



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
IN THE MATTER OF THE CONSTITUTION
OF THE REPUBLIC OF KENYA
MISCELLANEOUS CRIMINAL APPLICATION NO 180 OF 1985
STANLEY MUNGA GITHUNGURI.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT
JUDGMENT

This is a reference to the High Court under section 67(1) of the Constitution which reads as follows:

“S. 67(1). Where a question as to the interpretation of this Constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if a party to the proceedings so requests, refer the question to the High Court.

The subordinate court concerned was the court of the Chief Magistrate before which on May 20, 1985 one Stanley Munga Githunguri was charged with four counts alleging contraventions of the Exchange Control Act (cap 113). Two of the offences are alleged to have been committed in 1976 and the third in 1979. The fourth count is an alternative to the third count.

Mr. Georgiadis who appeared for the accused with Mr. Lakha and Mr. Opiyo both in the Chief Magistrate’s court and before us made a preliminary application to the Chief Magistrate.

With reference to the charges before the court Mr. Georgiadis said :

“All the charges formed a part of police enquiry and full investigations were carried out about 6 years ago. A detailed statement under caution was taken from the accused and charges were prepared and were 20 in number. These were signed by the officer in charge Mr. Shapi. The charges before the court today formed a part of the charge prepared earlier. A copy of such charges was given to accused six years ago together with a copy of his cautionary statement.

Subsequently in early 1980, the office of the Attorney- General having considered everything decided not to prosecute the accused and closed the files relating to all counts including the present ones. Further it issued instructions to credit in Kenya currency the accused bank account with equivalent amount of foreign currency in the charges now before the court. Indeed the accused was told in writing by his bank, and more importantly,

he was told officially of the Attorney- General Office's decision not to prosecute as the files were officially closed. This status quo prevailed through the successors of the office of the Attorney-General in the time of Mr. Karugu and Mr. Kamere who followed the then Attorney-General.

The position was reiterated publicly during a debate in parliament when Mr. Kamere was the Attorney-General. I wish to put the two reports – dated 20.6.81 (pages 599-608). Also National Assembly report of 1/2.7.81 (page 765-774).

That is where the matters rested 4 years ago until 3 charges with an alternative charge were resurrected and the accused was charged despite all previous assurances by police and investigation branch that the matters were settled and he would not be prosecuted. Despite these assurances the accused was again called at CID Headquarters and he was charged.”

He then referred to the powers of the Attorney-General under section 26 of the Constitution and formulated the following 5 questions being points of law arising from interpretation of that section which he requested the Chief Magistrate to refer to the High Court under section 67 of the Constitution :

“1. If the office of the Attorney General makes a decision not to institute or undertake any criminal proceedings against any person, is the power conferred under section 26(3) exhausted or spent?

2. Does the exercise of the power conferred on the office of the Attorney-General under section 26(3) have to be fair and reasonable, or can it be exercised arbitrarily or oppressively?

3. Is it a proper exercise of the powers conferred under section 26(3)(a) to institute criminal proceedings against a person charging him with offences allegedly committed over 3 years ago and investigated about six years ago following a full inquiry, and after the office of the Attorney-General had then decided not to institute or undertake criminal proceedings and to close the files?

4. Notwithstanding the powers conferred upon the office of the Attorney-General by section 26(3) of the Constitution, does the court have an inherent power and a duty to secure fair treatment for all persons who come or are brought before the Court, and to prevent an abuse of its process?

5. Is such a charge or charges against any person preferred 9 years after their alleged commission and six years after a full inquiry in respect thereof and five years after the decision of the office of the Attorney General not to prosecute and to close the file:

- (a) vexatious and harassing; and/or
- (b) abuse of the process of Court; and/or
- (c) contrary to public policy?”

Mr. Chunga who appeared for the Republic agreed. He said :

“Having heard the defence counsel's speech, I was in any case to ask this court to refer the questions to be put before the High Court.

As to evidence, it is the choice of the defence to choose.”

The learned Chief Magistrate then ruled that

“the questions raised by the defence and so agreed by the prosecution being questions of interpretation of section 26 of the Constitution and allied matters thereto”

be referred to the High Court.

