REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPLICATION NO. 271 OF 1985

STANLEY MUNGA GITHUNGURI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

These proceedings have already earned so much notoriety that the laurels have become withered. It may be because of the nature of the criminal offences which the applicant is alleged to have committed, or, because at one time he was a well-known figure in the banking and financial life of Kenya; or because as an individual he is the key figure in this seemingly legal battle which has been and is still raging for a decision whether the State's right to prosecute a citizen for an alleged criminal offence can be ended by the Court. Really it is not a battle between the State and the Court for they both represent the common interest of the people in their joint quest to find the correct solution for the commonweal. It is a search by them both for the principle as to if, and then when, the Court legitimately can say to the State that the intended prosecution must halt because it has become an abuse of the process of the Court, and/or it is also both oppressive and vexatious.

The applicant is an accused man. The public mind is an impressionable organ and the morbid usually attracts. The public in order to establish their own social values like to find out by comparing themselves with an individual who has come into lime light howsoever; and who appears to be a cut above them, whether wholesome or unwholesome, how such a person is treated in a Court of law, whether more or less than the common citizen.

Notwithstanding the considerable publicity already gathered by these proceedings so far they have come to nought. As this Court is hearing the application *de novo* its proceedings must be written fully. That is what makes our judgment somewhat prolate.

The beginning of these proceedings lies in the launching of Criminal Case No 4565 of 1984 —*Republic v Stanley Munga Githunguri*, i.e the applicant, in the Court of the Chief Magistrate, Nairobi. The applicant was charged with four counts alleging contraventions of the Exchange Control Act (Cap 113). Two of the offences were alleged to have been committed in 1976, and the third in 1979. The fourth count was an alternative to the third count.

The applicant raised a reference under section67(1) of the Constitution of Kenya in the Constitutional Court of this country in Criminal Application No 180 of 1985 –*Stanley Munga Githunguri v Republic*. Section67(1) provides:-

“S. 67(1) Where a question as to the interpretation of this Constitution arises in proceedings in a subordinate Court and the Court is of the opinion that the question involves a substantial question of law, the Court may, and shall if a party to the proceedings so requests, refer the question to the High Court.”

The following five questions were referred to the Constitutional Court, i.e.

“ 1. If the Office of the Attorney-General makes a decision not to institute or undertake any criminal proceedings against any person, is the power conferred under section26(3) exhausted or spent"

2. Does the exercise of the power conferred on the office of the Attorney-General under Section26(3) have to be fair and reasonable, or can it be exercised arbitrarily or oppressively"

3. Is it a proper exercise of the powers conferred under section26(3)(a) to institute criminal proceedings against a person charging him with offences allegedly committed over 8 years ago and investigated about six years ago following a full inquiry, and after the office of the Attorney-General had then decided not to institute or undertake criminal proceedings and to close the files"

4. Notwithstanding the powers conferred upon the office of the Attorney-General by Section26(3) of the constitution, does the Court have an inherent power and a duty to secure fair treatment for all persons who come or are brought before the Court, and to prevent an abuse of its process"

5. Is such a charge or charges against any person preferred 9 years after their alleged commission and six years after a full inquiry in respect thereof and five years after the decision of the Office of the Attorney- General not to prosecute and to close the file:

(a) vexatious and harassing; and/or

(b) an abuse of the process of Court; and/or

(c) contrary to public policy"

The Constitutional Courts’s answers to the five questions referred to it were as follows:-

1. If the Office of the Attorney-General makes a decision not to institute or undertake any criminal proceedings against any person the power conferred under section26(3) of the Constitution in not exhausted or spent.

2. The exercise of the power conferred on the Office of the Attorney-General under section26(3) should be fair and reasonable and should not be exercised arbitrarily or oppressively.

3. It is a proper exercise of the powers conferred under section26(3) (a) to institute criminal proceeding against a person charging him with offences allegedly committed over nine years ago following a full inquiry, and after the Office of the Attorney-General had then decided not to institute or undertake criminal proceedings and to close the file provided that nothing further has been done such as for example informing the person concerned that no proceedings will be instituted or returning to him or disposing of any property involved.

4. Notwithstanding the powers conferred upon the Office of the Attorney-General by section26(3) of the Constitution, the High Court (and not any subordinate Court) has an inherent power and a duty to secure fair treatment for all persons who are brought before the Court or a subordinate process of the Court.

5. The preferment of a charge against any person nine years after the alleged commission of the offence charged six years after a full inquiry in respect thereof and five years after the decision of the Office of the Attorney-General not to prosecute and to close the file is

(a) vexatious and harassing;

(b) an abuse of the process of Court; and

(c) contrary to public policy"

unless good and valid reasons exist for doing so, such as for example the discovery of important and credible fresh evidence or the return from abroad of the person concerned. Thus the Chief Magistrate is at liberty to proceed with the trial unless the Attorney-General in the light of our answers decides (as we hope he will) to terminate the proceedings or the accused applies for a prerogative order."

The Constitutional Court reached its answers after taking into account certain English authorities and some legal essays written on the subject which were brought to their notice. The Constitutional Court followed up by saying in the light of the foregoing they took the view that to institute proceedings now was both vexatious and an abuse of the process of the Court; however in the proceedings before them they could do no more than answer the questions contained in the reference. The Constitutional Court also said that the incumbents of the office of the Attorney-General are one but just as one incumbent may, having reached a decision not to prosecute, change his mind in the light of subsequent events, so may a later incumbent. But the right to change the decision may be lost if as in the present case the accused has been publicly informed that he will not be prosecuted and property has been restored to him. As a consequence of being led to believe that there would be no prosecution the accused may have destroyed or lost evidence in his favour.

The Attorney-General having refused to terminate the proceedings as hoped for by the Constitutional Court, the applicant, after obtaining leave under Order LIII rule 1(2) of the Civil Procedure Rules, by motion filed on September 3, 1985 asked the High Court to make an order prohibiting the magistrate from further proceeding to hear the Criminal Case No 4565 of 1984 – *Republic v Stanley Munga Githunguri*. The application for Order of Prohibition was based upon a statement required to be filed under the Rules and attached to the motion as well as the applicant's own affidavit sworn in support.

The ground upon which the Order of Prohibition was sought was that on the hearing of the Criminal Application No 180 of 1985 – *Stanley Munga Githunguri v Republic* – the High Court sitting as Constitutional Court, to repeat, held that the Chief Magistrate (including any other magistrate) be at liberty to proceed with the trial of the above case unless the Attorney- General decides to terminate the proceedings or the accused applies for a prerogative writ.

The application for Order of Prohibition was heard by two Judges of the High Court. After the elapse of a sufficient period to enable a decision to be reached it was finally reported to the Acting Chief Justice, now the Presiding Judge in these proceedings in this Court, that the two Judges were unable to agree upon a unanimous decision.

By virtue of the powers thereunto enabling him, the Acting Chief Justice on November 14, 1985 made an order divesting the two learned judges who were seised of the application for Order of Prohibition; also a further order that the application be heard *de novo* by three judges of the High Court which is how this present Court came to be constituted. The foregoing orders made by the Acting Chief Justice were also in accord with the spirit of the provisions of section359 (2) of the Criminal Procedure Code (Cap 75),

and section69 of the Civil Procedure Act (Cap 21), to which may be added section68 (2) of the Advocates Act (Cap 16), which are all to the effect that in the event of the two judges hearing an appeal being unable to agree the appeal shall be re-heard by three judges.

Let it be clearly understood that although we three judges constitute this court, in no way are we sitting on appeal on the opinions sent out by the Constitutional Court on the applicant's reference to them. Apart from briefly expressing our views we alertly remind ourselves that our sole task is to decide whether the applicant is entitled to Order of Prohibition in this Court. At the same time we do not consider ourselves inhibited from commenting on the judgment of the Constitutional Court as our views in relation thereto will be *obiter*.

We are respectfully of the opinion that the applicant's five questions were wrongly referred to the Constitutional Court under section67(1) of the Constitution (*supra*) notwithstanding that the Assistant Deputy Public Prosecutor, Mr Chunga, indicated to the Constitutional Court that the first question was a question of such a nature. We are of the view that none of the five questions was a question as to the interpretation of the Constitution (emphasis ours) which could have been properly referred to the Constitutional Court.

In our view two pre-requisites are required for a reference to the Constitutional Court. First, the question must relate to the interpretation of the Constitution (emphasis ours); secondly, the subordinate Court must be of the opinion that the question involves a substantial question of law. An example of where the subordinate Court did not consider that the proposed question involved a substantial question of law arose in Criminal Case No 4419 of 1984 in the Court of the Senior Resident Magistrate, Nairobi, who rejected the accused's application for a reference to the Constitutional Court the question that the provisions of section82(1) and 87(b) of the Criminal Procedure Code are in conflict.

With the utmost respect we also do not agree with the manner of expressing the final opinion of the Constitutional Court. In view of this difference of opinion between us we quote it once more:

"Thus the Chief Magistrate is at liberty to proceed with the trial unless the Attorney General in the light of our answers decides (as we hope he will) to terminate the proceedings or the accused applies for a prerogative order."

We are of the opinion that the Constitutional Court should have stopped with the enabling opinion expressed in their first sentence that the Chief Magistrate was at liberty to proceed with the trial. The rest of their opinion contains an implied threat, as well as a piece of gratuitous advice to the applicant, that in the event of the Attorney-General not terminating the proceedings he would be met by an application for a prerogative order by the applicant.

The reference to a possible application for a prerogative order had an unwholesome flavour because it tends as a direction to the Court hearing the application for Order of Prohibition to grant the Order without using its own discretion whether it should do so.

The Attorney-General did not need any authority, nor a reminder, that in the light of the opinions expressed by the Constitutional Court he could terminate the proceedings even when coupled with a wet hope that he would do so. As stated in section26(3) (a) and (c) of the Constitution:

(3) The Attorney-General shall have power in any case in which he considers it desirable so to do –

(a) to institute and undertake criminal proceedings against any person before any Court (other than a

Court-martial) in respect of any offence alleged to have been committed by that person;

(b) …..

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

And sub-section(8) provides:-

(8) In the exercise of the functions vested in him by sub-sections (3) and (4), (not relevant), of this sectionand by sections 44 and 55, (not relevant), the Attorney-General shall not be subject to the directions or control of any other person or authority.

If there is not a specific order made the Court ought to leave it to the good sense of the party concerned without exposing itself to defiance and ridicule by expressing a hope that its views will be respected in the event of its wishful thinking not being fulfilled, as it happened in this instance. A judicial officer delivering a bundle of opinions which is made to look authoritative and respectable because it is delivered in Court must have a red-face when those opinions or some of them are disregarded.

The Constitutional Court recognised the powers of the Attorney-General in this respect in their answers to the first question and the answer to the third question the appendant proviso to the latter question being quite unnecessary, by their reference to section26 of the Constitution.

A similar opinion was succinctly expressed recently by the Constitutional Court in Criminal Application Nos 319 – 324 of 1985 as follows:-

“The first thing to say is that under section26(3)(a) and (c) the power to institute and undertake criminal proceedings against any person before any Court (other than a Court-martial) in respect of any offence alleged to have been committed by that person, or to discontinue any such criminal proceedings as stated in subparagraph (c) is exclusively lodged in the Attorney- General without any limitation or restriction thereto by any one or any manner as to the exercise of his discretion.”

With the utmost respect we do not therefore agree with the Constitutional Court that the questions relating to the manner in which the Attorney- General is required to carry out his functions are not excluded under section67(1), because they are not questions as to the interpretation of the Constitution. We also do not agree that even question 4 which concerns the inherent power of the Court became relevant to the constitutional interpretation of section26 by the words appearing therein, i.e “notwithstanding the powers conferred upon the office of the Attorney- General by section26(3) of the Constitution”. These excepting words were introduced by the applicant. They are not a part of section26 or any other statute. Applicants are known to make interpretations favourable to themselves. We are of the opinion that while question 4 was not about the interpretation of the Constitution, it did concern the exercise of powers by the Attorney-General under section26(3) as we discuss later.

We are of the opinion that the five questions which were the subjectmatter of the reference to the Constitutional Court would have been a proper subject-matter for an application to the High Court under section84 of the Constitution which reads as follows:-

84(1) Subject to subsection(6) (not relevant), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) 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 another person alleges a contravention in relation to the detained person),

then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

(a) to hear and determine an application made by a person in pursuance of subsection(1);

(b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection(3),

any 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 sections 70 to 83 (inclusive). (3) If in proceedings in a subordinate Court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive), the person presiding in that Court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious.

(4) Where a 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.

(5) Parliament may confer upon the High Court such powers in addition to those conferred by this sectionas may appear to be necessary or desirable for the purpose of enabling that Court more effectively to exercise the jurisdiction conferred upon it by this section."

It seems to us that the application in these proceedings comes more appropriately as a fundamental right application under section77(1) of the Constitution as referred to in section84(1) above. Section77(1) is:

"If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law."

