Case Number:	Criminal Application 426 of 2001
Date Delivered:	27 Jul 2001
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Alex George Aluri Etyang
Citation:	Samwel D N Okello v Republic [2001] eKLR
Advocates:	Mr Tobiko for the Applicant, Mr Njeru for the Interested Parties, Mr Bwonwongwa for the State/Respondent
Case Summary:	**Samwel D N Okello *v* Republic** High Court, at Nairobi July 27, 2001 Etyang J Criminal Application No 426 of 2001 ***Constitutional Law*** *– High Court - supervisory powers of the High Court – absence of rules of practice and procedure regarding the exercise of this power – whether this deficiency denied court jurisdiction – Constitution sections 65(2), (3).* ***Criminal Practice and Procedure*** *– mentions – mentions of criminal cases – whether mentions amount to "proceedings".* The applicant filed a Notice of Motion seeking the High Court's exercise of its supervisory powers under section 65(2) of the Constitution, and its revisionary powers under sections 362 and 364 (1) (b) of the Criminal Procedure Code (cap 75). The applicant and the interested parties had been charged before the Chief Magistrate, Nairobi in Criminal Case No 399 of 2000. The charges were

preferred against them by the Kenya Anticorruption Authority (KACA). A constitutional court in High Court Miscellaneous Application No 302 of 2000 declared the investigative and prosecutorial powers of KACA unconstitutional and therefore null and void. The Attorney General then intimated his desire to take over the prosecution of the applicant, in exercise of his powers under section 26(3) of the Constitution. The applicant filed HC Misc Civil Application No 244 of 2001 seeking leave to apply for an order of *certiorari* to quash the criminal charges in Chief Magistrate's Case No 399 of 2000. The applicant also sought an order that such leave do operate as a stay of further proceedings until the hearing of the judicial review application. The orders for leave and stay were granted. When these orders were brought to the attention of the trial magistrate, the magistrate adjourned but ordered that the said criminal case shall continue to be mentioned on dates agreed upon until the determination of the judicial review application. The applicant was aggrieved by the decision of the trial magistrate terming it as improper, irregular, illegal and invalid for lack of jurisdiction or power to alter, vary or modify a High Court order.

Held:

1. The Constitution of Kenya has, vide section 65(2) thereof, bestowed upon the High Court Jurisdiction to supervise any civil or criminal proceedings before a subordinate court or a court martial, and to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts.

2. The fact that no rules of practice and procedure may have been made under section 65 (3) of the Constitution does not remove the High Court's supervising jurisdiction under section 65 (2) of the Constitution. Besides, rules of practice and procedure are only administrative in nature dealing with regulatory and machinery processes. The values and principles embodied in the Constitution remain.

3. After the record of the subordinate court has been called for pursuant to the provisions of

	section 362 of the Criminal Procedure Code, the High Court has jurisdiction and power to alter or reverse any order or finding of the subordinate court which may come into question. 4. The holding of mentions is a form and manner of conducting judicial business. It is not an administrative exercise. This is why mentions are conducted by judicial officers and that whatever transpires during mentions forms part of court proceedings. The trial magistrate had no authority to fix the mentions in the criminal case. *Application allowed in part.* **Cases** 1. *Njogu v Attorney General* High Court Criminal Application No 39 of 2000 2. *Njuki, David Manyara v Chief Magistrate's Court Nakuru* High Court Miscellaneous Application No 195 of 1999 **Texts** Black, HC (Ed) (1979) *Black's Law Dictionary* St Paul Minnesota: West Publishing Co 5th Edn p 1083 **Statutes** 1. Constitution of Kenya sections 26(3)(b); 65(2),(3) 2. Criminal Procedure Code (cap 75) sections 205(1); 362; 364(1)(b) 3. Penal Code (cap 63) sections 101(1), 317, 349 **Advocates** *Mr Tobiko* for the Applicant *Mr Njeru* for the Interested Parties *Mr Bwonwongwa* for the State/Respondent
Court Division:	Criminal

History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed in part
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE HIGH COURT

AT NAIROBI

CRIMINAL APPLICATION NO 426 OF 2001

SAMWEL D N OKELLO ……..…APPLICANT

VERSUS

REPUBLIC…….……. RESPONDENT

RULING

In this Notice of Motion filed on 21st June 2001 by Samwel D N Okello (the applicant) this Court is being called upon to exercise its supervisory powers under section 65(2) of the Constitution of Kenya and its revisionary

powers under sections 362 and 364 (1) (b) of the Criminal Procedure Code, to call for and examine the record of criminal proceedings before the Chief Magistrate's Court at Nairobi in Criminal Case No 399 of 2000 for the purpose of satisfying itself as to the correctness, legality or propriety of the ruling made therein by Mrs R Mutoka, a Principal Magistrate, on 3rd May, 2001 and by which the said learned Principal Magistrate ruled that the applicant and his co accused, namely; Abednego Ondingo Anjaro, Jaysh Shah and Umesh Shah (hereinafter referred to as "interested parties") continue attending court for mentions of their case notwithstanding the High Court order of 16th March, 2001 in High Court Misc Application No 244 of 2001, staying those criminal proceedings.