Before us Mr. Chunga raised a preliminary objection seeking to strike out questions 2 to 5 which he submitted were outside the scope of the court's Constitutional functions. The Constitutional point the court was asked to interpret he said, was contained in the first question. The manner in which the Attorney-General exercised his powers was not a matter for a Constitutional court which has no discretion or jurisdiction to inquire whether the powers are being exercised fairly or oppressively. The function of the court was merely to interpret the section and having interpreted it to remit the matter to the trial court to dispose of the case in accordance with the court's decision.

We dismissed this preliminary objection and reserved our reasons. These we now give briefly.

It was mandatory for the Chief Magistrate to refer the questions to the High Court. The accused through his counsel had requested that the questions be referred to the High Court and the Chief Magistrate was of the opinion that substantial questions of law pertaining to the interpretation of section 26 of the Constitution were involved. Not only had the accused made the request but Mr. Chunga said

“I was in any case to ask this court to refer the questions to be put before the High Court”.

If he objected to any of the questions he should, we think, have raised his objections in the subordinate court. Section 26 of the Constitution reads as follows :

(1) There shall be an Attorney-General whose office shall be an office in the public service.

(2) The Attorney-General shall be the principal legal adviser to the Government of Kenya

(3) The Attorney-General shall have power in any case in which he considers it desirable so to do-

(a) to institute and undertake criminal proceedings against any person before any court (other than court-martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

(4) The Attorney-General may require the Commissioner of Police to investigate any matter which, in the Attorney-General's opinion, relates to any offence or alleged offence or suspected offence, and the Commissioner shall comply with that requirement and shall report to the Attorney-General upon the investigation.

(5) The powers of the Attorney-General under subsections (3) and (4) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.

(6) The powers conferred on the Attorney-General by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(7) For the purposes of this section, an appeal from a judgment in criminal proceedings before any court, or a question of law reserved for the purpose of those proceedings to any

other court, shall be deemed to be part of those proceedings :

Provided that the power conferred on the Attorney- General by subsection (3)(c) shall not be exercised in relation to an appeal by a person convicted in criminal proceedings or to a question of law reserved at the instance of such a person.

(8) In the exercise of the functions vested in him by subsection (3) and (4) of this section and by section 44 and 55, the Attorney-General shall not be subject to the direction or control of any other person or authority.”

Subsection (3) with which we are mainly concerned confers wide powers upon the Attorney-General. They are not however spelt out in every conceivable aspect. This applies also to several other provisions of the Constitution. Hence the provision for a reference to the High Court. We are not restricted to an interpretation of the words in their ordinary and natural which the Attorney-General is required to carry out his functions are not excluded. We are satisfied that each question posed relates to the interpretation of section 26. Even question 4 which concerns the inherent power of the court becomes relevant to the interpretation of section 26 by the words

“Notwithstanding the powers conferred upon the office of Attorney-General by section 26(3) of the Constitution.”

For the foregoing reasons we dismissed the preliminary objection.

When Mr. Georgiadis commenced his submissions on the substantive reference he said “The facts are undisputed.” Mr. Chunga intervened to say that the facts were not undisputed. We found this statement surprising. Although no rules of procedure have been made for the hearing of such references it is usual for the facts to be agreed before a reference is made on a point of law. In the present case despite some remarks made by both counsel in the lower court regarding the matter of calling evidence we were under the impression that the facts stated by Mr. Georgiadis had been agreed by Mr. Chunga in which case no evidence would be necessary. The Chief Magistrate also in making his ruling must have assumed that the facts on which the questions were based were agreed. While Mr. Chunga in the proceedings before us from time to time protested that no evidence had been led at no time did he specifically deny any fact on which Mr. Georgiadis relied.

In the Chief Magistrate’s Court Mr. Chunga heard the facts narrated in open court, raised no objection and indeed was himself anxious that the questions based on these facts be referred to the High Court. He heard the extracts from the National Assembly Reports being read but gave no indication that it was not accepted that the counts now before the Chief Magistrate were not among the 20 charges referred to in Parliament. When the matter was mentioned before the Chief Justice on June 3, 1985, he said he would raise a preliminary point with regard to questions 2 to 5. He said nothing about any intention to dispute the facts. Nor did he do so in the course of making his preliminary objection.

