attorney General who told him the Judiciary was in fact the problem. He had even tape-recorded the alleged conversation between him and the Attorney General. The 1st Respondent went so far as to tell us that he visited the home of his Excellency the President, that he discussed the mater of Goldenberg with the President and in the process tape-recorded the President to boot and that in his presence he heard the President order the Chief Justice not to transfer a judge who had decided a matter in favour of Ali.
One factor which I found remarkable in all this is that at no stage did the 1st Respondent say that of his own knowledge he knew that any of the matters he wrote about had actually taken place. All the matters he wrote about were said to him by other persons in the course of his

investigative journalism which appears to mean that one merely talks to other people and publishes what they tell him. When the 1st Respondent was asked whether as a publisher, he did owe any obligation to his readers to himself verify the truth of what they tell him, the 1st Respondent fell back on his oft repeated request; “Call my witnesses and put them in the witness stand. Put me in the witness stand and I shall prove everything”. For my part, I got the clear impression that the 1st Respondent was merely asserting the truth of what he published because those things had been said to him by other persons whom he had done the Court the honour of naming and if those persons were to come to court and it turned out that what they had told the 1st Respondent was not true, then the matter ought to rest with them and not with the 1st Respondent.
It may well be that some of the people whom the 1st Respondent wanted to be called to testify told him the things he published in the magazine. It is not only possible but very probable that Ali could allege to the 1st Respondent that money had changed hands and that was why he lost. Disgruntled litigants can easily do that. But there still remains the question of whether what one is told is true and the burden is clearly on the person publishing such information to prove that what he has been told is in fact true. Surely, it is not asking for too much to expect that even the 1st Respondent must know that the truth of an allegation cannot be found in the assertion that because I was given that information by so and so, therefore, the same must be true and if it is not true then the matter must lie with the person who gave me the information. Once again, I would return to what I said in the **MAKALI CASE** and it is this:-
“It is true the 1st Respondent says that it is some unnamed legal experts who were of the view that the court showed “a sign of indecision and dishonesty” but my Lords if the matter was to be held to be contemptuous of the court, I do not think it can be a defence to the 1st Respondent to say that he was

merely stating the opinions of others, even if he had named those others……..”
That still remains my position to-day. So that even if the 1st Respondent here had been allowed to call his Excellency the President, the Hon the Attorney General, Mrs Murgor, Mr Ochieng Oduol, Mr Ali or any other person and all of them had agreed that they had given to him the information contained in the articles that would not have made the matter any less contemptuous of the Court unless those persons went further and proved the truth of what

they had told the 1st Respondent. But all that which the 1st Respondent did before us was to claim that he had done his investigative journalism, had obtained the information from the persons he named and demanded of us to have those persons summons. I have already dealt with the issue of calling of witnesses and giving of oral testimony in matters such as this and I need not repeat myself on it. The truth of the matter is that the 1st Respondent made no effect at all to prove the truth of what he published in the offending articles which are clearly contemptuous of the Court in the extreme.
Whether one designates them as falling under the rubric of scandalizing the court, which they in fact are, or whether one places them under the heading of the “rule of sub-judice”, the outcome must be the same. In the latter aspect of the matter being sub-judice, there could not be any doubt that at the time the articles were published, the case of Pattni and Ali were still pending in the Court. The Court has made its order but the reasons for making the order were reserved and were to be given later. The 1st Respondent apparently thought that the reasons for the decisions did not really matter. That, to me is surprising unless we have come to such a pass that we find it unnecessary to reason with each other. Perhaps reasons no longer forms part of our national psyche and that may well be the explanation for the monotony of words like thieves, looters and grabbers in our daily language and the apparently mindless violence in our midst. But I am digressing. The subject over which the 1st Respondent was attacking the Court was still pending before it because the court had not given its reasons for the decision. The mater was sub-judice. I have no quarrel with what Mr Justice Simpson, as he then was, said in **SHADRACK B.O. GUTTO & 4 OTHERS V HILLARY NGWENO & 3 OTHERS, HCCC Civil Case No. 888 of 1981 (unreported),** but I do not think that even that learned Judge would have approved to the abuse of judges in extremely violent and derogatory language obviously intended to compel them into deciding a matter in favour of one party. Hillary Ngweno did not seek to influence the decision of the judges through violent abuse or insult. His writing was reasoned and intellectual. I earlier on asked whether the law of contempt is iniminal to the freedom of expression guaranteed by **section 79 of the Constitution** and I have already answered it as best as I can. I would at this stage add this. Those who engage themselves in that kind of writing have nothing to worry about from the

courts. But those who seek, through insults and threats, to make us decided matters in their favour or in the favour of those whom they support have everything to fear from us.
The 1st Respondent admits that he wrote the articles and had them published in the 2nd Respondent’s magazine. The 1st and 2nd Respondents are, in my view, clearly guilty of contempt of this Court. As regards the 3rd Respondent, he was cited in these proceedings because he was, according to the records held by the office of the Registrar-General, thought to be a director of the 2nd Respondent. As far as I am concerned, the 3rd Respondent satisfactorily proved upon a balance of probabilities that he had in fact resigned his twin positions of director and secretary of the 2nd Respondent. At the very least, the 3rd Respondent had discharged the evidential burden on him by showing that he had resigned his positions. The burden of proof then shifted to the Applicant to prove beyond any reasonable doubt that the 3rd Respondent was in fact still a director and secretary of the 2nd respondent. The applicant could have done that by, for example, producing the registrar kept by the 2nd Respondent, to show who its directors and officers are. I would myself give the benefit of doubt to the 3rd respondent and I would acquit him of the allegation that he is in contempt of this court. But for my part, I am fully satisfied 76the Applicant has proved beyond any reasonable doubt that the 1st and 2nd Respondents are guilty of contempt of This Court and I would convict them of that charge.
On the questions of the proper sentence to impose on the 1st and 2nd respondents, I think it must be such a sentence as will bring it home to them in no uncertain terms, that they cannot gain anything by their kind of publication. I would accordingly propose the following sentences:-

1. 1st Respondent – six (6) months imprisonment.

2. 2nd Respondent – fine of Kshs. 1,000,000/= with a further order that the 2nd Respondent must forthwith cease publication until and unless the fine shall have have been paid.

August 20, 1999