In the interests of justice we will treat the application before us as having been made, and to deem it amended and to have been brought under section84(1).

The applicant's complaint is not that the Court hearing his case will not be an independent and impartial Court established by law as envisaged in section77(1). His complaint clearly is that the hearing of the case against him will not be within a reasonable time, and also that he shall not be afforded a fair hearing. Without meaning to cast any aspersions on any trial officer in this context we interpret the expression "fair hearing" to mean a "square deal", and also as being synonymous with a fair trial because so many years have elapsed.

In some countries the power to prevent an abuse of the process of the Court or to stop a prosecution because it is oppressive and vexatious is to be found in the common law and it also exists in the inherent powers of the Court. The great importance of this power is illustrated by it being statutorily enacted in section84 of our Constitution. It is a pre-requisite of the exercise of this power that at least one of the three conditions, specified in section77(1) should exist. The applicant contends that two of those pre-requisites exist in his case, i.e no hearing within a reasonable time, secondly not a fair hearing in the sense stated above.

Even if none of the pre-requisites exists as required by section77(1) it would still be open to this Court to say under its inherent powers, and also by virtue of the provisions of the Judicature Act (Cap 8), that it would not be in the public interest, sometimes also referred to as public policy, to allow the prosecution launched against the applicant to continue, and issue Order of Prohibition to stop it. It is as much in the public interest that breaches of the law should be punished, as it is to ensure that in the process of doing so the people are not bashed about so that they lose respect for the law. If the law falls into disrepute it will have a shattering effect upon the society's sense of security of their personal freedom and property. The Court is the final arbiter of how the public interest is to be preserved.

It is not in dispute that the present four charges were a part of 20 charges which were allegedly committed over nine years ago and were investigated about six years ago. The applicant says he was given a copy of the charges together with a copy of his cautionary statement recorded from him by the authorities. Thereafter early in 1980 the office of the Attorney-General decided not to prosecute the applicant and closed the file relating to all counts including the present four charges. The foreign currency, the subject matter of the four charges, was also ordered to be credited in Kenya currency into the applicant's bank account. The applicant says he was told in writing by the bank, and also officially of the decision of the Office of the Attorney-General not to prosecute him and files were closed. This position continued during the tenure in office of the two following Attorneys-General who succeeded the then Attorney-General. The position was reiterated during a debate in Parliament by one of the two Attorney- Generals as reported in National Assembly Reports dated June 30, 1981, and July 1st/2nd, 1981.

The applicant complains that the present four charges were resurrected four years later and he was charged notwithstanding all previous assurances by the police and investigation branch that he would not be prosecuted.

There is no time limit to the prosecution of serious offences except where a limitation is imposed by statute. There is no such statutory limitation imposed in respect of the four charges. Insofar as the time factor is concerned the Attorney-General is therefore free to prosecute provided he does not offend the fundamental rights conferred by section77(1) as protected by section84(1) of the Constitution. It is a part of the Attorney- General's life that he must operate as envisaged in section26 of the Constitution. The application therefore is understandably opposed by him.

The Assistant Deputy Public Prosecutor, Mr Chunga, has eloquently argued that the contents of the statement and the applicant's affidavit in support being merely hearsay evidence the application is incompetent and should be refused or struck out because no proven facts have been laid before the Court which establish that the applicant's prosecution will be an abuse of the process of the Court, vexatious and oppressive to exercise the Court's discretion thereon in favour of the applicant. Mr Chunga in particular referred to paragraphs 4, 5 and 6 of the affidavit as being totally hearsay, the Court does not act upon hearsay evidence he said. These three paragraphs, and also paragraph 7 which we add, at first glance appear to be hearsay. They are as follows:-

4. All the charges formed part of police inquiry and full investigations carried out about six years ago. A detailed statement under caution was taken from me and charges were prepared. These were twenty in number and signed by the Officer-in-Charge, Mr Shapi. A copy of the said charges was given to me six years ago together with a copy of my cautionary statement.

5. Subsequently in 1980, the Office of the Attorney- General having considered everything decided not to prosecute me and closed the file relating to all the charges including the present ones. Further, it issued instructions to credit in Kenya currency to my Bank account with equivalent amount to the foreign

currency for these charges. I duly received a letter from my Bank, the Kenya Commercial Bank, dated February 11, 1980 informing me that it had received from the CID on February 8, 1980 the foreign currency which the Bank credited to my local current account with it.

6. I was also told by the officers at the Central Bank of the Attorney-General's decision not to prosecute and that the files were closed. My files and papers were returned to me.

7. The position was reiterated publicly during the parliamentary debate when Mr Kamere was the Attorney-General. At the time I was personally in the House. The two reports dated June 30, 1981 (pages 599 – 608) and also of July 1 and 2, 1981 (pages 765 – 774) were produced before the Chief Magistrate's Court and I beg leave to produce the same at the hearing, if required and necessary.

This is no ordinary case. It has been debated in Parliament also. In the debate in the National Assembly the Minister for Constitutional and Home Affairs said:

"It is being alleged that there were charges against Mr Githunguri, but Mr Githunguri was not taken to Court …. I say I was the Attorney General at the time and I investigated this matter or allegations and, in fact, we never went beyond what is called an inquiry. Therefore there could never have been charges against anybody. This is because there was no truth in the allegations which were being made. So, I am saying, first thing, that there were no charges against Mr Githinguri … the file was brought to my office, and I was satisfied that there was no evidence against Mr Githinguri ….. This inquiry never went to Court …… "

An Assistant Minister for Constitutional and Home Affairs said:

"The stage where the Criminal Investigation Department reached with these investigations was an inquiry stage. The file was submitted to the office of the Attorney-General, and it was found that Mr Githunguri did not commit an offence….. I think we are being very unfair to Mr Githinguri. "

During the debate in the National Assembly on July 2, a new Attorney- General had been sworn in. This Attorney-General said:

"I would now like to make the following statement regarding the document which was laid on Tuesday, June 30, 1981. The document is a commentary on proposed charges. … This document is not and cannot be described as a charge sheet…. Prosecution is not persecution – what this House has been subjected to is to challenge the decision of the Attorney-General who decided not to proceed against Mr Githinguri on the evidence contained in the inquiry file."

Before dealing with Mr Chunga's submission we set out the following which we have paraphrased from pages 21 and 26 of *Sarkar on Evidence* (10th edn):

" It is now recognised that a state of a man's mind is as much the subject of evidence as the state of his digestion; and accordingly witnesses are permitted to testify directly as to their own mental condition, although not generally to that of others. A man's mental condition may be indicated by his evidence or by assertions.

" Statements, feelings, opinions and states of mind are just as much facts as any other circumstance of which through the medium of senses or by our selfconsciousness we become aware, and all are equally admissible for the purpose of proving or disproving the matter to which they relate.

Facts fall into two classes, those which can and those which cannot be perceived by the senses. Examples of facts which cannot be perceived by the senses are intention, fraud, good faith and knowledge. Facts can be directly perceived either with or without the intervention of senses. Anything which is the subject of perception or consciousness is a fact. The definition of fact (in the Evidence Act) does not restrict a fact to something which can be exhibited as a material object. The word proof seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition. Absolute certainty amounting to demonstrations is seldom to be had in the affairs of life and we are frequently obliged to rely on degrees of probability which fall very short of it indeed. Practical good sense and prudence consists mainly in judging aright whether in each particular case the degree of probability is so high as to justify one in regarding it as certainty and acting accordingly. If we waited for absolute certainty we would never act at all. In like manner all that a judge need look for is such a high degree of probability that a prudent man in any other transaction where the consequences of a mistake were equally important would act on the assumption that the thing was true. The Evidence Act adopts the requirements of a prudent man as an appropriate concrete standard by which to measure proof. Absolute certainty is not required. The definitions are mere embodiments of a sound rule of common sense."

Section3(2) of our Evidence Act provides:

" 3(2). A fact is proved when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists."

Guided by the commentary in *Sarkar* and the provisions of section3(2), as prudent men which we believe justifiably ourselves to be, we hold, that where applicable, the matters mentioned in the applicant's affidavit to which he deponed from personal knowledge have been turned and established into facts. The degree of probability is so high that proceeding by the sound rule of common sense we are justified in regarding them as certainty and to act accordingly.

A great deal of time was spent on arguing that the respondent had not filed an affidavit in reply. The respondent's argument is that he need not file one the onus being upon the applicant to satisfy the Court in order to win the Order of Prohibition which he is seeking. True the respondent was not compelled to file an affidavit in reply. It is a question of prudence in each case. The necessary information being in the possession of the respondent it would have been easy enough to disprove, if such be the case, by answering an affidavit, for example, that the file was not closed, or that the money was not released and deposited in the applicant's banking account, that the CID did not despatch any foreign currency to the Bank on January 8, 1980, which the Bank credited as claimed, or that no officer of the Central Bank informed the applicant of the Attorney-General's decision not to prosecute and that the files were closed and returned with papers to the applicant.

