CASE REVIEWS

John Mwashigadi Mukungu –vs- R, Criminal appeal NO.227 Of 2002 [Unreported]: A Sad Commentary on how not to Make Good Law

*Kyalo Mbobu**

Introduction

In the recent decision of the Kenya Court of Appeal delivered in Mombasa on 30th January, 2003, the court found itself confronted with the vexed question of dealing with a conviction in a sexual offence based on uncorroborated evidence

From the summary of the facts, it is alleged that the offence was committed on the 20/10/2000 at about 7:30 p.m. at Mwakingali Estate in Taita Taveta District of Coast Province, Kenya. The complainant was accosted by a man whom she identified as the appellant. She was dragged into a nearby house where she was forcibly stripped naked and forcibly sexually assaulted[1]. Although she screamed for help, apparently nobody came to her rescue. Indeed, she testified that after the assault, the appellant locked her in the house and went away, returning with another man who also forcibly had sexual intercourse with her. She did not identify the second man (although she identified the appellant).

The matter was not reported to the Police immediately allegedly due to poor telephone connectivity in the area. Nonetheless, it was reported to the village elder whose only immediate offer of assistance was for the victim to be escorted home.

The following day, the complainant reported the matter to the Voi Police Station who later (not told if on the same day or not) arrested and charged the appellant with the offence of rape. Again, the judgement does not reveal what tests were used by the police to identify and connect the appellant with the offence.

On the basis of this evidence and the evidence of witnesses who spoke to the complainant soon after the alleged incident, both the trial court and the High Court on 1st appeal found that the complainant was known to the appellant and that was how she identified him.[2]

No medical evidence was offered to connect the appellant to the alleged offence. Yet the trial court found corroboration of the complainant's evidence in the medial evidence, which was limited to an examination of the complainant for spermatozoa. No evidence of DNA or tissue testing or other advanced scientific methods was tendered, which could have elimi-

nated any doubt on the identity of the perpetrators.

The trial court as noted above found the appellant guilty as charged and convicted him thereby sentencing the accused to serve a term of 10 years in prison. The High Court affirmed this decision. Hence, the 2nd appeal to the final court.

The Law and S 82 of the Constitution

Sexual offences have always been suspiciously regarded by the common law and the courts of Kenya in particular and East Africa generally. As a result, the courts as a matter of practice (and not law), have required that in the cases of sexual offences, there is need for corroboration of the testimony of the complainant before a conviction may be entered. Perhaps the most inclusive definition of corroboration is that offered by Prof. A. Keane when he surmises that:-

> Evidence capable of amounting to corroboration may be defined ..... as evidence which is relevant, admissible, credible and independent and which implicates the accused person in a material particular.[3]

Indeed the question of the need for corroboration in sexual offences has vexed many Jurists. Not least of all being the High Court of Kenya in the *Maina V R case* cited by the Court of Appeal in its judgment.

This notwithstanding, the court nonetheless found that the practice requirement for corroboration of evidence of a single sexual assault complainant is discriminatory of women. It found that it contravened the provisions of S. 82 of our Republican Constitution which provides that:-

> S 82(1) Subject to sub-sections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.
>
> (2) Subject to subsections (6), (8) and (9) no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.
>
> (3) In this section the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

But what if the alleged sexual assault is against a male victim. Will the victim suffer will the victim suffer without the punishment of the perpetrator of the offence. Why should the Court of Appeal, the highest court in the land assume that only members of the female gender might fall prey to sexual assaults. Could the 'mischief' discovered by the Court of Appeal not be cured if an amendment

were made to the relevant provisions of the Penal Code to widen the scope of the offences to incorporate men?

To my mind, the *Mukungu* decision is liable to be critiqued on a number of issues.

Critique

The decision of the Court of Appeal, while laudable and quite in keeping with the ethos of the day seems to be quite perplexing.

To understand the problem, one has got to understand that the Court of Appeal of Kenya, like any court in its position, is a court of limited jurisdiction. The Court of Appeal has itself repeatedly stated that it is not a court of original jurisdiction qua the High Court. Rather, it is a court, which acts only on those matters referred to it limiting its consideration thereof to the issues presented before it. In other words, the court may not arrogate itself a jurisdiction it does not have.

In this case, the Court of Appeal carefully summarized the facts and the applicable law. And the court came to the conclusion that the appeal before it raised only one point of law i.e. whether a conviction based on uncorroborated evidence is sustainable in a sexual offence case. No constitutional question was urged before the court. Yet in a complete departure from the foregoing settled principles, the court proceeded to reach out to the Constitution and to hold that the practice of the courts was unconstitutional and contravened S. 82 of our Constitution.

Further, the Court of Appeal of Kenya prides itself of deciding cases principally on the issues before it. Time without number, the court has chided many a lower court Judge and magistrate for deciding cases on a whimsical basis without regard to the issues as framed and presented.[4] In the *Mukungu Case,* the court seems to have forgotten its usual stand on such matters. Without hearing or indeed inviting submissions on the point, the court '*suo moto*' went out of its way and found that the practice of the courts in calling for the corroboration of sexual offences was unconstitutional.

But who put forward this argument before the court? Will the court in future simply frame any issue, which comes to mind and purport to decide the same in total disregard of the issues before the court? Will this set a good precedent in the development of our criminal jurisprudence in Kenya?

Lastly, in making its unanimous judgement the court with respect made an assumption. The assumption was that sexual offences may only be perpetrated by members of the male gender to members to the female gender. It is all too easy to assume that men are never the subject of sexual assaults. In the case of *Burgess –vs- R*[5] the English Court of Appeal about 50 years ago took cognisance of this possibility holding that it is just as desirable that a jury be warned of the danger of convicting on the evidence of the complainant in the absence of corroboration in the case of indecent assault on an

adult male as in any other case of indecent assault or sexual offence. The judges of the English Court of Appeal would laugh at the decision of their Kenyan counterparts in the case under review!

Of course, the Kenyan court would hide behind the provisions of the Penal Code which define rape and other sexual assaults rather restrictively. Our submission though is that that is not enough. The Penal Code is not cast in stone. It should be amended to bring it in line with such an obvious possibility.

To my mind, the decision of the Court of Appeal in the *Mukungu case* , while appealing and a bold step by their Lordships in nullifying the practice requirement for corroboration in sexual offences, is at best obiter dicta and of little precedent value, if any. In the not too distant future, it ought to be reviewed if the decisions of the court are to regain respectability.

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Notes

1. The offence of rape is defined in S 139 of the Penal Code of Kenya(Cap 63, Laws of Kenya). The subsequent provisions between S. 140-167 of the code cover various forms of sexual assaults and the applicable sentences. It is regrettable that the code assumes that such offences may only be perpetrated against female persons.
2. We are not told whether the appellant admitted knowing the complainant on his part..
3. A. Keane, *the Modern Law of Evidence,* 4th Ed. Butterwrths, London, Dublin, Edinburgh, 1994, p.149.
4. See *Tanganyika Farmers Association Ltd –Vs- Unyamwezi Development Corporation Ltd. (1960) EALR,620.* Where it was held that Court of Appeal will not allow an appellant to urge a new matter which had not been pleaded; *Saggaf- vs-Algeredi (1960) EA 767,* Held that a new point not pleaded or convassed at the superior court should not be taken on appeal..
5. (1956) CAR, 144.

Stephen Mwai Gachiengo and Albert Muthee Kahuhia vs. Republic of Kenya, Nairobi High Court Criminal Application NO. 302 of 2000

The High Court's Perception of the Doctrine of Separation, of Powers in Kenya

*Osogo Wa Ambani**

> To that end they vested the structure of our central government in the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded- too easy. The experience though which the world has passed in our own day has made vivid the realization that the Framers of our constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power.[1]

The observation by a renowned scholar that 'a complete separation of powers, in the sense of a distribution of the three functions of government among three independent sets of organs with no overlapping or coordination, would (even if theoretically possible) bring government to standstill'[2] may not always be persuasive. Nay, compelling. Nothing confirms this candid conviction than the decision of the High Court of the Republic of Kenya in the application involving Stephen Mwai Gachiengo, as the first applicant, Albert Muthee Kahuhia, as the second applicant, and the Republic of Kenya as the responded[3]. This was a constitutional reference made pursuant to section 67(1) of the constitution of Kenya seeking the interpretation of the following matters:

(a) Whether it is unconstitutional and contrary to the principle of separation of powers for a prosecuting authority, Kenya Anti Corruption Authority (Kaca), to be headed by a High Court Judge;
(b) Whether such leadership compromises the accused person's right to be afforded a fair trial before an impartial court as envisaged by section 77(1) of the constitution;
(c) Whether the statute establishing the authority takes away the Attorney Generals power under the constitution; and

(d) Whether the provisions establishing Kaca were in conflict with section 26 of the constitution of the republic of Kenya.

The first applicant (Steven Mwai Gachiengo) had been charged before the Chief Magistrate's court at Nairobi with nine counts of abuse of office under section 101(1) of the Penal Code Cap 63 laws of Kenya. Albert Muthee Kahuhia (second applicant) also faced four charges relating to the same offence of abuse of office. It is in the course of this suit that counsel for the applicants raised preliminary objections on points of law urging the trial magistrate to refer the issues raised for interpretation in so far as they touched on the constitution of Kenya. The magistrate then accordingly referred the matter to the High Court.

Responding to the second question the High Court in its immense wisdom found that the accused person's right to be tried by an impartial tribunal could not be at stake for the minor reason that a judge was the head of the prosecuting body because judicial officers take an oath to preserve the integrity of their office and also to determine disputes without fear or favour. In reaction to the argument of the applicants' counsel that 'the trial magistrate will be under fear to rule against Kaca as he/she will be mindful of the fact that the matter before him/her has had an input from a High Court judge' and also that 'no magistrate will question a charge sheet that has had the input of a High Court judge,' the Court remarked:

> ... ... Our courts are under a duty to dispense justice to all the parties who appear before them irrespective of their class in society. Judicial officers take an oath to discharge their duties without fear or favour. We accordingly find the applicants' issue spurious and misplaced.

With that, the court had settled this point. And having dispensed with that hurdle, the Court went on to consider whether the Attorney Generals' power to prosecute under the constitution had been infringed upon. And the answer to this question was in the affirmative. The Courts view, in a nutshell, was that all matters pertaining to prosecution were the domains of the Attorney General and therefore it would be a case of 'power-usurped' for another body to be endowed with this jealously guarded power.

The Constitutional Reference Bench in particular took issue with the powers conferred unto Kaca by section 11B of the Prevention of Corruption Act Cap 65 Laws of Kenya which provision gave Kaca all the powers of a police officer above the rank of Assistant Superintendent of Police, and also section 11 B (5) which provided that the director of Kaca may assume responsibility for any investigation or prosecution commenced by the police; the borne of contention being that unlike the Commissioner of Police, Kaca had not been entrenched into the constitution. It was also the concern of the honorable Court that under section 3.10 of the said Act the director of Kaca had powers to cause a police officer to inves-

tigate any bank account, share account or purchase account of any person. Having considered all these issues at length, the supreme tribunal held that the enabling provisions were inevitably inconsistent with the constitution.

Another major point for determination was the question as to whether a judge, being a member of the judiciary branch of the government, would pose as a prosecutor without violating the principle of separation of powers. And again, the judicial answer to this question was in the affirmative. The Court, whose coram was Mbogholi-Msagha, J.K. Mitey and Kasanga Mulwa, pronounced:

> The temptation to disregard tradition cannot be allowed to take root in our judicial system. With the greatest respect therefore, we are of the view that for a judge to head Kaca is a serious step in reverse and is a direct affront to his constitutional appointment.

These words comprised the last nails in the coffin that was Kenya Anti Corruption Authorities'. And as if to bury the remains of the otherwise well-intentioned institution, Chunga C.J. (as he then was), confronted with similar point of determination in an application by persons initially prosecuted by Kaca, observed of this controversial judgment:

> It was a detailed, well-reasoned and well-researched ruling. The issues raised before and dealt with by the three judges were, in many ways, no different from the issues in the application before me. I will therefore, derive considerable advantage from what the judges said, to enable me to decide whether to give directions sought. The pronouncements of the court are clear and unmistakable[4].

Having so stated, he proceeded to evoke the doctrine of *stare decisis:*

> What it found and said forms part of judicial laws and precedent of this country. The rule of law requires that the pronouncement of the court be respected, upheld and followed unless otherwise set aside through a lawful and constitutional process or by litigation.

That was an insiders view. However, a close and critical look at the decision under review floats a few errors as vying for rectification. One such is the misconception that separation powers, as a principle, entails the erection of strong radiation-tight walls that clearly demark each and every organ of the state from another. A conviction fitting this description refutes to be informed by contemporary wisdom, which, has shown that all such strict demarcation would afford society, is a rigid dispensation incapable of greasy operations.

A contemporary legal scholar must have had this in mind when he wrote:

> In considering each of these aspects of separation, it needs to be remembered that complete separation is possible neither in theory nor in practice[5]

And such a profound proposition was not to be without corroboration. Another con-

stitutional teacher has, as if taking cue, written:

> What the doctrine must be taken to advocate is the prevention of the tyranny by the conferment of too much power on any one person or body, and the check of one power by another... [6]

Suffice is to say, the court on insisting on the letter and not the spirit of the doctrine of separation of powers (as evidenced in its holding that for a judge to head another institution infringes on the constitution) erred as a complete separation is not only an illusion but also undesirable.

The court was also mistaken in supposing that the strict interpretation of the doctrine is binding on the courts of law. What it struggled to forget and what is now a poorly guarded secret is the fact that unless the doctrine is specifically provided for in the constitution, it cannot apply the Montesqui way. It becomes easy to see then that the antenna of the court could not tune even into local incidences where for example the Attorney General is both a civil servant[7] as well as a member cabinet and at the same time the head of prosecutions.[8] Needless to mention that he sits in parliament in ex-officio capacity[9]. The court could not also ironically remember that judges in Kenya have often sat as chairmen of Commissions of Inquiries, which have time and again recommended prosecution of persons therein mentioned.[10]

The judges appeared to be speaking from both sides of the mouth when they refused to entertain arguments by the counsel for the applicants that magistrates would be intimidated by a prosecutor judge yet at the same time entertaining the vague notion that the same judge 'who had taken the oath' would not competently head Kaca.

Another point that narrowly escaped the Court's attention was the fact that one did not need to look beyond her own jurisdiction to cite examples of other institutions with some semblance of the Attorney General's power to prosecute. Such institutions with prosecuting powers are the likes of the National Social Security Fund, Kenya Bureau of Standards and local authorities.[11] It also fell short of the Courts wisdom that under section 88 of the Criminal Procedure Code, private citizens too have the right to prosecute.

It could only be in this context that section 26(3) (b) would lend itself to easy interpretation; for the section talks of the Attorney General as having the power to 'takeover' and 'continue' criminal prosecution. Candidly speaking, he can only takeover or continue already commenced prosecution.

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Notes

1. Mr. Justice Frankfurter, *Youngstown Sheet & Tube vs. Sawyer*, 343, U.S. 579 (1952).
2. O. Hood Phillips and Jackson, *Constitutional & Administrative Law*, 8th edn., Sweet & Maxwell. 2001, p 12.

3. High Court Miscellaneous Application No. 302 of 2000.
4. Criminal Application No. 429 of 2000. (Unreported).
5. Wade and Bradley, *Constitutional and Administrative Law*, p.58.
6. O. Hood Phillips and Jackson, *Constitutional & Administrative Law*, 8th edn. 2001.p.12.
7. Section 26(1) of the Constitution of the Republic of Kenya.
8. Section 26 of the constitution of the Republic of Kenya.
9. Section 36 of the Constitution of the Republic of Kenya.
10. The Commissions of Inquiry Act gives the president power to constitute Commissions of Inquiry, which makes inquiry, then reports back with recommendations.
11. Local Authorities are established under Cap. 265 of the Local Government Act Laws of Kenya.