



Director of Public Prosecutions v Okemo & 4 others (Petition 14 of 2020)
[2021] KESC 13 (KLR) (Crim) (5 November 2021) (Judgment) (with dissent - W Ouko, SCJ)

Neutral citation: [2021] KESC 13 (KLR)

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

CRIMINAL

PETITION 14 OF 2020

MK IBRAHIM, SCJ, MK KOOME, CJ & P, SC WANJALA, N NDUNGU & W OUKO, SCJJ

NOVEMBER 5, 2021

(BY A MAJORITY OF THREE, C.J KOOME, IBRAHIM SCJ, AND WANJALA SCJ; NJOKI SCJ, CONCURRING, AND OUKO SCJ, DISSENTING)

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND

CHRYSANTHUS BARNABAS OKEMO 1ST RESPONDENT

SAMUEL KIMUNCHU GICHURU 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

CHIEF MAGISTRATE COURT 4TH RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 5TH RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal (E. M. Gitinji, H. M. Okwengu and J. Mohammed, JJ.A) delivered at Nairobi dated 2nd day of March, 2018 in Civil Appeal No. 5 of 2016)

Authority by the Office of the Director of Public Prosecutions to institute extradition proceedings.

Reported by Ribia John

***Criminal Law** – extradition – nature of extradition proceedings - whether extradition proceedings were criminal in nature - which body had the authority to institute extradition proceedings between the Office of the Attorney General and the Office of the Director of Public Prosecutions? - what were the roles of the Office of the Attorney General and the Office of the Director of Public Prosecutions in extradition proceedings? – Constitution of Kenya, 2010, article 157; Extradition (Commonwealth Countries) Act.*



Brief facts

The Attorney General of Jersey made a request for the extradition of the 1st and 2nd respondents. The Attorney General of Kenya handed over the extradition request to the Office of the Director of Public Prosecutions (DPP) which was then a department in the office of the AG. The DPP after due consideration issued an Authority to Proceed to the Chief Magistrate and filed extradition proceedings.

Aggrieved by the decision the applicants filed an application, alleging that in the absence of Authority to Proceed under the hand of the AG, the extradition proceedings were invalid in law. The Chief Magistrate Court (Extradition Court) held that the extradition proceedings were criminal in nature and that the AG had no role to play.

Aggrieved by the Extradition Court's decision, the appellants appealed to the High Court. The High Court held that the court conferred with jurisdiction to conduct extradition proceedings was the Extradition Court and not the High Court and that it would not usurp the jurisdiction of the Extradition Court. The High Court held that although extradition proceedings had elements of international law, they were not *sui generis* proceedings but were criminal proceedings. The High Court went on to find that under the Constitution of Kenya, 2010, read with necessary adaptations, it was the DPP who had the legal authority to issue the Authority to Proceed, and thus the extradition proceedings were valid. Aggrieved by the decision the AG filed an appeal at the Court of Appeal where it was held that the Authority to Proceed issued by the DPP was a nullity as the role to institute extradition proceedings was vested in the AG. Aggrieved, the DPP filed the instant appeal.

Issues

- i. Whether extradition proceedings were criminal, civil, or *sui generis* in nature.
- ii. Whether it was the Attorney General or the Director of Public Prosecutions who could initiate and conduct Extradition Proceedings.
- iii. What was the nature of the prosecutorial powers vested in the Director of Public Prosecutions, and whether the same included the initiation and conduct of Extradition Proceedings.
- iv. Whether the 'Authority to Proceed' issued by the Director of Public Prosecutions was valid.

Held

Decision of the Majority (Per MK Koome, CJ and P; MK Ibrahim and SC Wanjala, SCJJ.)

1. It was a matter of grave concern to the Supreme Court that a case as fundamental as the instant one, revolving around a critical constitutional question, had been stuck in Kenya's justice system for over ten years for it to be finally resolved. Such dalliance with the exacting demands of justice was neither testimony to the Judiciary's judicial rigour, nor to Kenya's commitment to its international obligations. In view of the unacceptable delay, the Supreme Court decided to deliver the judgment in the instant shortened version, to be followed by detailed reasons, pursuant to rule 20(2) of the Supreme Court Rules 2021, on a date to be notified.
2. A reading of article 157 of the Constitution, the relevant extradition treaties, and other applicable laws, left no doubt that extradition proceedings were criminal in nature. The fact that extradition proceedings were criminal in nature, divested the Attorney General of any authority to involve him/herself in their initiation (that was issuance of Authority to Proceed) and conduct before a court of law. The Attorney General however retained the executive authority to receive requests for extradition and to transmit the same to the Director of Public Prosecutions for necessary action.
3. Under the Constitution of Kenya, 2010, the powers to prosecute any conduct of a criminal nature were the exclusive preserve of the Director of Public Prosecutions. That was subject to the provisions of article 157(6)(a) regarding a court-martial, and any legislation that could be enacted by Parliament pursuant to article 157(12) of the Constitution.

Concurring Opinion; Per NS Ndungu, SCJ.

1. Extradition proceedings were quasi-criminal in nature, having elements of both criminal and administrative law. On the one hand, they commenced as foreign policy issues including the execution



of international treaties and bilateral agreements between governments. On the other hand, they concluded as criminal processes. Therefore, they gave equal but complementary roles to both the Attorney General and the Director of Public Prosecutions, with each office required to play its part in the sequence of events that in totality amount to an act of extradition. That dual responsibility ought to be properly reflected in national legislation as Kenya's legal provisions were vague and rather untidy.

Dissenting opinion

Per W Ouko, SCJ.

1. Extradition proceedings were special international legal proceedings based on reciprocity and originating from bilateral and multilateral treaties and agreements between nations, making them matters of international relations that involved the exercise of ministerial or executive responsibility. That was recognized by, most if not all local statutes, including the Extradition (Commonwealth Countries) Act itself, as well as international instruments that dealt with such matters.
2. Due to the fact that extradition was a process and not a prosecution undertaken in the jurisdiction of the requested state, it was only the office of the Attorney-General, in Kenya's case, as the principal legal adviser to the Government that had the authority to commence and undertake such proceedings. Extradition was not criminal in nature but *sui generis*. The Director of Public Prosecutions had no powers to issue Authority to Proceed or institute extradition proceedings under the Extradition (Commonwealth Countries) Act or any law, as he did in the instant matter.
3. The delay in deciding which one of the two offices was responsible for matters of extradition was unconscionable and absolutely ludicrous. Whether it was the Office of the Attorney General or that of the Director of Public Prosecutions, the most important thing was that the Supreme Court had brought that circus to an end and the proceedings that had been pending in the subordinate court for over ten years could get going.

Appeal allowed.

Editorial notes

- i. *The judgment of the Court of Appeal dated March 2, 2018 was overturned.*
- ii. *The proceedings before the Magistrates Court which had been triggered by the authority to proceed issued on July 6, 2011 by the Director of Public Prosecutions were to continue on a priority basis either in the same court or court of competent jurisdiction;*
- iii. *For the avoidance of doubt the word "continue" in iii. above included "commencing afresh" which course of action was to be determined by the Director of Public Prosecutions, should it be necessary.*
- iv. *The costs of the appeal were to be borne by the 1st and 2nd respondents*

Citations

Cases

None referred to

Statutes

East Africa;

1. Constitution of Kenya, 2010 article 157(6)(a),(12) — (Interpreted)
2. Extradition (Commonwealth Countries) Act (cap 77) — (Cited)
3. Supreme Court Rules, 2011 (No 7 of 2011 Sub-Leg) rule 20(2) — (Interpreted)

Advocates

None mentioned



JUDGMENT

A. Introduction

- 1 After several false starts, this appeal was finally heard and concluded before the court on 21st October 2021. It is indeed a matter of grave concern to this court that a case as fundamental, revolving around a critical constitutional question, as this one, has been stuck in our justice system for over ten years for it to be finally resolved! Such dalliance with the exacting demands of justice, is neither testimony to our judicial rigour, nor to Kenya's commitment to its international obligations.
- 2 In view of this unacceptable delay in the processing of this matter, whichever way the trial court rules, we have decided to deliver the Judgment in this shortened version, to be followed by detailed reasons, pursuant to rule 20(2) of the *Supreme Court rules 2021*, on a date to be notified.

B. The Issues

- 3 After hearing the respective cases for the appellants and respondents hereto, and considering their written and oral submissions in support thereof; we have identified the following issues whose determination shall authoritatively dispose of the appeal. These are:
 - i. Whether Extradition Proceedings in Kenya are criminal, civil, or *sui generis* in nature.
 - ii. Whether it is the Attorney General or the Director of Public Prosecutions to initiate and conduct Extradition Proceedings.
 - iii. What is the nature of Prosecutorial Powers vested in the Director of Public Prosecutions, and if the same include the initiation and conduct of Extradition Proceedings.
 - iv. Whether the 'Authority to Proceed' issued on the 6th of July 2011, by the Director of Public Prosecutions was valid.

C. The Findings (By the Majority)

- i. On the Nature of Extradition Proceedings
- 4 A reading of article 157 of the *Constitution*, the relevant Extradition Treaties, and other applicable laws, leaves no doubt that Extradition Proceedings are criminal in nature.
 - ii. On Who May Initiate Extradition Proceedings?
- 5 The fact that Extradition Proceedings are criminal in nature, divests the Attorney General of any authority to involve him/herself in their initiation (ie issuance of 'authority to proceed) and conduct before a court of law. The Attorney General however retains the Executive Authority to receive Requests for Extradition and to transmit the same to the Director of Public Prosecutions for necessary action
 - iii. On the Nature of the Prosecutorial Powers Vested in the Director of Public Prosecutions



6 Under the current constitutional dispensation, the powers to prosecute any conduct of a criminal nature is the exclusive preserve of the Director of Public Prosecutions. This is subject to the provisions of article 157(6)(a) regarding a court martial, and any legislation that may be enacted by Parliament pursuant to article 157(12) of the Constitution. Such legislation must however be consistent with the preceding sub-articles of the main article.

iv. On the validity or otherwise of the 'Authority to Proceed' issued by the Director of Public Prosecutions

7 Flowing from the above, it follows that the 'Authority to proceed' issued by the Director of Public Prosecutions on 6th July 2011 was valid.

D. Hon Lady Justice Njoki Ndungu's Concurring Judgment

8 Extradition proceedings are quasi-criminal in nature, having elements of both criminal and administrative law. On the one hand, they commence as foreign policy issues including execution of international treaties and bilateral agreements between governments. On the other hand, they conclude as criminal processes. Therefore, they give equal but complementary roles to both the Attorney General and the Director of Public Prosecutions, with each office required to play its part in the sequence of events that in totality amount to an act of extradition. This dual responsibility ought to be properly reflected in national legislation as the current legal provisions are vague and rather untidy.

9 However, I am in agreement with the majority decision regarding the validity of the 'authority to proceed' issued by the Director of Public Prosecutions on 6th July 2011 and the consequential Orders of the Court.

E. Hon MR Justice W Ouko's Dissenting Judgment

10 Extradition proceedings are special international legal proceedings based on reciprocity and originating from bilateral and multilateral treaties and agreements between nations, making them matters of international relations which involve the exercise of ministerial or executive responsibility. This is recognised by, most if not all local statutes, including the *Extradition (Commonwealth Countries) Act* itself, as well as international instruments that deal with such matters.

11 Because extradition is a process and not a prosecution undertaken in the jurisdiction of the requested state, it is only the office of the Attorney-General, in our case, as the principal legal adviser to the Government that has the authority to commence and undertake such proceedings.

12 For these reasons I come to the conclusion that extradition is not criminal in nature but sui generis, and that the Director of Public Prosecutions has no powers to issue 'Authority to proceed' or institute extradition proceedings under the *Extradition (Commonwealth Countries) Act* or any law, as he did in this matter.

13 The detailed reasons for my conclusion above will be delivered on notice.

14 As these views are in the minority, the decision of the court is that of the majority. I however share the sentiments of the majority that the delay in deciding which one of the two offices is responsible for matters of extradition is unconscionable and absolutely ludicrous. For me, whether it is the Office of the Attorney-General or that of the Director of Public Prosecutions, the most important thing is that this court has brought this circus to an end and the proceedings that have been pending in the subordinate court for over ten years can now get going.



F. Orders

- i. The appeal dated 10th August, 2020 is hereby allowed;
- (ii) The Judgment of the Court of Appeal dated 2nd March, 2018 is hereby overturned;
- (iii) The Proceedings before the Magistrates Court which had been triggered by the Authority to Proceed issued on 6th July 2011 by the Director of Public Prosecutions are to continue forthwith on a priority basis either in the same court or court of competent jurisdiction;
- (iv) For the avoidance of doubt the word “continue” in 3 above includes “commencing afresh” which course of action is to be determined by the Director of Public Prosecutions, should it be necessary.

G. Costs

The costs of this appeal shall be borne by the 1st and 2nd respondents.

It is so Ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

M. K. KOOME

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**CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT**

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M. K. IBRAHIM

.....

JUSTICE OF THE SUPREME COURT

S. C. WANJALA

.....

JUSTICE OF THE SUPREME COURT

NJOKI NDUNGU

.....

JUSTICE OF THE SUPREME COURT

W. OUKO

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JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

