



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Cockar, Muli & Omolo JJ A)

CRIMINAL APPLICATION NO NAI 5 OF 1993

MARK OWEGGIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Nairobi

(Mr Justice Oguk) dated 28th September, 1993

in Misc Criminal Appl No 419 of 1993)

RULING

We are of the clear view that there is no merit in the application before us and it must accordingly fail.

The applicant Mr Mark Oweggi is an advocate of the High Court of Kenya. He is being prosecuted in the Court of the Chief Magistrate at Nairobi on charge of stealing by an agent contrary to section 283 of the Penal Code. That charge, he alleges, arose in the performance of his duties as an advocate and according to him, before the prosecution could be started by the Attorney-General section 80 of the Advocates Act should have been complied with. The *proviso* to that section is to the effect that no prosecution for an offence under that section shall be instituted unless a report has been made to the Attorney – General by the Disciplinary Committee created under the Act. The applicant’s contention appears to be that as he is an advocate, he can only be prosecuted for theft of a client’s property in accordance with the procedure set out under the Advocate’s Act and that since section 283 of the Penal Code under which he is being prosecuted does not set out similar requirements as those in section 80 of the Advocates Act, the two Acts are in conflict. He accordingly asked the trial magistrate and subsequently the High Court that a Constitutional Court should be instituted.

“to make a determination or interpretation in respect of the provisions of the Advocates Act *vis-à-vis* the Penal Code section 283”

According to the applicant his plea for a Constitutional Court was made pursuant to section 67 (1) of the Constitution. Section 67(1) of the Constitution can only be invoked where any question as to the interpretation of the Constitution itself arises in any proceedings in any subordinate court. As far as we can discern from the record, no question arose in the Magistrate’s Court as to the interpretation of the Constitution, and which section was to be interpreted.

What arose in the Magistrate's Court was the alleged conflict between section 80 of the Advocates Act and section 283 of the Penal Code. A conflict between two Acts of Parliament is not a matter requiring the interpretation of the Constitution.

Again, we drew the attention of the applicant to the provisions of section 26 (3) (a), (b) and (c) of the Constitution which gives the Attorney-General unfettered powers in matters relating to criminal prosecutions. If section 80 of the Advocates Act were to purport to derogate from the provisions of Constitution then the answer would be obvious and we need not state it. As far as we can discern from the material available to us on record, nothing has arisen in the subordinate court which requires the interpretation of the Constitution. What we are saying is that we are not satisfied that the applicant's intended appeal is an arguable one and that being our view of the matter we order the application to be dismissed.

Dated and Delivered at Nairobi this 2nd day of November, 1993

A.M COCKAR

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JUDGE OF APPEAL

M.G. MULI

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JUDGE OF APPEAL

R.S.C OMOLO

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JUDGE OF APPEAL