Mr Chunga wrongly protested that he was not given any notice to produce. The proviso to section69 of the Evidence Act says that such notice shall not be required in order to render secondary evidence admissible in any of the following cases –

(i) …..

(ii) When from the nature of the case, the adverse party must know that he will be required to produce it.

Paragraph 7 of the Affidavit speaks about the Attorney-General Mr Kamere's participation in the debate in the National Assembly who stated, let us repeat, that the Attorney-General had decided not to

proceed against Mr Githinguri on the evidence contained in the inquiry file. This was a repetition of the Minister's statement on June 30.

Mr Chunga asked us to read the statements in the National Assembly in the context of the debate, and to say that no assurance was ever given that the applicant would not be prosecuted. In our view both statements, made publicly in no less a forum than the National Assembly, constituted a positive assurance that the applicant would not be prosecuted. That is the conclusion to which the reasonable man in the market hearing those utterances would have come to. That being so the reasonable man in the market would also believe that the Attorney-General's word would be honoured. The reasonable man is the man in the market, the man on the Pangani bus or a housewife.

Mr Chunga argued that Prohibition ought not to be granted where alternative remedies are available to an applicant. He said the applicant would be entitled to defend himself. He referred to appeal after conviction, bail pending appeal, review by the High Court. Mr Chunga must have been speaking lightly for the impracticability of his proposition is brightly apparent. What kind of a mad man who has an opportunity to apply for Prohibition would opt for a trial, the risk of conviction and imprisonment. Review would not be available to him for section364(5) of Criminal Procedure Code lays down that where there is a right of appeal, review ought not to be granted. It was also so decided as far back as 1937 in *Chhagan Raja v Gordhan Gopal*, 17 KLR 69.

Mr Chunga argued that prohibition can only issue if the subordinate Court acts in excess or lack of jurisdiction. With respect this is not a correct statement of the law. See *Shah Vershi Devshi and Company Ltd v The Transport Licensing Board* [1970] EA 631: *Re Kassim Mills Ltd* [1960] EA 1002.

In *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cases, 210 at p 220, 221 Lord Blackburn said:

"But from early times … the Court had inherently its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse."

Lord Selbourne said, p 214:

"The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure."

In *Mills v Cooper* [1967] 2 All ER 100 at p 104 Lord Parker CJ said:

" every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court."

More recently in *R v Grays Justices*, *ex parte Graham* [1982] 3 All ER at p 653 the Court said:

"In our opinion, although delay of itself, with nothing more, if sufficiently prolonged, could in some cases be such as to render criminal proceedings brought long after the events said to constitute the offence both vexatious and an abuse ..."

In this instance the delay is said to have been nine years, six years and four years. The Court has not been told why these offences have been unearthed after they remained buried for so long. What caused turning up the soil! It is too long, too much of delay. The Attorney-General is not bound to tell the Court the reason but it would have made us knowledgeable if told.

Mr Chunga argued that the applicant waited too long before applying for Prohibition. The application was made within six days of the judgment of the Constitutional Court.

Mr Chunga argued about no *mala fides* being proved, therefore the Court ought not to exercise its discretion. The expression *mala fides* has an unpleasant connotation. The total silence of the unexplained delay does raise a presumption of unfairness.

Mr Chunga argued that the applicant acquiesced in his own prosecution. The applicant appeared in Court in answer to the summons, perhaps he was taken there under escort. He pleaded not guilty to the charges. No accused person acquiesces in his own prosecution on a criminal charge, not even for riding a bicycle without light. An accused person goes into a criminal Court trembling. He comes out somewhat shredded and shorn. He has no other option. It is not acquiescence, it is submission to the power of the law.

Mr Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section26 of the Constitution. This argument of his compels us to say that he kept free wheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General's powers under section26 can be interfered with. What this application is questioning is the mode (emphasis ours) of exercising those powers.

No one will succeed in convincing us that the Court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity.

