SECTIONS 25 AND 108 OF THE CONSTITUTION WITH PARTICULAR REFERENCE TO MURIITHI - V - ATTORNEY - GENERAL.

DEDICATED

TO MY MOTHER, WAMBUI.

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE BACHELOR OF LAWS DEGREE, UNIVERSITY OF NAIROBI.

BY

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UNIVERSITY OF NAIROBI
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INTRODUCTION

Kenya's Constitution is based on the Westminister model Constitution. It reflects the main characteristics of the British system of government. It emphasizes the rule of law and separation of powers. This is what is generally known as Constitutionalism.[1] Kenya's representatives had this in mind when the Constitution was being drawn up at the Lancaster House Conference. The Constitution is believed to reflect the general will of the people. However, with time the Westminister Model has been overtaken by events in Kenya. A Republic was declared in 1964 and since then various Constitutional changes have taken place. The most dramatic was the recent declaration making Kenya a de jure one - party state.

The Constitution has outlined the powers of the executive. It also vests the executive power in the President of the Republic of Kenya[2]. Under section 25 the President has power to dismiss public servants except those provided for by the law. The powers granted under the Constitution are, like any other law, subject to the review of the Courts. Thus, once the President has exercised his Constitutional powers (discretion), such act is, at the instance of the individual whose rights are violated or in danger of being violated, amenable to the process of the Courts for the purpose of testing its conformity with the law.

The choice of this subject was prompted by various reasons. In Kenya no one until the case in question had ever dared to challenge the powers of the President to dismiss a Public servant. So it was a precedent in Kenya's legal history. The case was also given full publicity thus making people aware of the action. The most striking feature of this case was the judgment which must have been frawned on by the legal professionals. There is a need to inform our hard working public servants of their position and rights. It would be failing if no comments were made on the case which has set a precedent.

This paper is based on two major hypotheses. First that President has power to dismiss at pleasure all public servants with some exceptions; and secondly that the powers granted under section 25 of the Constitution may be exercised through officers subordinate to the President but this should only extend to those responsible officers. The last proposition is that an officer who purports to dismiss at pleasure on behalf of the President cannot proceed to give reasons for the dismissal otherwise this is not an exercise of powers under section 25.

To deal with these propositions alot will involve reading and understanding the case of Muriithi - v- Attorney-General. This means making use of the High Court library reports and having a glance at the correspondence exchanged in this case. We will also refer to authorities on Constitutional Laws such as Dicey, O.H. Phillips and Nuabweze.

This will help in the understanding of the exercise of executive powers in other democracies especially England. There will be a case review of the various decisions on the question of the power to dismiss a public officer. Interviews will also be conducted among several people to get the general reaction to this case. This work will be contained in three chapters and a conclusion.

The first chapter goes into the historical background of the powers to dismiss at will. Here we find the exercise of such powers in England, the United States and in the Commonwealth countries as a whole. Except for England, the others as will be noted have written Constitutions granting the executive power to dismiss at will.

The second chapter is devoted to the Muriithi case which form the basis of this paper. In this chapter we will observe the case in details. These ~~is~~ are the issues of bias, interim declaration, jurisdiction, sections 25 and 108 of the Constitution. The issues will be outlined as they were solved by the learned judge in this case.

In the last chapter there will be a critical analysis of the case and the law. In this chapter the author will give his own views and also that expressed by the people interviewed.

In the conclusion we find the author's stand and the recommendations made to improve the existing law.

FOOTNOTES

I. For further readings see S.A. de Smith, The Constitution of the Commonwealth.

2. S. 23 of the Constitution.

CHAPTER I

THE HISTORICAL BACKGROUND OF DISMISSAL POWERS

(A) CROWN PREROGATIVE IN ENGLAND

For a long time the Constitutional development of Colonial Kenya had not paid much attention to the powers of the executive. This was because Kenya was a Colony and administered from Britain. All the prerogatives of the Crown applied to Kenya through the 1897 E.A. Order-in-Council. The executive authority of the Government of Kenya was vested in Her Majesty and exercised on her behalf by the Governor, either directly or through subordinate officers. The Governor had powers of appointing Colonial administrative officers. However, he acted on the advice of the Executive Council and the appointments had to be approved by the Home Secretary for Colonies. My concern here is the power of dismissal of Crown servants at will exercised by the Governor. During the period of self-government they were exercised by the governor-general. After Independence the Constitution conferred to the President power to dismiss public servants at will. This is contained in section 25 of the Constitution as shall be observed later. It becomes important therefore, to examine the historical background of the Crown Prerogative in England, mainly because most Kenyan Laws are English oriented. We shall also examine the exercise of Presidential powers of dismissal in the United States of American and a few Commonwealth countries (their systems of government is modelled on the same lines as Kenya) for comparative purposes.

Dicey describes "prerogatives" as "the residue of discretionary of arbitrary authority which at any given time is legally left in the hands of the Crown".[1] The prerogative is residual because parliament can take it away. It is seldom abolished expressly. However, it may be impliedly abolished, curtailed or merely suspended. Since the prerogative is part of the Common Law the Kind could not claim that a new prerogative had come into existence. A prerogative power is discretionary. Though its existence is determinable by the Courts, the manner of its exercise is outside their jurisdiction. This is not true of statutory powers, though the exercise of a statutory power may involve the exercise of discretion by the President. Prerogatives are legally vested in the King/Queen, and by custom and convention they are exercised through and on the advice of other persons, particularly Ministers. Blackstone referred to the royal prerogatives as that 'special pre-eminence which the King hath over and above all other persons and out of the ordinary course of the Common Law, in right of his regal dignity'.[2]

The history of the exercise of the royal prerogative in England goes back to the 16th Century. There emerged a distinction between the "absolute" and the "ordinary" powers of the King. Ordinary powers meant those involved in the administration of justice. These powers had long been exercised without discretion in accordance with definite principles and procedure. Absolute powers were the discretionary powers, for example: the direction of foreign policy; and the pardoning of criminals. In the Saltpetre Case[3] the court decided that the Crown may enter upon and

use the lands of the Citizen near the coast inorder to repel invasion. The citizen need not consent to the act.

In the Middle Ages therefore, the Monarch exercised considerable personal powers. However, in the course of centuries a transformation not always smooth and peaceful has taken place, by which the institution has progressively been adapted to meet the needs of modern democratic government. The effects of the Bill of Rights of 1688 in England was to curtail and not to destroy the prerogative rights. The future governmental power could only be enlarged by Parliament. But the prerogatives remained effective in those fields where it still predominates, namely, foreign affairs, patronage disposition etc.

Today there is a Constitutional monarchy in which the powers legally vested in the Queen by the Common Law or statute are exercised by her only on the advice of her Ministers or directly by Ministers on her behalf. The prerogatives have been classified as:

(a) Powers relating to the convening, proroguing and dissolving of Parliament and assenting to statutes;

(b) those powers relating to foreign affairs, war, peace and treaties;

(c) powers of appointing and dismissing officers, civil, military, executive and judicial;

(d) those affecting the collection and expenditure of the Revenue;

(e) powers relating to naval and military forces;

(f) those relating to the administration of justice and maintenance of order;

(g) powers relating to the social and economic affairs, for example, public health.[4]

The most important of these prerogatives is the Crown's power of appointing and dismissing Civil Servants. This is mainly because in England the Civil Servant holds his office at the pleasure of the Crown. He has no security of tenure. These powers were introduced in the Kenya Constitution as will be observed later. It becomes important therefore, to trace the relationship of the Crown and the Civil Servant.

In England, the foundation of the modern Civil Service took place in the middle of the last century. Before this the various Government departments and public officers were organised quite separately from each other. There was no concept of a unified corps of Civil Servants. Admission and promotion were usually on the basis of nepotism and political patronage; pay was not necessarily related to the work done, and..."lethargy and inefficiency pervaded many departments". Reform began with the North Cote - Trevelyan Report of 1854 which drew inspiration from the Indian Civil Service. The report recommended the abolition of patronage and that recruitment should be on the basis of competitive examination conducted by an independent central board. Proposals were also made, to encourage promotion by merit and the Civil Service to be viewed as a unified whole.

In 1855 a Civil Service Commission was established by an Order-in-Council. It effected most of the recommendations made by the North Cote-Trevelyan Commission. Purportedly

the Civil Service was immune from personal or political influence. Today the Civil Service is expected to exercise political neutrality. This is the theoretical basis of the Civil Service. Most of the high-ranking civil servants are not allowed to engage in politics. This is because of the fear that public confidence would suffer if there was even the appearance of political bias. The Commission also conducts examination of entrants to the Civil Service. Like Ministries, Civil Servants are servants of the Crown. They are called "permanent" since their appointment is non-political and in practice lasts during good behaviour, as opposed to Ministers and Parliamentary Secretaries who are responsible to Parliament and change office with the government.

Who is a "Crown Servant". There is no formal definition of a Crown Servant - "he can be said to be generally appointed by or on behalf of the Crown to perform public duties which are ascribable to the Crown.[5] Whether or not a person is a Crown Servant depends on the facts of the case. All civil servants are Crown Servants, but not all Crown Servants are Civil Servants for the term does not apply to Ministers, Parliamentary Secretaries etc. Local government officers and employees of public corporations are not Civil Servants although the nature of their work and their conditions of employment bear many similarities.

Civil Servants are subject to a general code of conduct, the fundamental principles of which are that a Civil Servant must give his individual allegiance to the state at all times and on all occasions. When it has a claim on his services.

He must not put himself in a position where his duty and his private interests conflict and he must not use his official position to further those interests. His private activities must not be such as to bring discredit on the Civil Service, for example, gambling and speculating. He must not only be honest in fact, but also he must not lay himself open to suspicion of dishonesty.

At Common Law a Civil Servant is dismissible at the pleasure of the Crown. In theory he has no security of tenure and can be dismissed at any time. This applies even if it was agreed at the time of the appointment that the Civil Servant would be employed for a fixed term. This was the case in Dunn v. The Queen.[6] The petitioner here was engaged for a period of three years in the Service of the Crown in the Niger Protectorate. Before the term was over he was dismissed. In upholding the dismissal by the Crown at will, Lord Herschell stated,

> 'I take it that persons employed as the petitioner was in the Service of the Crown, except in cases where there is some statutory provision for a higher tenure of office, are ordinarily engaged on the understanding that they hold their employment at the pleasure of the Crown. So I think that there must be imported into the contract of the employment of the petitioner the term which is applicable to Civil Servants in general, namely, that the Crown may put to an end the employment at its pleasure."

This proposition was followed by Tucker J. in Rodwell v. Thomas [7] though he thought it was only fair and reasonable

that a Civil Servant should be given some opportunity of presenting his case before dismissal.

However, some decisions seem to imply that the Crown's power to dismiss of pleasure is limited. This is particularly so where the terms of contract stipulate that the civil servant shall be given a hearing before dismissal. This was clearly stated in the case of Reilly v. The King.[8] In this case, whose facts are not of importance, Lord Atkin said in strong terms that,

> "If the terms of contract definitely prescribe a term and expressly provide for a power to determine 'for cause' it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded."

This appear to be the reasoning of the Board in Gould v. Stuart.[9] There are certain categories of Crown servants (for example the Attorney-General, Controller and Auditor-General, Judge ect) who cannot be dismissed at pleasure, either because of the nature of their duty or because of the terms of their employment or both. In all other cases the Crown's power to dismiss at pleasure can only be limited by statute.

Thus at common law the civil servant's position was rather harsh. In England today, a tribunal or court can recommend reinstatement if the civil servant was dismissed unfairly. He is entitled to compensation to a certain extent. Despite all these reforms, some of the common law disabilities affecting the civil servants still remain.

Having considered the history of the exercise of the Crown prerogative to dismiss at pleasure, we will now proceed to see how similar powers granted under the constitution

are exercised. There I intend to examine the exercise of Presidential powers of dismissal in the United States of America. This is important when it comes to comparing the exercise of such powers in different countries particularly in Kenya.

(B) PRESIDENTIAL POWERS OF DISMISSAL - UNITED STATES

Like most modern governments the United States has manifested a tendency towards concentration of power in the hands of the executive. The President is the political head of the country in extra constitutional affairs; he exercises the power of pardon, the veto power and extensive war powers, and has an almost exclusive control over foreign relations. Three striking divergent theories purport to describe the nature and scope of Presidential powers. They are: the constitutional theory, the stewardship theory and the prerogative theory. The presidential prerogative in relation to dismissal of public officers is the most important for our discussion here.

The President with the advice and consent of the Senate appoints ambassadors, judges of the supreme court and all other officers whose appointments are not provided for. While the power of removal is generally regarded as a power derived from a power to appoint, it rests within the sole discretion of the President only when exercised with respect to a purely executive or Ministerial office.

The question of the President's power of appointment was one of the first great issues of constitutional policy to reach the supreme court. This was in Marbury v. Madison [1]

where Marshall C.J. said that the constitution is the supreme law of the country and the court had the power to declare laws of Congress unconstitutional. However, the court avoided any full-dress consideration of Presidential removal powers until after the First World War. During this time the United States had been undergoing a period of reconstruction and little attention was paid to the exercise of powers by the Executive. When the question arose in Myers v. U.S.,[11] it was whether Congress could limit the President's discretion through statute by providing that the Chief Executive could remove certain officers only with the consent of the Senate. A majority of the judges upheld the direct Constitutional authority of the President to remove at his discretion members of his cabinet. Subject to Presidential appointment, and therefore subject to Presidential removal, were occupants of patronage positions, primarily in the Federal field service. From the above statements it can be observed that the existence of a Permanent civil service in the American system is quite distinct from the civil service which exists in Britain. The most outstanding fact about the latter is that it extends to all but the very highest levels of Government departments. A change in government thus means a change only at the very apex of the administrative hierarchy. In the United States the number of officers appointed by patronage remains surprisingly large. The President retains wide powers of removal over officers appointed by him, who are not part of the permanent civil service. This principle ensures the effectiveness of the President's position as

the administrative head of the State.

In Myers v. U.S.[12], President Wilson appointed the plaintiff as post master of Portland in 1917. Wilson then removed him in 1920 before the expiration of the statutory term of office which was three years. The plaintiff died while asserting his claim for salary. His wife and administrix appealed against an adverse decision. The supreme court was presided over by Chief Justice Taft who had pronounced his views on the question of the scope of Presidential powers of removal as follows:

> "It was settled as long ago as the first Congress... that even where the advice and consent of the Senate was necessary to the appointment of an officer, the President has the absolute power to remove him without consulting the Senate. This was on the Principle that the power of removal was incident to the Executive power and must be untrammeled...." [13]

Some members of the court in the above case argued that there may be a middle ground between the absolute power in the President to remove and the absolute power in the Congress to control the removal. On this theory Congress may undoubtedly control the removal when exercised by any other official. The majority of the judges stated that the removal of a civil servant is indisputably an executive power and as executive power is vested in a president, the power of removal inheres in him as part of his prerogative. Such power can only be limited by the constitution.

The dissenting judges in this case (Myers) (Holmes J., McReynolds J., Brandeis J.) argued that Congress can limit

the power of the President to remove inferior officers. This view was supported by the majority in Rathburn (Humphrey's Executor) v. U.S.[14] In Myers (supra) it was pointed out that the power of removal, though generally essential to the executive power, is different in its nature from that of appointment. The Senate has power to reject newly proposed appointments whenever the President removes the incumbents. Such a check enables the Senate to prevent the filling of offices with bad and incompetent men or with those against whom there is a reasonable objection.

From the decisions by the supreme court and English courts, it is clear that the view towards revomal powers of the President and Crown is not very different. In England the exercise of the prerogatives can only be limited by statute. The American courts seem to imply that the President has the sole discretion in the removal of executive officers but he can be controlled in the removal of inferior officers.

To move nearer home, we can now consider the exercise of powers of removal by the executive. In this respect, we examine the exercise of such powers among some Commonwealth countries. We will also consider the position in Kenya where the case in question arose.

(C) THE POSITION IN THE COMMONWEALTH

One of the controversial issues facing lawyers in the Commonwealth countries is whether the position of the civil servant is different from that of his counterpart in England, or whether or not the Colonial position has been

changed by legislations regulating the structure and control of the Civil Service.[15] The question of the President's prerogative to dismiss a public servant at pleasure has arisen in Uganda, India, Zambia and of late Kenya. The judges have tackled these issues carefully and supported their decisions with long lines of cases.

In Independent Uganda the question of President prerogative arose in the case of Opoloto v. Attorney-General.[16] In this case a Chief of Staff and Brigadier in the Uganda Army was discharged from the Armed Forces. The dismissal was sponsored by the President but purported to have been done by the Defence Council of which the President was Chairman. The plaintiff contended that the dismissal was contrary to the Armed Forces Act. The State Counsel on the other hand argued that there was no cause of action as the plaintiff had no security of tenure. The case was dismissed and the court, in strong words, upheld the President's power to dismiss at will saying that,

> "It would require clear words to take away this established prerogative right..." [17]

Thus the court refused to grant a declaration.

In Tanzania the power to dismiss can only be exercised if it is in the public interest. There is a distinction between this and the power to dismiss at will exercisable by the Crown in England or the President in Kenya.

In Zambia the question arose in 1972. This was less than a decade since her Independence. It was a challenge to the courts. It arose in the case of Kang'ombe v. A-G.[18] Here a government teacher was dismissed by a Permanent Secretary of the Ministry of Education on the orders of the President.

This came after the Permanent Secretary had made an application to the Public Service Commission that the teacher be dismissed. Finding no "justifiable cause" the Commission refused to act. The President intervened and ordered that Mr. Kang'ombe be discharged with immediate effect. This decision was conveyed to Kang'ombe by a letter. The High Court held the discharge to be unconstitutional and void, on the ground that under the relevant provision of the Constitution the President can himself exercise the power vested in him. This is the power to appoint, dismiss and discipline public servants only, and only if he has first required the public service or the Teaching Service Commission to refer to him a case still under consideration by the Commission.

> "If a Commission has given a decision in a case, then it is no longer under consideration. Its decision finally disposes of the case, and there is no power in anyone else other than the Court to review that decision.... There is no power for the President to set aside a decision of ... the Commission."[19]

At the time this appears to have been the Zambian stand in relation to dismissal of Public Servants.

In Kenya the Crown prerogative was exercised by the Governor on behalf of Her Majesty. This included the power to dismiss. This power was exercised as aforesaid. In theory, however, power was still vested in the Crown. These powers were transferred to the Governor-General at the time of self-government and later to the President at Independence. Under Section 25 of the Republican Constitution Subsection (1) reads:

> "every person who holds office in the service of the Republic of Kenya shall hold such office during the pleasure of the President".

Unlike the Crown prerogative in England the President does not have to await advice and can act on his own initiative. All the doubt of the reality of his power is removed by the express provision that in the exercise of his powers and functions,

> "the President shall act in his own discretion and shall not be obliged to follow advice rendered by other persons".

The idea of a Public Service Commission had not existed in Kenya until Constitutional changes brought about self-government and Independence. During the Colonial era, appointments to public offices of high ranks were made in the mother country's Colonial Secretariat. The Governor was the appointing authority in all local cases, for example, District Officers, Chiefs, etc. Disciplinary codes and procedure were laid down in General Orders and Colonial Regulations which were thmselves administrative regulations. Appointments, promotions and disciplinary measures affecting the more senior posts came under the supervision of the Governor and his Executive Council. There was a right of appeal to the Secretary of State for the Colonies open to all persons in the Crown service. As far as the Colonial rulers were concerned this system worked with impatiality and justice mainly because, in practice, the whole of it was managed by Civil Servants whether in the country or in Britain. This system was felt to be so effective that there was no need to establish an Independent body to manage the Civil Service. There was the assumption that

Europeans and other people were equal in the service of the Crown. The question of Crown's prerogative to dismiss its servant at pleasure arose in the case of Khair Din v. High Commissioner for Transport.[20] In this case the plaintiff, a guard, had been dismissed by the Superintendent of the railway line. He brought an action for damages for wrongful dismissal. The service Agreement had been made between the plaintiff and the Superintendent. In upholding the Crown's power to dismiss at will, the court stated that,

> "there is beyond all question an absolute power in the Crown, in the absence of statutory provision to the contrary, to dismiss at pleasure a person employed in the Civil Service of the Crown".

It was also stated that the Crown can contract through some of its officers and that the Superintendent fell under the category of such officers.

Kenya's executive Public Service Commission was established by, and entrenched in the Constitution.[21] The Commission was not supposed to be subject to the directions or authority of any person. Strong provisions existed to ensure that neither serving nor ex-politicians nor public officers could be members of the Commission nor could members of the Commission hold public offices before the expiry of three years after leaving the Commission. The Public Commission, established under Section 106 of the Constitution, is based on the English Model. During its initial stages the Commission was only an advisory body. Later it was granted the powers of promotion, appointing and disciplining

public officers. So far no legislatinn has been passed to define clearly the functions of the Civil Service. Since the powers of the Commission are shared with the President there is the question of the officers who fall under the powers of the Commission and those under the President.

Representations were made to the Ndegwa Commission of 1971 that the status and functinns of the Civil Service be set out in a written law. The Government, however, felt that the Service Commissions Act and the Public Service Regulations were sufficient safeguards.

The Civil Service is an important arm of the government. It implements the policies of the political heads of the administration. Once a policy has been formulated and made into law, it is the duty of the Civil Service to implement the policy by carrying out the provisions of the law. It is responsible for advising the President and his Ministers on policy matters. The President is the political head of the Public Service. The service functions through his directions and general orders. The Civil Service establishment in Kenya is controlled under the Directorate of Personnel headed by the Chief Secretary. The Permanent Secretary is the link between the Minister and the team of Civil Servants working in his Ministry. The Civil Service is also expected to maintain its political neutrality. This is mainly to enable smooth running of affairs especially where there is a change of government. This theory still persists in Kenya though it is doubtful how neutral the Civil Service is. The importance of the

Civil Service has been emphasized by Finer in his book[22] where he points out that

> "the function of the civil service in modern states is not merely the improvement of government, without it indeed government itself would be impossible."

The Public Service Commission is charged with the responsibility of the appointments, promotion and discipline of civil servants. This is provided under section 107 and 108 of the Constitution. The important role of the Commission cannot be underrated. W.N. Wamalwa in his book[23] states,

> "The primary function of a Public Service Commission is to provide the government of the day with an efficient civil service as an instrument for the implementation of policies and programmes."

However, not all public servants fall under the Commission. Appointments of certain senior officials (e.g. Ambassadors, Permanent Secretaries etc) who hold positions of confidence is reserved to the President. He has power to remove and discipline such appointees. There are a category of public servants who can only be dismissed in the manner provided under the Constitution. Such officers do not hold their offices at the pleasure of the President. They are the Judges of the High Court, the Attorney-General, Auditor-General etc.

In Independent Kenya the question of dismissal of a public servant at the pleasure of the President had not arisen until 1981. The question of the interpretation of Section 25 and S.108 of the Constitution arose in the case of Mwangi Stephen Muriithi v. Attorney-General.[24]

The decision in this case is of great importance to the general public and especially civil servants. It has set a precedent in Kenya's legal history and this paper will be an attempt to discuss some of the important issues raised in that case.

FOOTNOTES

1 O. Hood Phillips and Paul Jackson, Constitutional and Administrative Law (oth Ed, Sweet and Maxwell, 1978, Ch. 14.

2 Ibid at p. 267-268.

3 (1607), 12 Co. Rep. 12.

4 F.W. Matland, Constitutional History of England Cambridge University Press, 1961, at p. 422.

5 O. Hood Phillips, Constitutinnal and Adminstrative Law at p. 340-346.

6 (1896) I.Q.B. 116 at p. 119 (HL).

7 (1944) I All E.R. 700.

8 (1934) A.C. 176 at p. 179 (P.C.)

9 (1896) A.C. 575 (P.C).

10 1 Cranch (US) 37 21 Ed. 60.

11 272 US. 52, 265 (1926).

12 Ibid.

13 Schubbert, Constitutional Politics (Holt, Rhinehart and Winston Inc. New York, 1960 at p. 335.

14 295 US. 602 (1935)

15 Kiapi, Civil Service Laws in East Africa (E.A.L.B. 1974) Ch. 4.

16 (1969) E.A. 631.

17 Supra at p. 634

18 (1972) HP / 51 of 1st November 1972.

19 Nwabueze, Presidentialism in Commonwealth Africa (C. Hurst and Company, London,) at p. 185.

20 10 K.L.R. 109 at 110.

21 Sections 106, 107 and 108 of the Constitution outlines the general powers of the Public Service Commission.

For a detailed study see the Service Commission Act (Cap. 185).

22 Finer, Theory and Practice of Modern Governments at p. 709.

23 H. Rweyemann, A Decade of Public Administration in Africa (E.A.L.B., 1975) at 52.

24 Civil Case No. 1170 of 1981.

CHAPTER 2

MWANGI STEPHEN MURIITHI V. ATTORNEY-GENERAL [1]

The facts which led to this case go back to 23rd February 1981, when Mr. Muriithi was purportedly appointed as the General Manager of Uplands Bacon Factory. From the correspondence exchanged between the various parties (Office of the President, Mr. Muriithi, Director of Intelligence, Chairman of the Board of Uplands Bacon Factory, and the Public Service Commission) it is clear that the case was quite complicated. It involved many public officers. In this chapter we find the proceedings and judgment of the Muriithi case which has set a precedent in the history of the judiciary in Independent Kenya. A lot of the materials were gathered in the High Court Library since a portion of the case has not yet been typed.

On 13th April, 1981 Mr. Muriithi received the letter which purported to retire him under section 25 of the Constitution. The letter was also to operate retrospectively. The retirement was effective from 23rd February. The Government refused to withdraw the letter of 13th April and Mr. Muriithi commenced an action against the government for wrongful retirement. Since no other remedy was open to him, he prayed for a declaration.

The events which led to this case started on 23rd February as stated above. On this date the Chief Secretary wrote to the Permanent Secretary in the Ministry of Livestock Development asking him to replace Mr. Chomba who had been seconded to the Company (Uplands Bacon Factory). The

letter continued to state that Muriithi's appointment was for a term of three years renewable at the discretion of the government on the recommendation of the Board of Directors of the Company. The Permanent Secretary wrote to Mr. Muriithi on 24th February and confirmed the appointment and terms. But the letter which the Permanent Secretary in the Office of the President wrote to Mr. Muriithi was radically different from that of the 23rd February. It stated that the appointment to Uplands was on secondment. The altered statement read as follows:

> "However, the period of your secondment will be decided upon after consultation with the Board of Directors of Uplands after a reasonable period of assessing your performance".[2]

Whereas the other letter stated that the appointment was for three years and was renewable the latter was uncertain and ambiguous. In the latter letter he was also expected to return the Special Branch car, to stop exercising Police duties while at Uplands and to hand over his Police Card (appointment letter). It also stated that during Mr. Muriithi's secondment he was to be placed in general civil cadre and not as a Police Officer on Secondment.

In a letter dated 9th March 1981 the Permanent Secretary in the Office of the President confirmed that Mr. Muriithi's appointment was on secondment. Muriithi was not happy about being required to give up his police card and other related government property. He therefore, went to the Director of Intelligence for clarification. The Director wrote to the Office of the President and stated that since Muriithi

was going to Uplands as a Police Officer it was not lawful to ask him to hand over his Police Appointment Card, nor could he be required to stop exercising the powers of a Police Officer as long as he held his appointment under the Police Act. In another letter the Director stated that Mr. Muriithi's appointment could be "very useful in the expanding role of Intelligence acquisition."[3]

In yet another letter (17th March) Muriithi addressed the Permanent Secretary in the Office of the President through the Director of Intelligence. He expressed his acceptance of secondment from the Force

> "to the temporary position of General Manager of Uplands Bacon Factory for the period indicated".

He requested to be informed of the legal basis of being asked to hand over his certificate of appointment under section 8 of the Police Act or any other items issued to him in his capacity as a Police Officer. The Permanent Secretary replied stating that the criteria pertaining to secondment of staff from the Kenya Government service to parastatal organisations apply to all other officers and consequently Mr. Muriithi's appointment would be governed by Personnel Circular No.28 of 1968. Personnel General Letter No.44 of 1977 provides that secondment of senior officers to statutory boards and other similar organisations are contained in Circular No.28 of 1968.

The Public Service Commission became involved in the case in April 1981. In a letter dated 6th April the Chief Secretary addressed the Public Service Commission.

He narrated Muriithi's history as a Police Officer. In his second paragraph he stated as follows:

> "As you may be aware, Mr. Muriithi was recently appointed to be General Manager of Uplands Bacon Factory as from February 1981. Although it was intimated to Mr. Muriithi that he would be seconded for a period of three years to that parastatal organisation..., the matter has now been reviewed and it has been directed that Mr. Muriithi be retired from the service with immediate effect. This retirement shall be in accordance with the provisions of section 25 of the constitution of Kenya... The purpose of this letter is to request you to obtain the Commission's necessary approval for the retirement of Mr. Muriithi from the civil service with immediate effect as explained above".

Without much ado the Public Service Commission replied to this letter stating that

> "Mr. Muriithi, Deputy Director of Intelligence, should be retired from the Service with immediate effect, on Presidential directive, in accordance with section 25 of the Constitution of Kenya".

The final blow came on 13th April when Mr. Muriithi received a letter purporting to retire him from service. It stated as follows:

> "Consequent upon your appointment as General Manager, Uplands Bacon Factory, it has been decided with the approval of the Public Service Commission to retire you from the Service, as from 23rd February, 1981, in accordance with the provisions of section 25 of the Constitution of Kenya. Your new appointment is on agreement, terms of service and will be issued by the Ministry of Livestock Development. You will

not be regarded as being on secondment to this Board and previous letters should be treated as varied accordingly".

After persistent letters from Muriithi's advocates asking the Government to withdraw the letter of 13th April, followed with refusals to withdraw, Mr. Muriithi (thereafter to be referred to as the plaintiff) instituted proceedings against the government for wrongful retirement. Mr. Muriithi also wanted the court to order the Public Service Commission to give him an opportunity to defend himself and let him know the reasons and grounds upon which the Commission gazetted that he had ceased to be a Police Officer.

The case involved several issues of law some of which had to be decided before the actual trial commenced. The Attorney-General (represented by State Counsel Mr. Shields) intimated that he would not hesitate to raise a preliminary objection that under the Government Proceedings Act Cap.40 he is not the proper party to be sued for acts or omissions by the Public Service Commission. It was also contended that by the letter of 17th March 1981, the plaintiff had accepted the appointment as General Manager of Uplands Bacon Factory. On the other hand the plaintiff's advocates applied for an interim or temporary declaration for a stay of execution while the matter was still being heard. The plaintiff also alleged that the trial judge would be biased. He could not understand why the case was transferred from Cotran J. to Hanconx J.

On the question of the temporary declaration the judge stated that it is settled law that there is no such thing

as temporary declaration. He relied on the decision in Gachathi v. A-G.[5] In this case Cotran J. relied on an English decision in deciding whether there can be a temporary declaration or not. Quoting from Upjohn's decision in Underhill v. Ministry of Food[6] he said,

> "... an order declaring the right of the parties must in its nature be a final order after a hearing when the court is in a position to declare what the rights of the parties are, and such an order must necessarily then be resjudicata and bind the parties for ever subject only, of course, to a right of appeal".

The judge on this basis refused to grant an interim declaration as prayed for arguing that there is no such thing as an interim declaration.

For the plaintiff it was also argued that the circumstances of the transfer of the case, from Cotran J. to Hancox J. was not in accordance with the Civil Procedure Code. This Act inter alia sets out the circumstances of a transfer. The plaintiff's advocates contended that Cotran J. had agreed to hear the case but all of a suddeen the Chief Justice transferred it to Hancox J.. Cotran J. should have been allowed to disqualify himself from hearing the case. Thus, the plaintiff believed reasonably that he would not be accorded a fair hearing. He wanted the case transferred to another judge who is capable and competent.

In deciding whether there was bias Hancox J. relied on Jowitt's Dictionary of English Law which defines bias as follows:

> "Moreover no one can act in a judicial capacity if his previous conduct gives ground for believing that he cannot act with an open mind".

He came to the conclusion that in the instance case no concrete grounds of objection or evidence of likelihood of bias had been shown. He replied on a criminal case - Karanja v. R.[7], in which Sachdeva J. said that for a transfer to be granted on the grounds of bias a clear case must be made out that the accused person has a reasonable apprehension in his mind that he shall not have a fair and impartial trial. He said,

> "... Justice must not only be done but seen to be done. However, this court will not make such an order on flimsy grounds at the whim or fansy of an accused person".

Hancox J. was of the view that the above statement was applicable to civil cases as well. The court came to the conclusion that there would be no bias in this case. The plaintiff had to appear before Hancox J. or withdraw the case and pay costs.

In this case the court relied mainly on the evidence of two persons - the plaintiff and Dr. Muriithi chairman of the Board of Directors at Uplands. As noted earlier the court relied on correspondence brought before it. Here I am going to consider the evidence of these two characters especially their views relating to the appointment to Uplands.

In his evidence the plaintiff said that he "had never wanted to be anything other than a police officer". Therefore it was his wish that his appointment to Uplands Bacon Factory should be as a police officer and not otherwise.

The purported letter of appointment was addressed to him directly and after receiving it he marked on it "not accepted". He said the normal procedure is for such a letter to be addressed through one's superiors - in this case the Director of Intelligence. From the correspondence between the office of the President and the other departments involved, the plaintiff got the impression that he was going to Uplands on secondment. The plaintiff stated that an attempt to transfer him otherwise than on secondment would have been a breach of S.61(c) of the Police Act. His attempts to take over as General Manager of Uplands was after the meeting with Mr. Nyachae, the Permanent Secretary in the Office of the President. According to his evidence Personnel Circular No. 28 of 1968, though applying to officers in the Common Cadre, was infrequently used and was an option open to the Commissioner of Police to transfer officers in the Force to such departments as the Ministry of Home Affairs, the Central Bank, Kenya Commercial Bank, Stock Theft Unit and other units. He had been on secondment to the Ministry of Health where he unearthed the famous Drugs' Scandal of 19 . The plaintiff said that the letter of 13th April came as a shock. He was reluctant to hand over his warrant card as he felt that this would be depriving him of his powers as a police officer. It would also have meant that he had ceased to be a Police Officer.

Dr. Muriithi gave evidence as to the manner of appointment of a General Manager. He said that Mr. Chomba, the then General Manager of Uplands, was there on secondment. He

drew attention to the form of the plaintiff's appointment. The plaintiff was not given an appointment letter as Mr. Chomba. Such a letter has to be signed by both contracting parties. It sets out the duties, renumeration, housing, retirement, leaves, medical scheme, and the position as regards Trade Secrets, in comprehensive details. He said that the Factory was faced with multiple problems such as loss of funds, misappropriation, fraud, thieving and failure to pay farmers for the pigs they sold to the Factory. It was therefore, felt that these matters needed investigations According to his evidence the plaintiff was the proper person because as General Manager he could ask questions and demand answers. The letter of appointment left open the question of salary and other related terms. Dr. Muriithi as the plaintiff, believed all along that the plaintiff was going to Uplands on secondment. The witness also stated that in this case the requirement of experience of the pig industry was not necessary. Good management was the most important consideration.

After evidence was adduced, it was now left to the court to draw its own conclusions. It was faced with the question of the jurisdiction of the court and interpretation of sections 25 and 108 of the Constitution. In their submissions the counsel for the plaintiff and for the state relied on a number of decisions, mainly English cases. These cases will be referred to in the judgment especially because the facts were not similar to the case in question.

JUDGMENT

On the question of jurisdiction, the State Counsel, Mr. Shilds, raised an objection that the Attorney-General was not the proper party for acts or omissions by the Public Service Commission. Advocate for the plaintiff submitted that the Commission is not a corporate body, or capable of being sued, but is a government department. He was relying on Section 123(8) of the Constitution which gives authority to the court to review any functions exercised by a person whether in accordance with the Constitution or any other law.

However, the judge felt that this section had no bearing to the Public Service Commission which is set up by section 106 of the same Constitution. Its functions are outlined under the Public Service Commissions Act Cap. 185. He was of the view that if there is an error it can be amended. To him the court's duty is to remedy the situation and not to throw out or destroy the case simply on the ground of misjoinder. He referred to the unreported case of Okemwa v. Attorney-General,[8] where the application was for the issue of Certiorari and Mandamus, directed to the Public Service Commission to remove to the High Court and quash its decision to retire the applicant. The judges in this case had divergent views on the question of the Attorney-General. Chesoni J. felt that the Attorney-General was properly joined as provided under S.12(1) of the Government Proceedings Act and that even if he was improperly joined the application should not be dismissed. The mistake could be remedied by the name

of the Attorney-General being struck out and that of the Public Service Commission substituted and the "application heard on merit". However Kneller J. was of the opinion that the application was against the Commission and not the Government. Consequently the Attorney-General should not have been made a party to these proceedings. In the case of Wambugu v. Public Service Commission[9] the Commission was named directly as a party. This case involved the "removal" of an Inspector of Police and the question of retirement did not arise. The Commission was mentioned in relation to costs.

The judge in the instance case said that there is a world of difference between an application for certiorari, which was before the court in Okemwa's case[10] and in Wambugu's case,[11] and the present legal action commenced by "Summon and Plaint". Accordingly a declaration might lie against the individual members of the Commission as named parties but this does not mean that the Commission, as a collection of persons ought to be sued. Regarding this question in relation to justice the judge referred to a statement made by Farwell,L.J. in Dyson v. Attorney-General[12] where he stated:

> "It has been the practice, which I hope will never be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a court of justice when any real point of difficulty that requires judicial decision has occured".

Referring to the correspondence exchanged between the

parties the judge stated that the term "secondment" as used in these correspondence was used loosely. He relied on the definition given in the Oxford Shorter English Dictionary which defines secondment as follows:

> "To remove (an officer) temporarily from his regiment or corps for employment on the staff, or in some other extra-regimental appointment".

The judge noted as directed by Counsel for the Plaintiff that section 25 of the Constitution makes no reference to the Public Service Commission. The powers of the Public Service Commission in relation to Police Officers is outlined in section 108 of the Constitution. He said that the Commission has powers of removal and on the assumption that retirement is a kind of removal, then it had powers to retire the Plaintiff in this case. That even if the retirement had the approval of the Commission, it did not mean that this was its decision.

The judge then turned to deal with the contention that the Permanent Secretary in the Office of the President had no right to retire the Plaintiff in the manner he did and that it was not done in accordance with the Constitution. In reaching his conclusion the learned judge reviewed the existing case-law. Most of these decisions were English cases.

One of such decision Dunn v. Queen[13] concerned the dismissal of a Consular agent engaged for three years in the service of the Crown. Lord Herschell was of the opinion that persons employed as the petitioner held their employment at the pleasure of the Crown. In Rodwell v. Thomas[14] the judge (Tucker J.) was of the view that in cases of

contract it is imported into it a term applicable to all civil servants in general, namely, that the Crown may put an end to the employment at its pleasure. However, he felt that it would be fair and reasonable that a civil servant should be given an opportunity to present his case before dismissal. In the Kenyan case of Khair Din v. High Commissioner For Transport[15] the Crown's power to dismiss at pleasure was recognised as "beyond all questions".

Counsel for the Plaintiff, Mr. Khaminwa referred the judge to the Privy Council decision in Gould v. Stewart.[16] The court upheld the Crown's power to dismiss at pleasure but felt that such power could be limited in some cases. The relevant part of the judgment reads as follows:

> "These provisions, which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. In that case they would be superfluous, useless and delusive. This is, in their Lordships' opinion, an exceptional case in which it has been deemed for the public good that a civil service should be established under certain regulations with some qualifications of the members of it, and that some restrictinns should be imposed on the power of the Crown to dismiss them".[17]

In Reilly v. The King[18] the Plaintiff's office was abolished by an amending Act so that any contract that there might have been was discharged. Lord Atkin said that the relationship between the Crown and a public officer is not constituted by contract. However, he felt that for some offices a contractual relationship exists.

By "contract" it is meant a legally binding contract that will give the Civil Servant the right of access to a court of law to enforce compliance with its provisions.

Following the judgement in Gould v. Stuart [19] he said;

> ".... If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine 'for cause' it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded".

The Court was also referred to the statement of Lord Goddard in Inland Revenue Commissioner v. Hambrook.[20] Regarding the relationship between the Commissioners and the tax officer he said;

> "an established civil servant is appointed to an office and is a public officer.....,
>
> though there may be, as indicated in Reilly's Case, exceptional cases, as, for instance an engagement for a definite period where there is a contractual element in or collateral to his employment."

The above case was followed in Riordan v. The War Office[21] where the Plaintiff, a civilian employed in the Army base, resigned and then recanted only to have his resignation accepted and his service terminated. Diplock J. as he then was stated that the Crown can dismiss a public servant through its officers except in some special cases.

In Terrell v. Secretary of States for Colonies[22] the court held that a colonial judge, unlike his counterpart in England, held his office during the pleasure of the Crown.

The judge in the instance case referred to the Ugandan case of Opoloto v. Attorney-General[23] several times.

The main question in this case was the President's power to dismiss at pleasure. Under section 44 of the Constitution (Amendment) Act, 1963 of Uganda all the powers of the Crown in England passed to the President of Uganda. Further section 131 of the Uganda Constitution vested the executive power in the President. There was evidence adduced to the effect that the President had lost confidence in the Brigadier. In upholding the dismissal of the Plaintiff Sir Charles Newbold P. said that the President can exercise the executive powers either directly or through subordinate officers. In his view it would require clear words to take away this established prerogative right. Hancox J. in the instance case noted that unlike Uganda there is no provision in the Kenya Constitution importing the Crown prerogative to Kenya.

Advocates for the plaintiff referred the court to the practice in the United States. The cases decided in that country (e.g. Myers v. U.S.)[24] appear to make a distinction between executive and administrative officers. The court's opinion is that the President can dismiss at will executive officers but in relation to administrative officers his powers can be restricted by Congress. Though the judge made a reference to the practice in the U.S. he did not pay much attention to it. Thus it was not decided whether Muriithi was an executive or administrative officer.

The Court also referred to section 310 of the Indian Constitution for assistance. That section provides that every person who holds office connected with defence or any civil post under the Union holds it during the pleasure

of the President. Accordingly, the judge was of the opinion that

> "the provisions of section 25, are, as in India, intended to replace the previous English rule, and the position is therefore, very much the same as when Lord Goddard laid down the nature of the Crown and servant relationship in Hambrook's case in 1956".[25]

From the cases reviewed the judge concluded that every public officer holds office in the Republic of Kenya during the pleasure of the President unless there is specific statutory provision to the contrary. The judge felt that Muriithi did not fall under the category of officers whose tenure of office is protected under the constitution or any other written law. Therefore, he held office at the pleasure of the President.

The State Counsel, Mr. Shields, argued that the reference indicating the approval of the Public Service Commission in the letter of 13th April 1981, be rejected, or at any rate disregarded. He referred to the case of Thomas v. A.G. for Tobago and Trinidad [26] and asked the court to treat the instance phrase as a mere surplusage because the exercise of the Presidential prerogative does not require the approval of the Public Service Commission. In deciding this issue the judge said that none of the provisions referred to by the Plaintiff's advocates amounted to a "clog or restriction" on this power to dismiss at pleasure. Accordingly section 108 of the Constitution was additional to and not in derogation of this power. To him reference to the Public Service Commission was irrelevant and unnecessary to the exercise of the Presidential powers. He also said

that such phrases as "consequent upon your appointment as General Manager of Uplands Bacon Factory..." should be ignored.

The judge in the instance case stated that no reason for the exercise of the Presidential powers need be given. He quoted from Ridge v. Baldwin[27] which states:

> "... as the person having the power of dismissal need not have anything against the officer he need not give any reason".

In Shenton v. Smith [28] the Privy Council stated that the Government was not bound to show any cause for Dr. Smith's dismissal. As will be observed later the judge did not deal with the cases where a reason for dismissal is given.

The judge referred to S.23(1) of the Constitution which vests the executive power in the President. Such power can be exercised directly or through subordinate officers. In the instance case he felt that the Chief Secretary was "the most appropriate officer in the Government" to dismiss a public servant.

The other question to be resolved was whether Plaintiff's acceptance of the position of General Manager of Uplands amounted to a vacation or surrender of his previous office. The judge referred to Chitty on the Prerogatives of the Crown and said that there are three ways through which a public officer may loose his office. The most important in the instance case is by acceptance of another office, incompatible, even inferior, with that the person holds. The state Counsel contended that the Plaintiff had vacated his office by acceptance of the position of General Manager, an office which was incompatible with the office of Deputy Director

of Intelligence. The court was referred to the case of Milward v. Thatcher [29] where the court said that the office of a jurot which thePlaintiff previously held was incompatible with that of a town clerk to which he had been elected. The above case and Queen v. Mayor of Bangor [30] dealt with the validity of the second office whereas in the instance case the issue was the validity of the first office.

The judge referred to the evidence of Dr. Muriithi, Chairman of Uplands, and noted that though the offices (Deputy Director of Intelligence and General Manager) are quite different in character the duties of the Plaintiff's office were such that they could be useful at that moment - investigation purposes. Moreover, it was observed that the Plaintiff's willingness to go to Uplands was on the basis that he was going on secondment and would return to his office as police officer. Following the above reasoning the judge concluded that the Plaintiff's secondment could not be treated as a surrender or vacation of his office.

The final question related to the antedating of the Plaintiff's retirement. The judge referred to the case of Rodwell v. Thomas [31] where the letter of 22nd February, 1943 dismissed the Plaintiff with effect from 18th January. The court upheld the ante-dated dismissal saying that the Crown could not be fettered in the exercise of its powers. In Reilly v. The King [32] the dismissal of the appellant was antedated to the passing of the Act which had abolished his office five months earlier. The court upheld this dismissal. In the instance case the letter of 13th April

13th April, 1981 purported to retire the Plaintiff from 23rd February, the date of the Chief Secretary's first letter to Mr. Kibinge (Permanent Secretary in the Ministry of Livestock Development) and a day before the Plaintiff received notification of his appointment to Uplands. The judge was of the view that the Plaintiff's retirement was not antedated because he was entitled to 170 days leave which was to expire on 12th September, 1981, after which he would cease to be under Government employment again.

After taking evidence and reviewing the various cases relating to the issues raised, the court was to deliver its judgement. As already noted the case referred to the rights of a citizen. A man who had served the Government loyally for about a quarter of a century. The decision of the court would have been very important especially to the Public Servants in Kenya. The Presidential powers of dismissal were to be interpreted by the courts. The judge in this case was the well known Judge Hancox. He has set record in Kenya's legal development for his judgements This paper cannot give a review of the various cases he has decided but a good look of petition cases would show that for every issue he can advance an argument to support his conclusion. In the instance case he supported his views with a long line of cases. At the end he decided that from the evidence shown and the cases noted the defendants were the victors. The judgement was delivered on.....

FOOTNOTES

1 High Court of Nairobi Civil Case No. 1170 of 1981.

2 Correspondence read in the High Court of Nairobi Library on the Muriithi Case.

3 Letter by the Director of Intelligence to be found in the High Court of Nairobi.

4 Letter found in the High Court Library.

5 High Court Civil Case No. 3981 of 1979.

6 (1950) 1 All E.R.

7 Misc. Criminal Application No.199 of 1976.

8 Misc. Application No.4 of 1974.

9 (1972) E.A. 296.

10 Supra.

11 Supra.

12 (1911) 1 KB 410 at p. 424.

13 (1896) 1 QB 116.

14 (1944) 1 All E.R. 700.

15 (1926) 10 KLR 109.

16 (1896) A.C. 575 (Privy Council).

17 Supra at p.

18 (1934) A.C. 176 (Privy Council)

19 Supra at p. 578.

20 (1948) 2 All E.R. 770 at p.

21 (1959) 3 All E.R. 552.

22 (1953) 2 QB 482.

23 (1969) E.A. 631.

24 272 U.S. 52, 265 (1926).

25 The judgment in the Muriithi Case at p. 46.

26 Law Society's Gazette 14th October 1981 at p. 1143.

27 (1964) A.C. 40 at p. 65 (House of Lords).

28 (1895) A.C. 279 (Privy Council).

29 100 E.R. 45.

30 (1886) 18 Q.B.D. 349.

31 Supra.

32 Supra.

CHAPTER 3

A CRITICAL APPRAISAL OF THE LAW AND THE CASE

In the preceding two chapters we have extensively observed the exercise of Executive powers of dismissal at pleasure. In England the judges are of the view that the Crown's power to dismiss its servant at will can only be taken away or limited by an Act of Parliament. The Executive powers in the United States are rather distinct from those in England. In the former there are categories of officers who can be dismissed by the President without the consent of the Congress. These are officers holding executive or Ministerial offices. In this chapter we will discuss the existing law in Kenya and the Law as stated in the Muriithi's case. The latter will involve a close re-examination of the issues in that case and the judgement given by the learned judge, Hancox J. Then we will continue and give a critique of the law and the case. This will include interviews conducted among the various lectures in the Faculty of Law who showed some interest in the Muriithi case.

LAW IN KENYA

The scope of this paper extends only to the interpretation of section 25 and 108 of the Constitution as delivered by the High Court of Kenya in the case in question. Much more emphasize has been put to section 25 because the letter which purported to notify Muriithi of his dismissal referred to the section.

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Section 108 is mentioned because it relates to Police officers and Muriithi fell under this category of officers. The two sections are closely related because there is no category of officers who hold office at the pleasure of the President and others who stand to be dismissed by the Public Service Commission.

Section 25 of the Constitution was first introduced by the Constitution (Amendment) Act. No. 16 of 1966 as section 87 A. It was argued that the purpose of this section was to ensure that public servants would not claim a right to serve the Government, thus preventing it from cutting down its staff as, and when necessary. Moreover it was felt that the President should be clothed with almost the same powers as the Crown in England.

The exercise of these powers is not technical since no procedure is laid down for the dismissal of a public officer. Section 25 provides as follow:-

(I) Save in so far as may be otherwise provided by this Constitution or by any other law, every person who holds office in the service of the Republic of Kenya holds such office during the pleasure of the President:
Provided that this subsection shall not apply in the case of any person who enters into a contract of service in writing with the government of Kenya by which he undertakes to serve the Government for a period which does not exceed three years.

.....

This section covers a wide range of officers employed by the Government. As already seen some public officers have security of tenure and are provided for in the Constitution (for example Attorney-General, High Court Judges, Auditor-General, Permanent Secretaries etc). Holding office during the pleasure of the President means that one can be dismissed or retired for no reason. Thus the president can invoke the powers granted under section 25 when an officer's services are not required and there is no good reason to dismiss him. In theory therefore, a Public servant is employed by the President since he can be removed at any time and for no reason. Until, recently,[1] it could be said that a Public Servant held office during good behaviour.

However the powers of the President under this provision are not as wide as those of the Crown in England. These powers are exercised subject to any other provision of the Constitution or any other law. It would then mean that the President cannot purport to dismiss an officer whose removal is prescribed in an Act of Parliament even if he wanted to.

Those officers in the public service on contracts not exceeding three years do not hold office during the pleasure of the President. Thus if an officer's contract exceeds three years he falls under the purview of section 25. This is unlike in England where the Crown can dismiss its officers the contract notwithstanding. The restrictions put on this section are meant to ensure that there is no arbitrary dismissal or retirement by the Government of public officers employed on contract of short duration.

If such an officer is dismissed he is entitled to damages for breach of contract. Officers who can be dismissed during the pleasure of the President includes police officers. This brings us to consider section 108 of the Constitution which covers police officers. There used to be a Police Service Commission soon after Independence. Today all such bodies come under the Public Service Commission.

Section 108 deals with appointment, promotion and disciplinary control over police officers. The Commissioner of police is appointed by the President who can also dismiss him since his removal is not provided for by any law. The Commission deals with officers of or above the rank of a sub-inspector. Officers below this rank can be appointed and disciplined by the Commissioner of Police. Under this section the Commission may delegate its powers to the Commissioner of Police or to any one or more members of the Commission. The police Commissioner may delegate any of his powers to any member of the Kenya Police Force. But this does not include powers delegated to him by the Commission. This section does not exclude any police officer from the scope of section 25.

From the above we can observe that Muriithi could have been validly removed from office by the President in exercise of the powers granted under section 25 of the Constitution. He could also have been dismissed by the Public Service Commission following the procedure set out in the service Commission's Act (Cap. 185).

The Commission can only dismiss for a reason and the affected officer must be afforded a hearing in the interests of justice. Thus justice must not only be done but must be seen to be done. Although Muriithi owed his appointment to the Public Service Commission he could still be removed by the President since he did not fall under the category of officers whose office is protected.

We cannot fully understand the meaning of sections 25 and 108 without considering the Constitution and other laws. This is particularly so in the exercise of the powers granted. Under section 23 of the Constitution the President can exercise the executive powers vested in him through officers subordinate to him. The term subordinate has not been defined and it is rather ambiquous. It is not clear whether the President can dismiss a Public Officer through the Vice-President or not. It is not known whether the President should dismiss through the Minister concerned or the Permanent Secretary. In England the Minister exercises such powers on behalf of Her Majesty, the Queen.

As the Law stands the President can remove at pleasure every public officer in the Republic of Kenya except those whose removal is provided for under the Constitution. No can can challenge the President's powers of removal. However, the Court has jurisdiction to review the manner in which such powers were exercised. An aggrieved public officer can challenge the manner of exercise of such powers. The Public Service Commission cannot be heard to complain that the President has unsurped its powers where he has dismissed officers appointed by the Commission.

ISSUES RAISED IN THE CASE

The Muriithi case involved many and important issues. Some of these (Bias, interim declaration) will not be considered since they fall outside section 25 and 108 and they have already been discussed in the previous chapter. Here we will put more emphasize on the question of jurisdiction, removal by the President through subordinate officers, the role of the Public Service Commission and Muriithi's appointment to Uplands.

The Attorney-General objected to being made a party to the proceedings. The state Counsel argued vehemently that since Muriithi was challenging the dismissal by the President and asking the Court to order the Public Service Commission to give reasons for dismissing him, then the Commission was the proper party. The judge ruled that the Attorney-General was properly joined in this case because it was the Government that was being sued.

