REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CRIMINAL APPLICATION NO 34 OF 1992

HARUN THUNGU WAKABA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The applicant in this application, Harun Thungu Wakaba, is one of the 8 accused persons facing a treason charge covering 21 overt acts now pending before the High Court. It is alleged that on diverse days between the month of January, 1988 up to and including 8th October, 1990, being members of an unlawful society known as Kenya Patriotic Front (KPF) jointly participated in activities which were intended to further aims and objectives of the said unlawful society, namely the overthrow, by unlawful means, of the Government of Kenya as by law established. The other specific overt acts are particularised in paragraphs 2 to 21 of the information.

The proceedings arose from Criminal Case No 5167 of 1990 in the Court of the Chief Magistrate in Nairobi by way of committal proceedings prepared under part VIII of the Criminal Procedure Code. After such preparation the prosecution handed the committal bundles to the lower court on 27th March 1991. According to the record of committal proceedings, the Assistant Deputy Public Prosecutor, Mr Alex Etyang, furnished three sets of committal documents to the Court and one set to the applicant and each of his co-accused.

On 23rd April, 1991, nearly a month after committal documents had been handed to the Court and the accused, the Chief Magistrate pronounced that there were sufficient grounds for committing all the accused persons to the High Court to stand trial, we quote,

> "On charges framed in the same terms as the information filed and placed in the said bundle."

The said magistrate then added:

> "Section 232 (4) of the Criminal Procedure Code is duly complied with"

and continued:

> "The accused are warned to furnish the Court with a list of their witnesses and addresses and all particulars of alibi, if any, in writing within 14 days of to-date. Similar particulars to be given to the prosecution. All the accused are now remanded in custody until called upon to plead in the High Court at it's next criminal sessions."

On 21st January, 1992 all the accused, including the applicant, appeared before our brother Justice Bosire

to plead to the information containing the treason charge in High Court Criminal Case No 29 of 1991 but they refused to plead thereto claiming that there was no valid charge in Court over which they could be called upon to plead. Nevertheless, the learned Judge entered a plea of not guilty for each of the accused and remanded them in custody to await trial.

However, on 30th January, 1992, the applicant, through his counsel, Mr G B M Kariuki, filed a constitutional reference to this Court by way of originating motion pursuant to section 60 and 84 of the Constitution of Kenya, as read with section 70 to 83 of the same, to ask for various declarations and orders, namely:

> 1. That the applicant's fundamental rights to liberty under section 70(a) of the Constitution of Kenya have been violated by the respondent, *inter alia*, because no valid criminal charge exists in terms of section 77(1) of the Constitution of Kenya on the basis of which the applicant can lawfully be held by the respondent in Nairobi High Court Criminal Case No 29 of 1991.
>
> 2. That there is no valid or lawful order for committal in Nairobi High Court Criminal Case No 29 of 1991 in terms of section 234 of the Criminal Procedure Code chapter 75 of the Laws of Kenya.
>
> 3. That the committal proceedings in Nairobi High Court Criminal Case No 29 of 1991 are a complete nullity in law.
>
> 4. That this honourable Court be pleased to order that the applicant (and his co-accused) be entitled to immediate discharge and to be set at liberty at once.
>
> 5. That this honourable Court be pleased to order that Nairobi High Court Criminal Case No 29 of 1991 will not and cannot be fixed for hearing in view of the orders sought herein and the reasons supporting request for such orders.
>
> 6. That this honourable Court be pleased to order that the costs of this application be paid for by the respondent.

The application was supported by an affidavit deponed to and signed by the applicant's counsel Mr G B M Kariuki which comprised of 25 paragraphs. There was however, no replying affidavit from the respondent.

In paragraph 3 of the affidavit the counsel explained how the applicant and his co-accused appeared before the Chief Magistrate for the purposes of committal proceedings on the alleged offence of treason when the magistrate purported to commit him and his co-accused to the High Court for trial.

In paragraph 4 and 5 counsel stated that the Chief Magistrate's Court was obligated to comply with the provisions in part VIII of the Criminal Procedure Code and that the said Court failed to comply with the said provisions and in particular section 232 of the Criminal Procedure Code.

He deponed in paragraph 6 that the lower court wrongly purported to commit the applicant and his co-accused under section 234 of the said Code. And in paragraph 7 he deponed that having failed to comply with the said section 232 of the Criminal Procedure Code the magistrate in the lower court could not lawfully commit the applicant and / or his co-accused for trial in the High Court.

In paragraph 8 of the supporting affidavit counsel complained that the lower court failed –

> (a) to frame the charge,
>
> (b) to read over and explain to the applicant and his co-accused the charge so framed and to inform them that they were not required to reply thereto,
>
> (c) to comply with section 232 (4) of the Criminal Procedure Code and

(d) to comply with section 235 of the same code.

In paragraph 9 of the supporting affidavit the counsel deponed that in view of the failure by the lower court to frame the charge and to comply with section 232 of the Criminal Procedure Code, the magistrate could not lawfully commit the applicant and his co-accused or any of them to the High Court under section 234 of the Criminal Procedure Code; and in paragraph 10 he said the purpoted order for committal of the applicant to the High Court for trial was a nullity in law for want of compliance with section 232 of the Criminal Procedure Code.

In paragraphs 11, 12, 13 and 14 of the affidavit, counsel described the rights of the applicant which he believes were breached under the Kenya Constitution and that there being no valid charge in Nairobi High Court Criminal Case No 29 of 1991 in terms of section 232 of the Criminal Procedure Code the applicant and his co-accused are not lawfully held.

He deponed further that it is patently clear that the holding of the applicant by the respondent is illegal in that it is in contravention of the applicant's constitutional right to liberty and is in violation of section 70(a) and 72(1) of the Constitution of Kenya.

In paragraph 17 of the affidavit counsel deponed that under section 77(1) of the Constitution, a person is entitled to a fair hearing when he is charged.

He said that in the instant case, the applicant had not been properly charged as there was no valid charge against him and that he was entitled to have the issue tried by a Constitutional Court to determine whether:

(a) there was proper committal in law;

(b) there was a valid criminal charge;

(c) the applicant's constitutional right of liberty had been infringed by the respondent and

(d) there was a good and legal justification for the above case not to be fixed for hearing pending determination of these issues.

In paragraph 18 of the supporting affidavit counsel verily believes that the applicant against whom there is no valid charge is even more entitled to have the aforesaid issues tried before the above case is fixed for hearing because under section 77(2)(c) of the Constitution of Kenya, a person who is charged with a criminal offence is entitled to be given adequate time and facilities for the preparation.

In paragraph 20 he deponed that under section 80 of the Constitution of Kenya (he must have meant section 84 of the said Constitution) the applicant was entitled to apply to this honourable Court in it's original jurisdiction to hear and determine his application on the legal issue as to whether his inalianable and fundamental rights to liberty enshrined in the Bill of Rights in the Constitution had been violated by the respondent.

On 18th February, 1992, the matter came up for hearing before us. Mr Kariuki submitted that although the applicant and his co-accused were arrested between August and October, 1990 committal proceedings stretched up to April 1991 when a ruling was made thereon committing them to the High Court for trial.

According to him although the plea was taken on 21st January, 1992 under section 274 of the Criminal Procedure Code, all the accused persons refused to plead to the charge. He submitted further that they did so because there was no valid charge before the Court to which they could plead.

He said that under section 77 (2) (a) of the Constitution of Kenya every person charged in Court was presumed innocent until otherwise proved guilty or the charge is withdrawn against him and that since there was no valid charge the accused's right to liberty had been infringed by holding them into custody

over the present charges.

Counsel referred the Court to chapter 5 all through the section 86 of the Constitution of Kenya to illustrate how the accused's rights to personal liberty and protection of right to life had been violated by their detention in prison custody when no valid charge had been preferred against them. The counsel's complaints were mainly that sections 231 to section 253 of the Criminal Procedure Code and more particularly sections 232, 234, 235 and 251 had not been complied with.

According to him failure to comply with these statutory provisions was a breach of the accused's constitutional rights and therefore that they were not being validly held in prison custody to await the hearing of Criminal Case No 29 of 1991 pending before the High Court.

He complained bitterly about the failure by the committal magistrate to frame a charge as per section 232(2) of the Criminal Procedure Code and to comply with sections 232 (4) and 235(b) of the same Code.

He referred the Court to the case of *R v Morais* [1988] All ER p 161 and *Archibold's* 40th Edition at page 78 to strengthen his argument that failure by the Chief Magistrate to frame a charge was fatal.

Dr Khaminwa endorsed what Mr Kariuki had said and stressed the importance of the committing magistrate to frame a charge before committing the accused persons to the High Court for trial and the desirability of his compliance with section 232 (4) and 235 of the Criminal Procedure Code. He stressed that the word "shall" as is used in those sections meant a command to the committing magistrate to comply and that the question of exercising discretion did not arise.

He referred the Court to the case of *R v Tambukiza s/o Wanyonga* [1958]EA 212 which he argued established that a committing magistrate must draw up a charge.

Mrs Martha Njoka submitted that the Chief Magistrate's failure to comply with section 231 through to 235 of the Criminal Procedure Code and failure to include in the committal bundles all the exhibits which were to be relied upon by the prosecution during the hearing of the case denied the accused protection of the law.

According to her, failure to include all exhibits and statements in the committal bundles could not give the committing magistrate ample opportunity to rule either way and that committing the accused to the High Court for trial on incomplete committal documents denied the accused protection of the law.

She was of the view that mere supply of a list of exhibits, without giving copies thereof, did not comply with section 231 (2) of the Criminal Procedure Code and did not give the applicant and his co-accused ample opportunity and facilities to prepare their defence. On account of this, she argued, they were denied protection of the law.

She added further that non-compliance with the provisions of the Criminal Procedure Code made the proceedings null and void and that they should be quashed and the applicant and his co-accused set at liberty.

Mr Mussilli also submitted in support of his colleagues' submissions and said that the charge signed by the Attorney-General was not a valid charge as envisaged in section 232 of the Criminal Procedure Code. He was of the view that the learned Chief Magistrate was in a hurry in committing the accused to the High Court for trial.

Mr Chunga, the Deputy Public Prosecutor, opposed the application arguing that the accused were given ample opportunity and facilities to prepare their defence and therefore there had been no contravention of section 77 of the Constitution.

He submitted further that although the charge had been prepared by the Attorney-General, the accused were aware of the allegations made against them as they had been given copies of statements and other

exhibits in the bundle of committal documents on which the prosecution intended to rely in support of the charges.

According to him, under section 231 of the Criminal Procedure Code only a list of the exhibits which the prosecution intends to rely on at the trial is what the accused are entitled to and that they were handed all these documents to assist them prepare their defence.

In his submissions Mr Chunga further said that the charge had been read over to the accused and all the overt acts explained to them and that after the bundles had been handed over to them on 27th March, 1991, these remained in their possession until 23rd April, 1991 when they were committed to the High Court to stand trial, thus enabling them to familiarize themselves with the allegations made against them.

According to him, section 232 (4) of the Criminal Procedure Code was complied with and that although the word used is "shall" the provision is not mandatory. He stated that it is not indicated in the provisions that the committing magistrate should reproduce the provisions in full. According to him it is enough when a committing magistrate notes the provisions he has complied with.

He did not agree that the provisions complained of were not complied with and added that even an alibi warning was given as a result of which he received copies of 3 letters from advocates representing some of the accused persons addressed to the Registrar to indicate which witnesses that would be called and/or whether they were going to raise alibi defences.

Mr Chunga wondered what the accused were preparing for when they appeared in the High Court on 21st January, 1992 if it was not to answer charges as per the information signed by the Attorney-General over which Messrs Porter and Bosire J J had deliberated earlier.

He said that the committal bundles handed over to Court as well as those handed to the accused on 27th March, 1991 had the information signed by the Attorney-General. Although some had no committing magistrate's endorsement, two of them which had been handed to the High Court had his endorsement, a sign that the said magistrate was infact adopting the Attorney-General's information and that he had complied with section 232 (2) of the Criminal Procedure Code.

Counsels for the applicant intimated that they were objecting to the endorsement on the two informations because according to their recollection they never saw it during the committal proceedings nor did they see it when the accused appeared before Justice Bosire for plea on 21st January, 1992.

Nevertheless Mr Chunga insisted that he also appeared before Justice Bosire during the plea when arguments over the validity of the charge ensued and he re-called that he saw the endorsement on the two copies of the information supplied to the Court in High Court Criminal Case No 29 of 1991. Mr Chunga contended that no provisions of the Constitution had been violated although there were complaints about non-compliance with the provisions of the Criminal Procedure Code.

According to Mr Chunga the documents complained of under section 231(2) of the Criminal Procedure Code were listed in the committal bundles and that he had offered defence counsels the opportunity to carry out inspection of those documents although the offer had been turned down.

According to him, not all documents intended to be relied upon by the prosecution need be included in the committal bundles and that such documents would be open to inspection so long as there is information relating to them in bundles.

Mr Chunga referred the Court to the reverse side of the information which is notice to the accused attaching copies of the evidence which the prosecution intends to rely on at the trial and the place where copies of documentary exhibits may be inspected. It also gives the name of the investigating officer and his contact.

According to him non-compliance with certain provisions of the Criminal Procedure Code, if any, were

procedural irregularities and not constitutional issues.

Mr Chunga also stated that some of the accused had been before other Courts with similar complaints and that in line with *Anarita Karimi Njeru v The Republic* (1) [1979] KLR page 154, they should not ask the Court to arbitrate over the same issues more than once.

He referred the Court to Criminal Revision No 19 of 1991 and Miscellaneous Application Nos 569 of 1991 and 14 of 1992 (consolidated) filed by Mirugi Kariuki and Koigi wa Wamwere respectively, ruled upon by Porter and Bosire, JJ. He asked this Court to treat the matter as finalized since the same had been adjudicated upon.

In reply Mr Kariuki and Dr Khaminwa re-itereated their earlier submissions of failure by the committing magistrate to comply with part VIII of the Criminal Procedure Code and hence, violation of section 72 and 77 of the Constitution which deprived the accused of their fundamental rights.

As can be seen from the aforesaid submissions two main issues have been raised. These are, whether the application is competently before us, and secondly, whether there was non-compliance with the law, leading to violation of the applicant's fundamental rights.

This application was filed under section 84(1) of the Constitution which provides as follows:

> "Subject to sub-section 6, if a person alleges that any of the provisions of sections 70 to 83 inclusive has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to any matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

(2) The High Court shall have original jurisdiction:

> "(a) to hear and determine an application made by a person in pursuance of subsection (1);
>
> (b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive)."

On the first issue, we can do no better than to look at the enabling provision quoted above, for its purport and understanding. The jurisdiction of the Court to entertain an application pursuant to section 84(1) is specific. The applicant is obliged to bring his application within the ambit of that section before the Court can have jurisdiction to entertain and determine it. He must state the complaint he has, the provisions of the Constitution which he considers to have been infringed in relation to him and the manner in which he believes they have been infringed. The allegation of contravention, to our minds must relate to any or all of the provisions of section 70 to 83 (inclusive) of the Constitution before the Court can have jurisdiction under section 84 to intervene. See *Anarita Karimi Njeru* (*supra*) as quoted in *Kennneth Njindo Stanley Matiba v The Attorney – General* Miscellaneous Application No 666 of 1990 (unreported), reproduced from *R v El Mann* [1969] EA 351.

An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion; but a Court of law has to gather the spirit of the Constitution from the language of the same. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.

In the present application the applicant has stated his complaint which in the main is that the committing magistrate failed to comply with the provisions of part VIII of the Criminal Procedure Code. More specifically that he failed to frame the charge and also failed to comply with section 232 (4) and 235 of the same Code.

Mr Chunga argued that because s 84(1) specifically states that applications thereunder are to be made, we quote, "without prejudice to any other action with respect to the same matter which is lawfully available", this Court can only entertain a reference if made before the applicant had availed himself any other action lawfully available to him. In this interpretation he relied on this Court's decision in the aforesaid case of *Anarita* in which at page 159 letter I the learned Judges said as follows:-

> "We must now consider the expression 'without prejudice to any other action with respect to the same matter' in section 84 (1); and we shall deal first with the words 'without prejudice to' and then go on to consider those which follow them. It is clear that a person may utilise the section 84(1) to enable him to secure redress if no other action has ever been available to him; but what if such other action is, or had been, available? Mr Mwirichia would interpret 'without prejudice to', in its context as meaning 'apart from'; but we prefer 'without derogating from,' the Latin *'prae'* meaning (for our purpose) before in point of time and *'judicium'* meaning judgment, which leads us to the conclusion that you can apply under section 84(1) before, but not after, you have taken other action, and it is to be observed that section 84 (1) says 'any other action ….which is lawfully available', it does not say 'which was lawfully available'. Accordingly, we read section 84 (1) as providing the individual with a means of obtaining redress only if he has never had or has not already utilized such other action as was lawfully available to him."

In arriving at the meaning given to the words "without prejudice" the learned Judges seem to have given no effect to the word "without" nor did they say what would happen to any other action "which is"…then still available to the person. The learned Judges did not also address themselves to the fact that the section did not appear to intend limitation to the operation of the Constitution in ensuring that all grievances are redressed and not merely glossed over as it is the inherent duty of this Court to do justice unless specifically barred by law.

On our part we would prefer to deal with the interpretation of the words in issue by using the ordinary principles of interpretation of statutes, the primary one of which is that words should be given their ordinary meanings unless the context otherwise requires. According to *Collins Dictionary,* the words "without prejudice" in law mean, "without dismissing or detracting from an existing right or claim". We would as such interpret the words in issue as meaning "without dismissing or detracting from" any action which may still be available to the person. In our view therefore the statement only saves the future rights which a person may have but does not specifically bar any person from seeking redress thereunder if such a person had availed himself of any other action previously. The fact that previous actions are not mentioned by the section do not in our view by implication bar such person from coming to this Court. With due respect to the learned Judges who decided the *Anarita* case, we feel that the interpretation given to the words "without prejudice to any other actions" was too restrictive.

On the issue as to whether this Court should be required to consider matters more than once, we are of the view that such an act would easily lead to an abuse of the process of the Court. However, looking at the actions which had been taken in relation to the issues which are the subject of this reference, we find that in both of them the issues raised were not addressed. They therefore still require determination. An adjudication thereon would not be a waste of time nor would it amount to an abuse of the process of this Court, more especially as they raise issues relating to the legality of the proceedings, a matter which this Court has an inherent jurisdiction to deal with so as to rectify its records. In the result, we find that the instant application is properly before us.

The grounds on which the applicant contends that his rights have been violated are primarily that mandatory provisions of Criminal Procedure Code were not complied with by the learned Chief Magistrate in committing him and his co-accused to the High Court for trial. He also contends that by reason of the said non-compliance the committal proceedings and the charge in H C Cr Case No 29 of 1991 are a nullity and they are therefore being held unlawfully and in violation of their fundamental rights.

Section 231 (2) of the Criminal Procedure Code outlines documents which should be included in the committal bundle. They include:

(a) the information stating the charge in respect of which committal proceedings are to be held;

(b) a list of witnesses whom the prosecution intends to call at the trial and copies of their statements relevant to the case;

(c) a list of exhibits which the prosecution intends to produce at the trial and copies of the following exhibits (underlining ours)

(i) any statement of the accused;

(ii) any medical, psychiatric or post-mortem report;

(iii) any report on finger prints, on an identification parade or on the scene of a crime;

(iv) any report made by a firearms examiner, Government analyst or document examiner; and

(v) any photographs taken or sketch plan made;

(d) an alibi warning to the effect that, if the accused intends to say at his trial that he is not guilty because he was not at the place where the alleged offence was committed at the time of its alleged commission, details of that defence, and of the witnesses he will call in support thereof either at the committal proceedings or in writing to the committing Court and to the prosecution within 14 days thereafter, and that if he fails to do so he may be prevented at the trial from making that defence.

For our purpose here, the main complaint against the prosecution is non-compliance with (c), namely, failure by the prosecution to include certain documents, or exhibits in the committal bundles.

The main complaint is under section 232 (2) which provides as follows:

"The magistrate shall read the committal documents before the commencement of committal proceedings and at the commencement thereof if he considers that there are sufficient grounds for committing the accused person for trial before the High Court, shall frame a charge which he shall read over and explain to the accused person and inform him that he need not reply thereto," Underlining ours.

And sub-section 3 of this section provides that:

"The charge framed by the magistrate under subsection (2) may be in the same terms as the information furnished by the prosecution or may be an amendment thereof."

Subsection (4) of the same section which is also a bone of contention in this application provides as follows:

"where the magistrate considers that there are sufficient grounds for committing the accused person for trial before the High Court, the magistrate shall address him in the following words, or words to a similar effect:

'This is not your trial. You will be tried later in another Court before a Judge and assessors, where witnesses will give evidence and you will be allowed to question them. You will then be allowed to make a statement or give evidence on oath and call your witnesses. If you wish, you may say something now either on oath or not on oath. If you say something on oath now you may be questioned by the prosecution. If a promise or threat was made to you earlier, it should not make you confess to an offence now. Anything you say will be written down and may be used at your trial."

Then there is section 234 of the Criminal Procedure Code which allows the committing magistrate to commit the accused to the High Court for trial if satisfied from the committal bundle that there are sufficient grounds to do so and until the trial may admit the accused person to bail or remand him in custody.

Section 235 of the same Code deals with an alibi warning and provides as follows:

> "After the committal for trial the magistrate shall:
>
> (a) record the names and addresses of the witnesses whom the accused wishes to have summoned at the trial;
>
> (b) give to the accused person an alibi warning in the following words, or words to a similar effect:
>
> 'If, at your trial, you intend to say that you are not guilty because you were not at the place where the alleged offence occurred at the time it is alleged to have occurred, you must say so. You must also supply details of where you were and names and addresses of any witness who will support you. You may do so now, or you or your advocate may supply this information in writing to this Court and to the prosecution within the next 14 days. If you do not, you may be prevented at your trial from saying that you were not present when the alleged offence occurred.'
>
> (c) Record any details of an alibi defence given by the accused."

These provisions are being reproduced verbatim because they form the crux of the complaints by counsel for the applicant in this application and form the basis for arguments that constitutional violations have been committed by the respondent against the applicant and his co-accused.

The complaints raised in this reference mainly concern the learned Chief Magistrate's alleged non – compliance with statutory provisions during committal proceedings.

