



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, TUNOI & GITHINJI, J.J.A.)
CIVIL APPEAL NO. 131 OF 2005

BETWEEN

UWE

MEIXNER

VIOLET AKINYI ODERO
APPELLANTS

AND

THE ATTORNEY GENERAL
RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at

Mombasa (Maraga J) dated 20
th
April, 2005
in

MISC. CIVIL APPLICATION NOS. 222 OF 2005 AND 223 OF 2005

JUDGMENT OF THE COURT

This is an appeal from the ruling of Maraga J dated 20th April, 2005 in which the learned Judge of the superior court dismissed respective applications by the two appellants for leave to apply for orders of certiorari and prohibition relating to Mombasa High Court *Criminal Case No. 24 of 2004*.

The two appellants were jointly charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code in Mombasa, High Court, Criminal Case No. 24 of 2004. They were alleged to have murdered one Hanifa Uwe on the night of 21st and 22nd March, 2004. The deceased was living with the first appellant Uwe Meixner – a German national who was running business in Mombasa - as his wife while the second appellant was the first appellant’s girl friend. The two appellants filed separate but similar applications (Misc. Criminal Application No. 222 of 2005 and 223 of 2005 respectively) under **Order LIII Rules 1** and 2 of Civil Procudure Rules seeking leave of the court to apply for:

- (i) *Order of prohibition prohibiting the Hon. Attorney General from charging and or*

prosecuting the applicants for the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

(ii) Order of certiorari to remove into the High Court and quash the decision of the Hon. Attorney General and his subordinates to prosecute the applicants for the offence of murder contrary to section 203 as read with section 204 of the Penal Code on allegations contained in the information filed in the High Court Criminal case No. 24 of 2004.

The two appellants, as the their respective statements to support the applications show, applied for leave to apply for orders of prohibition and certiorari on identical grounds. They aver in the main ground that:

“... trial is an abuse of the constitutional powers conferred in (sic) the Honourable Attorney General and an abuse of the court process because:-

(a) The Honourable Attorney General decided to charge them when all the evidence shows that they are innocent”.

The appellants annexed to the applications copies of statements of about 40 police witnesses including their own statements to police all supplied to them by police through a court order. The trial Judge however, found that the appellants had not made out a prima facie case for grant of leave for two reasons, firstly, that the insufficiency of the evidence to support the charges were matters of evidence and merits which do not fall within the purview of Judicial Review, and, secondly, the High Court does not have jurisdiction to halt the prosecution of cases before it through judicial review. The learned Judge said in part:

“In this application it is the Applicants’ case that there is no evidence against them to support the Honourable the Attorney General’s decision to charge them with the offence of murder. To the contrary, the applicants contend, the statements of the witnesses and the documentary exhibits in their possession, some of which they have exhibited, prove that they are innocent. These are matters of evidence and merits which do not fall within the purview of judicial review Besides the fact that the Applicants’ complaint does not fall within the scope of judicial review, the High Court has no jurisdiction to halt the prosecution of cases before it. It can only halt prosecutions of cases before inferior courts or tribunals. The applicants of course argued that the orders they wish to apply for are directed against the Attorney General. The effect of those orders, however, is to terminate the prosecution of the murder case against the applicants already commenced in this court”.

The appellants state in their memorandum of appeal that the learned Judge erred in law in so finding. They stated that it is not a prerequisite for the grant of leave to prove a prima facie case. They also complain that the trial Judge ignored other complaints made against the Attorney General, to wit, that, the Attorney General was influenced by third parties; that the Attorney General first made a decision to charge the appellants and then sent investigators to come up with the evidence, and, lastly, that, there were attempts to blackmail and force the second appellant to give false testimony.

The leave of the court is a prerequisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion. This Court can only interfere with the discretion of the learned Judge denying the appellants leave to apply for judicial review on the firmly established principles stated in *Mbogo v Shah* [1968] E.A. 93.

The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under **section 26 (3) (a)** of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (**section 26 (8)** of the Constitution). Indeed, the High Court cannot interfere with the exercise of that discretion if the Attorney General, in exercising

his discretion, is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in **section 77** of the Constitution.

The appellants invoked the judicial review jurisdiction rather than the constitutional jurisdiction to question the exercise of the discretion by the Attorney General. In deciding whether or not to grant leave the learned Judge was entitled to consider, as he did, whether the grounds of challenge were within the narrow scope of judicial review.

The appellants contend that it is not a prerequisite to show a prima facie case for grant of judicial review orders before leave is granted. The test to be applied in deciding whether or not to grant leave is whether the applicant has an arguable case. In *Njuguna v Ministry of Agriculture* [2001] 1 E.A. 184, this Court said at page 186 paragraph g:

“... leave should be granted, if on the material available the court considers without going into the matter in depth that there is an arguable case for granting leave”.

The learned Judge used the phrase, a “prima facie case” as the test. But considering the matters that were considered, we are satisfied that the learned Judge applied the correct test, the words used notwithstanding.

As the learned Judge correctly stated, judicial review is concerned with the decision making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.

Having regard to the law, we agree with the finding of the learned Judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision. The other grounds which the appellants claim were ignored ultimately raise the question whether the evidence gathered by the prosecution is sufficient to support the charge.

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in **section 77** of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.

There are no good grounds for interfering with the exercise of discretion by the learned Judge. Fortunately, the appellants do not have to wait for long before they know their fate for the trial is scheduled in two-weeks’ time.

We accordingly dismiss this appeal. There will be no orders as to the costs of the appeal.

Dated and delivered at Nairobi this 16th day of September, 2005.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR