Editorial Note

The Preservation of Public Security Act (cap 57) section 4(2) which provided for the making of regulations for the detention of persons and Regulation 6 of the Public Security (Detained and Restricted Persons) Regulations were deleted by Legal Notice No 10 of 1997.

However, the principles set out on Prorogation of Parliament may still be relevant.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA ATA NAIROBI

MISCELLANEOUS CIVIL CASE NO 60 OF 1984

REPUBLIC ....APPLICANT

VERSUS

THE COMMISSIONER OF PRISONS................RESONDENT

EX PARTE

KAMONJI KANG'ARU WACHIRA

JUDGMENT

April 24, 1984, **Simpson CJ** delivered the following Judgment.

On March 13, 1984, following an *ex parte* application on behalf of four persons detained under regulations 6 of the Public Security (Detained and Restricted Persons) Regulations (LN 234 of 1978 for leave to issue a writ of *habeas corpus subjiciendum* granted leave in the form of an order requiring the respondent, the Commissioner of Prisons, to show cause why Kamonji Kang'aru Wachira, George Moseti Anyona, Dr. Edward Akeng'o Oyugi and Koigi wa Wamwere should not be released. In compliance with that order the Commissioner of Prisons appeared represented by the Attorney-General who was assisted by Mr. Chunga, Assistant Deputy Public Prosecutor.

Mr. Kiraitu Murungi and Mr. Gibson Kamau Kuria, the advocates representing the detainees, relied on four grounds on which they contended that the detentions were illegal. These grounds are set out in an affidavit which was sworn by themselves. They may be summarised as follows:

(1) The statements served on the detainees as required by section 83(2)(a) of the Constitution failed to specify in detail the grounds on which they were detained.

(2) These statements were not served within 5 days of the commencement of their detention in accordance with the provisions of section 83(2)(a).

(3) Notifications of the detentions of two of the detainees, namely, Wachira and Oyugi, were not

published in the Gazette within 14 days of the commencement of their detention thus contravening the provisions of section 83(2)(b) of the Constitution.

(4) The Public Security (Detained and Restricted Persons) Regulations 1978 (LN 234 of 1978) and the Public Security (Detained and Restricted Persons) Rules 1978 (LN 235 of 1978) were not properly laid before the National Assembly in accordance with the provisions of section 6(1) of the Preservation of Public Security Act (cap 57).

The respondent having filed an affidavit to the effect that in the case of each detainee notification of his detention had been duly published in the Gazette within 14 days as required by section 83(2)(b) of the Constitution the Attorney-General sought to know whether Mr. Kamau Kuria abandoned his third ground. The reply was in the negative and by consent this ground was argued first.

It is convenient at this stage to set out the provisions of section 83 in full:

"83(1) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of section 72, 76, 79, 80, 81 or 82 when Kenya is at war, and nothing contained in or done under the authority of any provision of Part III of the Preservation of Public Security Act shall be held to be inconsistent with or in contravention of those sections of this Constitution when and in so far as the provision is in operation by virtue of an order made under section 85.

(2)Where a person is detained by virtue of a law referred to in subsection (1) the following provisions shall apply:-

(a) he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained.
(b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Kenya Gazette stating that he has been detained and giving particulars of the provisions of law under which his detention is authorised;
(c) not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the President from among persons qualified to be appointed as a judge of the High Court;
(d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person; and
(e) at the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear in person or by a legal representative of his own choice.

(3) On a review by a tribunal in pursuance of this section of the case of a detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

(4) Nothing contained in subsection (2)(d) or (a) shall be construed as entitling a persons to legal representation at public expense."

In their affidavit Mr. Murungi and Mr. Kamau Kuria stated that Mr. Wachira was arrested on June 29, 1982, and served with his detention order dated July 13, 1982, and statement on July 15, 1982. His detention was notified in the Gazette on July 13, 1982.

Mr. Oyugi was arrested on June 15, 1982, and served with his detention order on July 13, 1982, and statement on July 15, 1982. His detention was notified likewise on July 13, 1982.

Mr. Kamau Kuria contended that the date of arrest was the date of the commencement of the detention in each case. According to the Attorney- General the detention of each detainee commenced with service on him of the detention order.

> **"Detention" in subsection (2) of section 83 clearly means detention "by virtue of a law referred to in subsection (1)".**

Subsection (1) refers to the Preservation of Public Security Act. The detentions complained of were detentions under Regulation 6 of the Public Security (Detained and Restricted Persons) Regulations made under that Act. Regulation 6 reads as follows:

> **"6(1) If the Minister is satisfied that it is necessary for the preservation of public security to exercise control, beyond that afforded by restriction order, over any person, he may order that that person shall be detained.**
>
> **(2) Where a detention order has been made in respect of any person, that person shall be detained in a place of detention in accordance with these Regulations, for as long as the detention order is in force, and, while so detained, shall be deemed to be in lawful custody.**
>
> **(3) The Minister may at any time revoke a detention order.**

An arrest and custody before the date of the detention order is not detention by order of the Minister under the Preservation of Public Security Act. A person may be arrested in the course of police enquiries on suspicions of the commission of a criminal offence or of activities which might justify a report to the Minister responsible for making detention orders. Subsequently such a person while still in custody might be served with a detention order.

The Public Security (Detained and Restricted Persons) Regulations make provision in Regulation 10(1) for serving a detention order as soon as reasonably practicable and in any case not more than 5 days after the commencement of his detention. The detained persons in the present case were duly served. Detention under the Preservation of Public Security Act commences in my view on the date of the detention order where the person to be detained is already in custody and in other cases with the services of the detention order. I am fortified in this view by the following statement of the High Court of Uganda (Sir Udo Udoma CJ, Sheridan J (as he then was) and Jeffreys Jones, J) in *Uganda v Commissioner of Prison (ex parte Matovu)*, (1966) EA 514 at page 545:

> "To constitute a detention under reg 1 of the Emergency Powers (Detention) Regulations 1966 an order signed by the Minister authorising such a detention must be served on the detainees and it is after such service that it could be said that the person was detained by the Minister in the exercise of his powers under the Regulations; and it is only then that the time prescribed under the constitution would begin to run."

It is not disputed that in the case of each of the four detained persons the detention was notified in the Gazette within 14 days of the date of the detention order and after service of the detention order. Thus ground 3 fails. The written statements served as required by section 83(2)(a) on all four persons were in identical terms, as follows:

> "You have engaged yourself in activities and utterances which are dangerous to the good government of Kenya and its institutions and in the interests of the preservation of public security your detention has become necessary."

Under the provisions of section 83(2)(a) of the Constitution the grounds upon which a person is detained must be specified in detail.

It is contended on behalf of the four detained persons:

> (a) that these statements are not sufficient to comply with the provisions of section 83(2)(a), and
> (b) that compliance is mandatory and insufficiency of details invalidates the detention orders.

Section 83(2)(a) has its counterpart in Constitutions of several Commonwealth countries including the former St Christopher, Nevis and Anguilla Constitution. The object of this provision was explained by Lewis CJ, in *Herbert v Phillips & Sealey* (1967) 10 WIR 435 (at p 452).

> "The object of requiring a detainee to be furnished with a statement specifying in detail the grounds upon which he is detained" the Chief Justice said, "is to enable him to make adequate representations to the independent and impartial tribunal which the same section of the Constitution requires to be set up for the review of his case. The statement is not required to contain the evidence which has come to the knowledge of the Governor and which it may be against the public interest to disclose. But is must, in detailing the grounds for detention, furnish sufficient information to enable the detainee to know what is being alleged against him and to bring his mind to bear upon it. A ground which is vague, roving or exploratory is insufficient to enable the detainee to know what is being alleged against him and to bring his mind to bear upon any acts or words of his which may possibly have attracted the attention of the authorities and from which the Governor has drawn conclusions adverse to him which satisfy the Governor that it is necessary to exercise control over him. With such a ground an innocent person would not know where to begin with the representation of his case to the tribunal."

With that statement I am in full agreement. It was approved also by Bweupe J in *Mutale v AG of Zambia* (1976) ZR 139 at p 144 and no authority to the contrary has been brought to my attention. I do not agree with Magnus J, who in another Zambian case said the grounds "must be at least as particularised as they would have to be in a pleading in an ordinary action: (*AG of Zambia v Chipango* (1971) ZRI). Nor do I accept the statement of Bhagwati J, delivering the judgment of the Court in *Khudiram Das v State of West Bengal* (1975) AIR 550 (SC) that:

> "It is obvious that the 'grounds' mean *all the basic facts and materials* which have been taken into account by the detaining authority in making the order of detention and on which, therefore, the order of detention is based". To set all the basic facts and materials would clearly in most cases be prejudicial to security and contrary to public policy. A number of authorities were cited by Mr. Kamau Kuria as examples of statements which were held to be insufficient. In the *Matovu* case (*supra*) the statement furnished to him read: "The grounds on which you are being detained are that you are a person who has acted or is likely to act in a manner prejudicial to the public safety and maintenance of public order".

The court was not satisfied that the statement contained sufficient detail of the grounds for the detention of the applicant.

In *PP Ooko v The Republic of Kenya* (HCCC No 1159 of 1966) the statement supplied to the plaintiff read as follows:

> "As a leading member of the trade union movement you have consistently pursued the role of an agitator and have sabotaged not only good relations in the labour field but also the labour policy of the Government by threatening illegal strikes in essential services thus adversely affecting the economy of the country and thereby the security of the Republic."

