

THE PEOPLE v KAMBARANGE MPUNDU KAUNDA (1991) S.J. (H.C.)

HIGH COURT  
MR. JUSTICE C. M. MUSUMALI IN OPEN COURT  
ON THE 24TH OF JANUARY 1991 AT 14:30 HOURS  
HP/119/1990

Flynote

Murder - Abuse of court process - Where the DPP publicly informs the accused that no charges would be proffered against him - Whether the DPP could prosecute thereafter

Headnote

The accused was charged with the murder of the deceased. The defence counsel raised a preliminary issue to the effect that the prosecution of the accused was an abuse of court process because the Director of Public Prosecutions had publicly informed the accused that no charges would be proffered against him. The court was called upon to make a ruling on the preliminary issue raised.

**Held:**

- (i) The incumbent Director of Public Prosecutions had not abused the process of the court by reopening the case and directing that the law should take its natural course against the accused person.

**Cases cited:**

- (1) High Court of Kenya:- Miscellaneous application No. 271 of 1985 Reported in the Nairobi Law monthly of October 1987

Captain M.K Kaunda, State Advocate  
Mr. Richard Ngenda of Richard Ngenda & Associates

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**Judgment**

**MUSUMALI, CM.:** delivered the judgment of the court.

This ruling concerns a preliminary point raised by the learned defence counsel by which he has asked this court not to entertain this case because it is an abuse of the process of this court. It is an abuse of this court's process, he contended because the late Director of Public Prosecutions Mr. Francis N. Mwiinga had ruled and publicly informed the suspect, who is the accused person now, that no criminal charges would be preferred against him in respect of the fatal shooting of the deceased, which is the subject of these proceedings now, because he acted in self defence. In support of his contentions Mr. Ngenda cited one Kenyan case of *Stanely Munga Githunguri v. Republic* (1). He also cited two other cases (British cases) in support of points which are not in issue at all.

These British cases appear in the decision of the court in Githunguri case. The meat of Mr. Ngenda's contention was that whilst accepting the fact that the office of the Director of Public Prosecutions in this country can review/reopen a case which he would have closed, that freedom is lost if and when he publicly informs a suspect that the matter against him is closed and that no criminal proceedings would ensue. In this case therefore, he contends the office of the Director of Public Prosecutions lost its freedom to reopen this case when the late Director of Public Prosecutions made the announcement. To reopen the case later is an abuse of this Court's process.

Captain Kaunda, no relation of the accused, in his turn submitted that the office of the Director of Public Prosecutions was not barred by the press statement of the deceased Director of Public Prosecutions because the Republican Constitution does not say so. A person is only precluded from fresh or subsequent prosecutions if either he has been pardoned or has been convicted or acquitted of an offence after his prosecution in court. He further said that the holding of inquest proceedings in this case brought out fresh evidence. It was on the basis of that fresh evidence that the Director of Public Prosecutions reconsidered the matter and decided to lay charges against the accused person. The ruling of the Coroner that the accused should be charged of a criminal offence was another dimension of this case, he said.

I have considered all the arguments adduced by both counsel in this case on this preliminary point. After such consideration it is my considered view and finding that:

- (1) This Court (the High Court) and indeed all other courts lower and higher have an inherent jurisdiction to protect itself from abuse. That is so, I venture to say and I think am right, because the institution of courts of law has been established to dispense justice. Under such a Constitution there cannot be room for abuse, as that (abuse) would be a negation of the requirement that justice be dispensed by the courts. This is so whether the matter is criminal or civil. A citizen therefore has to rightly look up to the Court for his protection against abuse. The Citizen has also to be protected from suits against him which are harassing, oppressive or vexatious.
- (2) The office of the Director of Public Prosecutions has power to reopen up a matter which that office may have closed. It must be remembered that there is no time limit to the prosecution of a serious criminal offence, except the requirement that justice to all should not only be done but should also be seen to be done. I will be explaining this requirement in detail shortly.

The power to reopen a case by the office of the Director of Public Prosecutions is not necessarily lost by the fact that that office would have made a public statement informing the suspect and the world at large that the matter has been closed and that no criminal charges would ensue. Whether or not the making of such a statement would be a bar to a re-opening of the case later would depend on the circumstances of each case. Those circumstances would determine whether or not the requirements of justice would be served by the re-opening of the file. If the answer to those requirements would be in the affirmative, then the case would nay must, be re-opened and re-examined and fresh instructions given to the relevant authorities. If the answer would be in the negative then the case ought not be re-opened. In looking at the dictates of justice, the extent to which the making of the public statement may have made the suspect to either lose or destroy some pieces of his evidence, thereby being unable to put up a good defence is one of the important factors that the office of the Director of Public Prosecutions would be required to consider. The Githunguri case says so and I am in complete agreement with it.

In that case the applicant allegedly committed some twenty offences in or about 1976. The offences were investigated and sometime in 1980 the office of the Attorney-General informed him that the investigation file was closed and that no prosecution would ensue. The foreign currency the subject of those charges, was given back to the applicant in Kenyan currency. In 1981 the office of the Attorney-General, publicly stated in the National Assembly that the applicant would not be prosecuted. In 1984 the Attorney-General, two Attorney-Generals having come and gone in the meantime, resurrected four of those original (20 in all) charges and the applicant was charged. The applicant then applied for an order of prohibition. The court, of three judges, held that in the circumstances of that case the order prayed for should issue because given the long period of time that had passed since: the commission of the

alleged offences (nine years); the holding and conclusion of full inquiry in respect thereof (six years) and five years after the decision by the Attorney-General not to prosecute, these periods were found by that Court to be too long to allow for a fair and just hearing of the case as the applicant was likely to have destroyed or lost evidence in his favour especially so after he was publicly informed that he would not be prosecuted and the property restored to him. The Court then held that public interest in that case demanded that the applicant should not be charged with the offences.

The case before this Court is, not on the same footing as the above examined Kenyan case.

To begin with this offence is alleged to have been committed in September 1989. By October the following year (1990) the charge against the accused person was certified for summary trial in the High Court by the Director of Public Prosecutions. In the period of twelve months - September 1989 to August 1990 - the office of the Director of Public Prosecutions had made the public press statement referred to already, and inquest proceedings had commenced. The fast manner in which the events in this case took place substantially distinguishes it from the Githunguri case. In that time in this case the accused person is not likely to have lost or destroyed the exhibits; firearms and cartridges and empty cartridge cases which appear to be the main exhibits. It does appear in this case that the prosecution wings of the Republic did in fact get hold of those pieces of evidence and have kept them in safe custody. That being the case, it does not appear that the accused is likely to suffer prejudice in the conduct of his defence as a result of the public statement by the late Director of Public Prosecutions.

Further I would like to say that in a case like this one where the statements of the witnesses appear to show a possible commission of an offence, public policy would dictate that the law should take its course. For those who are not used to the practice obtaining in the High Court in respect of criminal offences, I would like to inform them that copies of all the statements made by the witnesses are furnished to the judge; so that he reads them before the opening of the sessions, although he is also free to read them even after the sessions have been opened; and appraises himself of the likely evidence to be led. That evidence is of course not subject to cross-examination. The prior reading of those statements informs the court roughly whether or not there is revealed by those statements of facts on which a criminal prosecution of the suspect may be based.

Those are the same statements which are placed before the office of the Director of Public Prosecutions so as for him to determine whether or not the suspect should be prosecuted in a criminal court. The result which the Director of Public Prosecutions comes up with should therefore be reasonably supported by the revelations of the witnesses' statements. If it is not so supported, the interests of justice would dictate that the matter be reopened and fresh and proper instructions given, whether or not a public statement had been made informing a suspect that he would not be prosecuted. In this case my appreciation of the issues raised by the statements made by the witnesses dictates that the learned Director of Public Prosecutions should not have made the statement that he made as there are facts which require that if justice is to be seen to be done to all the people of this country, the accused should be prosecuted for a criminal offence. It is therefore my view and finding that the incumbent Director of Public Prosecutions has not abused the process of this court by reopening this case and directing that the law should take its natural course against the accused person. The matter is properly before this court and I order that the trial should proceed.

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