The other important issue was Muriithi's claim that the President could not retire him under section 25 since his removal was clearly outlined under section 108. The judge relying on various decisions was of the view that Muriithi held office during the pleasure of the President even though the Commission could also retire him. The question of dismissal through subordinate officers arose in relation to the letter of 13th April, 1981, which was signed by the Permanent Secretary in the Office of the President. The court was of the view that the President can exercise the powers granted under section 25 through subordinate officers by virtue of section 23 of the Constitution.

The judge said that "the Chief Secretary is the most appropriate" officer through who the President can dismiss or retire a public officer. The other issue was whether Muriithi's appointment to Uplands Bacon Factory meant that he had vacated his office as the Deputy Director of Intelligence. The judge said that Muriithi's appointment and secondment to Uplands had no connection to his retirement by the President. These were two different issues and should be treated differently. He was of the view that Muriithi had not vacated his office and remained a public officer all along. These were the most important issues raised in the case. We will now proceed to give a critique of the case especially the interpretation given to the above issues and the letter of 13th April, 1981.

A CRITIQUE

Here there is a close observation of the various issues which the writer considers were not given proper treatment. The issue of jurisdiction did not raise any real problems and the judge decided correctly that the Attorney-General was the proper party where the Government is involved. The main criticim shall be levelled against the judges interpretation of section 25 and the letter which purported to notify Muriithi of his retirement. Here there will be an attempt to lay down the points on which an appeal can lie. A distiction will be made between the cases relied on by the learned judge.

Considering that law is mainly geared towards the achievement of justice, it would seem that section 25 in this case was given a wide interpretation. The powers granted under section 25 are discretionary powers and it would be necessary that the President put his mind to the issue involved. Even through section 25 of the Constitution was mentioned in the letter there is nowhere to indicate that the Permanent Secretary was acting at the instigation of the President. In fact the only thing that is clear in this case was the involvement of the Chief Secretary and the Permanent Secretary. Neither the Chief Secretary nor the Permanent Secretary has powers to dismiss a public officer at pleasure. This is the sole prerogative of the President and the Permanent Secretary erred in not warning the officer involved that was acting for he the President under section 23 of the Constitution.

The learned judge in this judgement relied heavily on on English decisions which are quite distinct from the instance case. Reference shall be made to a number of cases referred to by the judge. These cases and the law in those countries shall be compared to the Muriithi case. The judge, considered these cases as binding on the High Court. Before considering these cases it is good to note the words of Sir Charles Newbold who cautioned judges on reliance on foreign decisions in the following words:-

> "I accept that when Kenya adopts the legislation of a Commonwealth Country /Section 25 is not adopted from England or anywhere/ with a similar system of law then, in construing the provisions of the adopted legislation regard should be had to the judicial decisions of the Commonwealth country on the meaning of the equivalent section. I accept that qualification subject to two qualifications: first that any such decision may be disregarded if in the view of the East African Court the decision is clearly wrong, and secondly,

> that such decisions disclose a consistent interpretation of the section in question and are not at variance with one another".[2]

If we compare Kenya's Constitution and England from where most of the decisions were derived it can be seen that the practice in each country is different. Kenya has a written Constitution though based on the English system. The English unwritten Constitution is mainly based on conventions. The Crown has wide powers of dismissal which can only be limited or taken away by a statute. This can be seen in the case of Dunn-v-The Queen[3] where the plaintiff was employed under contract and was dismissed by the Crown at will. This is unlike Kenya where the President cannot dismiss at pleasure a public officer whose contract does not exceed three years. Therefore, the powers granted under section 25 of Kenya' Constitution are not similar to the powers of the Crown in England.

In relation to the last statement of Newbold, the judgement in the instance case does not indicate non-reliance on foreign decisions. In fact the judge did not give full considerations to section 25. He did not state what is meant to "hold office during the pleasure of the President" nor did he mention that there are officers who cannot be dismissed by the President. Coming back to the case law on which the judge relied, it can be observed that so far there had been no previous interpretation given to section 25. The English decisions are not consistent on the question of contracts.

In Dunn-v-The Queen,[4] Reilly-v-The King,[5] the courts were of the view that the Crown could dismiss at will even in cases of contract. However, in Rodwell - v - Thomas,[6] and Gould-v-Stuart[7] the Privy Council was of the view that the Crown's power should be limited in cases of contract.

The judge made reference to the case of Opoloto-v-Attorney General,[8] a Ugandan case which reached the East African Court of Appeal. In this case whose facts have already been noted briefly a Brigadier in the Ugandan Army had been dismissed at the instigation of the President. From the evidence it was indicated that the President had directed his mind to the dismissal and that he had no faith in the officer concerned. The office was one of great importance because it involved the security of the state.

As an officer in the Special Branch, Muriithi's office also concerned the security of the state. However, there is no evidence to indicate any involvement of the President or that the President had no faith in him. The powers of the President of Uganda in this case involved dismissal of Public officers at pleasure. The relevant section of the Constitution imports directly the powers of the Crown into Uganda. Kenya's Constitution has no similar provision.

Therefore in determing the meaning of section 25 the learned judge should have noted that there is no case-law from any country with a similar provision. Thus he would have proceeded to refer to English and other Commonwealth decis bearing in mind the distinction. He should have noted the differences in facts between those decisions and the case before him.

At this stage of Kenya's development the judge should have known well not to encourage "made in England laws". Section 25 should be given its literal meaning and decisions from other countries to have only a persuasive effect.

The most striking feature of this case was the letter of I3th April I98I. It sparked off this case and the judge decided to give it full consideration. Until he received this letter, Muriithi believed that he was at Uplands on secondment. The letter mentioned his appointment to Uplands as the reason of his dismissal from the Public service. The Public Service Commission is said to have approved Muriithi's retirement from service. This are quite puzzling statements made by senior responsible officers who knew the law and purported to act on behalf of the President.[9] The judge correctly decided that Muriithi's secondment to Uplands did not mean that he had vacated his office as Deputy Director of intelligence. Moreover, while on secondment an officer is given a choice to either join the body to which he is seconded or return to his normal duty after the expiry of three years. This is provided for under General letter No. 44 of I977 the relevant section which reads:

".... when an officer is seconded to a statutory Board or organisation, he should within a period of not more than three years, make up his mind whether or not he wishes to join the statutory body or organisation, he should either retire voluntarily from the Government service in accordance with the provisions of Personnel Circular No. 28 of I968 and No. 7 of I974, or if the retirement scheme is not applicable to him, she should resign his appointment in the Government service.

Alternatively his secondment to the statutory body should be determined at the end of the three year period and he should revert to his appointment to the government service".

Muriithi could not be said to have taken up appointment at Uplands as anything other than as a police officer. The learned judge decided to concentrate on section 25 of the Constitution giving a very narrow interpretation to the letter. Section 108 of the Constitution was not mentioned so he stated. But it is evident that the mention of the Public Service Commission brought in section 108 since it is this provision that deals with police officers. He did not give reasons why he decided to mutilate the letter and give meaning to section 25 only. His argument was that there is no need to give reason or get the approval of the Commission in the exercise of powers granted under section 25. He did not deal with a situation where a reason is given as in this case.

The Permanent Secretary decided to give reason for Muriithi's retirement. The judge should not have ignored this fact because the facts leading to the proceedings began with Muriithi's appointment to Uplands. There was a reason given to his retirement and this should have been reviewed by the Court to establish whether it was a good reason or not. Although section 25 does not require an officer to be dismissed or retired for a reason it would only be fair to examine the reason where it is given. In the alternative the judge should have ruled that since a reason was given then this was not an exercise of power under section 25.

It was not a retirement during the pleasure of the President. what is important is that the judge should not take it upon himself to decide which parts of the letter were relevant and which were not. The best view would have to be that the Permanent Secretary intended everything that was included in that letter.

The judge should also have noted that the Chief Secretary was nowhere mentioned in the letter of 13th April, It is the Permanent Secretary who wrote that letter and so there was no consideration whether he was the proper person through who the President can exercise his powers in relation to public servants.

It is not disputable that the President has power to dismiss a public officer such as Muriithi.

Interviews conducted among various personalities who were interested in the case indicates that each understood the full implications of the case differently. Some indicate pragmatic thinking while others appeal to justice. The next few paragraphs will be devoted to these people who willingly(except some of them) aired their views.

In an interview with the Deputy Director of Personnel, Mr. Kamunge it was evident that all he was prepared to do was to uphold the powers of the President to dismiss a public servant. He was of the view that the President can dismiss or retire an officer through other officers. But he did not enlighten us on the category of officers who should be used by the President in such cases.

To him there was no conflict of powers between the President and the Public Service Commission.

An attempt to reach the Commission was not very helpful. An interview with Mr. Kimani Secretary to the Commission was unfruitful. He hid under the protection of section 7 of the Service Commissions Act (Cap 185) and refused to answer any questions. It cannot be forgotten that the Commission approved of Muriithi's retirement without considering the reasons for such a decision. He maitained that the Commission remained neutral even though its members were appointed by the President. The above interviews express a non-lawyers view of the case. No legal arguments were advanced by these esteemed officers. The Secretary to the Commission could not answer a simple question why the body had approved a retirement without following the laid down procedure.

Mr. Eshiwani[10] expressed his views on the legal issues raised in the case. He felt that the body with the powers of dismissal or retirement also carries the powers of appointment and vice versa. The President can dismiss public officers under the powers granted by section 25 of the Constitution. On the question of who should be the most appropriate officer to be used by the President in such a case, he felt that a senior and responsible officer is preferrable. He based his augument on the chain of command theory. He was of the view that between the President and the Permanent Secretary (who purportedly appeared in the letter of 13th April) there is the Chief Secretary who is the head of the Civil Service.

Accordingly, Muriithi should have been appropriately retired through the Chief Secretary and not the Permanent Secretary. The President is not normally involved in the removal of officer of Muriithi's rank. He referred to cases where high ranking officer have been removed without the President being involved. One such case he said involved the dismissal of John Ombaso, former Principal of Mombasa Government Training Institute. He felt that the manner of removal is governed by the sensitivity of the case. He gave an example of the Murang'a case in which the D.C. Mr. Misiko was dismissed by the President. That was a case that required prompt action and the President decided to invoke the powers granted to him under section 25 of the Constitution. Accordingly Muriithi's office involved the security of the state and he could be easily got rid of under section 25 without going through the procedure set out for the Public Service Commission.

Dr. Ooko Ombaka[11] made reference to the case of Crown-v-Skinner.[12] He said that even though these case related to Ministers it could also apply to the President. He also felt that it is only fair for the President to dismiss officers such as Muriithi through responsible officers. The Permanent Secretary can be used in such cases. He was of the view that Muriithi could have been validly retired in two ways, either at the pleasure of the President under section 25 or by the Public Service Commission under section 108. The authority opted for section 25 because there was no good reason to retire Muriithi from the Public service.

On the question of justice he felt that according to law justice had been done. The law had been followed to the letter and there were no deviation whatsover. However, he was of the view that the rules of natural justice do not demand that a person should be arbitrarily removed from his office for no reason. The motive behind the retirement was morally wrong.

We cannot fail to relate this case to what was going on in the political arena, of this country at this time. The famous and only treason trial ever in Kenya was going on in the courts. During the course of the proceedings there were apparent contradictions between the evidence of the the Special Branch officials and those of the C.I.D. (Criminal Investigation Department). Mr. Muriithi being the Deputy Director of Intelligence was very much involved in this case. The court castigated those involved for having brought a case before it while they were not sure of the facts. The judge in this case failed to highlight on the relevant issues raised. The judgement was not convincing and the Public servant has been left in the dark as to who should dismiss him under section 25 of the Constitution.

FOOTNOTES

1. The case of Muriithi -v- Attorney General has left no doubt to the fact that a public servant can be dismissed by the President for no reason.
2. (1972) E.A. 2 & 6
3. (1896) 1QB. 116
4. Supra
5. (1934) A.C. 176
6. (1944) All E.R. 700
7. (1896) A.C. 575
8. (1969) E.A. 631
9. The Chief Secfetary and the Permanent Secretary displayed their ignorance in our case. Anyone who glances at section 25 of the Constitution can see clearly that the President does not have to dismiss for a reason nor is the consent of the Public Service Commission required.
10. A Lecture in the Faculty of Law, Univeristy of Nairobi.
11. A lecturer in the Faculty of Law, University of Nairobi.

CONCLUSION

As observed throughout this paper, the issue in the Muriithi case related to the powers of the President to dismiss public servants (civil servants). The most glaring issue was whether the President could/can exercise the powers granted under section 25 of the Constitution through a subordinate officer. The exercise of such powers in England is absolute and the Crown can dismiss its servants at will unless there is express prohibition. In Kenya and the United States such power is derived from the Constitution.

The Constitution is the gospel of every democratic state. The various organs of the state - Executive, Legislature and the Judiciary - draw power from it. It outlines the most important issues relating to each organ. Being the document that express the will of the people, any exercise of power contrary to it is null and void.[1] Thus,

> "the supremary of the Constitution demands that the court should declare void any exercise of power which does not comply with the prescribed manner and form."[2]

So far there is no provision which excludes any section of the Constitution from judicial review. Therefore, Section 25 can be challenged in a court of law even if it concerns the powers of the executive. Even in England, the most democratic of all democracies, the power of the crown to dismiss at pleasure can be challenged as already seen.

This is to ensure the protection of an individual's rights against arbitrary or unlawful exercise of power by any organs of government.

The High Court has inherent jurisdiction over the interpretation of the Constitution. No appeal used to lie to the East African Court of Appeal on Constitutional matters. It is to be presumed that this applies to the present Kenya Court of Appeal although there is no provision excluding an appeal. It has been seen that to enable a judge to act impartially without fear or favour, his tenure of office is not determined by the President. However, we should not forget that judges are appointed by the President. If a judge decides a case which causes embarassment to the government, his tenure of office shall not be extended.[2] A judge has therefore to be very cautious while deciding a case affecting the executive.

The president in the exercise of powers granted to him under the Constitution does not have to seek the advise of the Cabinet or anybody else.

The judgement which the court arrived at had the greatest impact on the civil service. Today the Civil servant has been stripped of any security he might have had. He cannot harbour any illusions that he has security of tenure. He can be dismissed at any time without notice and for no reason. In this connection he cannot go to court to ask for a declaration of his rights because he will be a loser.

The state will always rely on the Muriithi case to defeat any action by the Public servant. This case has indicated clearly to what limits section 25 of the Constitution can be taken. It can be used justly and at the same time arbitrarily. Moreover, the case has established that the powers granted under section 25 can be exercised by another officer other than the President. Thus the Permanent Secretary of a Ministry, the Chief Secretary can dismiss at pleasure under the directions of the President with the exceptions provided under section 25. The consequence is that a public officer has no security of tenure.

The role of the Public Service Commission in this case left little to be desired. It acted in derogation of its powers and the duty to the public servant. Inorder to please the executive, the Public Service Commission approved the dismissal of an officer while it had not considered the case (reason for retiring Muriithi) properly. It is not clear whether the Commission can also purport to act under section 25.

The letter of 13th April 1981, was bad in law. It was confused and ambiquous. The Permanent Secretary in the Office of the President purported to retire Mr. Muriithi following his appointment to Uplands Bacon Factory. At the same time he claimed to retire him under section 25. He was giving a reason for retirement while at the same time retiring an officer at pleasure.

The judge in this case should have declared the letter ambiquous. No wonder Muriithi did not know whether to sue the Government or the Public Service Commission. The Commission was mentioned in the letter. The powers granted under section 25 do not require the approval of the Commission in their exercise.

Thus

> "Legislation can itself be a cause of arbitrariness, arbitrary practice may stern from a failure to take account adequately of appropriate interests and how they are best to be met. Thus rules [acts] can be arbitrary where there is no clear relation between the rule enunciated and the official end to be achieved. Rules [acts] are arbitrary when they reflect confused policies, are based on ignorance or error, and when they suggest no inherent principle of criticism."3

This calls for reform to our existing laws. The civil servants need protection from arbitrary dismissals by the executive. They should be assured (not orally) that they will not loose their retirement benefits after serving the Government for so long. This is necessary to avoid any mass exodus from the public service to the private sector. The functions and rights of the Civil service should be set out in an Act of Parliament to clear any doubts. The present safeguards and laws are not sufficient. The recommendation of the Ndegwa Commission of this issue should be implemented.

An independent body to hear the complaints of public servants should be set up.

We should have a body equivalent to an Ombudsman. This body should be free of any executive control. The President should have nothing to do with the appointment of the members to the body. This should be the work of Parliament. Thus what we need is a Parliamentary Commissioner and not an ombudsmouse. With such a body cases like the Muriithi would have been settled out of court. The body would have access to departmental files and summon any officer before it.

The events leading to Muriithi's dismissal left little to be desired. First his appointment to Uplands and then retirement from the Police Force at the pleasure of the President. Recent events have shown clearly that there was more to the case than catches the eye. It is highly unlikely that a year after he was dismissed and his case dismissed in court, he has become a security risk requiring him to be detained under Preservation of Public Security Act.[4] Today he is detained which means his freedom will be curtailed for an indefinite period. No appeal had been lodged although the advocates for Mr. Muriithi expressed such an intention. Soon afterwards Muriithi's advocates, Mr. Khaminwa was detained under Preservation of Public Security Act. Lawyer and client are now in detention and the possibilities of an appeal are nil. It means a close of a chapter to that breath-taking case. Recent Constitutional changes have resulted in the Chief Secretary's position secured in the Constitution.[5] He no longer holds his office during the pleasure of the President.

FOOTNOTES

I. S. 3 of the Constitution

2. This especially applies to expartriate judges whose terms of contract is three years unless it is renewed. If a judge delivers an embarassing decision he risks a chance for a renewal of his contract of service. A local judge might be forced to resign.

2A It is the authors contention that junior officers should not have to dismiss.

3. Rosalind Brooke, Law, Justice and Social Policy (Croom Helm, London I979, P. I25)

4. This Act has been used for many reasons. It is not yet clear what it means to be a threat to the security of the public. However, it is not for this paper to maintain a discrussion on this issue.

5. See Kenya Gazette Supplement Bills, 4th June I982.

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