Criminal proceedings in the Chief Magistrate's Court in criminal case No 399 of 2000 have already been called for and examined. They have been the basis of submissions made before me by counsels representing these parties. Quite clearly therefore this prayer in the motions is spent. Mr Keriako Tobiko advocate acting for the applicant, and Mr Macharia Njeru advocate, acting for the interested parties, have jointly called upon this Court now to proceed further and alter or reverse the said order of the learned Principal Magistrate in exercise of my revisionary powers under sec section 364 (1)(b) of the Criminal Procedure Code, which application is opposed by Mr Justus Momanyi Bwonwongwa, learned Asst Deputy Public Prosecutor representing the Attorney General.

The Constitution of Kenya has, vide section 65 (2) thereof, bestowed upon the High Court jurisdiction to supervise any civil or criminal proceedings before a subordinate court or a court martial, and to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administeredby those courts.

The Honourable The Chief Justice is required under section 65(3) of the

Constitution, to make rules with respect to the practice and procedure of the High Court in relation to this supervisory jurisdiction and authority. It seems to me that this has not been done. In my considered view, however the fact that no such rules of practice and procedure may have been made, does not remove the High Court's said supervisory jurisdiction. The Court may nevertheless invoke its inherent jurisdiction as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Besides, rules of practice and procedure are only administrative in nature, dealing with regulatory and machinery process. The values and principles embodied in the Constitution remain. It is precisely on this point that a Constitutional Court, (Oguk, Etyang and Rawal JJ) said in High Court Cr Application No 39 of 2000 *Crispus Karanja v Attorney General* as follows:

“It is our considered view that constitutional provisions ought to be interpreted broadly and liberally, and not in a pedantic way. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legalisation. It is a living document.”

With reference to the matter now before me, I am satisfied that the values and aspirations of the applicant and the interested parties must be given meaning, by invoking the supervisory jurisdiction and authority as enacted in section 65(2) of the Constitution notwithstanding that the Chief Justice may not have made rules of practice and procedure as required under s 65(3) thereof.

This constitutional supervisory jurisdiction of the High Court is further pursued through statutory provisions under section 362 and 364 of the

Criminal Procedure Code often referred to as the revisionary jurisdiction of the High Court. For after the record of the subordinate court has been called for pursuant to the provisions of section 362 of the Criminal Procedure Code, the High Court has jurisdiction and the power to alter or reverse any order or finding of the subordinate court which may come into question.

In essence therefore the application now before me is properly before this Court and the orders prayed for are available. It is for the applicant to satisfy the Court that he is now entitled to the order being sought.

The facts giving rise to this motion are simple. On the 22nd February, 2000 the applicant and the interested parties were charged before the Chief Magistrate Nairobi in Criminal Case No 399 of 2000. The applicant was charged in counts 1 and 2 with abuse of office contrary to section 101(1) Penal Code, and in counts 3 and 4 with forgery contrary to section 349 of the Penal Code. They were then jointly charged in counts 5 with conspiracy to defraud contrary to section 317 of the Penal code. These charges were preferred against them by Kenya Anti-corruption Authority (KACA). Then on 22nd December, 2000 a Constitutional Court in High Court Misc

Application No 302 of 2000 declared the investigative and prosecutorial powers of KACA unconstitutional and therefore null and void. The Attorney General then intimated of this desire to take over the prosecution of the said case, in exercise of his constitutional powers under section 26(3) (b) of the Constitution, a move which was objected to by the advocates for the defence on the ground that as KACA was an illegality there was nothing which the Attorney General could take over. The learned Principal Magistrate adjourned the hearing of that objection to the 20th March, 2001.

In the meantime on the 16th March, 2001 Mr Tobiko filed an application being High Court Misc Civil Application No 244 of 2001 seeking leave to apply for an order of *certiorari* to quash the criminal charges filed against the applicant and interested parties in the Chief Magistrate’s Case No 399 of 2000. He also sought for an order of prohibition directed at the Attorney General, to prohibit him from taking over the said criminal case. There was a third prayer which is relevant to the matter before me now. Mr Tobiko, in addition, sought an order directing that the grant of such leave to operate as a stay of further proceedings until the hearing of the judicial review application. Pursuant to that application the High Court (Osiemo J) on the same 16th March, 2001 granted leave and directed that the same operates as a

stay of further proceedings. An order was duly extracted and the attention of the learned Principal Magistrate was drawn to it on 20th March, 2001 in court, who noted the same as the court record and directed that the case be mentioned on 27th April, 2001. The said High Court order of 16th March, read as follows:

“That the grant of such leave do operate as stay of further proceedings until the hearing of the review application which should be if filed within 21 days”.

On the 27th April, 2001, Mr Tobiko again drew the attention of the leaned Principal Magistrate to the stay order and submitted that as result of it the continued holding of “mentions” was contrary to and or inconsistent with the stay order. Thereupon the learned Principal Magistrate adjourned to the 3rd May, 2001 when she ruled that the said criminal case shall continue to be mentioned on dates agreed upon until the determination of the judicial review application. Being aggrieved by that decision, the applicant has now filed this motion, terming the decision of the learned Principal Magistrate improper, irregular, illegal and invalid for lack of jurisdiction or power to alter, vary or modify a High Court order. The only issue for my determination if whether “mentions” of a criminal case, as may be ordered from time to time in the course of a trial, are part of proceedings. With particular reference to the application before me, I must decide whether mentions of the criminal case under review are part of the proceedings which the High Court stayed vide its order of 16th March, 2001.

The statutory basis for mentions of criminal cases during proceedings is section 205 (1) of the Criminal Procedure Code. Pursuant to the provisions of this subsection a court has authority, before or during the hearing of a case, to adjourn the hearing to a certain time and place to be then appointed and stated in the presence of the parties or their respective advocates. When such a hearing is adjourned, a court may admit an accused to a bail or bond, with or without sureties, conditioned for his appearance at the time and place to which the hearing or further hearing is adjourned or remand him into prison custody. Provided that no such adjournment shall be for more than 30 clear days when an accused has been admitted to bail or bond, and for not more than fifteen clear days when he is committed to prison.

All the three counsels appearing before me now are agreed that “mentions” are part of proceedings, but the learned Assistant Deputy Public Prosecutor maintaining that, with reference to the said High Court order of stay, it was only the hearing of the case, but not the mentions, which was stayed. What then are “proceedings”" Mr Tobiko referred me to *Black’s Law Dictionar*y 5th Edition page 1083 to the following definition of proceedings:-

“Proceedings: In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment.”

Mr Tobiko has submitted that the holding of mentions is a form and manner of conducting juridical business. It is not an administrative exercise. This is why mentions are conducted by judicial officers and that whatever transpires during mention forms part of court proceedings. Mr Tobiko’s submission meets with my views and approval and is the correct position in law. Indeed, an accused person, unless expressly empted by court, must appear in court at all mentions of his case, not as an administrative requirement, but as a judicial and statutory requirement, failure to do so often leads to a cancellation of bail/bond and the issuance of a warrant of arrest to enforce such attendance in the case of an accused who has been admitted into bail. This further emphasizes the judicial nature of mentions and the seriousness with which courts take them.

The learned ADPP has submitted, with reference to this matter, that there is a need for the learned

Principal Magistrate, to monitor the progress of the application for judicial review which the applicant has filed, and that the said learned Principal Magistrate can do so during the mentions of this case, as was directed by the Hon Chief Justice in a similar application being High Court Mis Application No 195 of 1999 D*avid Manyara Njuki vs Chief Magistrate Nakuru*. With due respect to the learned ADPP, the Hon Chief Justice was dealing with an application where the applicant had conceded that the mentions of his case during his trial were harmless and non-contentious. In the application now before me the applicant and the interested parties all contend that the mentions of this case during their trial is unconstitutional, illegal and wrongful because their arrest, arraignment and prosecution by KACA was unconstitutional. They further contend that there are no valid criminal proceedings in existence before the Chief Magistrate's Court Nairobi and that the criminal charges preferred against them in Criminal Case No 399of 2000 , together with the entire proceedings and orders made therein, are all illegal and are a complete nullity.

I have given serious thought to the applicant's case as put before me by Mr Tobiko. It again meets with my views and approval. It is precisely because of the perceived unconstitutionality, and therefore illegality of their prosecution by KACA, that the applicant and the interested parties have come to the High Court, seeking leave to prohibit their prosecution, which leave they have obtained to file an application for judicial review to prohibit that prosecution, they have also applied for and been granted an order staying further proceedings in Criminal Case No 399 of 2000.

As the learned ADPP has conceded that mentions are part of criminal proceedings, then it is only logical and legitimate to hold that the High Court, on 16th March, 2001, ordered a stay of the entire Criminal proceedings, including mentions in Criminal Case No 399 of 2000. To hold otherwise would be absurd.

It must follow that the learned Principal Magistrate defied the said High Court order of 16th March 2001 when she purported to fix mentions in Criminal Case No 399 of 2000 to continue until the disposal of the intended application for judicial review. She had no authority to do so. For the foregoing reasons I grant prayer 2 in this Notice of Motion as prayed.

It is so ordered.

Dated and delivered at Nairobi this 27th day of July, 2001

A.G.A.ETYANG

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JUDGE