



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Cockar, Omolo, Tunoi JJ A)

CRIMINAL APPLICATION NAI. 4 OF 1994

BETWEEN

REPUBLIC.....APPLICANT

AND

1. DAVID MAKALI.....1ST RESPONDENT

2. BEDAN MBUGUA.....2ND RESPONDENT

3. INDEPENDENT MEDIA SERVICES LIMITED.....3RD RESPONDENT

RULING

In the course of his submissions, Mr Chunga for the Republic referred to sections 7, 20 & 21 of the Penal Code and section 136 of the Criminal Procedure Code. Section 7 has ruled out, except in certain types of offences, ignorance of law as an excuse. Sections 20 & 21 together with sections 22 & 23 are the only sections contained in chapter 5 of the Penal Code which is titled, “parties to the offence”. Both Mr Imanyara for respondents Nos 1, 2 & 3 and Mr Khaminwa for the 4th respondent objected vigorously to any reference to any sections of the Penal Code for the sake of seeking any assistance from them.

Mr Imanyara’s objections mainly were that section 5 of the Judicature Act (cap 8) had given a special jurisdiction in relation to contempt proceedings. It was specifically laid down in the sections that this Court shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice of England. So it was the law and practice for the time being as it was exercised in England which was to be followed here. There was no mention of the Penal Code in section 5 of the Judicature Act. If it was the intention of the applicant now to involve certain sections from the Penal Code then the contempt proceedings should have been brought under the Penal Code.

Mr Khaminwa adopted the above submissions made by Mr Imanyara and added that what was relevant to the present proceedings was order 52 of the Supreme Court Rules and the relevant sections thereof and not any section of the Penal Code. He referred to *Mutitika v Baharini Farm* [1982 – 88] 1 KAR in which Hancox JA who appeared to have accepted Mr Khaminwa’s submissions herein had termed the contempt proceedings therein as of a quasi – criminal nature. Reference to sections of Penal Code contended Mr Khaminwa would therefore be an attempt to introduce the law and procedure under the Penal Code through the back door. We would point out here that we do not think that a reference to *Baharini Farm* on this issue has any relevance because those contempt proceedings emanated from a disobedience of a stay

order granted by the Court and were, therefore, eminently of a civil nature. Finally, Mr Khaminwa submitted that the consolidation order that was granted was for the purposes of convenience and it was not proper for this Court to go into the question of common intention between the 4th respondent and the other three respondents. To do so would muddle up the issues.

We have already held that these contempt proceedings are of a criminal nature. As to the law and procedure followed in England, it is to be noted that criminal contempt in England is a common law misdemeanour which may be dealt with either on indictment in accordance with ordinary criminal procedure or under the jurisdiction of the superior courts to punish contempt by the summary process of attachment or committal – *Smith & Hogan Criminal Law* 4th edition p 738. In this country if a person is charged with an offence committed in breach of any statute such as an offence under the Traffic Act these sections of part 5 of the Penal Code would equally apply because they codify the general principles of criminal law. These general principles apply both in Kenya and in England and we quote again from *Smith and Hogan (supra)* at p 739.

“...According to Lord Denning, criminal contempt is governed by the principles applicable to criminal offences generally

This proposition of Lord Denning is to be found in the case of *Balagh v St Albans Crown Court* [1974] 3 All ER 283 at 289 CA.

These general principles laid down in part 5 of the Penal Code are for the protection of the persons charged with criminal offences. Such sections are the source for the principles of law relating to the burden of proof being always on the prosecution and the standard of proof to be always beyond reasonable doubt. Contempt proceedings do not fall outside the application of these general principles. We do not see any merit in the objections and we overrule them.

Dated and Delivered at Nairobi this 27th day of April 1994.

A.M.COCKAR

.....

JUDGE OF APPEAL

R.S.C.OMOLO

.....

JUDGE OF APPEAL

P.K.TUNOI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR