REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO 41 OF 1992

REPUBLIC .....APPELLANT

VERSUS

JONAH ORAO ANGUKA.....ACCUSED

RULING

Mr Bowry for the accused person has asked this Court to disqualify or bar Mr Chunga, the learned Deputy Public Prosecutor from prosecuting this case, where the accused faces charge of murder of late Dr Robert J Ouko, the erstwhile distinguished Senior Member of the Cabinet.

The underpinnings of Mr Bowry's extraordinary demand are that (a) Mr Chunga had adopted a certain stand, at an early stage, as to the cause of death; (b) he had assumed an investigative role at the Ouko Commission of Inquiry and (c) the defence intends to call him as a witness.

The defence is apprehensive that the continued participation of Mr Chunga as a prosecuting counsel in this case is (1) legally and factually not permissible (2) ethically forbidden (3) oppressive and likely to cause prejudice to the accused (4) against the Principles of Natural Justice and (5) will not afford a fair hearing, thereby contravening s 77(1) of the Constitution.

These are not trivial matters raised by the defence and the Court needs must cogitate over the same with deliberation and care. The right of an officer of the court, duly qualified and competent, to appear and present the case of his client to the Court, is *prima facie* unfettered and unchallenged. Mr Bowry's request to the Court has introduced a new dimension to this well established principle. There is nothing in the written laws of this country which empowers the High Court to disqualify a duly qualified advocate to appear and conduct a case unless it be matter arising or incidental to having committed contempt of Court. Even where it is patently clear that the interest of the advocate is in conflict with his client, it is doubtful that the Court may order disqualification, though such conflict may be pointed out and commented and then left to good sense of such advocate to withdraw from representing the client. Mr Bowry is of the view that despite the absence of any provisions of written law, this Court has under its unlimited and inherent jurisdiction power to make such order in order to prevent failure of justice.

In support of his contention, Mr Bowry has drawn my attention to s 60(1) of the Constitution which invests the High Court with "unlimited original jurisdiction in civil and criminal matters" as well as s 77(1) of the Constitution which affords to an accused person a fair hearing …. By an independent and impartial Court established by law."

To augment his proposition, Mr Bowry has relied on that often cited English case *Connelly vs DPP* 48 Cr

App Rep 183 which is also found in [1964)]2 All ER 401. I shall cite various passages by the learned Lords from the Cr App Reports.

At p 201 Lord Reid states –

> "there must always be a residual discretion to prevent anything which savours of abuse of process."

There can be no quarrel with the comment of Lord Morris at p 206 –

> "There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and suppress any abuses of its process and to defeat any attempted thwarting of its process."

He goes on to say –

> "The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a Criminal Court include a power to safeguard an accused person from oppression or prejudice."

Again, it is worth noting the comment of Lord Hudson at P 247 –

> "The inherent power of the court to control its own process, civil or criminal, should not prevent access to the Courts when a lawful claim is presented. So to hold would involve grave interference with the liberty of the subject to have access to the Courts, which I should be surprised to find to be warranted by authority."

I shall conclude on *Connelly's* case by citing the passage of Lord Devlin at p 259 –

> "the Judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce Rules of Practice in order to ensure that the court's process is used fairly and conveniently by both sides."

Connelly's case was cited with approval in *Githunguri vs Rep* HC Misc Cr App No 180 of 1985 where a constitutional Court comprising of Simpson CJ & Sachdeva and Mbaya JJ said –

> "Mr Chunga conceded that the High Court has inherent jurisdiction and that a person charged before a subordinate court and considering himself to be the victim of oppression may seek remedy in the High Court by way of an application for a prerogative order. We have no doubt that he is correct and that the judges of the High Court have similar discretion in respect of offences triable before them. *(Connelly vs DPP* [1964] 2 All ER 401 cited by both counsel). It is power to be exercised very sparingly, however."

Although Mr Chunga accepts that High Court has inherent jurisdiction to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, on the basis of above passages in *Connelly* and *Githunguri*, he takes issue with the view that s 60(1) of the Constitution is the statutory provision in Kenya enabling High Court to exercise its inherent jurisdiction. He argues that s 60 of the Constitution does no more than establish High Court and gives general umbrella of jurisdiction which must be in conformity of the closing words of subsection (1) of s 60, namely "and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law". With respect I beg to differ with this view. It would appear that the history of the development of the English law with regard to discretionary and inherent powers have emanated from the breast of the judges on the form of precedents and common law and not by statutes. In so far as Kenyan Courts are concerned, they are creatures of the Constitution and it cannot be said that the inherent powers of our courts are derived from

vacuum or breast of Judges. These powers must appear to emanate from statute. In this case the Constitution.

S 60(1) of the Constitution not only establishes the High Court but also invests such High Court with "unlimited original jurisdiction." In my view, such unlimited original jurisdiction is not limited or restricted by the closing words "and such other jurisdiction ……." It is *ejusdem generis* and does not for inherent powers to be exercised, have to look elsewhere. True, such unlimited powers cannot be exercised arbitrarily but must be exercised with judicial restraint in a case where there is no known power or remedy to prevent occurance of injustice or abuse of process. Such powers ought to be used sparingly and in a situation where ends of justice may be defeated by failing to exercise the same. Of course, there must be reasonable and cogent grounds placed before the Court in order that it may exercise its unlimited original jurisdiction or otherwise described as inherent or residual powers.

It is in the light of all the above that Court considers it to be prudent, fair and just to deliberate the grounds of complaint raised against Mr Chunga.

(1) Suicide theory

The first plank of the defence complaint is that at an early stage of this most publicly aired mysterious death of Dr Ouko, Mr Chunga had in his advisory capacity, taken a stand as to the cause of death. Mr Bowry derives the basis of such assertion only from a statement in the committal proceedings of late Mr Hezekial Oyugi, the then Permanent Secretary Provincial Administration and Internal Security. In order to understand and appreciate the implication of such assertion, it is necessary to set out verbatim the relevant passage in the inquiry statement of Mr Oyugi (CD 91) made to a Senior Assistant Commissioner of Police on 1st December, 1991, at p 22 –

> "On Monday 19th February, 1990 at 7.30 am I went to the office as usual. At about 10.00 am we held a consultative meeting in my office which was attended by among others, the Commissioner of Police, Director of CID, Dr Kaviti, Professor Oliech and Mr Chunga. The officers gave their professional versions. The statement was drawn by the Commissioner of Police which came through the media on that day.
>
> The purpose of the Government statement was to inform the public the position of the incident as it has been observed by the technical officers. There was no insinuation in the statement as to the cause of death. The meeting ended in the morning."

Mr Bowry wishes to read in this statement much more than what it reveals. He argues that Mr Chunga participated in the matter four days after discovery of the body, gave his professional view, and advised those present at the meeting about the issue of statement which insinuated theory of suicide. Therefore, he cannot now come to Court and advance theory of murder and conduct prosecution on such basis.

With respect, it would be unfair and improper to read in the above passage of late Oyugi what Mr Bowry propounds. Unfortunately, Mr Oyugi is not alive to tell us the details of that meeting. Be that as it may, that statement does not suggest that Mr Chunga gave any professional advice, let alone that he advanced theory of suicide. It would seem from the tenor of Mr Bowry's submission that there was something more to it than met the eye when Mr Chunga participated in that meeting. Reading that passage, it appears that senior officers of the Government met to discuss the implications of the discovery of the body of Dr Ouko and how to inform the members of the public of the position of such discovery as had been observed by the technical officers. The phrase 'technical officers' could not mean a legal officer such as Mr Chunga, who was presumably attending the meeting as the Deputy Public Prosecutor, representing the Attorney General, who is the principal legal adviser to the Government of Kenya (s 26(2) of the Constitution). There can be nothing improper or insinuative for Mr Chunga to attend such meeting in order to give legal advice. Again, reading that passage in the inquiry statement of late Mr Oyugi, it would appear that he was painstakingly making it clear to the officer recording the statement that "There was no insinuation in the statement as to the cause of death."

Mr Chunga who opposes the application is very peeved that Mr Bowry has imputed in that passage of late Mr Oyugi that which is not there and has done so without any basis or evidence to substantiate such imputation. Mr Chunga is of the view that such imputations made without any basis are not only professionally improper but constitute an attempt to mislead the Court. He has throughout his submissions in opposition to the application questioned the *bonafide* of the application to disqualify him.

Be that as it all may, Mr Chunga has quite correctly propounded that assuming that he had at an early stage advanced suicide theory, albeit on the professional opinion of the pathologists then available, there was nothing wrong or sinister to change that theory and form another theory during the progressive development of investigation. It is not unknown, either locally or elsewhere, that there have been several instances where opinions as to cause of death may be reviewed upon further evidence or further scientific observations or further investigations.

Upon careful deliberation of all the submissions made before me as well as all the material now available to me, I find that there is no basis for Mr Bowry's insinuation that Mr Chunga had adopted a stand with regard to the cause of death during the early stages of the investigation of late Ouko's death. Even if it were so, I do not regard such stand as extraordinary or abnormal for this Court to question professional propriety of Mr Chunga to now conduct prosecution for murder.

(2) Investigative Role at the Ouko Commission of Inquiry

> On 2nd October, 1990, the President in pursuance of powers under s 3 of the Commission of Inquiry Act (cap 102) appointed a Judicial Commission of Inquiry to inquire into the circumstances surrounding and leading to the disappearance and subsequent death of Dr Robert John Ouko, former Minister for Foreign Affairs and International Co-operation. Mr Chunga was on the same date appointed to be one of the two counsel to assist the said Commission. The Commissioners made rules for the conduct and management of the said inquiry which were published by the G N No 4718 on 12th October, 1991. Rules 7 and 8 relate to the counsel assisting the inquiry and read – "(7) The counsel assisting the inquiry will present evidence relating to the inquiry referred to in the terms of reference of the inquiry.
>
> (8) The counsel assisting the inquiry will warn witnesses that after examination – in – chief they may also be cross-examined by him."

The Ouko Commission of Inquiry proceeded with its task at Kisumu until 26th November, 1991 when by G N No 5692, the President directed that the Commissioners should cease the proceedings of the inquiry forthwith and by G N 5840 the President on 3rd December, 1991 revoked the Commission in exercise of powers conferred by s 4(1) of the Commission of Inquiry Act.

It is agreed that during the life of the said Commission of Inquiry, Mr Chunga appeared as a leading counsel assisting the Commission where he presented relevant evidence as well as cross-examined many of the witnesses.

It is Mr Bowry's contention that the fact that Mr Chunga was an officer assisting the Commission, he became the 'Cardinal Investigating Officer'. With respect Mr Chunga was not appointed an officer but was a counsel appointed to assist the Commission. The distinction must be made between an officer and a counsel. Mr Bowry submitted that the role of the Commission was totally investigatory, that during the hearing before the Commission, Mr Chunga led witnesses whom he interviewed and where necessary he issued out notices to those persons adversely mentioned in the inquiry. He submitted that the degree of participation of Mr Chunga in the inquiry was not superficial. In fact, he was a pivotal point around which the Commission revolved. He went on to accuse Mr Chunga of performing dual functions at that inquiry namely to assist the Commission as well as perform the duties of the Deputy Public Prosecutor. He said that Mr Chunga recommended and supervised perjury proceedings against some witnesses. All the above, Mr Bowry terms as being unfair to the accused in this case and militates against the Principle of Natural Justice. The cumulative effect of all the above in the eyes of the accused is prejudicial to him. Mr Chunga having so vehemently participated in the Ouko Commission of Inquiry, it results in him disqualifying

from the present prosecution and should not prosecute the case now before the Court.

Mr Bowry cited a passage in "*Conduct & Etiquette at the Bar* by W W Boulton 3rd Ed at p 31 –

> "Abarrister who has presided as a Special Commissioner at an inquiry held under the Local Government Act, 1888, should not appear as counsel on behalf of the County Council or other party at a later inquiry held to review the order made upon the first inquiry."

With respect, the above does not apply to the present situation. Mr Chunga did not preside at the Ouko Inquiry nor are the present proceedings an inquiry to review any order made at the Ouko Inquiry.

Mr Chunga has taken exceptions to several assertions made by Mr Bowry. Mr Chunga submitted that

> (a) Role of the Commission was not investigatory;
>
> (b) He did not interview witnesses;
>
> (c) He was not the pivotal point around which the Commission revolved;
>
> (d) He was not a cardinal investigator;
>
> (e) He did not combine the functions of counsel assisting the Commission with those of the Deputy Public Prosecutor by recommending and supervising perjury proceedings against any witness at the inquiry.

Mr Chunga has elaborately dealt with each and every allegation set out as above in order to show to the satisfaction of the Court why there is no substance in any of them. This Court need not go into the details, as has done Mr Chunga, to consider each and every such allegation and to make a finding thereon. Suffice it to say that before making these assertions, it behove Mr Bowry to lay a foundation by some evidence such that the Court would act on the same. Unfortunately this is not so. Mr Chunga justifiably feels aggrieved by various assertions made without substantiating any of them and strongly questions the *bona fides* of counsel for the accused.

The Indian Criminal Procedure Code s 4 contains definitions of words and expressions. 'Investigation' is defined to include "all proceedings under this code for collection of evidence conducted by a police officer or by any person (other than a magistrate) who is authorized by a magistrate in this behalf."

There is no such definition of the word "Investigation" in our Criminal Procedure Code, Police Act or the Interpretation and General Provisions Act. In these circumstances, this Court may take some comfort and persuasion from the above definition and the commentary thereon at p33 of *Mitra's The Code of Criminal Procedure* 14th Edition –

> "Under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case (3) Discovery and arrest of the suspected offender (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation or to be produced at the trial, and (5) Formation of the opinion as to whether on the materials collected there is a case to place the accused before a magistrate for trial, and if so, taking the necessary steps for the same by filing of a charge-sheet."

Not being an investigator myself but having an experience on the bar and the bench as advocate and as a magistrate and a Judge for nearly 4 decades, I think I am qualified to say that the commentary above succinctly and comprehensively sets out what 'investigation' means in legal parlance.

Having considered all that is now before the Court, I would say that there is nothing on the record to

persuade this Court to accept that Mr Chunga's role as the counsel assisting the Ouko Commission of Inquiry assumed at any time the role of an investigator.

(3) Chunga as a defence witness

In pursuance of s 252 of the Criminal Procedure Code, the defence on 21st October, 1992 applied to the Court for issue of summons to compel attendance of 13 witnesses at the trial, amongst whom is the name of Mr Bernard Chunga, the prosecuting counsel in this case. This was less than 24 hours before the making of the present application.

Mr Browry, who has cited *Bukenya & others vs Uganda* [1972] EALR 549 as well as *Mubito vs R* [1961] EACA 244, argues that the mere fact that the defence has applied for Mr Chunga to be called as a witness, would suffice to disbar Mr Chunga.

In *Bukenya's* case, it was held that (i) the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent and (ii) the Court has a right, and the duty to call witnesses whose evidence appears essential to the just decision of the case.

With respect, *Bukenya's* holding cannot apply to the present situation where there is nothing on the record to indicate that Mr Chunga has made any statement with regard to the offence or he is a witness necessary to establish the truth or that his evidence may be inconsistent, or that his evidence appears essential to the just decision of the case. In the instant case, it is the defence who has applied for summons though the application nor Mr Bowry's submission to this Court has revealed the nature of evidence which Mr Chunga is expected to give. Be that as it may, *Bukenya's* case does not in any way assist this Court with regard to matter before it.

In *Mubito's* case, it was argued on a second appeal that the appellant had been prejudiced by the investigating officer acting as prosecutor and giving evidence; and the Court of Appeal held -

> "(i) In Uganda there is no express provision of law which forbids a police officer from prosecuting a case which he has investigated and a trial is not *ipso facto* invalidated if the investigating officer gives evidence."

Similarly, there is no such express provision of law in Kenya.

In India, there is such a provision, namely s 495 (4) of the Code of Criminal Procedure which forbids an officer of police to conduct a prosecution if he has taken part in the investigation into the offence with which the accused is being prosecuted.

Again, in *Mubito's* case, the Court of Appeal observed that-

> "If a person is in a position to give important evidence, his evidence should not be refused because he is counsel in the case, though the fact that he is a witness may be a good reason for returning the brief."

Pausing here, one may reflect that the material criteria is that the person is in a position to give important evidence should not be refused because he is counsel in this case. In the present case, there is nothing on the record that Mr Chunga is in a position to give important evidence. Even so, the discretion lies with the counsel who has important evidence to give whether there may be a good reason to return the brief.

In any event, the Court of Appeal in *Mubito's* case said –

> " the fact that the game ranger had taken part in the investigation and was prosecuting, went to the weight of his evidence, not to his competency to give it."

Mr Bowry quite correctly draws distinction that in the present case the defence is calling Mr Chunga. If a

prosecuting counsel has important piece of evidence to give on behalf of the prosecution, he is expected to know what such evidence is and to judge for himself that there is a good reason to return the brief. In a case where the defence intends to call the prosecuting counsel as a witness, to give important piece of evidence, then it becomes the duty of the defence to indicate to such counsel at the earliest possible opportunity, the nature and importance of such evidence, in order for such counsel to decide whether it is prudent and there are good reasons to return the brief. Merely to summon a prosecuting counsel as a defence witness at the eleventh hour without indicating to him the nature of evidence which he has and which he is expected to give, is not sufficient to disbar such counsel from prosecuting the case.

I am indebted to Mr Bowry for furnishing instructive excerpts from treatise on duties and responsibility of an advocate, be he a defence counsel or a prosecuting counsel in a criminal trial or a counsel for a plaintiff or a defendant in civil suits. These are '*The Technique of Persuasion'* by Sir David Napley at pp 79, 80 and 81; *Duty and Art in Advocacy* by Sir Malcolm Hilberry at pg 8, 9 & 10; and "*Conduct and Etiquette at the Bar"* by W W Boulton, 3rd Ed at pg 31, 32 and 33. I have gone through these highly illuminating treatises for the benefit of practicing advocates, but with respect none of these are of assistance to determine that a prosecuting counsel who is intended to be called as a defence witness ought not to prosecute that case.

I do subscribe to the sentiments expressed in *Reginald Arthur Wadey* 25 Cr App R 104 at p 107 that –

> " Counsel entrusted with the public task of prosecuting accused persons should realize that one of their primary duties is to be absolutely fair."

This duty to be 'absolutely fair' is elucidated and elaborated in *Alec Bennet Sugarman* 109 at p114 and 115 of the same report namely 25 Cr App R, -

> " It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth be known, and that justice be done. It would be deplorable if any counsel for the Crown should refuse to stand on the real strength of his case and think that he can strengthen and support it by things collateral in a manner contrary to the English Law. By so doing he can only weaken his case and may prevent a verdict which ought otherwise to be obtained. As the Lord Chancillor (Lord Sankey) said in *Maxwell* (24 Cr App R 152 at p 176) ; 'It must be remembered that the whole policy of English Criminal Law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues'. The sanctions for the observance of the Rules of Evidence in the criminal cases is that, if they are broken in any case, the conviction may be quashed."

Although the above observation is not pertinent to the question that the investigator may not at the same time be prosecutor as well as a witness, the same, I expect, will remain always uppermost in the mind of Mr Chunga, a Public Prosecutor, for almost over 20 years.

I have considered carefully the complaint raised against Mr Chunga and that he should be barred from conduct of prosecution in this case. I must say that it has not been made out that the participation of Mr Chunga in this trial as a prosecuting counsel will be oppressive and prejudicial to the accused person or is against the Principle of Natural Justice. There is no legal, ethical or factual ground to order disqualification of Mr Chunga. Participation of Mr Chunga as prosecuting counsel is not tantamount to not affording a fair hearing to the accused.

I therefore dismiss the application made by the defence.

Dated and delivered at Nairobi this 28th day of October 1992

F.E ABDULLAH

JUDGE