With respect to the Parliamentary Reports he submitted that Mr. Georgiadis had to prove that the present charges were amongst the previous proposed charges and attempted to show by reference to the Reports that some at least of the 20 proposed charges had nothing to do with the charges before the Chief Magistrate. Asked by the court if the charges before the chief magistrate were among the 20 proposed charges, Mr. Chunga replied that he did not know. At the request of the court he was handed a copy of the 20 proposed charges by Mr. Georgiadis. Mr. Chunga later confirmed that the present charges were amongst the previous 20. At the time he stated that he was instructed to indicate that inquiries would have to be carried out to establish how the list of 20 proposed charges came to be in possession of the accused.

We think that for the purposes of this reference we are entitled to assume that the relevant facts are as stated by Mr. Georgiadis and accepted without demur by Mr. Chunga in the Chief Magistrate’ Court.

Mr. Georgiadis in his submissions conceded that except where limitation is imposed by statute, there is no time limit to the prosecution of serious offences such as murder. He referred to various articles in legal

publications on the subject of the powers and duties of the Attorney- General in England. While bearing in mind the absence of a written constitution in England, we think that the principles emerging from these authoritative statements are principles which, having regard to Kenya's adherence to the democratic system and respect for the rule of law, should be followed by the Attorney-General.

In an article in the *International and Comparative Law Quarterly* Vol 22 (1973) entitled "Control of Prosecutions in the United Kingdom" by Bernard M Dickens, the learned author at page 11 had this to say about the functions of the Director of Public Prosecutions :

"It is recognized that "one reason ... for the selection of offences as requiring the consent of the Director is to protect members of the public from oppressive prosecution," but the basic issue in all cases is whether, in the whole of the circumstances, the public interest requires that the proceedings should be taken in a particular case. Where conduct constitutes breach of the strict letter of the law but does not violate its spirit, or a clearly shown offence was committed long before, or committed by a person whose circumstances or character are shown to have changed, no proceedings may be considered necessary."

Sir Elwyn Jones when he was Attorney-General wrote (*Cambridge Law Journal* – April 1969 at page 49) :

"The decision when to prosecute, as you may imagine, is not an easy one. It is by no means in every case where a law officer considers that a conviction might be obtained that it is thought desirable to prosecute.

Sometimes there are reasons of public policy which make it undesirable to prosecute the case. Perhaps the wrongdoer has already suffered enough. Perhaps the prosecution would enable him to present himself as a martyr. Or perhaps he is too ill to stand his trial without great risk to his health or even to his life. All these factors enter into the consideration."

Sir Hartley Shawcross said in the House of Commons :

"The truth is that the exercise of a discretion in a quasijudicial way as to whether or when I must take steps to enforce the criminal law is exactly one of the duties of the office of the Attorney-General... It has never been the rule in this country - I hope it never will be - that suspected, criminal offences must automatically be the subject of prosecution. The public interest ... is the dominant consideration."

("Discretion in Prosecuting" by Glanville Williams (1956) *Criminal Law Review* page 222).

The Attorney-General in Kenya by section 26 of the Constitution is given an unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do." As Sir Hartley Shawcross said this discretion should be exercised in a quasi-judicial way. That is it should not be exercised arbitrarily, oppressively or contrary to public policy. The decision however is his alone. He "shall not be subject to the direction or control of any other person or authority" (section 26(3)). This includes judges and magistrates in relation to the decision to institute criminal proceedings. Once proceedings have been instituted before a court the court has discretion to regulate its own proceedings subject however to the provisions of the Criminal Procedure Code (cap 75).

Do magistrates have in addition inherent powers to refuse to hear a summons if the prosecution amounts to an abuse of the process of the court? In *Republic v Brentford Justices, ex parte wong* [1981] 1 All E R 884 it was held by Donaldson CJ and Mustill J that magistrates in England had such a discretion. No East African authority attributing such powers to magistrates has been cited to us and we can foresee dangers arising from attributing such a discretion to magistrates many of whom are without legal qualifications and unlike magistrates in England have no legally qualified clerk to advise them. Furthermore the prosecutors in magistrates' courts are generally legally unqualified. We are not persuaded that in Kenya they have discretion to refuse to hear a criminal case prosecuted by the Attorney-General or his

representative on the ground that it is an abuse of the process of the court.

