



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO 88 OF 1991

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

EX PARTE: MIRUGI KARIUKI

JUDGMENT

Mirugi Kariuki (the applicant) has applied for an order of *certiorari* to remove into the High Court and quash the decision made by the Honourable Attorney General of Kenya contained in his letter CONV/ADV/100 Vol VII dated 19.12.1990 denying the applicant permission to bring in a foreign advocate to appear for him in the Chief Magistrate's Court Criminal Case No 5167 of 1990 now High Court Criminal Case No 29 of 1991. He has also applied for an order of *mandamus* directed to the Attorney General to carry out and complete his legal obligations under section 11 of the Advocates Act (hereinafter called the Act) and grant permission for Michael Mansfield Esquire QC to be admitted as a foreign advocate for the purpose of his leading the defence of the applicant in the said Criminal Case No 29 of 1991.

On 8th October, 1990 the applicant who is an advocate of this Court was arrested in his home in Nakuru. On 19th October, 1990 he was charged along with others in the Chief Magistrate's Court at Nairobi in his aforesaid criminal case with the offence of treason contrary to section 40 of the Penal Code. The only penalty for that offence is death. At the conclusion of the committal proceedings, the Chief Magistrate committed him together with others to the High Court to be tried for the same offence. The case is still pending in the High Court.

On 11th December, 1990 Ms Martha Njoka of Martha Njoka and Co Advocates of Nairobi wrote the following letter to the Attorney General seeking his permission for Mr Mansfield to appear for the applicant.

“Duly instructed by Mrs Susan Mirugi Kariuki I hereby apply for permission under section 10 of the Advocates Act for Michael Mansfield QC of Tooks Court, Cursitor Street London EC4A EJA United Kingdom to appear as my senior for Mr Mirugi Kariuki in Chief Magistrate's Court Case No 5067 of 1990 where the said Mirugi Kariuki is charged jointly with six others with the offence of treason.

I shall be grateful if you could kindly give your attention to this matter as expeditiously as possible to enable (me) to communicate with Mr Mansfield”.

In her said letter Ms Martha Njoka has erroneously referred to section 10 of the Advocates Act which was the relevant section under the old Act which had been already repealed. At the material time it was section 11 of the new Advocates Act (Act No 18 of 1989) which came in force on 15.12.1989.

By his said letter dated 19.12.1990 the Attorney General wrote to Ms Martha Njoka in reply to her letter as follows:

“I acknowledge receipt of your letter Ref MN/K/C/17/90 dated 11.12.1990 applying for admission of a foreign advocate namely Mr Michael Mansfield QC to lead you in the defence of your client.

I have considered your application and I find nothing to justify my admitting a foreign advocate for the purpose. Accordingly your application is hereby refused.”

Consequent upon said refusal the applicant on 8.2.1991 applied in these proceedings for leave to apply for orders of *certiorari* and *mandamus*. The application for leave was refused by Dugdale J saying that there was no basis in fact or law for the allegations made by the applicant against the Attorney General. The applicant appealed to the Court of Appeal in Civil Appeal No 70 of 1991 and the Court of Appeal allowed the appeal (hereinafter called the appeal) and granted leave to the applicant to apply for the said orders of *certiorari* and *mandamus*. More about the Court of Appeal judgment later.

The grounds on which the reliefs in the notice of motion before us are sought are (*inter alia*) that the Attorney General’s refusal to admit Mr Mansfield QC to practice as an advocate in Kenya for the purpose of leading the defence of the applicant in the said treason case was made in breach of the rules of natural justice; that the Attorney General did not give the applicant any proper or sufficient opportunity of being heard or making representations before the refusal which affected the applicant; that no opportunity was given to the applicant to explain why the permission to admit Mr Mansfield should be granted; that the Attorney General’s refusal was not founded upon basis of fact and is unreasonable and oppressive and as such null and void; that the Attorney General’s refusal violates the applicant’s constitutional rights under section 77(2) of the Constitution of Kenya to be defended by a legal representative of his choice, that the Attorney General’s refusal was not the exercise of his own discretion on a statutory matter and that no other remedy exists in law to compel the Attorney General to carry out his statutory obligation under the Advocates Act.

Section 11(1) of the Act reads as follows:

“11 (1) The Attorney General may in his absolute discretion admit to practice as an advocate for the purpose of any specified suit or matter in or in regard to which the person so admitted has been instructed by the Attorney General or an advocate, a practitioner who is entitled to appear before the Superior Courts of a Commonwealth Country, if such person has come or intends to come for the purpose of appearing, acting or advising in that suit or matter and is not disqualified or suspended by virtue of the Act and a person so admitted (hereinafter in this section referred to as a ‘foreign advocate’), shall not for the purposes of that suit or matter be deemed to be an unqualified person.”

Thus before the Attorney General exercises his discretion under the subsection a foreign advocate must be entitled to appear before the Superior Courts of a Commonwealth Country. He must not be disqualified or suspended by virtue of the Act and there must be in existence a suit or matter in regard to which he has been instructed either by the Attorney General or by an advocate and he must have either already come or intends to come to Kenya for the purpose of appearing, acting or advising in the suit or matter.

We take judicial notice that as a Queen’s Counsel Mr Mansfield is entitled to appear in the superior courts of United Kingdom. It is clear from the said letter that Ms Njoka Advocate had instructed Mr Mansfield to lead her in the defence of the applicant in the aforesaid treason case. There is no evidence before us that Mr Mansfield is disqualified or suspended by virtue of the Act. We also accept that if admitted Mr Mansfield intends to come to Kenya for the purpose of appearing in the treason case only.

Mr Ole Keiwua for the Attorney General submitted that in order to be eligible to apply for judicial review the applicant must prove that he has a right which has been infringed by the refusal of the Attorney General to admit Mr Mansfield. He said the applicant has complained that his fundamental right under s 77(2) (d) of the Constitution of Kenya had been violated. The said section of the Constitution enjoins that if a person is charged with a criminal offence then unless the charge is withdrawn he shall be permitted to defend himself before the Court in person or by a legal representative of his choice. "Legal Representative" has been defined under section 86 of the Constitution as a person entitled to practice as an advocate in Kenya. Thus he said the right which the applicant has is to defend the charge against him by a person who is entitled to practice as an advocate in Kenya which right has not been denied to him. In fact, he went on to say that the applicant has Ms Martha Njoka who is an advocate of this Court defending him in that criminal case. We agree with Mr Ole Keiwua that the applicant does not at present possess any right under s 77 (2) (d) of the Constitution which could have been breached. Nevertheless he does have a right, the right or interest to require the Attorney General to exercise his discretion properly and according to law to determine whether or not to admit Mr Mansfield as a foreign advocate to practice as an advocate in Kenya under s 11(1) of the Advocates Act. If Mr Mansfield is admitted under s 11(1) of the Advocates Act, he becomes entitled to practice as an advocate in Kenya for the purpose of defending the applicant in the said treason case. He is then covered within the definition of legal representative under s 86 of the Constitution. The applicant thus claims that his said right under the Advocates Act has been infringed. We agreed that as a person aggrieved by the refusal of the Attorney General to admit Mr Mansfield under s 11 (1) of the Act the applicant has *locus standi* to apply for judicial review of the said refusal.

Mr Ole Keiwua also drew our attention to Miscellaneous Application No 57 of 1990, a constitutional reference filed by Mr Koigi Wamwere a co-accused of the applicant in the said treason case. Mr Wamwere also had unsuccessfully requested the Attorney General to admit a foreign advocate for the purpose of defending him in that treason case. But he did not apply for judicial review of the Attorney General's refusal as the applicant has done. In that reference one of Mr Koigi's complaints was that his constitutional right to be defended by a legal representative of his choice as enshrined in section 77(2) (d) of the Constitution had been denied to him. The Court dismissed Mr Wamwere's reference holding that he did not have any right to be defended by a foreign advocate who had not been admitted under s 11(1) of the Act to practice as an advocate in Kenya. Thus Mr Koigi Wamwere's said constitutional reference was substantially different from the applicant's present proceedings.

Mr Ole Keiwua also submitted that under s 11(1) of the Act the Attorney General had an absolute discretion to admit a foreign advocate to practice as an advocate. It is an administrative discretion in the exercise of which the Attorney General was not acting as a Court, he said and he was merely to consider the request made to him on the applicant's behalf and either accede to it or refuse it. Mr Ole Keiwua pointed out that there was no investigative machinery or enquiry envisaged by the Act. He argued that the Attorney General's decision can be challenged only if it was *ultra vires* s 11 (1) of the Act. He conceded that the Attorney General's administrative action has to be fair but so long as the decision was within the law it could not be termed unfair. On the other hand the applicant has attacked the Attorney General's refusal mainly on the ground that it was made in breach of the rules of natural justice without giving him any or sufficient opportunity of being heard in support of his application so as to explain why Mr Mansfield should be admitted.

In *David Oloo Onyango vs Attorney General* Civil Appeal No 152 of 1986 (unreported) Platt JA said:

"It is clear that the English Courts have taken the view that the Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a lead which I think the Courts in Kenya would do well to follow in carrying out their task of balancing the interest of the Executive and the citizen. It is to everyone's advantage if the Executive exercises its discretion in a manner which is fair to both sides and is seen to be fair."

In the same case the late Nyarangi JA had this to say:

“There is a presumption in the interpretation of statutes that the rules of natural justice will apply”.

In *Fairmount Investments Ltd vs Secretary of State for the Environment* [1976] 1 WLR 1255 p 1263 Lord Russell of Killowen said:

“...it is to be implied unless contrary intention appears that Parliament does not authorize by the Act the exercise of powers in breach of the principles of natural justice and that Parliament does by the Act require in the particular procedures compliance with those principles.”

In *Attorney General vs Ryan* [1980] AC 718 p 730 Lord Diplock had this to say:

“It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority”.

All the above immediately mentioned cases were followed with approval in the appeal. Following excerpts from the appeal are relevant to note:

“It is however quite clear that it is not within the powers of the Act to depart from the principles of natural justice when the discretion is being exercised under this sub-section.”

“The mere fact that the exercise of discretion making authority affects the legal rights or interests of some person makes it judicial and therefore subject to the procedure required by natural justice. Thus the discretion must be exercised judicially. That is to say fairly. The fact that the exercise of discretion is administrative does not make it less judicial.”

“In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under s 11(1) of the Act, if in its exercise the applicant’s rights or interests were affected.”

Again in *Council of Civil Service Unions and Others vs Minister for Civil Service* [1984] 3 All ER 935 which was also followed by the Court of Appeal in the appeal Lord Scarman said at page 948:

“I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that if the subject matter in respect of which prerogative power exercised is justiceable that is to say it is a matter on which Court can adjudicate the exercise of power is subject to review in accordance with the principles developed in respect of review of the exercise of statutory power.”

In support of his submission Mr Ole Keiwua relied on the following cases.

Shah vs Attorney General [1970] EA 543. In this Uganda case Goudi J cited the following passage with approval

“*Mandamus* does not lie against a public officer as a matter of course. The Courts are reluctant to direct writ of *mandamus* against executive officers of a Government unless some specific act or thing which the law requires to be done has been omitted. The Courts will not intervene to compel action by an executive officer unless his duty to act is established and plainly defined and the obligation to act is peremptory.”

Also in the same case Goudi J quoted the following passage from “*The Judicial Review of Administrative Action*” 2nd Edition by S A de Smith.

“in *mandamus* cases it is recognised that when a statutory duty is cast upon a crown servant in his official capacity and the duty is one owed not to the crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it.”

In *Queen vs Moses ex parte* (1982) 29 SASR 385 (reported in Judicial Decisions at p 52) it was held that infringement of the rules of natural justice relating to bias was sanctioned by the statute itself. Similarly in another South Australian case namely *Queen vs City of Whyalla ex parte Kittel & Others* (1979) 20 SASR 386 (reported again in the Judicial Decisions at p 439) it was held that the relevant legislation and the regulation made thereunder impliedly modified the common law rule of natural justice against a person being a judge in his own cause.

In *A G vs Bastow* [1957] 1 All ER 497 it was held that in a relator action where restraining infringement of a public right is involved, the choice of remedy where other remedies were available and the only question was whether other remedies had been exhausted, was a matter for Attorney General's administrative discretion and the Court would be slow to interfere with his discretion. Similarly in *Chief Nehemia Gitonga vs Stephen Kinyanjui* [1959] EA 1096 it was held that it is within the administrative discretion of the Attorney General to decide whether it is in the interest of the Crown that a particular litigant should be provided with legal representation.

Franklin vs Minister of Town & County Planning [1947] 2 All ER 289 (HL) in which it was held that under the statute no judicial or quasi judicial duty was imposed on the Minister in the discharge of his statutory duties which were purely administrative. We have however noted that note 3 under para 76 of volume 1 of *Halsbury's Law of England* 4th Edition is to the following effect

“The decision of the House of Lords in *Franklin vs Minister* to the effect that a minister in deciding whether to make an order in the face of objection lodged against its own draft order was acting in a purely administrative capacity must be confined to its peculiar context”.

Wednesbury Corporation and others vs Ministry of Housing & Local Government (1966) 2 QB 275. Following the *Franklin* case it was held that the purpose of local enquiry into the objection under the statute was to inform the mind of the Minister of the matter to which the objection related. It was an administrative act imposed on him by the Act.

Armah vs Government of Ghana [1968] AC 192. It was an appeal to the Privy Council against an order to extradite the appellant under the Fugitive Offenders Act 1881. Privy Council held that there is a power in the superior court to review the case to consider whether any magistrate applying his mind could reasonably have come to conclusion that a strong and probable presumption of guilt had been made out and that the evidence before the magistrate did not satisfy the above test.

Ex Parte J H Mwau Misc Civil Case No 299 of 1983 (unreported) in which the applicant applied for a writ of *mandamus* against the Principal Immigration Officer Nairobi to direct him to return the applicant's passport to him which had been withdrawn. It was held that an order of *mandamus* will not lie against the Principal Immigration Officer as he had no duty upon him as a *persona designata*. In withdrawing the passport the Principal Immigration Officer acted as the instrument of the Minister. He has no clearly established and plainly defined peremptory duty to return the passport.

All the cases cited by Mr Ole Keiwua must be “confined because of their peculiar circumstances to their peculiar contexts” In our view they are all distinguishable from the present case before us.

In the instant case as we have said the applicant is charged with one of the most serious offences under the Penal Code namely treason contrary to section 40 thereof. If found guilty he is liable to be sentenced to death which is the only penalty for the offence. In this unenviable situation the applicant had decided that he should be defended by an English Q C who of course is going to cost him considerably more than a local advocate. But naturally he must have thought that his life is more important than any amount of expense involved. With that in mind the applicant through his wife instructed Ms Njoka to instruct Mr Mansfield Q C to lead her in the defence of the applicant which she did. But Mr Mansfield could appear in Kenyan Courts only if he had been admitted as an advocate under s 11(1) of the Act. So Ms Njoka requested and required the Attorney General to admit Mr Mansfield as an advocate under the Act. Under the Act the duty is imposed on the Attorney General alone and nobody else to consider whether a foreign advocate should be admitted to practise as an advocate in Kenya for the purposes of a specified case. It

has already been held in the appeal that “it is not within the power of the Act to depart from the principles of natural justice when the discretion is being exercised by the Attorney General under section 11(1) of the Act” . But the Attorney summarily rejected the applicant’s request saying he found nothing to justify admitting Mr Mansfield as an advocate under the Act. He was aware that the applicant had been charged with treason. He was also aware that the charge was very serious and carried the penalty of death. He did not either call the applicant’s advocate or write to her to justify why the services of a foreign advocate were required by the applicant. We do not have any material before us to show that any rule of natural justice was observed by the Attorney General before deciding to refuse the application. We say “any rule of natural justice” because we accept that the content of the rules of natural justice is not stereotyped. Given the flexibility of the rules of natural justice, as the Court of Appeal has said in the appeal, “nothing should be done in the name of justice which would strike a reasonable man as unjust.”

Mr Ole Keiwua has conceded that the Attorney General was obliged to act ‘fairly’. But he said so long as he has acted within sub-section 1 of section 11 of the Act, he cannot be said to have acted unfairly. But would it seem reasonable and just to a reasonable man that the Attorney General should refuse the application without giving any reason for so doing? We think not. It is tantamount to arbitrary exercise of the discretion on the part of the Attorney General. We cannot condone or overlook it. We on our part would say that considering the severity of the offence with which the applicant is charged, the complexity of the issues involved in the treason case and the fact that Mr Mansfield was qualified within the meaning of section 11(1) of the Act to be admitted, the Attorney General should have given his reasons for the refusal.

In the circumstances we allow the application and quash the Attorney Genreal’s letter dated 19.12.1990 refusing to admit Mr Mansfield under s 11(1) of the Act. As the Attorney General is the only person according to Act who can admit a foreign advocate under s 11(1) to practise as an advocate we cannot usurp his authority. We cannot admit Mr Mansfield. We therefore direct the Attorney General to reconsider the applicant’s application in accordance with the rules of natural justice which include the applicant being given an opportunity to make representations in support of his application if he so wishes. Therefore the Attorney General should exercise his discretion in a judicial manner giving his reasons for whatever decision he ultimately takes.

We award costs of the application to the applicant against the Attorney General.

Dated and delivered at Nairobi this 26th day of November 1992

J.A ALUOCH

G.SPALL

JUDGE

JUDGE