



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 116 OF 2007**

**THOMAS PATRICK GILBERT CHOLMONDELEY..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Ruling and Order of the High Court of Kenya at Nairobi (Apondi, J) dated 27<sup>th</sup> day of July, 2007*

**In**

**H.C.Cr. Case No. 55 of 2006)**

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**JUDGMENT OF THE COURT**

The question that we shall attempt to answer in this appeal was posed by Mbogholi-Msagha and Kuloba, JJ way back in 2003 in the case of **GEORGE NGODHE JUMA & TWO OTHERS VS. THE ATTORNEY GENERAL**, Miscellaneous Criminal Application No. 345 of 2001 (unreported). There, the High Court was asked to rule that the right to a fair trial with regard to criminal matters, guaranteed in **section 77** of the Kenya Constitution which is the supreme law of the country, of necessity, involved the duty on the part of the prosecution to supply an accused person with all the relevant material in its possession, and to do so in advance of the beginning of the trial so that the party to be tried is made aware of the case to be advanced against him and to accordingly prepare his answer to that case. The two learned Judges had no difficulty at all in giving a positive answer to the question posed before them, though of course they made certain exceptions and circumstances in which the duty of the prosecution to give an advanced disclosure to an accused person may be excused, such as where the state is claiming public interest immunity. The state did not as far as we are aware, appeal against the decision of the learned Judges of the High Court and in the case of **THOMAS PATRICK GILBERT CHOLMONDELEY V. REPUBLIC**, which is the subject of the appeal before us, the Republic, at the beginning of the trial before Muga Apondi, J, duly supplied the defence with the relevant evidence which it (i.e. the Republic) intended to bring before the High Court in support of its charge of murder against Cholmondeley (hereinafter “*the appellant*”). We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under **section 77** of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified. The position is the same in various

commonwealth countries. The United Kingdom does not have a written constitution as we in Kenya do, but even there on the issue of disclosure of evidence, their law is the same. In **R V WARD [1993] 2 ALL ER 557**, Ward who was alleged to be a member of the Provisional Irish Republican Army, the IRA, was charged with very serious offences of having participated in a bombing spree between 1973 and 1974. In one such bombing incident in London, twelve people were killed and others injured. Ward was tried and convicted on various offences, connected to the bombings and was sentenced to life imprisonment as the United Kingdom abolished the death penalty a long time ago. Ward appealed to the Court of Appeal in England and the main ground was that before and at her trial, there was a material irregularity in the failure of the prosecution to disclose to the defence relevant evidence which it was under a duty to disclose. GLIDEWELL, NOLAN, and STEYN, LJJ who heard Ward's appeal were unanimous in allowing her appeal and they held that:-

***“The prosecution’s duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses. -----“***

Despite the gravity of the charges against Ward, the Court of Appeal in England still allowed her appeal, quashed the various convictions against her and set her free. The English court based its decision on a common law duty. In our circumstances it is based on our Constitution. The Supreme Court of Canada took exactly the same stand in the case of **R V. STINCHCOMBE [1992] LRC (Cri) 68**. There **Stinchcombe** who was a practising lawyer, was charged with criminal breach of trust, theft and fraud. He was in the end convicted and with leave he eventually appealed to the Supreme Court on the issue of failure by the prosecution to disclose certain material or evidence to him. The Supreme Court held, ordering a retrial, that:-

***“In indictable offences the Crown had a legal duty to disclose all relevant information to the defence. The fruits of the investigation which were in the position of the Crown were not its property for use in securing a conviction but were the property of the public to ensure that justice was done. The defence were under no obligation to assist the prosecution, or make reciprocal disclosure, and was entitled to assume a purely adversarial role towards the prosecution. Arguments advanced by the Crown - the absence of a duty to disclose that such a duty would impose onerous new obligations on prosecutions resulting in delays, and would allow the defence to tailor its evidence to conform with the information disclosed – were not convincing. Failure by the prosecution to disclose would impede the ability of the defence to make full answer and defence, a common law right which was subsequently included in the Canadian Charter of Rights and Freedoms and was one of the pillars of the criminal justice system which ensured that the innocent were not convicted. The obligation to disclose was a continuing one and was to be updated when additional information was received. The material to be disclosed included not only that which the Crown had intended to introduce but also that which it had not. All statements obtained by the prosecution from persons who had provided relevant information were to be disclosed to the defence regardless of whether or not they were going to be called as Crown witnesses. Where statements did not exist, other information, such as notes, were to be disclosed or, where there were no such notes the name, address, occupation of the witness and all information in the possession of the prosecution relating to any relevant evidence that the person could give were to be supplied to the defence.”***

Our understanding of this Canadian decision is that there is a duty on the part of prosecuting authorities to disclose to an accused person the evidence which they intend to bring before the court in support of their charge. That duty also includes disclosing to an accused person evidence which the prosecution has in their possession but which they do not intend to use during the trial. Such evidence may, if adduced,

weaken the prosecution's case and strengthen that of the defence; whatever may be its nature, the prosecution is still obliged to disclose it to the defence. The duty continues during the pre-trial period and during the trial itself, so that if any new information is obtained during the trial, it must be disclosed.

Of course in some cases, the prosecution may claim public interest immunity and the courts in Kenya will have to consider the provisions of the newly enacted Witness Protection Act, No. 16 of 2006. In certain circumstances, the courts in Kenya may well hold that it would not be in the interest of justice to disclose the names, address and occupation of a particular witness or witnesses. But their evidence would have to be disclosed for we cannot imagine a situation in which an accused person can be ambushed with totally new evidence and convicted thereon.

We now live in a global village and these principles which have served the interests of justice in well established commonwealth jurisdictions must also apply in Kenya and the basis for applying them in the country is even sounder: We have the provisions of **section 77** of the Constitution whose purpose is to guarantee to persons accused of crime fair trial within a reasonable time. Even in the United Kingdom they have now been forced to legislate these requirements though the Act there, the Criminal Procedure and Investigations Act, 1996, **Chapter 25** goes much farther and places upon an accused person a reciprocal duty to disclose his case to the prosecution. This can be explained on the basis that the United Kingdom, like the United States of America, are all trying to cope with terrorist attacks upon their countries. The United States of America has been forced to hold its "terrorist suspects" in Guantanamo Bay, far away from the reach of the Supreme Court. In the United Kingdom there is no written constitution and the principle there is the supremacy of Parliament. In Kenya, if Parliament were to attempt to introduce an Act similar to the British Criminal Procedure and Investigations Act, 1996, without appropriate amendments to the Constitution, the courts here might well strike out such an Act as being unconstitutional. The Court of Appeal in Uganda, which is the Constitutional Court in that country, appears to have applied these principles – See **OLUM & ANOTHER V. ATTORNEY GENERAL [2002] 2 EA 508**. We think the High Court was perfectly right in applying the principle in **JUMA'S Case**, (supra). The case has the seal of approval of this Court and it must be taken as correctly setting out the legal position in the country.

We now go back to the question which the learned two Judges in the **JUMA Case** did not resolve and which Muga Apondi, J attempted to resolve in the present dispute. In their judgment the learned Judges in the **JUMA Case** remarked as follows:-

***“It is not easy to justify the position which clings to the notion that the prosecution does not have a legal duty to disclose all relevant information. Opponents to such disclosure sometimes say that the duty should be reciprocal, so that the accused too should disclose his case before trial. This will be considered when an occasion presents itself for its consideration. It does not arise in the present reference before us. But while it deserves consideration in the future, it is not a valid reason for absolving the prosecution of its duty. -----“***

This question arose before Muga Apondi, J in the following manner. As we have seen, the appellant before us is being tried before that learned Judge on a charge of murder. The prosecution, at the beginning of his trial, supplied the defence with all the relevant material upon which they intended to rely. That was perfectly right because that material was gathered by the police using the resources provided by tax-payers among whom is the appellant. That material is not the personal property of the police and the police are under a legal duty to gather it on behalf of the public. Of course, no busy-body would be entitled to demand to see that material, unless there be some very good reason for such a demand. But the appellant was a party directly involved in the affair and as public property directly affecting him, he was entitled to. The police were under a legal duty to pass that material to the Attorney General and the Attorney General, who is, in all criminal cases, the prosecuting authority was bound to disclose it to the appellant before his trial and throughout the trial. If the Attorney General received any new information during the trial the Attorney General was bound by law to disclose it. This is because the duty of a prosecutor, acting on behalf of the Republic is not to secure a conviction at all costs but to be a minister of justice, i.e. to help the court arrive at a just and fair decision in the circumstances of each case. Any public prosecutor who sees his or her duty as being to secure

convictions misses the point. As ministers of justice, public prosecutors must place before the court all evidence, whether it supports his or her case or whether it weakens it and supports the case for the accused.

Having supplied this appellant with the material at its disposal, the trial of the appellant proceeded, the case for the Republic being led by no lesser a person than the learned Deputy Public Prosecutor, Mr. Keriako Tobiko. At the close of the Republic's case Muga Apondi, J ruled under **section 306** of the Criminal Procedure Code, **Cap 75** Laws of Kenya, that the appellant had a case to answer on the charge of murder. Following that ruling, Mr. Fred Ojiambo, learned counsel for the appellant, told the Judge and we quote:-

***“Accused will make an unsworn statement. We also intend to call 7 witnesses in total. One of the witnesses was a prosecution witness viz Fanuel Musonge. He gave evidence as PW 28 F NO 21489 – Chief Inspector Musonge.***

***We also apply for summons against him to produce a master card in relation to Frank Tundo – together with any temporary permits that have been issued under the card.***

***All other witnesses will be called by the defence. The accused is willing to give his defence even now.”***

Mr. Tobiko, in turn, told the Judge:-

***“I appreciate the readiness of the defence to defend themselves even now. That was because they had already been supplied with the statement of witnesses. They knew our case in advance as required by the Constitution. We have very little idea of what defence they have to offer. Your Lordship has had the benefit of delivering a Ruling as (sic) section 77 of the Kenya Constitution, Ref pg. 17 of your Ruling. As the prosecution, we represent the society and public at large. The rights of a fair trial is not the monopoly of the accused person. The prosecution and the defence should be given equal chances. My colleague has conveniently kept quiet on who the other witnesses are: we have not seen the statements of those witnesses. We do seek an order directing the defence make (sic) a full disclosure of their witnesses. They must also be directed to supply to the prosecution, the statements of their witnesses.***

***In addition we seek direction in advance to be supplied with copies of all ballistic and scientific reports that they intend to produce in evidence. That will enable us to decide whether to call rebuttal evidence as allowed by law. We are ready to take the earliest hearing date.”***

Mr. Tobiko continued:-

***“Your jurisdiction arises from two sources:-***

***Section 60 of the Constitution gives this court original jurisdiction in both criminal and civil matters.***

***Secondly, your Lordship has inherent powers to regulate the processes and procedure. I pray that you invoke the powers that have been invested in you.”***

Mr. Ojiambo was apparently taken by surprise by Mr. Tobiko's submissions and Mr. Ojiambo, regretfully, was not of much help to the Judge on Mr. Tobiko's application. We think he ought to have asked the Judge for time to consider the issue or issues raised by Mr. Tobiko. Mr. Ojiambo simply told the Judge:-

***“I do not know whether my colleague is making an application for the interpretation of section 77 of the Constitution. My colleague seems to remind you about a Ruling that you made obiter dicta on section 77 of the Constitution. This Court has never given an interpretation of that section and whether the prosecution has the rights he claims. Currently there is no such pending application before the court. We do not wish to state anything further.”***

The learned trial Judge for some reason of his own, took this to be Mr. Ojiambo's full answer to the issues raised by Mr. Tobiko. The Judge proceeded as follows:-

***“COURT: in view of the above, the court hereby reserves its Ruling to 27<sup>th</sup> July, 2007 at 11.00 a.m.”***

With respect to the learned Judge, we think he should have asked Mr. Ojiambo to clarify his position further and if he (Mr. Ojiambo) wanted Mr. Tobiko to make a formal application for the interpretation of **section 77** of the Constitution. It is worthy of note that both Mr. Tobiko and Mr. Ojiambo did refer to **section 77**. It is clear to us beyond peradventure that in his application, Mr. Tobiko was claiming that the Republic is equally entitled to the benefits available to an accused person under **section 77** of the Constitution. Otherwise why would Mr. Tobiko tell the Judge:-

***“----- The rights of a fair trial is not the monopoly of the accused person. The prosecution and defence should be given equal chances. ---- We have not seen the statements of those witnesses. We do seek an order directing the defence make a full disclosure of their witnesses. They must also be directed to supply the prosecution the statements of their witnesses.”***

However hard one may try to dissemble, what Mr. Tobiko was asking the Judge to do was to order the defence to disclose to them in advance their (i.e. the defence) case as the prosecution had done in favour of the defence. The right to a fair trial guaranteed to persons accused of an offence by **section 77** of the Constitution is not a monopoly of such accused persons. The prosecution and the defence should be given equal chances. In pursuit of such equal chances, Mr. Ojiambo ought not to have conveniently kept quiet on who the other witnesses were but should have disclosed their names to the prosecution. Since Mr. Ojiambo had failed to do so the court was under a duty to order the defence to desist from their silence and disclose to the prosecution their case, including the statements of the witnesses to be called, copies of all ballistic and scientific reports that were intended to be produced. Mr. Tobiko did not directly lay his claim under **section 77** of the Constitution; rather he laid it under **section 60** of the Constitution and the inherent power of the High Court to regulate its processes and procedure.

How did the learned Judge deal with these issues? He readily agreed with the position taken by Mr. Tobiko. Having cited the decision in **JUMA'S Case**, the learned Judge states:-

***“The million dollar question is whether the prosecution is also entitled to reciprocal rights. Assuming that the prosecution are not entitled to the same, will the playing field be level? At the outset, it is apparent that parliament has not provided similar provisions in favour of the state during a criminal trial. It is not clear why such rights have not been conferred on the prosecution. ----.”***

The Judge then cites a quotation from **JUMA'S Case** and continues as follows:-

***“My keen observation in this case clearly show (sic) that the court was able to hear the thirty eight witnesses expeditiously since the defence knew from the outset the case that their client was facing. They had the statements of all the witnesses and copies of various reports that had been made by different experts. It was on the basis of the above information that the defence team was able to do commendable research which resulted in meaningful and incisive cross-examination. Given the above and my inherent powers, I hereby direct the defence team to supply the prosecution with the following:-***

***(a) Statement (sic) and particulars of the 7 witnesses.***

***(b) Copies of any document or forensic reports.”***

The appellant appeals against these findings and a total of eight (8) grounds of appeal are cited in the memorandum of appeal, namely:-

***“1.The decision of the learned judge was made without jurisdiction.***

2. *The learned judge erred in law in making the order without giving the Appellant an opportunity to be heard.*
3. *The learned judge erred in law and fact in failing to find that the respondent should have filed a formal application for the interpretation of section 77 of the Constitution.*
4. *The decision of the learned Judge violates the Appellant's constitutional right to protection of the law under section 77 of the Constitution.*
5. *The learned judge having found that there are no legal provisions in favour of the Respondent similar to those in favour of the Appellant, for a fair hearing during a criminal trial, erred in law and misdirected himself in proceeding to make the impugned order.*
6. *The learned judge erred in law in misapprehending and misrepresenting the principle in Juma & Others vs. Attorney General, High Court Miscellaneous Criminal Case No. 345 of 2001, in failing to apply the correct principle correctly and in failing to seek the parties comments on the case prior to applying it.*
7. *The learned Judge misdirected himself in arriving at the decision based on belief and anticipations which were not supported by any evidence.*
8. *The decision of the learned Judge displays manifest bias against the appellant."*

When the hearing of the appeal opened before us, Mr. Tobiko took a preliminary objection in limine that we had no jurisdiction to hear the appeal. We gave a decision on the spot, ruling that we had jurisdiction and we reserved our reasons for so doing. We think it will be easier for us to give our reasons for holding that we had jurisdiction after we have dealt with the main issue, namely, was the learned Judge right in ordering the appellant to disclose to the prosecution his case in advance?

We start from the point that in each and every criminal prosecution, the burden of proof of guilt is invariably upon the prosecution and at no stage does that burden shift to an accused person whether the accused person be the meanest beggar on our streets, or Lord Delamere whose grandson the appellant is said to be. **Section 77 (2) (a)** of the Constitution puts it thus:-

***"(2) Every person who is charged with a criminal offence –***

***(a) shall be presumed to be innocent until he is proved or has pleaded guilty;"***

And **section 77 (7)** says:-

***"No person who is tried for a criminal offence shall be compelled to give evidence at the trial."***

So if at the beginning of the trial, the Constitution obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance? Mr. Tobiko's position appears to be that if the accused person chooses to give evidence and call witnesses then he ought to be able to disclose his case to the prosecution. That contention, however, ignores one basic distinction. The privileges, if we may so designate them, of the accused person are conferred on him by the Constitution. As soon as he is arrested, he shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. Nobody is ever likely to arrest the Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence against it. The question of reciprocity is, therefore, misplaced. The other rights set out under Chapter 5 of the Constitution which is headed "**protection of fundamental rights and freedoms of the individual**" run from **section 70** to **section 82**. **Section 70** of which marginal notes are "*fundamental rights and freedoms of individual*" opens with the averment that:-

***"Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual***

***that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -----.***

The various succeeding sections, among them **section 77**, then set out the various rights which each individual in Kenya is entitled to. Surely the state cannot qualify as an individual in the sense set out in these provisions. No individual person can deprive the state of its life or existence; only another state can deprive the state of Kenya of its right to exist and only through an act of war. No person can deprive the Republic of its liberty; no person can hold the Republic in slavery or servitude except another state and by an act of war. Nor can any person subject the Republic to torture or inhuman or degrading treatment. All these rights are rights which are inherent in each and every individual living in Kenya and the prosecution, as an adjunct of the state, cannot claim those rights as being applicable to them. That must be why Mr. Tobiko was clearly reluctant to base his claim to entitlement to disclosure under the provisions of **section 77** of the Constitution. He instead resorted to the provisions of **section 60** of the Constitution and the inherent jurisdiction of the High Court as a court. **Section 60 (1)** of the Constitution provides:-

***“There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.”***

With regard to this section, stress is always laid on the phrase:-

***“unlimited original jurisdiction in civil and criminal matters -----.”***

*What does that phrase mean in the context of the Constitution?*

We can only illustrate the concept by examples. **Section 64 (1)** creates the Court of Appeal. The Court of Appeal is a Court with limited jurisdiction. It does not have original jurisdiction and cannot conduct a trial of a case, except in certain rare circumstances like when it is alleged a party is in contempt of the Court itself. But under the Constitution it only has:-

***“--- Such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law -----”*** - see for example **JASBIR SINGH RAI & 3 OTHERS VS. TARLOCHAN SINGH RAI & 4 OTHERS**, Civil Application No. NAI. 307 of 2003. (unreported)

Then **section 65 (1)** authorizes Parliament to create subordinate courts and pursuant to that section the courts of the magistrates were created under the Magistrate’s Courts Act, **Chapter 10** Laws of Kenya. Each magistrate’s jurisdiction is strictly limited as to the territory the magistrate can cover and the amount or value of the subject matter in dispute. Again **section 66 (1)** authorizes the creation of the Kadhis courts and the Kadhis Courts Act, **Chapter 11** Laws of Kenya limits the jurisdiction of the Kadhis to matters pertaining to Islamic law.

All these courts, namely the Court of Appeal, the Magistrates’ Courts and the Kadhis Courts are courts with limited jurisdictions. In the case of the Court of Appeal its jurisdiction is limited to hearing appeals from the High Court. In the case of the magistrates’ courts, while they have original jurisdiction to hear certain matters, yet that jurisdiction is limited as regards territory and value of the subject matter in dispute. The Kadhis courts can only deal with matters relating to Islamic law.

The High Court, on the other hand can hear all matters without regard to territory or the subject matter in dispute. In criminal matters, it has jurisdiction to try the pettiest of offenders to the murderer. Likewise, in civil matters it has the jurisdiction to try a claim for the meanest amount without regard to the origin of the claim. Of course it does not normally do so; it would be overwhelmed by the sheer volume of work. But it has the jurisdiction to do so. That is our understanding of the phrase:-

***“--- unlimited original jurisdiction in civil or criminal matters ----”***

in section **60 (1)** of the Constitution.

But can the High Court, as it were, create more jurisdiction for itself under **section 60 (1)** so as to give itself power to order that even though **section 77** of the Constitution does not confer on the prosecution the powers it confers on an accused person, yet the High Court itself can confer those powers? In our view that question is merely rhetorical. **Section 60 (1)** itself clearly stipulates that the High Court shall have:-

***“--- such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.”***

So the jurisdiction or powers must be conferred on the High Court either by the Constitution itself or by any other law.

Muga Apondi, J, appreciated that Parliament had not conferred on the prosecution the same rights as those conferred on accused persons. He, therefore, resorted to his inherent jurisdiction as a court and since he thought it would be convenient for the prosecution to have the same privileges as those of the accused person, the learned Judge would himself confer such powers on the prosecution through the exercise of his inherent jurisdiction.

That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under **section 77** of the Constitution. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association. We know who is capable of locking up individual Kenyans in the Nyayo House Dungeons. We know who is capable of telling Kenyans: *“If you rattle a snake you must be prepared to be bitten by it.”* It is the state who has the capacity to deprive individual Kenyans of their rights guaranteed by **sections 70 to 82** inclusive of the Constitution. In the recent case of **PAUL MWANGI MURUNGA V. REPUBLIC**, Cr. Appeal No. 35 of 2006, (unreported) this Court, having cited the case of **NDEDE V. REPUBLIC [1991] KLR 567**, delivered itself as follows:-

***“The appellant in this case had been brought to court some thirty days after his arrest. It was one of those cases which were then called “The Mwakenya cases.” The courts then chose to see no evil and hear no evil, and sought no explanation as to where the accused persons involved in those cases had been before being brought to court. The consequence of the silence on the part of the courts was the infamous “NYAYO HOUSE TORTURE CHAMBERS. It is a history about which the courts of this country can never be proud of.”***

We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by the Constitution. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in the Constitution and it ought not to be allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the courts must try to keep the lion away from the lamb. In other words there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute gives the state such privileges, and the Constitution, wisely in our view, does not give the prosecutors such powers. They cannot be given through the inherent power of the court. Even in civil matters, there is a specific provision in the Civil Procedure Act, **Chapter 21** Laws of Kenya, recognizing the existence of the inherent power of the court:-

***“to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of***

*the court.*” – see *section 3A*.

There is no similar provision in the Criminal Procedure Code, **Cap 75** Laws of Kenya and we think the omission is deliberate. But even if there was such a power with regard to criminal matters, we do not accept that a judge would be entitled to create non-existent rights and confer them upon a party as the learned Judge purported to do here. Of course this appellant is a person who cannot be compared to a tame and helpless lamb. He is clearly a well-heeled member of society, the type the Court referred to in the case of **PAUL MWANGI MURUNGA V. REPUBLIC**, supra. He has, through his able lawyer Mr. Ojiambo, fought the State to a stand-still since Muga Apondi, J made his ruling nearly one year ago. The appellant himself, if not exactly a lion, can be compared to a tiger, able to wage his own battle against the State. He certainly is not representative of the persons who day in and day out pass through our criminal justice system. It is not surprising that Mr. Tobiko in the end asked us to confine any principle we may make to be applicable only to the circumstances of the appeal. It would clearly be contrary to the spirit if not the letter of our Constitution to lay down a principle that the prosecution is entitled to demand and receive in advance a disclosure of evidence from well-heeled Kenyans but not from the poor and vulnerable. We reject any such distinctions being introduced in the criminal justice system. We think there is merit in the complaints raised by the appellant in grounds one, four, five, six and seven of the grounds of appeal.

As to ground two, we think the fault lay with Mr. Ojiambo and he ought not complain that he was not heard. He chose not to address the Judge or ask him for directions or for time to consider his position and though the learned Judge also acted rather precipitately, probably with the desire to bring the trial to an end, Mr. Ojiambo was nevertheless heard as regards what he had to say. He was availed opportunity to be heard in any way. There is no merit in that ground.

As to ground 3, we have stated time and again that each judge of the High Court is a constitutional judge and where an application is made before any of them touching on any section of the Constitution they can deal with it without necessarily insisting on a formal application. The learned Judge in this case understood the issue he was called upon to determine and he dealt with it. There is no allegation that he had no jurisdiction to do so. We reject that complaint as well.

Ground 8 which alleges bias on the part of the learned Judge has no basis in fact and is really unjustified. We reject that ground as well.

We must now deal with the reasons why we ruled that the appeal before us was competent and that we had jurisdiction to deal with it. In ordinary criminal trials, there is generally no interlocutory appeals allowed for **section 379 (1)** of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; Muga Apondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal. But the basis of this appeal, as far as we are concerned is that the learned Judge made an order in the course of the trial which violated the appellant’s fundamental rights guaranteed by **section 77** of the Constitution. Whether that order was made pursuant to **section 60 (1)** of the Constitution, and we have found it could not have been made under that section, or whether it was made pursuant to the exercise of inherent jurisdiction as the learned Judge said he was doing, the effect of the order was to violate the appellant’s rights under **section 77**. The appellant had two choices. He could have chosen to wait until after the determination of the charge against him and if he was convicted, he would be entitled to appeal on all aspects of the trial. Secondly, he had the option to appeal under **section 84 (1)** of the Constitution. He chose to exercise this option and it is to be noted that the trial Judge readily allowed him to appeal. The Judge must have been aware that his decision touched on the fundamental rights of the appellant guaranteed by the Constitution and hence he (i.e. the Judge) readily agreed to stop the trial and allow the appellant to exercise his right of appeal under **section 84 (7)** of the Constitution. It was for these considerations that we held the appellant had a right of appeal to the Court and that we, therefore, had jurisdiction to hear his appeal.

We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under **section 84 (7)** of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25<sup>th</sup> July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court.

We have said enough, we think, to show that we are allowing this appeal. We allow the appeal on grounds **one, four, five, six** and **seven** set out in the memorandum of appeal. We set aside the Ruling of Muga Apondi, J dated 27<sup>th</sup> July, 2007 and we also set aside all the orders consequent upon the said Ruling. The trial of the case must now proceed to its conclusion. Those shall be our orders in the appeal.

Dated and delivered at Nairobi this 13<sup>th</sup> day of June, 2008.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**