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 a remedy in the High Court by way of an application for a prerogative order. We have no doubt that he is correct and that Judges of the High Court have a similar discretion in respect of offences triable before them. (*Connelly v DPP* [1964] 2 All ER 401 cited by both counsel). It is a power to be exercised very sparingly however.

In *DPP v Humphreys* [1976] 2 All ER 497 Lord Salmon said (at page 527-3) :

“I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is in my view, of great Constitutional importance and should be jealously preserved.”

May LJ in *R v Grays Justice* [1982] 3 All ER 653 had this to say regarding prohibition of the further prosecution of proceedings (page 658) :

“ Certainly there must be some abuse of the process of the court, some at least improper and it may be *mala fide* use of its procedure, before an order of judicial review in the nature of prohibition will be made.

In our opinion, although delay of itself, with nothing more, if sufficiently prolonged, could in some cases be such as to render criminal proceedings brought long after the events said to constitute the offence both vexatious and an abuse, we do not think delay of the order that there has been in and in the circumstances of this case can be so described.”

The delay in that case was only two years. The delay in the present case from the dates of commission of the alleged offences is 9 years in the case of two of the counts and 6 in the case of the other two. As may be seen from the National Assembly Official Report for June 30, 1981, the Attorney-General “never went beyond what is called an inquiry” which resulted in 20 proposed charges. The inquiry never went to court. The file was brought to the office of the Attorney-General and he was satisfied that there was no evidence against Mr. Githunguri. Mr. Chunga has conceded that the present 4 charges were amongst those proposed 20 charges.

As stated in the Chief Magistrate’s Court and forming part of the basis for this reference instructions were issued by the Attorney-General’s office to credit the accused’s bank account in Kenya currency with the equivalent amount of the foreign currency specified in the charges before the Chief Magistrate. The accused was informed of this in writing by the bank and was told officially of the decision of the Attorney-General not to prosecute as the files were officially closed. In the light of the foregoing, we take the view that to institute proceedings now is both vexatious and an abuse of the process of the court.

In the present proceedings however we can do no more than answer the questions contained in the reference. The incumbents the office of the Attorney- General are one but just as one incumbent may, having reached a decision not to prosecute, change his mind in the light of subsequent events, so may a later incumbent. We think the right to change the decision may be lost if as in the present case the accused has been publicly informed that he will not be prosecuted and property has been restored to him. As a consequence of being led to believe that there would be no prosecution, the accused may have destroyed or lost evidence in his favour.

We now answer the questions before us as follows :

1. If the office of the Attorney-General makes a decision not to institute or undertake any criminal proceedings against any person the power conferred under section 26(3) of the Constitution is not exhausted or spent.
2. The exercise of the power conferred on the Office of the Attorney-General under section 26(3) should be fair and reasonable and should not be exercised arbitrarily or oppressively.
3. It is a proper exercise of the powers conferred under section 26(3)(a) to institute criminal proceedings against a person charging him with offences allegedly committed over nine years ago following a full inquiry, and after the Office of Attorney-General had then decided not to institute or undertake criminal proceedings and to close the file provided that nothing further has been done such as for example informing the person concerned that no proceedings will be instituted or returning to him or disposing of any property involved.
4. Notwithstanding the powers conferred upon the office of the Attorney-General by section 26(3) of the Constitution the High Court (and not any subordinate court) has an inherent power and a duty to secure fair treatment for all persons who are brought before the Court or a subordinate court and to prevent an abuse of the process of the court.
5. The preferment of a charge against any person nine years after the alleged commission of the offence charged six years after full inquiry in respect thereof and five years after the decision of the office of the Attorney-General not to prosecute and to close the file is
 - a. vexatious and harassing,
 - b. an abuse of the process of the court, and
 - c. contrary to public policy

unless good and valid reasons exist for doing so, such as for example, the discovery of important and credible fresh evidence or the return from abroad of person concerned.

Thus the Chief Magistrate is at liberty to proceed with the trial unless the Attorney-General in the light of our answers decides (as we hope he will) to terminate the proceedings or the accused applies for a prerogative order.

Dated and delivered at Nairobi this 11th day of July, 1985.

A.H SIMPSON

S.K SACHDEVA

W. MBAYA

CJ

JUDGE

JUDGE