Rudd J held that this was not sufficient.

In the instant case the Attorney-General argued strongly that the statement was sufficient. To give particulars would not be in the public interest he said. They might disclose the manner in which the information was obtained and perhaps endanger the person who obtained the details. I am not however convinced that the public interest requires that no further details be given. As was said by Lewis CJ in the

lierbert case the statement must "furnish sufficient information to enable the detainee to know what is being alleged against him and to bring his mind to bear upon it".

The stereotype statement served on the four detainees merely informs them that they have engaged themselves in activities and utterances which are dangerous to the good Government of Kenya. No indication is given of the nature of these activities or utterances. This statement to my mind contains insufficient information to enable the detainees to know what is being alleged against them. Further information could surely have been furnished without endangering the security of the State or the safety of informants.

Were the detention orders in consequence invalid?

Mr. Kamau Kuria relied *inter alia* on *AG of St Christopher v Reynolds* (1979)3 All ER 129 at p 141, where the Privy Council considered a similar provision requiring the grounds of detention to be specified in detail. With regard to the statement in that case Lord Salmon had this to say:

> "It is very short and its barren words bear repetition:
>
> > "That you John Reynolds during the year 1967, both within and outside of the State, encouraged civil disobedience throughout the State, thereby endangering the peace, public safety and public order of the State."
>
> It is difficult to imaging anything more vague and ambiguous or less informative than the words of this notice. It was indeed a mockery to put it forward as specifying in detail the grounds on which Mr. Reynolds was being detained. It seems plain to their Lordships that the irresistible inferences to be drawn from this notice is that there were no grounds, far less any justifiable grounds, for detaining Mr. Reynolds. Had there been any such grounds they would surely have been set out in the notice. The fact that no grounds of any kind have been put forward on behalf of the Governor to justify him making a detention order against Mr. Reynolds, and all the circumstances of the case, raise or irresistible presumption that no such grounds have ever existed. Accordingly their Lordships have no doubt that the detention order was invalid and that Mr. Reynolds was unlawfully detained."

In that case not only were there no grounds for detention shown in the statement but no grounds were shown in a subsequent inquiry and in an action for false imprisonment. It was the complete failure to put forward grounds which led their Lordships to conclude that no grounds existed and that accordingly the detention order was invalid. It was not merely insufficiency of detail.

In the *AG of Zambia v Chipango's* case (*supra*) it was held that failure to furnish a statement of the grounds for detention within the prescribed 14 days rendered the detention order invalid.

While the foregoing two cases can be distinguished other authorities the *Mutale* case (*supra*), *Herbert v Phillips and Sealey* (*supra*) and *Das v West Bengal* (*supra*) cited Mr. Kamau Kuria support his submissions that mere insufficiency of detail renders the detention invalid.

The East African authorities on which the Attorney-General relied I find more persuasive however. In the *Matovu* case Sir Udo Udoma CJ, reading the judgment of the High Court said (at p 546):

> "Insufficiency of the statement of the grounds of detention served on the applicant is a mere matter of procedure. It is not a condition precedent but a condition subsequent. We therefore hold that it is not fatal to the order of detention made by the Minister."

With that statement I respectfully agree. The furnishing of a statement specifying the grounds of detention within 14 days mandatory and failure would no doubt render the detention order invalid as was held in *Chipango's* case. Insufficiency is a relative term. In some cases (such as the present) insufficiency is obvious on the fact of the statement. In others owing to varying circumstances a stereo-type statement

which to one detainee might contain information sufficient to enable him to know what is being alleged against him might convey nothing to another. In such a case the court has to base its decision on the evidence of the detainee assessing his credibility, knowledge and intelligence, a far from sound basis on which to make a finding of invalidity. The defect according to the Uganda High Court is curable by an application to the court under the provisions of the Constitution for directions.

In the *Ooko* case, Rudd J, a most experienced judge came to a similar conclusion:

> "The plaintiff" he said "argued that failure to state sufficient detailed ground rendered his detention unlawful. I think there could well be a great deal of substance in such a submission if no written statement at all of the grounds for the detention had never (sic) been given. In this case there was a statement of grounds though not in sufficient detail."

In such a case he thought the plaintiff's remedy was apply to the High Court for further and better particulars of the grounds for the detention.

In my opinion insufficient of details in a statement furnished under section 83(2)(a) of the Constitution does not render the detention invalid. Since the object is to enable the detainee to know what is being alleged against him the remedy of the detainee is to seek further and better particulars. I agree with the Attorney General that the appropriate forum for such an application is not the High Court but the review tribunal referred to in paragraphs (c), (d) and (e) of section 83(2).

I hold accordingly that ground (1) fails and since the statements were served within 5 days of the commencement of detention ground (2). I turn now to the last ground. Section 6(1) of the Preservation of Public Security Act (cap 57) provides as follows:

> "All subsidiary legislation shall be laid before the National Assembly as soon as may be after it is made, and, if the Assembly within the period of twenty days commencing with the day on which the assembly first sits after the subsidiary legislation is laid before it, resolves that it be annulled, it shall cease to have effect."

An annulment resolution is known as a negative resolution. Where a resolution is required to bring subsidiary legislation into force it is known as an affirmative resolution.

The Public Security (Detained and Restricted Persons) Regulation 1978 (LN 234 of 1978) and the Public Security (Detained and Restricted Persons) Rules 1978 (LN 235 of 1978) are subsidiary legislation. It is not disputed that these Regulations and Rules were laid on November 3, 1978. Mr. Kiraitu Murungi who argued this ground submitted that it was mandatory that they should be laid to 20 days and this was not complied with.

The National Assembly was adjourned on November 3 (a Friday) and prorogued on November 7 without sitting again. The next sitting was on March 6, 1979. The Regulations and Rules were never laid before Parliament at the next or any subsequent session. They therefore became invalid and detention orders made became null and void *ab initio.*

Mr. Murungi relied on passages in *Erskine May's Parliamentary Practice* (19th Edition).

At page 250 the learned author says:

> "The effect of a prorogation is at once to suspend all business until Parliament shall be summoned again. Not only are the sittings of Parliament at an end, but all proceedings pending at the time are quashed… Every Bill must therefore be renewed after a prorogation as if it were introduced for the first time."

The laying of subsidiary legislation before the Assembly, he submitted, was a proceeding pending at the time of prorogation and since the Regulations and Rules in question were not laid again at the next

session they were quashed. No authority was cited for this proposition.

The correct position is I think as stated by the Attorney General in his lucid submissions. An adjournment is an interruption in the course of a session. A prorogation terminates a session and the period between the prorogation of the National Assembly and its reassembly in a new session is termed a “recess” (see *Erskine Hay* at p 259). Once subsidiary legislation has been laid before the House that business (if it can be so described) has been concluded. It does not continue from day to day. The subsidiary legislation in question would again become the business of the House if a member were to move that it be annulled. Once laid subsidiary legislation continues to lie for the 20 days necessary to allow a member to move its annulment should be so inclined. Such subsidiary legislation is valid from the date it is made and continues to be valid unless a resolution for its annulment is passed within 20 days. The period of 20 days commences with the day on which the Assembly first sits after the subsidiary legislation is laid before it. In this instance Parliament having been in adjournment between November 3, the day on which the subsidiary legislation was laid before it and November 7 the day it was prorogued that date was March 6, 1979. Since this followed a prorogation not a dissolution the membership was unchanged. Until March 25, 1979, therefore, a member could have moved a resolution for annulment. This was not done.

In England it is provided by legislation that where a negative resolution may be moved no account is taken of any time. Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days (Statutory Instruments Act 1946, Section 7). Such a provision would have been unnecessary if subsidiary legislation laid before the house were regarded as proceedings pending at the time of prorogation which are quashed by prorogation.

No such provision is to be found here in Kenya but since time did not start to run until March 6, 1979, it is unnecessary for me to decide whether or not time runs during an adjournment or prorogation. Obviously it is desirable that it should not do so otherwise members might be deprived of an opportunity to move a resolution for the annulment of subsidiary legislation laid shortly before prorogation. It is interesting to observe that in section 85 of the Constitution where it is provided that an order of the President bringing into operation Part III of the Public Security Act shall cause to have effect unless approved within 28 days by a resolution of the National Assembly no account is to be taken of any time during which Parliament is dissolved. Nothing is said about time during which Parliament is prorogued. Perhaps the legislature assessed that time would not run during the recess.

I am satisfied that section 6(1) of the Preservation of Public Security Act was duly complied with. If I am wrong the question then arises what is the effect of failure to comply? The answer depends on whether the provisions of the Act are mandatory or directory. It has been held in England that a requirement that Statutory Instruments be laid before Parliament subject to negative resolution is in the absence of express stipulation to the contrary directory only (see *Law and Orders* by CK Allen (4th Edition) at page 163).

Erskine May says:

> **Breach of statutory duty to lay an instrument before parliament will not of itself invalidate the instrument though it may amount to a misdemeanour.”**

Thus even if I were not satisfied that section 6(1) had been complied with I would have held that the Regulations and Rules were not thereby rendered invalid. Ground (4) therefore fails.

The application for a writ of *Habeas Corpus and Subjiciendum* to issue is accordingly refused and the applicants are ordered to pay the costs of the respondent. In view of the nature and importance of the case costs will be taxed on the higher scale and there will be a certificate for two counsel.

Dated and delivered at Nairobi this 24th day of April, 1984.

A.H SIMPSON

JUDGE