



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APP. NO. 968 OF 1998

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

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

MUKARA

BETWEEN

THE REPUBLIC.....APPLICANT

AND

THE CHIEF OF GENERAL STAFF ARMED
FORCES OF KENYA.....1ST RESPONDENT

COMMANDER KENYA ARMY.....2ND RESPONDENT

PRESIDING OFFICER,

COURT MARTIAL.....3RD RESPONDENT

R U L I N G

This is an application by way of Chamber Summons for a basic order that the applicants be admitted to bail or be released from military custody on terms and conditions the court may deem fair and just pending the hearing and determination of their application for judicial review.

The applicants LT. COL. J.K. GATOBU and LT. COL. D.A. MUKARA are military officers who have already obtained the leave of this court to file an application for an order of certiorari to remove and quash the decision of the first and second respondents or any officer or officers acting under them or on their behalf to convene and constitute a court martial to try them. They have also obtained leave to file an application for an order of prohibition stopping the respondents or any person or authority from

convening and holding a court martial to sit and try them.

Having obtained the said leave, the applicants also secured an order staying the court martial proceedings pending the hearing and determination of the application for Judicial Review.

As at the time the present application was argued before me, the application for Judicial Review had not been heard, and considering that the proceedings of the court martial shall depend on the outcome of the application for Judicial Review, no dates can be fixed for the court martial proceedings.

The present application is brought under section 60, 65 and 86(2) of the Constitution of Kenya, section 48 of the Armed Forces Act Cap. 199 Laws of Kenya Rules 6 and 105 of the Armed Forces Rules of Procedure and Chapter 11 section 11 Rules 84 and 85 of the Armed Forces Standing Orders.

The application for bail is opposed by the respondents and I have the submissions of learned counsel on record.

Two important matters of law must be addressed from the outset. The learned counsel for the respondents has submitted that this court has no jurisdiction to entertain this application and that the same is res judicata. The second submission can be disposed of quite easily. The application before Ang'awa J. was grounded on different provisions of law as clearly appears both in the application and the first page of the ruling delivered on 8th September, 1998. A clear distinction appears between those provisions and those cited in the present application. Further, in the earlier application, the circumstances leading to the applicants' confinement were as surprising to them as they were to their counsel. That is not so in the present case where the detaining officer has purported to prescribe the same. It cannot be said that the application is res judicata and that objection fails.

As to jurisdiction, section 60(1) of the Constitution provides that the High Court shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law.

Section 65(2) of the Constitution provides as follows:

“(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts”

I bear in mind the provisions of section 86(2) of the constitution. It is significant to note that, that section falls and Chapter 5 of the Constitution and its applications is restricted to that Chapter alone. On the other hand, both sections 60(1) and 65(2) of the Constitution appear under chapter 4 The title of which is “The Judiciary”. The jurisdiction conferred upon the High Court by section 65(2) is supervisory and extends to court-martial. Read together with section 60(1) of the constitution, I have no doubt that this court has jurisdiction to entertain the present application.

Both applicants have been placed in close arrest pursuant to service upon each one of them of an Abstract of Evidence under Rule 21 of the Armed Forces Rules of Procedure.

The conditions for close arrest have been set out in annexure 2 signed by Colonel A.S. Ahmed and served upon each applicant. They provide, inter alia, that the applicants shall be held in close arrest until the hearing and determination of the charges raised against them by the court martial, they shall at all times be confined to their quarters at the 7 Kenya Rifles Officers Mess- Langata except where otherwise stated and under such conditions as explicitly stated, they shall be in the custody and under the direction of their escorting officers at all times, they are not allowed to appear in any place of amusement or entertainment or at any public assemblies whether in the said mess premises or anywhere else, they will be allowed a limited period out of the said quarters once a day for exercises under direct supervision of the escorting officer and on humanitarian grounds they will be allowed two visits a week by their wives

(as appearing in the service records) and one close relative. Each such visit will last a maximum of one hour.

The learned counsel for the applicants has submitted that the Armed Forces Act Cap. 199, the Rules thereunder and the Standing Orders are not restrictive and any condition such as those imposed upon the applicants are oppressive.

This is compounded by the fact that unless and until the application for Judicial Review is heard and determined, the convening officer cannot comply with Rule 21 of the Armed Forces Rules of Procedure which provides, inter alia, for the appointment of the date, time and place for the trial.

The Armed Forces Standing Order Number 85 provides as follows:

- “ 85 In law an accused person is deemed innocent until proved guilty and close arrest prior to trial is, therefore, never to be ordered with the motive of punishing the accused. He should only be kept in close arrest whilst awaiting trial when exceptional circumstances exist, such as:
- a. He is deliberately trying to undermine discipline by acts of misconduct. (Isolated instances of Insubordinate language or violence would justify placing an accused person in close arrest immediately and retaining him there until he is brought before his commanding officer on a charge, but would not in themselves justify his retention in close arrest whilst awaiting trial.)
 - b. The offence charged is one for which maximum sentence is death.
 - c. His conduct is so violent that it would be unsafe to himself or to others not to place him in close arrest.
 - d. He is known to have habitually absented himself without leave and it is considered he will be unlikely to be present to stand trial unless kept in close arrest. e. He is likely to attempt to influence witnesses.” (see also order No. 86)

My reading of the Armed Forces Act Cap. 199, the Rules made thereunder and the standing orders, convinces me to believe that they are a comprehensive and elaborate composition of laws and regulations intended to protect all those who serve in the armed forces, and not to curtail or abridge their rights.

I have read the affidavit of Colonel A.S. Ahmed sworn on 4th September, 1998 and the subsequent averments that led to the close arrest of the applicants. With respect, I find that no exceptional circumstances exist that warranted the placing of the applicants in close arrest.

Further to the foregoing, I have related the provisions of the Armed Forces Act, the Rules and the standing orders aforesaid to the conditions under which the applicants are being held. I find they are tainted with oppression. That is an affront to the spirit, tenor and context of the same provisions which are intended to bestow honour and dignity to all those subjects they affect.

The foregoing being the case, the High Court should exercise its jurisdiction under section 65(2) of the Constitution. Accordingly, the applicants' application hereby succeeds. I order that each shall be released on executing a personal bond of Kshs. One Million. On being released, each shall report to their respective Commanding Officers once every week - on Mondays - during working hours. These orders shall remain in place until otherwise vacated.

Orders accordingly.

Dated at Nairobi this 2nd day of December, 1998.

A. MBOGHOLI MSAGHA

JUDGE