IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Kwach & Cockar JJ A)

CIVIL APPEAL NO 70 OF 1991

Between

MIRUGI KARIUKI.....APPELLANT

AND

ATTORNEY-GENERAL .....RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi (Dugdale, J) dated 28/2/91

in

H C Misc Civil Case No 88 of 1991)

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JUDGMENT

Section 11(1) of the Advocates Act No 18 of 1989, hereinafter called, the Act, is in the following terms:

> "11(1) The Attorney General may, in his absolute discretion, admit to practise 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 superior courts of a Commonwealth country, if such person has come or intends to come to Kenya for the purpose of appearing, acting or advising in that suit or matter and is not disqualified or suspended by virtue of this Act and a person so admitted (hereinafter in this section referred to as a 'foreign advocate') shall not, for the purpose of that suit or matter, be deemed to be an unqualified person."

Thus, before the Attorney General can exercise his discretion under this subsection, the foreign advocate must be entitled to appear before superior courts of a Commonwealth country; he must not be disqualified or suspended by virtue of the Act; there must be in existence a specified suit or matter in or in regard to which he has been instructed by the Attorney General or an advocate; and, he must have come or intends to come to Kenya for the purpose of appearing, acting or advising in that suit or matter. When the application of the subsection has been invoked by a person interested and the foregoing factors have been established, the Attorney General must proceed to exercise his discretion. Once this obligation is discharged, the Act is mute as to what redress is available to a person aggrieved in the exercise of that discretion.

On 8th October, 1990, Mirugi Kariuki, the appellant, was arrested at his home in Nakuru. On 19th October, 1990 he was charged before the Chief Magistrate's Court at Nairobi with the offence of treason contrary to section 40 of the Penal Code. The o

nly penalty for that offence is death. On 11th December, 1990 the appellant's advocates, Martha Njoka & Co, wrote a letter to the Attorney-General seeking permission for Michael Mansfield, Esquire, QC to appear in the Chief Magistrate's Court as a defence attorney for the appellant. That letter which was signed by Martha Njoka, advocate and copied to Mrs Mirugi Kariuki, Nakuru stated:

> "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 EC 4A EJA, United Kingdom to appear as my senior for Mr Mirugi Kariuki in the Chief Magistrate's Court Criminal Case No 5167 of 1990 where the said Mr Mirugi Kariuki, advocate 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."

Section 10 of the Advocates Act referred to in this letter was the relevant section in a matter such as is contained in the said letter in the now repealed Advocates Act, Chapter 16 of the Laws of Kenya. The relevant section now and as at the date of the letter aforementioned is section 11 of the Act.

By a letter dated 19th December, 1990 addressed to Ms Martha Njoka & Co, Advocates, Nairobi the Attorney-General responded to this matter as follows:

> "I acknowledge receipt of your letter Ref, MN/K/C/17/90 dated 11th December, 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 to this letter, the appellant, on 8th February, 1991 after giving the requisite notice to the Registrar pursuant to order 53 rule 1(3) of the Civil Procedure Rules, applied to the High Court for leave to apply for orders of *certiorari* and *mandamus* as is required by sub-rules 1 and 2 of the aforesaid rule.

The appellant's chief complaints were that he was not notified of the intended refusal to admit a foreign advocate to appear for him in the Nairobi Chief Magistrate's Court Criminal Case No 5167 of 1990; he was not given notice to show cause why his request for a foreign advocate should not be granted; the Attorney-General did not act fairly; and on the whole, the exercise of discretion by the Attorney-General was in breach of the rules of natural justice.

> "In her submissions learned counsel alleged that the Attorney-General's refusal was contrary to law and in breach of natural justice; that he failed to give the applicant an opportunity to be heard or make representations upon the refusal and that the applicant was given no opportunity to show cause why (the request for) a foreign advocate should not be granted.
>
> There is no basis in fact or law for these allegations which are rejected by the Court."

The learned Judge then proceeded:

> "The Court finds that the Honorable the Attorney-General exercised his discretion properly in every sense of the word.
>
> The Court has noted that learned counsel has made no reference whatsoever, to the 'absolute discretion' involved, either in her address or in the pleadings."

After concluding that on the face value the appellant's application did not justify the grant of the orders for which leave to apply was sought, the learned Judge dismissed the same.

Appellant appeals to this Court and has put forward 18 grounds of appeal of which grounds 1, 2 and 18 are pertinent. These are:

> "1.The learned Judge erred in law and in fact in failing to appreciate that the application for leave is only a preliminary step intended to invoke the jurisdiction of the Court by compliance with the formal rules and is not, *stricto sensu*, the time for going into the full merits of the substantive application for orders of *certiorari* and *mandamus*.
>
> 2. The learned Judge erred in law and in fact in dealing with the application for leave as if it were the application for orders for *certiorari* and *mandamus* and dealing with the merits thereof.
>
> 18. The learned Judge erred in law and in fact by failing to find that the Attorney-General's discretion under section 11(1) of the Advocates Act must be exercised judicially and hence subject to judicial review."

According to counsel for the appellant, Ms Martha Njoka, the High Court did not apply the proper criteria when dealing with the appellant's application for leave to apply for orders of *certiorari* and *mandamus*. Indeed, to her, that Court went into the merits of the appellant's intended application for the aforesaid orders. This was erroneous. Her further argument is that the appellant alleged that the rules of natural justice were overlooked in that the Attorney-General did not accord him an opportunity to be heard. He was not given a chance to explain his case. Had this happened, he may have been able to point out why Mansfield, Esquire, QC should have been admitted as a foreign advocate to appear for him in the criminal case mentioned above in terms of section 11 of the Act.

The argument advanced by counsel for the respondent, Mr Oyalo, is that leave to apply for orders of *certiorari* and *mandamus* is not a matter of course. In a matter such as was the subject of the application for leave to apply for the orders aforementioned, the Attorney-General's discretion was unfettered. In the exercise of that discretion, he could not be faulted. To counsel therefore, the trial judge was right to refuse the leave sought by the appellant.

There is no doubt that the learned Judge was alive to the appellant's principal complaints. He set them out in his ruling, as can be seen above, but rejected them as having no basis in fact or law. It is not clear how he arrived at this conclusion for at that stage their merit was not an issue. In truth, once the appellant alleged a breach of the rules of natural justice, the learned Judge should have paused there: for clearly that was a point fit for further investigation. Such investigation could only have been possible on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument.

In *David Oloo Onyango vs the 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 tasks of balancing out the interests 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, Nyaragi JA had this to say:

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

In *Fairmont Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255 at page 1263 letters C, D and E Lord Russel of Killowen said:

> "There was a certain amount of discussions before your Lordships on the significance and applicability of the phrase 'may quash' and on the difference between the phrase 'not within the powers of this Act' and 'the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with'. In my view the instant appeal does not require discussion of these points; for I am satisfied that if the true conclusion is that the course which events followed resulted in that degree of unfairness to Fairmont that is commonly referred to as a departure from the principles of natural justice it may equally be said that the order is not within the powers of the Act and that a requirement of the Act has not been complied with. For it is to be implied unless the contrary appears, that Parliament does not authorise 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."

The foregoing is a powerful statement in regard to a departure from the principles of natural justice. As pointed out earlier in this judgement, the Act is silent as to what remedy is available to a person affected in the exercise of discretion by the Attorney General under section 11(1). It is however, quite clear that it is not within the powers of the Act to depart from the principles of natural justice when discretion is being exercised under this subsection.

Lord Diplock, delivering the judgment of the Privy Council in the case of *Attorney General v Ryan* [1980] AC 718 at page 730 letter E observed:

> "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."

The mere fact that the exercise of discretion by the decision-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, that discretion must be exercised judicially, that is to say, fairly. The fact that the exercise of discretion is administrative does not make it any the less judicial for this purpose- see page 463 of the 5th Edition of HWR Wade on *Administrative Law*.

In *Council of Civil Service Unions and others v Minister for Civil Service* [1984] 3 All ER 935 at page 948 letters E and J, Lord Scarman said:

> "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 is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."

It is not the absoluteness of the discretion nor the authority exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The appellant's complaint in the High Court was that this was so and for that reason he sought leave of the Court to have it investigated.

Lord Scarman in the case of *Inland Revenue Commissioners v National Federation of the Self-Employed and Small Business Ltd* [1981] 2 All ER 93 at page 113 letters g and h and had this to say:

> "It is wrong in law, as I understand the case, for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case,

> is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers. I do not see any other purpose served by the requirements for leave."

In this appeal, the issue is whether the appellent in his application for leave to apply for orders of *certiorari* and *mandamus* demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question. Without a rebuttal to these allegations, the appellant certainly disclosed a *prima facie* case. For that, he should have been granted leave to apply for the orders sought.

Section 3(2) of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya provides that:

> "3(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court."

In the present appeal, the appellant has asked the Court to set aside the order of the High Court dismissing his application for leave to apply for the writs of *certiorari* and *mandamus*; to grant him leave to apply for these writs; and costs of this appeal.

From what we have endeavoured to set out above, we are in no doubt that the appellant ought to have been granted leave to apply for orders of *certiorari* and *mandamus*. The dismissal of his application in this regard by the High Court was without sound legal basis. Accordingly we allow this appeal; set aside the order of the High Court dismissing the appellant's application as mentioned above; and pursuant to the provisions of section 3(2) of the Appellate Jurisdiction Act, *supra*, order that the appellant be, and is hereby granted leave to apply for the writs of *certiorari* and *mandamus*. He will have the costs of the appeal.

Those then are the orders of the Court.

Dated and delivered at Nairobi this 10th day of April 1992.

J.E GICHERU

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JUDGE OF APPEAL

R..O KWACH

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR