



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Misc Crim Appli 8 of 1998

ALI SAID CHIZONDO & 2 OTHERS..... ACCUSED/APPLICANTS

AND

REPUBLIC.....RESPONDENT

(Being a constitutional reference from the original case No.2495/97 of the Chief Magistrates' Court at Mombasa dated 21st August, 1997)

RULING

On 21st August, 1997, Ali Said Chizondo, Khalifa Khalifa and Al-amin Mohamed Mazrui appeared before Mombasa Chief Magistrate, Mr. Muchelule, to answer a charge of "taking part in an unlawful assembly contrary to section 79 of the Penal Code". They all denied the charge. The 2nd and 3rd accused were released on a bond of Kshs. 100,000/= plus one surety each, but the 1st accused who already was in custody was detained there.

When the case came up for hearing on 14th November, 1997, Dr. Khaminwa, who appeared for the 2nd and 3rd accused, raised the issue that the charge before the court contravened the rights and freedoms of the accused under section 80 of the Constitution of Kenya

guaranteed them the freedom of assembly and association. Dr. Khaminwa supported by Mr. Ngombo for the 1st accused then requested that the question be referred to the High Court under section 84(3).

This is what section 84(3) of the Constitution says:

"If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious."

The Chief Magistrate wrote a short ruling in which he held that since, in his opinion, the issue of fundamental rights and freedoms which counsel had raised was not frivolous or vexatious he was compelled by the language of section 84(3) to refer the question to the High Court for determination.

The two counsel for the accused and Mr. Gacivih, Senior State Counsel for the Republic, appeared before the High Court (Ang'awa, J.) on 3rd March, 1998, and Dr. Khaminwa submitted that the learned Judge had jurisdiction to hear the constitutional question raised because the matter could be heard by a single judge.

In the High Court, Mr. Ngombo sought to file an originating motion under section 84(1) of the Constitution and formally allege how the hearing of the case in the Chief Magistrate's Court would infringe the accused's rights and freedoms under sections 70-83 of the Constitution. The originating motion would also seek to terminate the subordinate court's proceedings, Dr. Khaminwa submitted that section 84(1) and (2) gave the High Court original jurisdiction to hear the reference, and there was no need to involve the Chief Justice or a constitutional court. Mr. Gacivih supported Mr. Ngombo's proposal that there was need to make a written application.

The learned Judge after hearing the parties and lamenting the inability by successive Chief Justices to make rules of practice and procedure under section 84(6) of the Constitution held that this was a constitutional reference under section 67(3) which required a three judge bench. She ordered that the file be placed before the Hon. Chief Justice for directions as, to, inter alia, the composition of the panel of judges to be appointed to hear the matter.

Did the accused have a right to be heard? Yes, they had a right because the Constitution gave it to them.

Section 84(1) provides that -

"(1). Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2). The High Court shall have original jurisdiction -

(a) to hear and determine an application made by a person in pursuance of subsection (1);

(b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70-83 (inclusive)."

The High Court exercises three types of constitutional jurisdiction namely:

(a) original jurisdiction, and

(b) two kinds of referral jurisdiction

The first type of referral jurisdiction is when the court is asked to interpret the Constitution under section 67(1), which reads as follows:

"67(1) Where a question as to the interpretation of this Constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if a party to the proceedings so requests, refer the question to the High Court."

The second type of referral jurisdiction is that conferred by section 84(3) aforesaid, and relates to enforcement of fundamental rights and freedoms where contravention of those rights and freedoms set out in sections 70 to 83 (inclusive) is alleged in proceedings in a subordinate court.

Both Dr. Khaminwa and Deputy Public Prosecutor, Mr. Bwonwon'ga, (for the Republic) who appeared before me, jointly submitted that the question referred to the High Court by the Chief Magistrate did not involve interpretation of the Constitution. It was an alleged contravention of the applicants' fundamental rights and freedoms. With respect, I agree with that suggestion.

The question is whether the fundamental rights and freedoms of the applicants conferred under section 80 of the Constitution have been or will be contravened by their being charged and prosecuted for taking part in an unlawful assembly contrary to section 79 of the Penal Code? Dr. Khaminwa says that fundamental right will be infringed.

