REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO 4 OF 1979

ANARITA KARIMI NJERU .....APPLICANT

VERSUS

REPUBLIC .....DEFENDANT

JUDGMENT OF THE COURT

The applicant moves this Court for a declaration that during her trial before the Resident Magistrate Meru upon two charges of stealing by a person employed in the public service (involving respectively Shs 46,574/40 and Shs 9,936) the provisions of section 77 of the Constitution of Kenya were contravened. She further asks for orders that her trial be nullified or otherwise disposed of under those provisions.

The manner in which the Constitution is said to have been infringed is set out in the supporting affidavit dated 5th January 1979 of Mr Mwirichia, of counsel, who has appeared for the applicant both at the trial and in the proceedings before us. Paragraphs 5 to 9 respectively of that affidavit state:

> 5. That the submissions under section 210 of the Criminal Procedure Code occupied 13th and 19th September 1978 and a ruling under section 211 of the Criminal Procedure Code was made at the close of the proceedings on 19th September 1978.
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> 6. That the defence applied for summons to issue on a defence witness resident at Nyeri immediately following the ruling of court on 19th September 1978 in accordance with section 211 (2) of the Criminal Procedure Code.
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> 7. That summons were issued returnable on 21st September 1978.
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> 8 That on 21st September 1978 the summons were returned unserved.
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> 9. That the Court refused a defence application to adjourn the hearing suitably to enable the serving officer to effect service of the summons on the witness.

The witness referred to in this part of the affidavit was Richard Francis Mase, the resident manager in Nyeri of Pannell , Bellhouse Mwangi & Co, the firm of accountants who audited the accounts of the St Mary's Girl's Secondary School, Egoji, Meru, of which the applicant was headmistress until 26th July 1974, in which capacity she was convicted of committing these offences. Mr Mwirichia's affidavit and its seven exhibits are filed with these proceedings. They comprise the auditor's report, the balance sheet and income and expenditure account for the calendar year 1973, together with correspondence passing between the firm and the applicant's successor, Mrs Njue, relating to payment of the firm's charges for preparing those accounts. Their charges were not in fact paid until 25th January 1978.

In paragraph 13 of Mr Mwirichia's affidavit it is further alleged that the Court refused a defence application for an adjournment to enable the applicant to secure the attendance of witnesses other than Mr Mase, of whom it is said the defence had notified the Court. These matters are also covered in paragraphs 10 and 21of the applicant's petition of appeal. This appeal was not heard because the application to file the intended appeal out of time was rejected by Cockar J on 22nd December 1978. Mr Mwirichia quite rightly agreed that he was precluded from raising before us any of the remainder of his grounds in the applicant's petition of appeal, that is to say those not dealing with points validly attributable to the Constitution.

On the morning of the commencement of the hearing before this Court Mr Muttu representing the Republic raised a preliminary objection. After hearing it, we then invited Mr Mwirichia to give us further and better particulars of precisely that which he is alleging under the second head of his complaint, that is to say that the applicant was not given facilities to procure the attendance of witnesses other than Mr Mase. In the event he did not do so; and in our opinion he could not validly do so, for he is on record as having said to the magistrate, after he had returned to conduct the applicant's defence, that the only evidence the defence wished to call was that of Mr Mase. Accordingly, in our view, the only complaint that can lie of an alleged refusal to afford the defence such facilities (and we accept that this means "reasonable facilities" under section 77(2) (e) of the Constitution) is as respects Mr Mase. We mention that we also sought to be enlightened as to which of the paragraphs of section 77 of the Constitution were thereby alleged to have been infringed, and Mr Mwirichia referred to his list of authorities (filed on to the day preceding the hearing) which mentioned both paragraphs (c) and (e) of subsection (2) of that section. This was a rather curious manner of bringing a statutory provision to the notice of a court of law, but, at all events, we were prepared to permit Mr Mwirichia to develop his arguments under both paragraphs. In the event, on the second day of the hearing before us, Mr Mwirichia abandoned the position he had previously taken up under paragraph (c) . We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

While we are dealing with matters of this kind we also draw attention to the way in which the proceedings are instituted. They are numbered "Miscellaneous Criminal Application No 4 of 1979". This was because the firm of advocates acting for the applicant drafted the papers in this way. We observe that both *East African Community v The Republic* [1970] EA 457 and *Okunda v The Republic* [1970] EA 453 (to both of which authorities we were referred in argument) were filed specifically as constitutional references. Though we do not wish to make an issue of this at this stage, we are nevertheless satisfied that that is the correct form of heading. We are also satisfied that the rest of the heading "In the matter of the Constitution of Kenya" and so on, is appropriate to a reference of this nature.

What Mr Muttu argued in support of his submission was that the application was incompetent for one of two reasons, that it was too late for the applicant now to seek redress because she could and should have sought it whilst on trial in the subordinate court; and that, having appealed or sought to appeal to this Court against her convictions and sentences, she should not be allowed to come here again for what is in effect the same purpose. She was attempting, under the guise of a Constitutional reference, to get us to resolve grounds of appeal which this Court had said it would not entertain. For his part, Mr Mwirichia urged us to hold that the fact that the applicant had not sought a reference to this Court whilst on trial was of no consequence; and that, though she had taken other proceedings in this Court, she had been frustrated in her purpose and had had no alternative but to apply to us, for otherwise the decision of the trial magistrate (which he said was unjust) would have to stand. We should invoke the spirit of the Constitution in the applicant's favour to protect a fundamental right which the Constitution had given, and the magistrate had taken, from her.

We will deal with the last point first. The Constitution is a liberal document and we are concerned with that part of it appearing in a chapter which is headed "Protection of Fundamental Rights and Freedoms of the Individual", but we apprehend it to be required of us to proceed on the lines set out in a *dictum* of Das J in *Keshava Menon v State of Bombay* [1951] SCR 228 which this Court adopted in *The Republic v El*

Mann [1969] EA 357, 360, and which reads:

> An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a Court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.

What then are the facts, the law and the arguments upon which we must resolve the preliminary objection set before us? The facts are these. The applicant, whilst on trial, was denied an adjournment to enable her to call a witness, did not thereupon ask for a reference to this Court as to whether or not such denial was constitutional and allowed the trial to go on and to be completed. Then having been convicted and sentenced, she drew up a petition of appeal (which, *inter alia*, contained the points which she would now wish us to resolve) and being out of time to lodge it in this Court as of right, applied for leave to appeal, which Cockar J refused. The law is to be found in Chapter V of the Constitution and comprises sections 70 to 86, and particularly section 77(2)(e) which reads:

> Every person who is charged with a criminal offence ... (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the Court of the same conditions as those applying to witnesses called by the prosecution ...

and section 84 (1) to (4) which provides:

> (1) Subject to subsection (6), if any person alleges that any of the provisions of section 70 to 83 (inclusive) [of this Constitution] has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter is lawfully available, that person (or that other person) may apply to the High Court for redress.
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> (2) The High Court shall have original jurisdiction (a) to hear and determine any application made by any person in pursuance of subsection (1) (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 70 to 83 (inclusive) [of this Constitution].
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> (3) If in any proceedings in any subordinate -court any question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive) [of this Constitution], the person presiding in that Court may and shall if any party to the proceedings so requested, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious.
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> (4) Where any question is referred to the High Court in pursuance of subsection (3), the High Court shall give its decision upon the question and the Court in which the question arose shall dispose of the case in accordance with that decision.

The arguments were these. Mr Muttu asked us to hold that because section 84(3) specifically deals with proceedings in subordinate courts, section 84(1) has no application where a question as to the contravention of a fundamental right or freedom of the individual has arisen in such a Court, and that in any event the applicant having applied for redress in other proceedings cannot now apply under section 84(1) for the same redress, even if (contrary to what he had primarily urged) subsections (1) and (3) of section 84 are not mutually exclusive. To support his argument he drew our attention to Durga Das Basu's *Commentary on the Constitution of India* (5th Edn) Vol 1, where, on page 193 under the subhead "(X) The question must be raised at the proper stage", the author says:

> (A) USA. In the United States, it has been established that Constitutional questions must be raised "reasonably", that is at the earliest practicable moment. As a result of this rule "A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it".

The application was not "reasonably" raised, he said. He also referred us to the wording of section 84(2) which, he claimed, drew the distinction he was making for him because its paragraph (a) refers to applications made under section 84(1) and its paragraph (b) refers to the determination of questions arising from references made under section 84(3). He asked us to adopt a passage from *Craies on Statute Law* (6th Edn) which is reproduced in *The Republic v El Mann* [1969] EA 357, 359, and which reads:

> The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. "The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject-matter with respect to which they are used and the object in view.

and we are content to do so. Mr Mwirichia urged upon us that section 84(1) applies, as it says, to "any person" and speaks of "any of the provisions of sections 70 to 83 (inclusive)", pointing to section 77 being possible of contravention only in a Court. He asked us to hold that section 84(3) is what he called "permissive", meaning that an accused may, in a subordinate court, ask for a reference, but may resolve not to do so without forfeiting his rights under section 84(1) because he would yet be "any person" within it. He told us, "You cannot expect section 84(3) to be utilised every time there is a refusal of an adjournment". He contended that the other steps which the applicant had taken did not prevent her from making (and succeeding in) her instant application because section 84(1) was always there to be utilised. When, however, we drew attention to the words which appear in the subsection in brackets and asked him whether he was saying that an unsuccessful application (say for *habeas corpus*) could be followed by an application for the same relief under section 84(1), he said that it was not possible. But he drew a distinction between such a situation and that now before the Court because "There is no prior decision on this issue".

We are in general agreement with the arguments which Mr Mwirichia advanced as to the relationship of subsections (1) and (3) of section 84; we do not believe that the two subsections are mutually exclusive. Section 84(1) refers, without qualification, to sections 70 to 83 (inclusive) and section 77 is one of those sections. Nor can we convince ourselves, and here we have in mind the principle to which we were referred, that in a document enshrining the rights and freedoms of the individual it was seen fit to limit to a single moment that time when redress must and can only be sought for the contravention of such rights. We are well aware of the maxim", *ignorantia juris neminem excusat*; but the Legislature of this country could surely not have ignored the fact that the great majority of persons accused of criminal offences before the Courts are not represented by counsel. Moreover, though it would be unwise for us, without argument, to essay an analysis of section 84(3) we think it right nonetheless to say that it appears to us to contain nothing to suggest that which Mr Muttu would have us hold, and it does not say that the contraventions for which it caters must have occurred in a subordinate court, only that they must have arisen in proceedings before such Court, which may not necessarily be the same thing.

We must now consider the expression "without prejudice to any other action with respect to the same matter" in section 84(1); and we shall deal first with the words "without prejudice to" and then go on to consider those which follow them. It is clear that a person may utilise the section 84(1) to enable him to secure redress if no other action has ever been available to him; but what if such other action is or had been ,available? Mr Mwirichia would interpret "without prejudice to," in its context as meaning "apart from"; but we prefer "without derogating from," the Latin "*prae*" meaning (for our purpose) before in point of time and "*judicium*" meaning judgment, which leads us to the conclusion that you can apply under section 84(1) before, but not after, you have taken other action, and it is to be observed that section 84(1) says "any other action ... which is lawfully available", it does not say "which was lawfully available".

Accordingly, we read section 84(1) as providing the individual with a means of obtaining redress only if he has never had or has not already utilised such other action as was lawfully available to him. The applicant cannot, therefore, now be heard on this application if the steps she has taken amount to such other action. But to what does "action" refer? Unfortunately, neither counsel dealt with this point. Section 86(1) of the Constitution (which is the definition provision covering section 84) does not interpret the word, whilst section 3 of the Interpretation and General Provisions Act defines it (save where there is something in the subject or context inconsistent with such construction or interpretation, and except where it is expressly otherwise provided) as "any civil proceedings in a Court and includes any suit as defined in section 2 of the Civil Procedure Act". On the other hand, the dictionary meanings (so far as they can apply to the matter under discussion) are "a lawsuit" or "proceedings in a Court".

There can be no doubt that for certain alleged contraventions civil proceedings would be an appropriate way of seeking redress, but what of contraventions offending section 77(2) which concerns itself only with criminal offences? Presumably prerogative writs might go, but in *Re Keshavlal Punja Parbat Shah* (1955)22 EACA 381 it was held that this Court had jurisdiction to entertain proceedings for prerogative writs on the criminal or the civil side of its jurisdiction according to the nature of the proceeding and we take the view that in its context "action" in section 84(1) cannot properly be limited only to civil proceedings. Were this not so, it would enable applications to be made thereunder whenever an alleged contravention set before a Court in a criminal cause had been turned down, but not otherwise; unless, that is, subsections (1) and (3) of section 84 are (contrary to our view) mutually exclusive. Utilising the dictionary meaning seems to us to be the correct approach and we believe that in its context the word "action" means proceedings in a Court. And there were such proceedings in this case, ie those before Cockar J although they were prematurely determined. In those proceedings there were grounds of appeal with respect to the same matters which Mr Mwirichia wishes us now to consider. Nor are we attracted by the argument that whatever may have been done in the past, no other remedy is now available; *interest reipublicae ut sit finis litium* commends itself to us and, as Mr Mwirichia conceded, a Court ought not to be asked to adjudicate more than once on the same issues. We do not think it right to go behind the order which this Court made. Cockar J has in fact said to the applicant "You are too late to raise these questions" and we do not think that we should now add "but not in respect of one or two of them". The preliminary point taken before us thus succeeds, but having heard Mr Mwirichia on the merits we shall now discuss them.

Trevelyan J then described the details of the events before the magistrate on 19th,, 20th and 21st September 1978 and concluded: The Defence left the matter until the submission of no case had been rejected on 19th September, before applying for the witness summons. We are not impressed by Mr Mwirichia's contention that he was taken by surprise because the prosecution called only twenty-three witnesses, instead of the anticipated thirty-two, and thus concluded their case earlier than expected. It may well be that Mr Mase was on vacation in August, and that the accountants' head offices were in Nairobi. Nonetheless there remained nearly three weeks within which to secure his attendance. They could have applied for a summons well before 19th September. In our view the defence was not entitled to take it for granted that the magistrate would accede to its submissions of no case, or await its rejection, before applying for the summons. Even were this not so, the summons was issued on 19th September, and it was by no means impossible for it to be served on Mr Mase, 90 miles away though he was, and for him to have attended on 21st September.

Mr Mwirichia at this juncture referred us to *Muyimba v Uganda* [1969] EA 433, in which Russell J is recorded as having said that it was unreasonable to expect a professional man to drop everything and hasten 80 miles by road to the Court. But that was said in relation to an advocate defending an accused person, and moreover the trial magistrate was under a misapprehension as to the advocate's knowledge of the hearing date, a fact which appears to have been induced by his clerk. In a similar case, that of *Dixon Gokpa v Inspector-General of Police* [1961] 1 All NLR 423 it was said that there had been a denial of a fair trial.

At all events in the instant case, we are satisfied that the defence were well aware of the nature of the evidence they needed, and by whom it would be given, at latest by 16th August, and very probably well before that. Given the circumstances we have set out we are quite unable to say that the magistrate's

discretion exercised under section 211 (2) of the Criminal Procedure Code, was unjudicially or in any way improperly, exercised. This does not necessarily mean that had either of us been trying the case we would have exercised the discretion in the same manner; although we might very well have done so. It follows that, in our view, the claim that the defence was not afforded reasonable facilities to procure the attendance of the witness Mr Mase fails, since we have not been persuaded that the magistrate's discretion, which was undoubtedly exercised, was exercised un-judicially or improperly.

Application dismissed.

Dated and delivered at Nairobi this 29th day of January 1979

E. TREVELYAN

JUDGE

A.R.W HANCOX

JUDGE