The relevant records appear at pages 35, 36, 44 and 45 of the typed copy of the lower court's proceedings. At page 35, the record shows the date 27th March, 1991 when the Assistant Deputy Public Prosecutor, Mr Etyang, assisted by two state counsels Messrs Okumu and Murgor handed in committal proceedings to the Court. Counsels for the accused present included Mr Shamalla for the first accused, Dr Khaminwa and Mr Ndungi for the second, sixth and seventh accused, Mrs Njoka for accused three, G B M Kariuki for accused five, the applicant in this matter, Kauma Mussilli for accused four and Thiongo for accused 8. The records reads thus:

> "Etyang: I wish to present to the Court committal proceedings as required under section 231 Criminal Procedure Code. We have made three sets for the Court. Included in the bundle is an information duly signed by the Attorney-General on 25th March, 1991. The second page contains the names of the accused persons also signed by the Attorney-General as well as a list of overt acts. We are now presenting each accused with a copy of the bundle of documents. There is a little variation of the overt acts.

The first one now has the eighth accused and the second overt act now contains figure (2) instead of (6). There are new overt acts numbers 3, 4, 5 and 6. Overt acts number 7 to 21 remain the same. The overall effect is that in *lieu* of the original 18 overt acts we now have 21. There is a typing error in overt act No 1 which instead of January 1988, it should read October, 1988. There is in the bundle a list of prosecution witnesses the prosecution intends to rely on and their addresses.

> We have included a list of exhibits and these number 301. Medical examination reports are mandatory and are included, identification parade forms, sketch plans of Busia and Bungoma bus stages, fire arms examiners' report and photographs. The Court may allocate a date for committal proceedings. That is all.

Court: The charge and all overt acts read afresh and explained to all accused who are not required to plead."

Thereafter there were arguments as to whether contents of committal bundles should be the subject of reporting by newspapers and after prolonged submissions by counsels the Court ruled that, apart from the names of accused and overt acts, all the other contents should not be reported in the media.

There were also arguments about the conditions under which the accused were being held at the prison with defence counsels requesting that there be *viva voce* evidence from the accused for the Court's order but the parties agreed that the matter should be resolved administratively failing which there would be a hearing over the dispute resulting in a Court's order.

On 23rd April, 1991 the Court re-assembled for committal proceedings. The appearances were the same as on 27th March, 1991 and this is what the Court said at page 44:

"Ruling:

This Court has perused the committal bundle presented herein and I consider that there are sufficient grounds for committing each of the accused persons to the High Court for trial on charges framed in the same terms as the information filed and placed in the said bundle. Section 232(4) Criminal Procedure Code is duly complied with.

Order

The accused are warned to furnish the Court with a list of their witnesss and addresses and all particulars of alibi, if any, in writing within 14 days of to-date. Similar particulars be given to the prosecution. All accused are now remanded in custody until called upon to plead in the High Court at it's next criminal sessions."

After the magistrate's order there were arguments based mainly on absence of some exhibits from committal bundles. Dr Khaminwa complained that the committal bundle supplied to him was incomplete as it had no copies of exhibits included.

Mr Shamalla also complained in similar terms saying that exhibits Nos 180 to 229 were missing from his bundle as were exhibits number 231, 233 and 234.

Mr Etyang, who appeared for the prosecution explained that under section 231 (2) (c) of the Criminal Procedure Code, the prosecution was only bound to produce a list of exhibits intended to be relied on at the trial and that copies to be supplied had been supplied. He said further that information of the exhibits which had not been supplied as per Mr Shamalla's list need not be handed over to the defence.

Then Dr Khaminwa took over and now said that there were questions of a constitutional nature which he wished to refer to the High Court for interpretation. He said that even if the Court found that there were sufficient grounds, this was not a case which could be referred to trial at all. He said that this was because the fundamental questions ought to be answered first.

Dr Khaminwa went on to submit that he did not agree with the interpretation of the learned Assistant Deputy Public Prosecutor in that the offence preferred was very serious and that in the circumstances it was fair they (the accused) do not suffer any prejudice at all and that their counsel must have full access to any exhibits and documents to be relied upon at the trial otherwise they would be denied justice.

According to Dr Khaminwa section 231 of the Criminal Procedure Code did not bar the giving out of exhibits to the accused persons. He said that there were no sufficient grounds as to why certain exhibits were given and others withheld, and that if all the exhibits referred to were not produced then the committal documents did not make sense. He said all counsels wanted to see these exhibits in order to take full instructions.

Dr Khaminwa invited the Court to properly interpret section 231 of the Criminal Procedure Code so that counsels were given all the exhibits including KPF manifesto which he did not know what it was all about. He also required greeting cards, happy birthday cards etc. He said that the nature of the charge was such that the accused were to be given full opportunity to prepare their defence. He said they would not be able to do this if they were denied the chance they were asking for because they would suffer irreparable damage.

The magistrate made a ruling on these submissions. He said that since he had already committed the accused persons for trial his Court had become *functus officio* and could not make any further order thereon.

While hearing this constitutional issue, it was submitted before us that after the magistrate committed the accused persons for trial to the High Court counsel tried to draw the learned Chief Magistrate's attention to the irregularities committed, namely non-compliance with provisions of sections 231 up to 253 of the Criminal Procedure Code, but to no avail due to the hostile attitude held against them.

In his submissions Mr Mussilli said the magistrate was so hostile that he committed the accused persons for trial to the High Court "*wapende wasipende*". He said the magistrate was in a hurry and never allowed counsels to make any corrections. He said counsels faced hostilities in the lower court and that they were not able to represent their clients sufficiently.

Needless to say, we have quoted nearly verbatim what counsels said after the accused were committed for trial to the High Court. Mr Shamalla and Dr Khaminwa specifically submitted on the irregularities committed by the learned Chief Magistrate and the main basis of the dispute was non-compliance with section 231 (2) (c) above.

As can be read through this provision, the subsection required that a list of exhibits which the prosecution intends to produce at the trial be included in the committal bundles and then specifically add that copies of other documents named in (i) to (v) of the subsection be supplied to the defence. If the Legislature intended that all the exhibits the prosecution intends to rely upon be included in the committal bundles then it should have given the information specifically as it did in respect of exhibits (i) to (v) above.

Counsels for the accused have relied on section 77 in their application and one of the provisions cited is section 77 (2) (c) where the accused should be given adequate time and facilities for the preparation of his defence.

The only facilities accused counsel argue have not been afforded to them as per arguments on 23rd April, 1991 are the missing exhibits, more particularly KPF manifesto, greeting cards, happy birthday cards.

The Deputy Public Prosecutor whilst offering inspection of the missing exhibits, argued that these were not supposed to be supplied and section 231 (2) (c) of the Criminal Procedure Code supports him in that view. In the circumstances we would not agree that the accused have not been given adequate facilities to enable them prepare their defence, nor are we persuaded that they have been denied protection of the law. They have in any case been offered an opportunity to inspect all the exhibits.

As to whether section 232 was complied with, we have given a verbatim record of the proceedings of the learned Chief Magistrate on 23rd April, 1991 and in particular where he said he was committing the accused persons to the High Court for trial "on charges framed in the same terms as the information filed and placed in the said bundle. Section 232 (4) Criminal Procedure Code is duly complied with."

During counsels submissions after the committal of the accused to the High Court, neither Mr Shamalla nor Dr Khaminwa or any other counsel specifically submitted that section 232 (2) and (4) or 235 of the Criminal Procedure Code had not been complied with. They all based their submissions on non-compliance with section 231(2) (c) of the same Code.

Apart from the charge drawn by the magistrate which we cannot find on the record, he must have

complied with the provisions without recording actions taken verbatim, hence counsel's silence thereon on the 23rd April, 1991. Further, within 14 days or so, after committal, counsels for some of the accused persons wrote letters to the Registrar of this Court with copies to the Attorney-General in compliance with section 235 of the same Code.

According to the counsels' argument, under s 232(2) of the Criminal Procedure Code the lower court had to frame a charge which should have been read to the accused persons. We however find that under s 232 (3) of the same Code such a charge could have been in the same terms as the information furnished.

When committal proceedings are taking place the lower court is expected to carry out a number of functions including framing of charges which may be in the same terms as the information. The section is silent on the signing of the framed charge. The magistrate, is however, required under s 250 to transmit 2 copies of the information containing the charge framed to the Registrar. The trial in this Court proceeds on this basis of the information signed by the Attorney General. See sections 232(2), (3), 250, 253, 274 to 280 of the Criminal Procedure Code.

As can be observed from s 232(2) and (3) as read with s 250 of the Criminal Procedure Code, the charge framed is supposed to be contained in the information. In this regard, Mr Kariuki and Dr Khaminwa argued that the word framed requires the magistrate to write out a charge which could be in the same words as the one in the information or an amendment thereof. In support thereof counsel, Dr Khaminwa cited the dictionary meaning of the word frame in *Webster's Dictionary*, 2nd Edition, where the word is defined as "to make, to compose, to contrive; to plan; to devise, to invent; to put into words". He also referred the Court to the meaning ascribed to the said word in the *English Learners Dictionary,* which defines the word as, "to put together and to make". Counsel's submissions which appear to require the necessity of writing of a separate charge do not explain how such "framed" charge could eventually be contained in the information. Our own research show that according to the *New Collins Dictionary and Thesaurs*, 1986, the word "frame" means, "to compose or conceive"; to "form (words) with the lips especially silently".

On account of the fact that section 232 is silent on the signing of the charge by the magistrate and yet the charge is to be contained in the information, which has already been signed by the Attorney General we would prefer to read the word frame as meaning "to form or adopt the charge without necessarily re-writing it."

To illustrate our view on "framing" of charges by a magistrate, we found it necessary to refer to several High Court Criminal Cases two of which are Eldoret High Court Criminal Case No 25 of 1991 and Nairobi High Court Criminal Case No 16 of 1984, which commenced by way of committal proceedings.

In these 2 cases, which were murder trials the Principal Magistrate and acting Chief Magistrate, respectively, complied with s 232 of the Criminal Procedure Code by way of framing a charge by writing it out in full, reading it to the accused and giving the requisite caution and "alibi" warning as per sections 232 (4) and 235 of the Criminal Procedure Code. Although the magistrates' proceedings on committal appear in the respective High Court files, we noted that on the day of the plea in the High Court, the accused persons in both cases pleaded to the information signed by the state counsel and the Assistant Deputy Public Prosecutor, respectively on behalf of the Attorney General.

In the 2 High Court cases referred to above, the accused persons were never called upon to plead to the charges framed by the magistrates. This then begs the question, what is the purpose of the requirement in s 232(2) of the Criminal Procedure Code that a magistrate "shall frame a charge?"

In our view, we find that since the charge framed by the magistrate does not form the basis of the trial in the High Court, what is required of the magistrate is to consider the information furnished by the Attorney General, and if he finds it sufficient, he can adopt and or amend the same. The act of adoption could be signified by endorsement on the information by the magistrate, which was duly done in this case in respect of the 2 bundles of committal proceedings transmitted to the Registrar under s 250 of the Criminal Procedure Code.

The meaning of section 232 (2) of the Criminal Procedure Code is by no means clear and we would recommend to the authorities concerned to look at it afresh.

Notwithstanding the above conclusion, this case was argued mainly on the question as to whether the failure by the magistrate to frame a charge pursuant to s 232(2) of the Criminal Procedure Code rendered the proceedings in Nairobi Chief Magistrate's Case No 5167/1990 and to the charge in Nairobi High Court Criminal Case No 29 of 1991, a nullity.

On this point, Mr Kariuki referred the Court to the case of *R v Morais* [1988] 3 EAR p 161.

On perusal of the authority we found that the indictment in that case had not been signed by an authorised officer. The Court found the proceedings a nullity and ordered a re-trial.

In the present case, however, the information furnished by the Attorney-General was signed by a duly authorised officer. However, the provisions of s 232 (2) of the Criminal Procedure Code being silent on the question of signature, we found no relevance between *Re-Morai's* case, and the instant application.

Dr Khaminwa, also referred us to the case of *Mainza and Others v The people*, where the applicants were charged with the offence of robbery. After committal to the High Court for trial, no action was taken for 2 years, and the applicants applied for a writ of "*habeas corpus*" claiming that they had been unlawfully detained. At the hearing of their application the prosecutor was unable to produce a charge, and infact the State Attorney conceded that the State did not intend to proceed with the case against them.

The application was allowed. In the current case, however the prosecution has produced the information over which it intends to proceed to trial. This application can therefore be distinguished from *Mainza's* case.

On the other hand the learned DPP, Mr Chunga, was of the view that the failure to frame a charge under s 232 (2) of the Criminal Procedure Code, was not fatal. In this regard, he referred the Court to the cases of *Muhoja s/o Manyenye v R* (1942) 9 EACA 70, *Koinange Mbiu v R* [1951] 2 KLR 130 and *Kababi v R* [1980] KLR 95, and argued that such omission by the magistrate, if any, was a mere irregularity and could not render committal proceedings and the charge, a nullity.

In each of the above cases, the magistrates had failed to frame the charges, or to read over to the accused, the amended charge as required by the relevant provisions. Nevertheless the Court of Appeal Judges in *Manyenye's* case and the High Court Judges in *Koinange Mbiu's* case, decided that no prejudice had been caused by the omissions. The learned Judge in *Kababi's* case went on to say,

> "I am unable to hold, as counsel for the applicant, invited me to do that the mere failure to comply with a section is fatal. I think that whether it is fatal or not must depend on the circumstances of the particular case concerned."

We respectively agree with the above view expressed by the learned Judge.

In the instant case, the learned Chief Magistrate substantially complied with the provisions of the Criminal Procedure Code, and the fact that the applicant and his co-accused are still to be tried by the High Court, if the State so wishes, where they will be accorded all the opportunities of being heard, we are unable to find that they have or are likely to be prejudiced. The committal proceedings and information, now pending before the High Court are, in our judgment valid and therefore the fundamental rights of the applicant and his co-accused under sections 70(a), 72(1) and 77(1) and (2) of the Constitution have not been violated. We therefore dismiss this application with no order as to costs.

Dated and delivered at Nairobithis 10th day of March 1992

D.K.S AGANYANYA **J.A ALUOCH** **G.P MBITO**

JUDGE **JUDGE** **JUDGE**