As I have said, Mr. Ngombo sought to agitate his client's right by filing an Originating Motion. Had he not joined Dr. Khaminwa in requesting the subordinate court to refer the question to the High Court he would have been entitled to invoke his client's constitutional right and freedom by any one of the following ways, that is -

(a) a plaint,

(b) Order LIII of the Civil Procedure Rules, or

(c) originating motion. The procedure to be adopted would depend on the constitutional relief sought. In the case of OLIVE CASY JUANDOO -V.- THE ATTORNEY-GENERAL OF GUYANA (1971) A.C. 972 the landowner owned an area of land in Guyana upon which the Government proposed to construct a new road. She took the view that that action would be in contravention of her fundamental rights under article 8(1) of the Constitution of Guyana which prohibited the compulsory acquisition of property except under the circumstances provided in that article.

By originating notice of motion, naming the Attorney-General as respondent, she applied to the High Court under article 19(1) for redress. The High Court dismissed the application without consideration of its merits on the ground that an originating notice of motion was not the proper procedure and that the application should have been made by writ of summons. The Court of Appeal dismissed the landowner's appeal. On appeal to the Judicial Committee it was held allowing the appeal, "that the right to apply to the High Court for redress conferred by article 19(1) (this article is, in all material respects, similar to section 84(1) of the Constitution of Kenya) was expressed to be subject to paragraph (6) of that article and since neither the Parliament nor the rule-making authority of the Supreme Court had exercised their power under article 19(6) to make provision with respect to practice and procedure the method was qualified and the right wide enough to cover application by any form of procedure by which the High Court could be approached to invoke its power, and an originating motion was one of the ways by which that could be done." (words in brackets are mine) The relevant part of article 19(6) which is similar to section 84(6) of the Kenyan Constitution provided that -

"(6) Parliament may make provision with respect to the practice and procedure - (a) of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article..... "

The Kenyan provision says:

"84(6) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section ..."

The position here is as was stated by Warrington, J. in In re MEISTER, LUCIUS AND BRINING LTD [T914] 31 T.L.R. 28,29, viz:

"where the Act" (sic. Constitution) "merely provides for an application and does not say in what form that application is to be made, as a matter of procedure it may be made in any way in which the court can be approached."

A person who alleges that his or her rights guaranteed by any of the provisions of sections 70 to 83 (inclusive) are contravened can apply to the High Court for enforcement of those rights. The court exercises its original jurisdiction in hearing and determining the application. The constitution has not defined the quorum of judges who should hear such an application, and, there is no reason to make anyone suggest that the composition should not be the normal complement of a single judge. Both Dr. Khaminwa and Mr. Bwonwonga were of the view that a single judge would do. The quorum of the High

Court when exercising its "Constitutional Jurisdiction" is a single judge. When exercising its referral jurisdiction under section 67 the legally mandated composition of the High is at least three judges. If the High Court is exercising its referral jurisdiction of enforcement of the fundamental rights and freedoms under section 84(3) the quorum is also one judge.

There is now an established practice in the High Court for the Chief Justice to be asked to constitute a bench of three judges to hear and determine constitutional questions both of interpretation and of enforcement in exercise of the court's original and referral jurisdiction. This practice has led to the development of the three judge bench acquiring the designation of a "Constitutional Court". Whereas it is legally mandatory for a three judge bench to deal with constitutional questions under section 67 there is no such requirement in respect of constitutional questions which arise under section 84(2) and 84(3). However, the development of a three judge bench must have some reasons like the Chief Justices who empanel the bench of judges taking into account the seriousness of constitutional questions, and the respect for the conventional wisdom that many heads are better than one. This ruling should, therefore, not be treated as intended to discontinue the practice of three judge bench except in cases involving questions of interpretation of the Constitution. Whether to have a quorum of one or three judges in a constitutional matter will depend on the gravity of the questions raised by the individual case.

I have already said that anyone who wishes to invoke the court's jurisdiction for protection of the fundamental rights and freedoms guaranteed under sections 70 to 83 (inclusive) can do so by plaint, Order 53 of the Civil Procedure Rules or originating motion. Elaborate procedures already exist. Consequently there was no basis for the learned Judge's complaint for lack of rules of practice and procedure made under section 84(6). Any rules of practice made are unlikely to add much, if anything, to the already existing forms.

I am satisfied that the referral jurisdiction in this case can competently be exercised by a single judge. In the result, I direct that the question referred to the High Court by the Chief Magistrate in the instant case be heard and determined by a single Judge on a date to be fixed by the parties at the Registry at Mombasa High Court.

Dated and delivered at Nairobi this 20th day of May, 1998.

Z.R. CHESONI

CHIEF JUSTICE