

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Koome; CJ & P, Ibrahim, Wanjala, Njoki & Ouko, SCJJ)

PETITION NO. 14 OF 2020

—BETWEEN—

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

—AND—

CHRYSANTHUS BARNABAS OKEMO.....1ST RESPONDENT

SAMUEL KIMUNCHU GICHURU.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

CHIEF MAGISTRATE COURT.....4TH RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....5TH RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal (E. M. Githinji, H. M. Okwengu and J. Mohammed, JJ.A) delivered at Nairobi dated 2nd day of March, 2018 in Civil Appeal No. 5 of 2016)

JUDGMENT OF THE COURT

(By a Majority of three, C.J Koome, Ibrahim SCJ, and Wanjala SCJ; Njoki SCJ, Concurring, and Ouko SCJ, Dissenting)

A. INTRODUCTION

[1] After several false starts, this Appeal was finally heard and concluded before the Court on 21st October 2021. It is indeed a matter of grave concern to this Court that a case as fundamental, revolving around a critical constitutional question, as this one, has been stuck in our justice system for over ten years for it to be finally resolved! Such dalliance with the exacting demands of justice, is neither testimony to our judicial rigour, nor to Kenya's commitment to its international obligations.

[2] In view of this unacceptable delay in the processing of this matter, whichever way the trial court rules, we have decided to deliver the Judgment in this shortened version, to be followed by detailed reasons, pursuant to Rule 20 (2) of the Supreme Court Rules 2021, on a date to be notified.

B. THE ISSUES

[3] After hearing the respective cases for the appellants and respondents hereto, and considering their written and oral submissions in support thereof; we have identified the following issues whose determination shall authoritatively dispose of the appeal. These are:

- (i) *Whether Extradition Proceedings in Kenya are criminal, civil, or sui generis in nature.***
- (ii) *Whether it is the Attorney General or the Director of Public Prosecutions to initiate and conduct Extradition Proceedings.***
- (iii) *What is the nature of Prosecutorial Powers vested in the Director of Public Prosecutions, and if the same include the initiation and conduct of Extradition Proceedings.***
- (iv) *Whether the ‘Authority to Proceed’ issued on the 6th of July 2011, by the Director of Public Prosecutions was valid.***

C. THE FINDINGS (BY THE MAJORITY)

(i) *On the Nature of Extradition Proceedings*

[4] A reading of Article 157 of the Constitution, the relevant Extradition Treaties, and other applicable laws, leaves no doubt that Extradition Proceedings are criminal in nature.

(ii) On Who May Initiate Extradition Proceedings?

[5] The fact that Extradition Proceedings are criminal in nature, divests the Attorney General of any authority to involve him/herself in their initiation (i.e. issuance of ‘authority to proceed’) and conduct before a court of law. The Attorney General however retains the Executive Authority to receive Requests for Extradition and to transmit the same to the Director of Public Prosecutions for necessary action

(iii) On the Nature of the Prosecutorial Powers Vested in the Director of Public Prosecutions

[6] Under the current constitutional dispensation, the powers to prosecute any conduct of a criminal nature is the exclusive preserve of the Director of Public Prosecutions. This is subject to the provisions of Article 157 (6) (a) regarding a court martial, and any legislation that may be enacted by Parliament pursuant to Article 157 (12) of the Constitution. Such legislation must however be consistent with the preceding sub-articles of the main Article.

(iv) On the validity or otherwise of the ‘Authority to Proceed’ issued by the Director of Public Prosecutions

[7] Flowing from the above, it follows that the ‘Authority to proceed’ issued by the Director of Public Prosecutions on 6th July 2011 was valid.

D. HON. LADY JUSTICE NJOKI NDUNGU’S CONCURRING JUDGMENT

[8] Extradition Proceedings are quasi-criminal in nature, having elements of both criminal and administrative law. On the one hand, they commence as foreign policy issues including execution of international treaties and bilateral agreements between governments. On the other hand, they conclude as criminal processes. Therefore, they give equal but complementary roles to both the Attorney General and the Director of Public Prosecutions, with each office required to play its part in the sequence of events that in

totality amount to an act of extradition. This dual responsibility ought to be properly reflected in national legislation as the current legal provisions are vague and rather untidy.

[9] However, I am in agreement with the majority decision regarding the validity of the ‘authority to proceed’ issued by the Director of Public Prosecutions on 6th July 2011 and the consequential Orders of the Court.

E. HON. MR. JUSTICE W. OUKO’S DISSENTING JUDGMENT

[10] Extradition proceedings are special international legal proceedings based on reciprocity and originating from bilateral and multilateral treaties and agreements between nations, making them matters of international relations which involve the exercise of ministerial or executive responsibility. This is recognised by, most if not all local statutes, including the Extradition (Commonwealth Countries) Act itself, as well as international instruments that deal with such matters.

[11] Because extradition is a process and not a prosecution undertaken in the jurisdiction of the requested state, it is only the office of the Attorney-General, in our case, as the principal legal adviser to the Government that has the authority to commence and undertake such proceedings.

[12] For these reasons I come to the conclusion that extradition is not criminal in nature but *sui generis*, and that the Director of Public Prosecutions has no powers to issue ‘**Authority to proceed**’ or institute extradition proceedings under the Extradition (Commonwealth Countries) Act or any law, as he did in this matter.

[13] The detailed reasons for my conclusion above will be delivered on notice.

[14] As these views are in the minority, the decision of the Court is that of the majority. I however share the sentiments of the majority that the delay in deciding which one of the two offices is responsible for matters of extradition is unconscionable and absolutely ludicrous. For me, whether it is the Office of the Attorney-General or that of the Director of Public Prosecutions, the most important thing is that this Court has brought this circus to an end and the proceedings that have been pending in the subordinate court for over ten years can now get going.

F. ORDERS

- (i) The Appeal dated 10th August, 2020 is hereby allowed;**
- (ii) The Judgment of the Court of Appeal dated 2nd March, 2018 is hereby overturned;**
- (iii) The Proceedings before the Magistrates Court which had been triggered by the Authority to Proceed issued on 6th July 2011 by the Director of Public Prosecutions are to continue forthwith on a priority basis either in the same court or court of competent jurisdiction;**
- (iv) For the avoidance of doubt the word “continue” in 3 above includes “commencing afresh” which course of action is to be determined by the Director of Public Prosecutions, should it be necessary.**

G. COSTS

The costs of this Appeal shall be borne by the 1st and 2nd Respondents.

It is so Ordered.

DATED and DELIVERED at NAIROBI this 5th Day of November, 2021.

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M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