Mr Chunga argued that because of the provisions of section26(a) which states that the Attorney-General "may institute and undertake criminal proceedings ….." the Court has no power to grant prohibition. Mr Chunga argued that once a prosecution is launched the Attorney-General is entitled to carry it to conclusion without interference until it ends in an acquittal or conviction, or we suppose, it is otherwise lawfully terminated. This is a strange argument indeed, one which begs itself. The less said about it the better, save that we must draw attention to section123(8) of the Constitution which enacts:

"No provision of this Constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a Court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law"

Finally Mr Chunga argued that the decision of the Constitutional Court was wrongly arrived at, and we should ignore it. We have not taken it into account in reaching our decision but not for the reason advanced by Mr Chunga.

Perhaps, some day a Constitutional Court with a full bench of five judges will be called upon to pronounce whether what Mr Chunga says is correct. In the meantime the judgment of the Constitutional Court is the law of the land, it is final, also unassailable and unappealable as the Constitution states.

These proceedings have put our Constitution on the anvil. They are the subject of considerable notoriety. They will become a milestone in the legal history of Kenya. The country is watching us. Africa is watching us. Other countries outside, some with their own peculiar systems of administering justice, they are all waiting to see how we will decide this case.

We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self-laudatory when we say the Republic of Kenya is praised and admired by other peoples and other systems for the independent manner in which justice is dispensed by the Courts of this country.

We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the Constitution if it fails to give effective protection to their fundamental rights. The people know and believe that destroy the rule of law and you destroy justice, thereby also destroying the society. Justice of any other kind would be as shocking as the crime itself. The ideals of justice keep the people buoyant. The Courts of justice must reflect the opinion of the people.

We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the Court will be within a reasonable time as required by section77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General. It was a case which had received notable publicity, and the matter was considered important enough to be raised in the National Assembly.

We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious.

If we thought, which we do not, that the applicant by being prosecuted is not being deprived of the protection of any of the fundamental rights given by section77(1) of the Constitution, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent this prosecution in the public interest because otherwise it would similarly be an abuse of the process of the Court, oppressive and vexatious. It follows that we are of the opinion that the application must succeed in either event.

In our job we have been constantly engaged for a long time in gauging the minds of people who appear before us by reading and we try to assess, their thinking process. The analytic nature of our work has endowed us with increasing our insight into the minds of people which enables us to assess patterns of human behaviour. We have come to believe that in this instance there are likely to be members of the public who think that notwithstanding the disesteem generated by the attempt to resurrect the four charges against the applicant which were publicly proclaimed to have been dropped, the files closed and an assurance given that the appellant will not be prosecuted, the applicant should still be taken to Court for law-breakers must be punished for the crimes they commit. As is their custom such body of public opinion will not stop to consider that the applicant has to be proved guilty in order to be punished, and his trial has not yet taken place.

There will be a second school of thought who while not forgetting that the appellant may be guilty of serious contraventions of the provisions of the Exchange Control Act they will reason to themselves that

scoundrel or innocent, enough is enough. In addition an undertaking was given officially that the applicant would not be prosecuted. That undertaking must be honoured in the circumstances of this case not only because it came from the high Office of the Attorney-General of the Republic of Kenya, but also the members of the society are entitled to an orderly and tranquil life and not be subjected to vicissitudes of law especially when there have been no subsequent fresh events to justify it. And no claim is made that there have been any fresh events. We believe that the members of this second school of thought are in a far bigger majority and they think like we do. Again, therefore it is not in the public interest to continue with the applicant's prosecution. It is one of the few occasions when public policy is logical. A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed. The present incumbent of the Office of the Attorney-General is in a difficult position through no fault of his own. His right to prosecute has receded by having the ground tactically cut off from under his feet completely by the Attorney- General who decided not to prosecute. He ensured it by publicly informing the applicant accordingly. The Attorney-General who succeeded him practised inertia. The second Attorney-General who succeeded him reinforced the applicant's case by stating in the National Assembly that it had been decided not to prosecute the applicant. Instead of merely crossing the t's and dotting the i's he could have used his own mind to use his powers under section26 of the Constitution.

Stanley Munga Githunguri! You have been beseeching the Court for Order of Prohibition. Take the order. This Court gives it to you.

When you leave here raise your eyes up unto the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the juridical system of Kenya.

Order: Prohibition to issue as prayed.

Dated and Delivered in Nairobi this 10th day of February 1986.

C.B.MADAN

CHIEF JUSTICE

D.K.S.AGANYANYA

JUDGE

J.E.GICHERU

JUDGE