REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 94 of 1994

TANGA MUNDEKE D.K. ALIAS BENDE ALIAS JEAN CLAUDE ALIAS IBORO BARODO....APPELLANT

AND

REPUBLIC…….....…….....……RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Patel, J.) dated 16/12/94

IN

H.C.CR.A. NO. 843 OF 1994)

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JUDGMENT OF THE COURT

There is a lack of important details in the record of proceedings in the Senior Principal Magistrate's Court as to whether crucial provisions of the Extradition (Contiguous and Foreign Countries) Act under which the Appellant it would seem, was arrested and ordered to be extradited, had been complied with.

Sections 5(1) and 6(1) of the Act requires that a diplomatic representative or consular officer in this case of Uganda, shall first send to the Minister in Kenya, a requisition for the surrender of the Appellant, who may then require a magistrate to issue a warrant for the arrest of the Appellant to appear before the magistrate. But where the Appellant is arrested on a warrant without the order of the Minister, he should be discharged by the magistrate unless he receives from the Minister within a reasonable time, the latter's order signifying that a requisition for the surrender of the Appellant, had been made. There is no evidence that any of these mandatory procedures were followed in bringing the Appellant before the Senior Principal Magistrate who, under section 7(1) of the Act, shall hear the case in the same way and have the same powers "as nearly as may be, as in a trial before a subordinate court." Section 8(1) of the Act goes on to provide that where for instance, a Ugandan warrant authorizing the arrest of the Appellant has first been duly authenticated, then upon the production of the required evidence, the Appellant shall be committed to prison, but not otherwise. Where committed, the Appellant should be informed by the magistrate that he has fifteen days within which to apply for the issue of directions in the nature of habeas corpus, but this was never done. Although the Assistant Superintendent of Police of the Criminal Investigation Department of Kampala, Mr. Tumuhimbisa Katto Paul, gave evidence before the Senior Principal Magistrate that:

"I prepared the charges MFI 12 and obtained this warrant of arrest from the Chief Magistrate Kampala

MFI 13",

there was no evidence given to show that it had been authenticated. The alternative methods described above for bringing the Appellant to court as provided for under sections 5(1), 6(1) and 8(1) of the Act, were not followed.

But another method of arresting fugitive criminals which from the evidence of Assitant Superintendent Tumuhimbisa, would seem to be what was purported to have been followed, is provided under PART III of the Act, which was made by L.N. 95/1966 to apply to Uganda and Tanzania. This the "Reciprocal Backing of Warrants". Sections 12 and 13 of the Act make it possible where a warrant had been issued in Uganda for the arrest of the Appellant, for it to be endorsed by a magistrate in Kenya and thus, make it sufficient authority for the arrest of the Appellant in Kenya. It is also provided that whilst awaiting the endorsement of the warrant of arrest issued in Uganda, a magistrate in Kenya can issue a provisional warrant of arrest of the Appellant if certain conditions are satisfied.

But here again, the evidence concerning the arrest of the Appellant does not satisfy any of the strict conditions prescribed under sections 12 and 13 of the ACT. The evidence of Assistant Superintendent Tumuhimbisa does not show that the warrant that he had brought with him had been endorsed by a magistrate in Kenya. The following unhelpful evidence of Mary Ngariuko, the chief Inspector of Police who arrested the Appellant, shows that the Appellant was neither arrested because of a backed or provisional warrant nor any warrant at all:

" Attached to CID Headquarters Interpol Section. I deal mainly with correspondence. I am the one who opened these proceedings. They are against Tanga Tanga Mudeke alias Iboro Barodo. He had a case before court No. 6 and I learnt that he had been fined. I therefore came to the court and arrested him. He was accused of obtaining money by false pretences."

In the foregoing circumstances, could a committal order be legally made against the Appellant? The answer would appear to be in the negative. Section 14(1) of the Act provides that it is only

"….where a person arrested under a warrant endorsed in accordance with section 12, or a provisional warrant issued under section 13, is brought before a magistrate and, in the case of a person arrested under a provisional warrant, the original warrant has been produced and endorsed",

that

"the magistrate may, if he is satisfied –

(a) that the warrant was duly authenticated as directed by this Act and was issued by a person having lawful authority to issue the same; and

(b) by evidence on oath, that the prisoner is the person named or otherwise described in the warrant, order the prisoner to be returned to the country in which the original warrant was issued, and for that purposes to be delivered into the custody of the persons to whom the warrant is directed or any one or more of them and to be held in custody and conveyed into that country."

Clearly the proceedings before the Senior Principal Magistrate for the reasons set out hereinbefore, were fatally flawed. What is more, the order that the Senior Principal Magistrate made, namely, that:-

"I therefore direct that he be extradited for trial."

does not comply with section 14(1) of the Act.

But a fundamental issue that we must, however, consider, is whether in the first place, the Senior Principal Magistrate had any jurisdiction to act under the Act. Section 2(1) of the Act defines "magistrate" as follows:

"except in subsection (2), means a Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate,".

Subsection (2) which does not deal with the exercise of jurisdiction under the Act is that:

"If any fugitive criminal or other person is arrested in pursuance of the provisions of this Act and brought before a magistrate who has no power to exercise jurisdiction under this Act, that magistrate shall have power to order such person to be brought before some magistrate having such jurisdiction, and to remand or admit such person to bail, and effect shall be given to any such order."

If it was intended that a Senior Principal Magistrate should, as was done with respect to the definition of a magistrate in the definition section of the Magistrates' Courts Act, have power to exercise jurisdiction under the Act, section 2(1) of the Act, could have been amended to include such a magistrate. As it is, all that the Senior Principal Magistrate can do under the selective provisions of the Act, is where a fugitive criminal or a person arrested in pursuance of the Act is brought before him, to order such person to be taken before a magistrate specified in section 2(1) of the Act, and not, to hear the case himself. This state of affairs may well have arisen out to an oversight, but it does not affect the position that what occurred before the Senior Principal Magistrate was, for that reason alone, a nullity. Indeed, if only the Senior Principal Magistrate had taken the trouble to look at the Act, he would have found that he had no jurisdiction to do what he did.

Being dissatisfied with the decision of the Senior Principal Magistrate in a matter that was purported to have been brought under sections 12 and 13 of the Act, the appellant appealed to the High Court. He had a right of appeal to the High Court for under section 16(4) of the Act, it is provided that:

"Without any prejudice to any application for directions in the nature of a writ of habeas corpus in respect of anything purporting to be done under Part III of this Act, an order or refusal to make an order of discharge under subsection (3) may be the subject of an appeal to the High Court."

In the case of Kunga v Republic (1995) E.A. 151, Kneller J. as he then was, at 152 had this to say:

"Returning now to the Act, but still dealing with procedural matters, it will seem that this application for directions in the nature of a writ of habeas corpus appears available to John Benjamin Mule Kunga as well as the right to appeal from the order of the Senior resident magistrate: s.16 (4)….An appeal would probably have been admitted by the judge and heard by two and then given rise to a right of appeal to the court of Appeal of East Africa: s. 361 of the code."

The Appellant's appeal which was heard by Patel J., was with respect, dealt with or heard with or heard most cursorily.

Counsel for the Appellant had most unprofessionally and clearly not having bothered to look at the Act and the proceedings before the subordinate court, merely said:

"I leave it to court."

The Senior Principal State Counsel for the respondent supported the "order of the magistrate for extradition of the appellant to Uganda." He too had obviously not bothered to consider the relevant provisions of the Act or the proceedings before the subordinate court. Unfortunately, even the learned judge, in what can only be described as a judgment which cannot be taken seriously, concluded matters most briefly in this way:

"I have considered the issues with care. These are criminal charges against the appellant in Uganda. The required convicting factor has been established and all the requirements complied with. I see no grounds to allow the appeal. I uphold the order. Appeal is dismissed."

We regret to have to say that the learned judge did not bother at all to look at the Act or the

proceedings before the subordinate court, or indeed, to consider as he said, "the issues with care". If he had done what was right, he would at least, have found that the Senior Principal Magistrate had no jurisdiction to hear the matter that was placed before him. Apart from the dictum of Kneller J. in Kunga that an appeal to the High Court could give rise to a second appeal the Court of Appeal of East Africa under s.361 of the Criminal Procedure Code, this Court in Torroha Mohamed Torroha v. Republic Criminal Appeal No. 163 of 1988(unreported), had no difficulty in accepting as being within its jurisdiction, a second appeal from the High Court in respect of a decision of the Chief Magistrate with respect of proceedings brought under section 14 of the Act.

Prior to the hearing of the appeal, Torroha Mohammed Torroha had in Torroha Mohammed Torroha v. Republic Criminal Application No. Nai 5 of 1988 (unreported), applied to this court for stay of the execution of the order of extradition made against him by the High Court after setting the order of the subordinate court which had discharged him from committal to prison to await extradition. Although this Court must have accepted that it had jurisdiction to entertain the intended appeal, it refused to grant stay. This Court unfortunately, had assumed that the Chief Magistrate had jurisdiction to hear proceedings brought under section 14 of the Act. But no matter, the point established by Torroha was that this Court had jurisdiction to hear a second appeal on a matter of law in respect of a decision made under section 14 of the Act. In Torroha this Court at the beginning of its judgment, set out the position that it could hear a second appeal thus:

"This second appeal is from a judgment of the High Court allowing the appeal of the Republic from the decision of the Chief Magistrate whereby he discharged and set free the appellant Torroha Mohammed Torroha, a National of Tanzania who was the other person concerned in proceedings which were brought under section 14 of the Extradition (Contiguous and Foreign Countries) Act, Cap 76 of the Laws of Kenya(The Act)."

This Court then went on to say that:

"The appeal before the Court is based on two grounds. First, it is said the judges misdirected themselves on the onus of proof and that prima facie evidence was not necessary. The second ground of attack on the judgment which is really a variant of the first is that there was no evidence to connect the appellant with the offenses to be preferred against him in Tanzania…. The questions that have been canvassed before us on the basis of the two grounds of appeal raise issues of law."

The memorandum of appeal in the appeal before us, raises several issues of law and we are therefore clothed with jurisdiction under section 361 of the Criminal Procedure Code, to hear the appeal. Among the several grounds of appeal are the following which raise issues of law:

'That the trial judge his Lordship V.V. Patel erred in law and in fact in failing to observe that my appeal was brought before the court because there was no or not sufficient evidence to warrant my extradition.

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…..

That the trial judge his Lordship Justice V.V. Patel erred in law and in fact in failing firstly to weigh out properly his action in ordering my extradition without hearing the main appeal, which action is against both logic and in view of the rule of natural justice."

The question of the jurisdiction of the Senior Principal Magistrate to hear the matter that was brought under the Act is a fundamental issue of law which can be raised in limine. Clearly, proceedings which are a nullity can not be propped up. But apart from this, can it be said from our analysis of the proceedings before the Senior Principal Magistrate that there was any compliance of the provisions of the Act to warrant the vague decision of the Senior Principal Magistrate ordering, not the committal of the Appellant to prison or into the custody of a person named in a warrant, but inappropriately, his

extradition, without stating where to? We would say, No!

In the result, the appeal is allowed and the orders of the High Court dismissing the Appellant's appeal and that of the Senior Principal Magistrate ordering the extradition of the Appellant are hereby quashed and the consequential imprisonment of the Appellant as a result of those orders are hereby set aside. Unless otherwise lawfully held in custody, the Appellant is hereby forthwith released from imprisonment.

Before concluding this judgment we would like to make the following comments. On the 19th of December,1994, three days after the Appellant's appeal was dismissed by the learned judge of the High Court, the Appellant filed his notice of appeal to this Court. The record of proceedings before the learned Judge amount to not more than thirty nine lines in all, yet it has taken three years and five months for this matter to be heard by this Court. So that apart from the fatally flawed proceedings in both the subordinate court and the High Court, the Appellant has now been in prison for nothing, for nearly five years. This is unacceptable. We further order that copies of this judgment be served on the Registrar of the High Court, the Deputy Registrar of the Court of Appeal. We direct that a copy be also handed over to the Hon. Mr. Justice V.V. Patel.

Dated and delivered at Nairobi this 29th day of May, 1998.

A.M. AKIWUMI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR