Republic v Mohammed & another (Criminal Application 2 of 2018) [2018] KESC 51 (KLR) (23 April 2018) (Ruling)

Republic v Ahmad Abolfathi Mohammed & another [2018] eKLR

Neutral citation: [2018] KESC 51 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CRIMINAL APPLICATION 2 OF 2018

DK MARAGA, CJ, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

APRIL 23, 2018

BETWEEN

REPUBLIC ..... APPLICANT

AND

AHMAD ABOLFATHI MOHAMMED ..... 1ST RESPONDENT

SAYEED MANSOUR MOUSAVI ..... 2ND RESPONDENT

Holding of the Applicants at an Anti-Terrorism Police Unit establishment by the Police, after a court had ordered them to ensure the continued presence of the Applicants within Kenya, does not amount to contempt of court.

Reported by Kakai Toili

Evidence Law *– standard of proof – standard of proof in contempt of court cases - higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt - what was the rationale for the set standard of proof in contempt of court cases*

Civil Practice and Procedure *- contempt of court - definition of contempt of court - failure to comply with court orders - conduct that would amount to contempt of court - whether holding the applicants at an Anti-Terrorism Police Unit establishment after a court had ordered the respondent to ensure the continued presence of the applicants within Kenya amounted to contempt of court - Contempt of Court Act, section 4; Supreme Court Act, section 28 (1) (b).*

Brief facts

The court in February 2018 issued an order that pending the hearing of the application seeking to review the Court of Appeal decision acquitting the applicants, arrangements be made by the respondent to ensure the continued presence of the applicants within the jurisdiction of Kenya without infringing on their liberties as guaranteed by the Constitution.

After the issuance of the court order, the applicants continued being held in police custody at the Anti-Terrorism Police Unit in Nairobi Area. Aggrieved by the actions of the police, the applicants filed the instant application seeking various orders including that a stay of the hearing of the respondent's application be granted, that the Inspector General of the National Police Service be cited for contempt of the court order issued in February 2018 and that he be committed to civil jail for a term not exceeding six months.

Issues

i. What was the standard of proof in contempt of court cases?
ii. What was the rationale for the standard of proof in contempt of court cases?
iii. Whether holding the applicants at an Anti-Terrorism Police Unit establishment, after a court had ordered the respondent to ensure the continued presence of the applicants within Kenya, amounted to contempt of court.

Held

1. According to section 4 of the Contempt of Court Act, contempt included civil contempt which meant wilful disobedience of any judgment, decree, direction, order or other process of a court or wilful breach of an undertaking given to a court. Section 28 (1) (b) of the Supreme Court Act also made it an offence for a person to wilfully and without lawful excuse, to disobey an order of the court, that section allowed the court to punish for contempt. It was therefore evident that the wilful disobedience of a judgment, decree or order properly constituted contempt of court.
2. It was evident that not only did contemnors demean the integrity and authority of courts, but they also derided the rule of law. That had to not be allowed to happen. The standard of proof in cases of contempt of court was well established. The standard of proof had to be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to have been left where it belonged, *to wit*, in criminal cases. It was not safe to extend it to an offence which could be said to be *quasi*-criminal in nature.
3. The rationale for the standard of proof in contempt cases was that if cited for contempt and the prayer sought was for committal to jail, the liberty of the contemnor would be affected. As such, the standard of proof was higher than the standard in civil cases. That power to commit a person to jail had to be exercised with utmost care and exercised only as a last resort. It was of utmost importance for the applicants to establish that the alleged contemnor's conduct was deliberate in the sense that he or she wilfully acted in a manner that flouted the court order.
4. Whichever way the court's order was interpreted, it did not allow the release of the applicants. It would therefore render the proceedings otiose and utterly nugatory if the applicants were set free. Courts do not act in vain. The court did not order that the applicants be released but rather that their rights not to be infringed, indeed the applicants were not in prison but in a situation more elevated than that of prisoners.
5. Holding the applicants at the Anti-Terrorism Police Unit establishment was not wilful or deliberate disobedience to court orders. It was a well-considered course of action for balancing between applicants security and compliance with the court's order.
6. The allegations of contempt of court had not been proved to the required standard, the respondent was not in contempt of court.

Application dismissed.

Orders

i. *Application dismissed*
ii. *No orders as to costs.*

Citations

Statutes

1. Constitution of Kenya, 2010

2. Contempt of Court Act
3. National Police Service Act
4. Supreme Court Act

Advocates

None mentioned

RULING

(Being an application for a finding of contempt under Section 28 (1) (c) of the *Supreme Court Act*, Article 160 of the *Constitution*, and all other enabling provisions of the law)

A. Introduction

1. This Ruling arises from the Notice of Motion application dated 1st March, 2018 and filed on 2nd March 2018, by the respondents in the main matter before the Court. The application (No. 2 of 2018) is supported by an affidavit sworn on 1st March, 2018 by Ahmad Abolfathi Mohammed (1st respondent/ applicant). It is a contempt application, seeking the following Orders:

   (a) that, pending the hearing and determination of this application, this Court be pleased to issue a stay of the hearing of the applicant's Notice of Motion dated 19th February 2018;

   (b) that the Court be pleased to cite Mr. Joseph K. Boinett, Inspector General of the National Police Service, for contempt of this Court's Order issued on 23rd February 2018, and further to order that he be committed to civil jail for a term not exceeding six months;

   (c) that this Court be pleased to grant any other or further Orders, for the purpose of protecting the dignity and authority of the Court;

   (d) that the costs of this application be provided for.

2. The application is set around an earlier Order of this Court, of 23rd February 2018, in the following terms:

   > ii. Pending the hearing of the aforesaid and in view of the fact that the respondents have been acquitted of all criminal charges that were preferred against them by an Order of a Court of competent jurisdiction (the Court of Appeal in Criminal Appeal No. 135 of 2016), and further taking into account the fact that the determination of the present Motion is dependent on the continued presence of the respondents within the jurisdiction of Kenya, we hereby direct that arrangements be made by the applicant to ensure the continued presence of the respondents within the jurisdiction of Kenya without infringing on their liberties as guaranteed by the *Constitution*."

3. It is contended that, despite the foregoing Order being made in the presence of counsel for the applicant, the respondents continue being held in police custody at the Anti-Terrorism Police Unit in Nairobi Area, in disregard of the Order, and that this amounts to contempt of Court.

B. Background

4. This application emanates from the Notice of Motion of 19th February, 2018, filed by the Republic, seeking review of the Court of Appeal's decision of 16th February 2018, in which leave had been

denied for an appeal to this Court, on the basis that the case did not entail a matter of general public importance.

5. The State was aggrieved by the denial of leave, and approached this Court seeking a review of the Appellate Court's decision, as well as an Order staying the decision acquitting the respondents, by Judgment (Kariuki, M'inoti & Murgor, JJA) of 26th January 2018. Filed under certificate of urgency, the matter was placed before a single Judge (Ojwang, SCJ) on 20th February, 2018, who duly certified it as urgent, with Orders that the respondents remain within the jurisdiction of the Supreme Court, pending hearing and determination. The motion was fixed for inter partes hearing on 23rd February, 2018.

6. On 23rd March, 2018, Mr. Ahmednasir, SC appearing for the respondents, sought an adjournment of the hearing, on the ground that there was pending before this Court Application No. 21 of 2016, Goldenline International Ltd. v. Blue Sea Shopping Mall Ltd. & 3 Others, the determination of which would also dispose of the main question in the present Motion before the Court. Counsel also applied for the discharge of the Orders made by Ojwang, SCJ on 20th February 2018. The consequence of granting the discharge as was sought, would have been the immediate release of the respondents from the State's safekeeping.

7. The Court declined to grant the application for adjournment of the hearing of the substantive Application No. 2 of 2018 until the earlier Application No. 21 of 2016, Goldenline International Ltd. v. Blue Sea Shopping Mall Ltd. & 3 Others was heard. The application for review was set for hearing on its merits on 13th March, 2018; but in the meantime, the Court made the Order set out in paragraph *2* above — which is the subject of the instant application.

8. On 13th March 2018, learned Senior Counsel, Mr. Gatonye came on record, and sought adjournment, on the basis that he had just been appointed to lead the applicant's case, so he needed time to review all the relevant documentation. His application was contested by Mr. Ahmednasir, who also notified the Court that the respondents had filed a contempt application, as "the applicant had disobeyed the Court's Order of 23rd February, 2018". The Court allowed Mr. Gatonye's application for adjournment, and set the hearing date for the respondents' contempt application for 28th March, 2018.

C. Submissions

9. At the hearing of the contempt application on 28th March, 2018, Mr. Ahmednasir submitted that the Inspector-General, despite being aware of the Court Order, had failed to comply with it. He submitted that the respondents were being held in police custody at the Anti-Terrorism Police Unit, and that in this respect, their constitutional rights, notably those contained in Articles 27, 29, 32, 36 and 39, were being infringed.

10. Mr. Ahmednasir submitted that this Court had two options: either to allow the application for contempt as filed, and commit the Inspector-General to civil jail for a term not exceeding six months, or to dismiss the application—which, in his view, would be a dereliction of the Court's duty.

11. On the law, Mr. Ahmednasir submitted that the statutes governing contempt were the *Supreme Court Act*, and the *Contempt of Court Act* (No. 46 of 2016), and that these statutes empower the Supreme Court to imprison a person convicted of contempt for upto 6 months, or/and impose a fine of upto Ksh. 200,000.

12. Learned Counsel, Mr. Gatonye urged that Article 245 (2) (b) of the *Constitution*, and section 10 of the *National Police Service Act* (No. 11A of 2011) left no doubt that the Inspector-General is the "accounting officer" of the Police Service; and that, by section 30 (2) of the *Contempt of Court Act*, it was

required that notice be served upon an accounting officer, to show cause why contempt proceedings should not be commenced against him. The applicant contended that as such notice was not served, the application before the Court was defective.

13. It was the applicant's case that the holding of the respondents at the Anti-Terrorism Police Unit was done in execution of the Inspector-General's duties, and in good faith. The applicant submitted that, pursuant to section 30 (6) of the *Contempt of Court Act*, the Inspector-General cannot be convicted for contempt of Court, if he executed his duties in good faith. It was also submitted that the Court's Order was a balancing Order, not requiring the release of the respondents.

14. The applicant urged that there was no willful defiance of the Court Order, and that, for a charge of culpability to be tenable, the relevant court Order must be clear and unambiguous.

15. It was the applicant's case that the particulars of contempt were not specified by the respondents, making it unclear how the Order had been breached, and rendering the applicant incapable of answering with certainty the allegations of contempt. The applicant urged that the respondents had not met the standard of proof for contempt, which is close to the criminal standard of proof-beyond-reasonable-doubt.

16. The applicant submitted that there had been due compliance with the Court Order, ensuring that the respondents remained in the country, and that their security and liberties were duly safeguarded.

17. The applicant submitted that the respondents, while at the Anti-Terrorism Police Unit, were provided with a room with comfortable bedding; were allowed to walk around in the compound; receive medical attention whenever necessary; could make telephone calls, receive counsel/visitors, and have a well-balanced diet. The applicant urged that he and his officers did their best in the circumstances, to comply with the Order of the Court.

D. Issues for determination

18. Two issues for determination arise in this application:

    (a) Whether the application before the Court is fatally defective;

    (b) Whether the applicant is in contempt of this Court's Order.

E. Analysis

19. The applicant/respondent urged the Court to dismiss this application, for being in contravention of the mandatory provisions of the *Contempt of Court Act*. The statutory provisions referred to by the applicant are contained in section 30 of the *Contempt of Court Act*, which provides as follows:

> (1) Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.
>
> (2) No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

(3) A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.

(4) If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.

(5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.

(6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith."

20. While the respondent disputed the contention that the Inspector-General is the "accounting officer" of the National Police Service, the applicant urged the contrary. The applicant invoked the provisions of Article 242 (2) (b) of the *Constitution*, under which the Inspector-General commands the National Police Service, and also section 10 of the *National Police Service Act*, which outlines the powers and functions of the Inspector-General. We have, however, considered only the more pertinent of the several arguments raised by learned counsel.

21. The meaning and import of contempt of Court is clear enough, for both sides. What remains a subject of contest, is whether the Order was willfully disobeyed. Further, learned counsel for the applicant, Mr. Gatonye, has hinted that the Court Order was ambiguous. He relied on two authorities: Amos Mathenge Kabuthu v. Simon Peter Mwangi [2015] eKLR, and Jihan Freighters v. Hardware & General Stores Limited [2015] eKLR—to advance his contention that to cite the applicant for contempt, the Court must be satisfied that the impugned Order is clear and unambiguous.

22. According to Section 4 of the *Contempt of Court Act*, contempt includes civil contempt, which means willful disobedience of any Judgment, decree, direction, Order, or other process of a Court, or willful breach of an undertaking given to a Court. Section 28 (1) (b) of the *Supreme Court Act* also makes it an offence for a person to willfully and without lawful excuse, to disobey an Order of the Court. This section allows this Court to punish for contempt. It is, therefore, evident that the willful disobedience of a Judgment, decree or Order properly constitutes contempt of Court.

23. Authorities on the necessity to punish for contempt are legion. We have considered those provided by the respondent, and also cite the following, in affirmation of the principle.

24. In Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990 (unreported), where the Court of Appeal stated as follows:

> It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In HADKINSON v. HADKINSON (1952) 2 All E.R. 567, it was

held that: It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."

25. In Att-Gen. v. Times Newspapers Ltd. [1974] A.C. 273, Lord Diplock stated:

> .....There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity."

26. The Court of Appeal in A.B. & Another v R.B., Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in Burchell v. Burchell, Case No.364 of 2005 where it was held:

> Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. the *Constitution* states that the rule of law and supremacy of the *Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."

27. Ojwang, J (as he then was) in B. v. Attorney General [2004] 1 KLR 431 that:

> The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

28. It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:

> In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."

29. The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.

30. The question that begs an answer, thus, is: did the applicant willfully disobey this Court's Orders? The applicant showed the steps it took towards compliance with the Court Order. The deposition of Nyale Munga reveals the applicant's effort in complying with the Court Order. He avers that as the

respondents were foreign nationals, only the National Police Service could ensure their security and protection. It was deposed that the applicant had a special responsibility: to ensure the security of the respondents, which could only be guaranteed by the Kenyan Government through the National Police Service, at the Anti-Terrorism Police Unit, until their eventual removal from the country, as there was no extradition treaty between Kenya and Iran.

31. The applicant was quite categorical, that if the respondents were not held, they would leave the country for good, something not in accordance with the Court's Order. The Court also noted the submissions of Senior Counsel Amednasir for the respondents, in this regard. He submitted that it would be exemplary for the rule of law, for the respondents to be set free, leave the country and not return, rather than continue being held in custody. First we would reiterate that, whichever way it is interpreted, this Court's Order did not allow the release of the respondents. It would therefore render these proceedings otiose, and utterly nugatory, if the respondents were set free. Courts do not act in vain.

32. The applicant deponed that the State had to ensure the security of the respondents, whilst at the same time assuring that the respondents' liberties, as guaranteed in the *Constitution*, were not infringed. This Court did not order that the respondents be released, but rather, that their rights be not infringed; we note that, indeed, they are not in prison, but in a situation more elevated than that of prisoners.

33. Mr. Munga deponed that, while they considered other options, holding the respondents at the Anti-Terrorism Police Unit establishment was found to be the best option. We would not perceive such a line of action as a willful, or deliberate disobedience to Court Orders. It was a well-considered course of action, for balancing between respondents' security, and compliance with Court Order.

34. Further, we are unconvinced that the allegations of contempt of Court have been proved to the required standard. In as much as the respondents are convinced that their liberties, as contained in Articles 27, 29, 32, 36 and 39 of the *Constitution*, are being infringed, and they impute willfulness and bad faith on the part of the applicant, such inferences have been rebutted, by demonstrating that the applicant did what was sincerely believed to be in accordance with the Court Order.

35. It is our finding that the applicant is not in contempt of Court; and we dismiss the motion dated 1st March, 2018 with no orders as to costs. We are disinclined to issue stay of hearing for the applicant's Notice of Motion of 19th February, 2018.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2018.

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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N. S. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA