



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 331 of 2002

SHADRACK MWITI ITHINJI & 9 OTHERS.....APPLICANTS

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

The Originating Summons dated 29th November 2004 was brought pursuant to Sections 67 (1) and 84 (1), (3) and (6) of the Constitution of Kenya and the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001.

Seven questions were referred to this bench under the above sections for determination. They are as under:-

1. Is the Central Bank of Kenya (herein after referred to as “CBK”) usurping the powers of the Attorney General contrary to the provisions of Section 26 of the Constitution.

(i) Whether or not the Banking Fraud Investigation Department (hereinafter referred to as BFID) of the Central Bank can prosecute a Penal Code offence in place of the Attorney General or his lawfully authorized agents contrary to the Constitution and the legislative provisions of the Criminal Procedure Code.

(ii) Who gives instructions to the “BFID” of the Central Bank and whether such instructions can constitute lawful authority to conduct prosecution of a criminal offence, with or without the sanction to prosecute from the Attorney General

2. Can Central Bank of Kenya Prosecute the accused in this case or at all?

(i) Is Central Bank of Kenya acting ultra vires the Act establishing it and the Constitution of the Republic of Kenya by purporting to prosecute the 1st accused in Nairobi CM’s Case 887/00

3. Whether it is unconstitutional and contrary to the principles of the due process of law for Central Bank to prosecute a Penal Code offence;

(i) What is the role, interest, rights and duties of the BFID vis a vis the prosecution of an

accused person who is not an employee of the Central Bank of Kenya charged with a Penal offence.

(ii) Whether investigations and searches conducted at the behest of the BFID operating under the direction and control of the Central Bank of Kenya and/or Efficiency Monitoring Unit operating under the control and direction of the Cabinet, Office of The President amounts to an arbitrary search or entry as contemplated under Section 76 of the Constitution of Kenya.

(iii) Whether an alleged Penal Code offence can be prosecuted and tried based on evidence illegally obtained through an arbitrary search in contravention of Section 76 of the Constitution

(iv) Whether the purported prosecution is an abuse of the process of court;

4. Can the Central Bank of Kenya and Efficiency Monitoring Unit of Cabinet Office, Office of the President collectively and/or singularly expose the accused to any investigation and/or prosecution?

(i) Whether the BFID of the Central Bank of Kenya is an entity known to law and established by an Act of Parliament mandated with the prosecution of offences;

5. Can and has the Attorney General delegated his prosecutorial functions to the Central Bank of Kenya being a corporate body established under Central Bank of Kenya Act Cap 491.

(i) Can and does BFID legally investigate or prosecute offences outside those prescribed under the Central Bank of Kenya Act;

(ii) Whether Section 26 of the Constitution of Kenya, Sections 83 and 85 of Criminal Procedure Code Cap 75 Laws of Kenya or any other Act of Parliament permit the Attorney General to delegate his prosecutorial powers to the BFID;

(iii) If not, what is the existent and nexus between the Attorney General's prosecutorial functions and the purported prosecution by Central Bank of Kenya through the BFID?

6. Is the Central Bank of Kenya acting ultra vires the Act establishing it and the Constitution of Kenya.

7. Is the court's constitution independent and impartial when the Central Bank of Kenya is prosecuting the Applicants?

Consequently the Applicant seeks the following orders;

1. The trial of 1st accused person in NRB CMC 887/00 be declared unconstitutional, null and void and an abuse of the process of court.

2. A declaration that the constitutional rights of the 1st accused in the said Criminal Case have been infringed and therefore a permanent stay be granted from the further proceeding with the case or otherwise with the prosecution of the said case.

The Originating Summons was supported by the Affidavit of Shadrack Mwiti Ithinji the, 1st Applicant, dated 28th July 2003, others dated 16th October, 2003, 29th November 2004 and another by Mr. Bowry dated 4th November 2003, and skeleton arguments. The background of this case is that the 10 Applicants were charged with the offence of stealing contrary to Section 275 of the Penal Code and handling stolen goods contrary to Section 322(2) of the Penal Code as per the amended charge dated 26th July 2000 in CMC 887/00.

The Applicants denied the offences. On 7th February 2001, Mr. Bowry, Advocate for the 1st Applicant

(accused) applied for stay of the proceedings and applied to refer the matter to the High Court under Section 67(1) and 84(3) of the Constitution for interpretation of the alleged violation of the Applicant's Constitutional rights. On 18th February 2002 the trial magistrate's ruling was read referring the matter to the Hon. the Chief Justice. On 20th December 2002, the Hon. the Chief Justice ruled that the matter would be heard by a Constitutional bench of 3 judges. It is by virtue of the Chief Justice's order that we became seized of this matter.

Though the 1st Applicant was the only one who applied for stay of proceedings and filed the Originating Summons dated 29th November 2004, the other Applicants too supported the Originating Summons. The court record indicates that the Applicants had been represented by Counsel but at the hearing of this reference on 3rd July 2006 before us, only Mr. Bowry, Counsel for the 1st Applicant was present. The other Applicants were also present and each confirmed to this court that they support the Originating Summons but for various reasons, their Counsel were absent and each of them confirmed that the hearing should proceed without their Counsel. The court went ahead to hear the Originating Summons. The Originating Summons is therefore in respect of all the Applicants who were accused persons in NRB CMC 887/00.

It is Mr. Bowry who made submissions on behalf of the Applicants case whereas Mrs. Ondieki represented the Hon the Attorney General, the Respondent herein.

Mr. Bowry submitted that the contention in this case arises from both the Original and amended charge sheets in which the Applicants were charged. The charge sheet were presented to court on 20th April 2000 and 26th July 2000 respectively. The said Charge Sheets bear the stamp of the Central Bank of Kenya (Banki Kuu ya Kenya), Banking Fraud Investigation Department Nairobi, meaning that they originated from Central Bank of Kenya and yet CBK does not have any prosecutorial or investigative powers. He urges that Section 4 of the Central Bank of Kenya Act Cap 491 Laws of Kenya does not have any of its objects as prosecution or investigation and by the Central Bank of Kenya purporting to investigate and prosecute, it was offending the provisions of Section 26 of the Constitution and was usurping the powers of the Attorney General under that Section. The court will consider Section 4 of Central Bank of Kenya Act and Section 26 of the Constitution later on in this judgment.

Mr. Bowry further submitted that they exhibited a Circular from the Central Bank of Kenya No. 01/07/94 ADM annexed to the Affidavit of 1st Applicant dated 10th October 2003 which sets out the various Departments in Central Bank and one of them was BFID headed by one Joseph Kamau – and further that a letter was addressed to the Counsel on 3rd September 2003 from the BFID annexed to his Affidavit of 4th January 2003. Counsel said that this was evidence that the Central Bank of Kenya was the investigator and prosecutor in the case and therefore usurped the powers of the Attorney General and Commissioner of Police. He submitted that the Banking Fraud Investigation Unit (hereinafter referred to as BFIU) referred to by Mr Birech in his Affidavit of 14th January 2005 is a later creation and there has been no explanation why it changed its names from BFID to BFIU after 17th April 2000 after the Applicants were charged.

Counsel further urged that by endorsing its stamps on the charge sheet, the Bank was binding itself as the one prosecuting the Applicants and yet there is no evidence that the Attorney General ever delegated its powers to the Bank. Under Section 83 of the Criminal Procedure Code, such delegation had to be made by gazette notice. He said that Central Bank violated the Applicant's rights when the Bank's Officers arrested the Applicants, detained them at Police Station and later a Police Officer signed the charge sheet on behalf of the Bank. He concluded that the investigation and charging of Applicants was an act done by the Central Bank. In support of his contentions Mr. Bowry cited the case of **PRABHULAL SHAH V AG CA 24/1985** where a Government Officer working at Central Bank of Kenya was held to be an employee of Central Bank of Kenya and was carrying on investigation on behalf of Central Bank of Kenya. Mr. Bowry holds BFID Officers to have been doing likewise.

Mrs. Ondieki opposed the application and relied on the Affidavits filed by 1st and 2nd Respondent's

Nicholas Kamwende on 29th July 2003, 8th October 2003 and 11th February 2004 and another filed by Mr. Birech on 14th January 2005 and the submissions filed in court on 19th January 2005.

Mrs. Ondieki's first point was that since the application is brought under Section 67 (1) and 84 of the Constitution, the Applicants were obliged to demonstrate that there is an issue for Constitutional interpretation and should specifically state what rights have been violated.

She further submitted that the case before court was investigated by I.P. Maracha of BFIU and is now being prosecuted by IP Ndemwa a Police Officer who is duly gazetted. She said that the BFIU is under the command and control of the Police who are answerable to the Police Commissioner and are paid by the Government of Kenya not by Central Bank.

As regards the stamps on the charge sheet in which the Applicants were charged, Counsel submitted that it was for purely administrative purposes to show the centre of investigation and does not make it the Bank's investigation.

Mrs. Ondieki said that in any event the stamping of the charge sheet with BFID stamp does not raise any Constitutional issue for if there is any defect in the charge sheet it can be amended under Section 214 of the Criminal Procedure Code. She said that in the case of **KAMLESH PATTNI V REP MISC CR APPLICATION 810/99** the court held that the role of the BFID was irrelevant as far as investigations were concerned. Counsel further submitted that the charge sheet is headed Kenya Police, bears a Kenya Police number and is signed by Mr. Maracha and registered at Kileleshwa Police Station.

On the Circular from Central Bank of Kenya exhibited by the Applicant, Counsel said that the same is for identification of the centre of the investigations but does not make it belong to Central Bank of Kenya and that in any event in the case of **MEME V REP CR APP 495 of 2003**, the court held that investigations are not the preserve of the Police and can be done by other agencies under the direction of the Attorney General. She urged that the application be dismissed.

In reply, Mr. Bowry said that there would be no question if the Police Commissioner created a department ran by the Police which conducted investigations instead of BFID. The question, according to Mr. Bowry, is whether the Attorney General's powers can be delegated to a corporate body, the Central Bank of Kenya. He said that the question for interpretation is therefore, Central Bank Act.

We have considered the submissions of Counsel, noted the issues set out in the skeleton arguments of the two Counsel which seem to be quite similar. They are basically similar to the questions raised in the Originating Summons and we will summarize the issues we find pertinent and necessary for our determination as follows;

1. Is the Central Bank of Kenya usurping the powers of the Attorney General under Section 26 of the Constitution?
2. Does the Central Bank of Kenya have prosecutorial powers and if so, can it prosecute this case?
 - Is it unconstitutional for the Central Bank of Kenya to prosecute a penal offender?
 - Has the Central Bank of Kenya acted ultra vires its powers under the Act.
3. Can the Central Bank of Kenya and Efficiency Monitoring Unit of Cabinet Office, investigate and prosecute?
4. Can the prosecution rely on evidence that is illegally gathered?
5. Can the Attorney General delegate his prosecution functions to the Central Bank of Kenya which is a corporate body established under the Central Bank of Kenya Act, Cap 491 Laws of Kenya?

6. What is the effect of the Central Bank stamp on the charge sheet in which the Applicants were charged?

7. Will the court's independence be compromised under the circumstances?

8. Is the charging and prosecution of the accused persons an abuse of the court process?

Section 26 (3) of the Constitution gives the Attorney General an unfettered discretion in matters of criminal prosecution. However, the Attorney General cannot be able to undertake the same personally and so Section 26(5) empowers the Attorney General to delegate these powers to Officers who are subordinate to him under specific or general instructions. Section 26 of the Constitution provides as follows;

“Section 26 (3)

The Attorney general shall have power in any case in which he considers it desirable so to do -

(a) To institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person;

(b) To take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and

(c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

(4) The Attorney General may require the Commissioner of Police to investigate any matter which, in the Attorney General's opinion relates to any offence or alleged offence or suspected offence and the Commissioner shall comply with that requirement and shall report to the Attorney General upon the investigation.

(5) The powers of the Attorney General under subsection (3) and (4) may be exercised by him in person or by Officers subordinate to him acting in accordance with his general or special instructions.

(6) The powers conferred on the Attorney General by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority;

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(7) For the purposes of this Section, an appeal from a judgment in criminal proceedings before any court, or a question of law reserved for the purpose of these proceedings to any other court, shall be deemed to be part of the proceedings: Provided that the power conferred on the Attorney General by subsection (3) (c) shall not be exercised in relation to an appeal by a person convicted in Criminal proceedings or to a question of law reserved at the instance of such a person:

(8) In the exercise of the functions vested in him by subsection (3) and (4) of this Section and by Section 44 and 55, the Attorney General shall not be subject to the directions or control of any other person or authority.”

Powers of delegation are expressly given to the Attorney General under the Constitution as shown in the above provision.

In the case of **JOHN HARUN MWAU V REP (1985) KLR 748** – the court held at page 754

“The Attorney General could validly delegate the power (Constitutionally conferred on him alone) to be exercised by an appropriate Officer”

Section 85 (1) of the Criminal Procedure Code empowers the Attorney General to appoint public prosecutors. It provides as follows;

“Section 85 (1) the Attorney General, by notice in the Gazettee, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases,

(2) The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service not being a Police Officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any case.

(3) Every public prosecutor shall be subject to the express directions of the Attorney General.”

It is Mr. Bowry’s submission that the Banking Fraud Investigation Department (BFID) is an in-house Police Department within Central Bank of Kenya and is an organ of the Central Bank and the Officers take instructions from and are under the direction of the Central Bank of Kenya but not the Commissioner of Police. On the contrary, Mrs. Ondieki submits that this is a unit like the Flying Squad or Anti-Narcotic Unit or Special Crime Prevention Unit which are all under the Commissioner of Police and are answerable to him but deployed in different departments or institutions.

The issue that Mrs. Ondieki failed to address is what is the BFID and what is the difference between BFID and Banking Fraud Investigation Unit (BFIU). In all her submissions, Mrs. Ondieki refers to BFIU which title seems to have come into use sometime after this case was filed. This is because the letter addressed to Mr. Bowry dated 3rd September 2003 by Kamwende of the BFIU has the letter-head of BFID and the circular to all Banks which was addressed to all Banks and exhibited on the Affidavit dated 16th October 2003 by Shadrack Mwititi indicates that the BFID was a Department of Central Bank of Kenya and was headed by one Joseph Kamau. In his Affidavit dated 14th January 2005, David Birech at para 11, 14 and 15 deposes that the BFIU was referred to as a department of the Central Bank of Kenya because the Bank maintains departments for administrative purposes. Indeed Mr. Kamwende who succeeded Mr. John Kamau as the in charge of that Department has exhibited a letter dated 11th March 2003 emanating from the Director of CID posting him to the BFIU of the Central Bank to replace Mr. Joseph Mwangi Kamau. Kamwende is a Senior Superintendent of Police. It is after his posting that Mr. Kamwende wrote the letter dated 3rd September 2003 which letter was forwarding witnesses statements and exhibits in the criminal case 887/00 to Mr. Bowry. As noted above, though the letter-head read BFID, it was signed as emanating from BFIU.

In our considered view, BFID is one and the same as BFIU which is a Police unit based at the Central Bank of Kenya. According to Kamwende and Birech, it is charged with responsibility of investigating and detecting crime and it is manned by Police Officers. Joseph Kamau who manned it as BFID was recalled by CID who replaced him with Kamwende which is evidence that the Unit was under the control of CID who were in charge of the personnel there. Birech who is also a Police Officer, has exhibited his payslip, which evidence that he is not an employee of Central Bank of Kenya but an employee of the Government of Kenya & on Police payroll though deployed a Central Bank of Kenya’s BFIU. We are satisfied that BFID is one and same as BFIU. It is just use of different terminology. Though Mr. Bowry submitted that the relationship between the BFID Officers and Central Bank of Kenya is one of master and servant, he did not demonstrate that by way of evidence eg – letters of employment or payslips from Central Bank of Kenya to any of the Officers involved. The Applicants contentions remain mere delegations.

The Central Bank of Kenya is governed by Central Bank of Kenya Act Cap 491 which is introduced in its preamble as an Act of Parliament to establish the Central Bank of Kenya and to provide for the operation thereof; to establish the currency of Kenya and for matters connected therewith and related thereto.

Under Section 3 (2) of the Act the Central Bank is a body corporate with perpetual Succession and a Common seal, with power to acquire, own, possess and dispose of property, to contract, and to sue and to be sued in its own name. Section 4 of the Acts sets out the objects of the Bank. It provides;

“Section 4 The principal objects of the Bank shall be to regulate the issue of notes and coins, to assist in the development and maintenances of a sound monetary, credit and banking system in Kenya conducive to the orderly and balanced economic development of the country and the external stability of the currency, and to serve as banker and financial adviser to the Government”

From the above provision it is apparent that the CBK Act does not confer any investigative or prosecutory powers on the Central Bank of Kenya.

The question then is whether it is the Central Bank of Kenya that investigated the Criminal case 887/00 case and commenced to prosecution of the Applicants. We have already partly considered the role of BFIU(D). There is no doubt they were the investigators of the case. We have also established above that they were Police Officers seconded to the Central Bank of Kenya by CID, a department of the Police under the command of the Police Commissioner. Mr. Birech has deponed at paras 8, 9, 16-21, of his Affidavit that the investigating Officer was one I.P. George Maracha.

Apart from the Applicants alleging that the said IP Maracha was an employee of Central Bank of Kenya, there is no evidence availed by them to that effect. On the contrary Mr. Birech and Mr. Kamwende have demonstrated that they are Police Officers from CID, and paid by the Government of Kenya on Police payroll– not Central Bank of Kenya and are deployed to the Central Bank of Kenya by CID and get directions or instructions from the Commissioner of Police. Similarly Mr. Joseph Kamau, who was replaced by Mr. Kamwende was a Police Officer who was recalled by the Director of CID when Mr. Kamwende took over BFIU.

The secondment of Police Officers to the said unit would not be unusual in the civil service. Secondment of specialized Officers from one Ministry or department to another is not uncommon. Very near home is the secondment of judicial Officers to Tribunals like the Co-operative Tribunal, Business Premises Tribunal, and Rents Tribunal. The Officers who man the tribunals are judicial Officers, remunerated by the Judiciary and disciplined by the judiciary and at the expiry of their terms at the various tribunals, return to the judiciary. It is nothing strange that these Police Officers would be based at the Central Bank of Kenya to perform specialized duties there. In any event there are other units like the Flying Squad, the Anti Narcotics Unit and Special Crime Prevention Unit, Revenue Protection Services based at KRA. It does not mean that when Police Officers are seconded to the various places or institutions, then they become employees of those Ministries or Departments.

Though it is not clear who signed the charge sheet, it is deponed by Mr. Birech at para 8 of his Affidavit that I.P. Maracha who was the investigation Officer signed the charge sheet. There is no evidence to the contrary. The Applicants have taken issue with the stamp of BFID on the charge sheet alleging that the stamp is proof that Central Bank of Kenya are the owners of the charge sheet. Contrary to that, the charge sheet indicates on its letterheads that it is from the Kenya Police. The case was given a Police No. 142/13/2000. Having found earlier that BFID is a Police unit based at Central Bank of Kenya, we do agree with the submissions of the Respondents that the stamp from BFID only identifies the centre of the investigations and has no legal effect on the legality or otherwise of the charge sheet. After all the charge sheet bears the letter heads of Kenya Police and a Police file number meaning that the case emanated from a particular Police station.

We are satisfied and hold that the investigations in this case were carried out by Police Officer who also preferred charges against the Applicants. The charge sheet was accepted by the court and the 1st page of the charge sheet does bear a signature and date of 20th April 2000 and we believe it is the magistrate's signature and this is in compliance with Section 89 (5) of the Criminal Procedure Code. The magistrate accepted it as a proper charge sheet. Had it been defective the magistrate would have rejected it.

The court record in the lower court, speaks for itself, that the prosecutor was one I.P. Ndemwa. Mr.

Birech does depone at para 21 of his Affidavit to this fact.

In the case of **BENJAMIN LULE KITAKA & OTHERS V REP CR AP 389/01** the court described a public prosecutor as follows;

“Public prosecutor means the Attorney General, the Solicitor General, the DPP, a State Counsel, a person appointed under Section 85 or a person acting under the directions of the Attorney General”

Police Officers are appointed prosecutors by virtue of Section 85 (2) Criminal Procedure Code. I.P. Ndemwa is a qualified prosecutor as he is above the rank of Ag Inspector of Police as per requirements of Section 85 (2) Criminal Procedure Code. The Court of Appeal in the case of **ROY RICHARD ELIREM A V REP MSA HCCR 271 & 273/2000** said that if a prosecution is conducted by an qualified prosecutor it is rendered null and void. The court considered provisions of Section 85 (2) Criminal Procedure Code.

The Attorney General had delegated his powers to IP Ndemwa to prosecute the said matter under Section 85 (2) Criminal Procedure Code and there is totally no evidence to prove that I.P. Ndemwa did it on the directions of the Central Bank of Kenya or that he was controlled and remunerated by Central Bank of Kenya.

I.P. Ndemwa is a qualified prosecutor in terms of Section 85 (2) of the Criminal Procedure Code and his prosecution of the case cannot be faulted.

Section 26 (3) (b) provides that the Attorney General can take over and continue criminal proceedings that have been instituted or undertaken by another person or authority. Section 89 of the Criminal Procedure Code does provide that criminal proceedings can be instituted by any body making a complaint or by bringing a person who has been arrested without a warrant before a magistrate and the complaint may be oral or written. If the complaint is oral, the magistrate then draws up a charge containing a statement of the offence. If it was written, it has to be signed by the complainant and the Magistrate. The magistrate will then consider whether or not the complaint discloses an offence and if it does not, he will not admit it and record reasons for so doing. If it is admitted, the court can allow the complaint to be prosecuted by the complainant or the prosecutor can take it over. So there is indeed provision for private prosecutions in our law. The question is whether the Central Bank of Kenya did investigate and prosecute the Applicants and if so, is it unconstitutional?

The answer to the 1st question is in the negative as the Central Bank of Kenya did not investigate or purport to prosecute the Applicants. In any event under the Constitution and Criminal Procedure Code, had the Central Bank of Kenya had a complaint against the Applicants, it can prosecute only if the procedure outlined in Section 89 Criminal Procedure Code was complied with and the court gave Central Bank permission to proceed or if the Attorney General took over the prosecution. It is not what transpired in this matter. The Police investigated and preferred charges against the Applicants and continued with the prosecution of the case till the matter was referred to this court under a reference. Mr. Bowry’s argument that the Attorney General should have perused the file to ascertain the legality or propriety of the charges and decide whether or not to take over would only apply if it is the Central Bank of Kenya which had investigated the matter and filed the complaint. The case of **CRISPUS NJOGU V ATTORNEY GENERAL (2001) 2 EA 485** would therefore not be relevant to this case. The court had held in that case that the file whose prosecution was commenced by a private person had to be passed over to Attorney General to peruse to decide whether or not to proceed with the prosecution.

We therefore come to the conclusion that Central Bank of Kenya has the legal mandate to file a complaint and prosecute the same provided the court finds the charge and complaint competent and substantial. However we find in this case that due process has been followed in investigation and prosecution of the Applicants. It was done by Police and Central Bank of Kenya cannot be faulted in any way.

It is the submission of the Applicants that there is no nexus between the functions and involvement of

Efficiency Monitoring Unit of the office of the President, the BFID and the Kenya Police in the investigation, and prosecution of the Applicants and that therefore, the search and freezing of the Applicants accounts by EMU was a violation of the rights and liberties of the Applicants. Mr. Birech at para 17 of his Affidavit states that IP Maracha who investigated the case sought the assistance of EMU to audit the transactions that gave rise to the charges due to their complexity. Under Section 26 (4) of the Constitution, the Attorney General may require the Police Commissioner to investigate any matter that relates to any offence or alleged offence or suspected offence. And the Commissioner shall then report to Attorney General. The Commissioner does this through delegation to his Officers. The CID is the body that generally undertakes investigations and is answerable to the Commissioner of Police in turn. We do agree with the Respondents submission that in Kenya there is no law barring the Police from relying on material evidence given by people other than Police Officers or seeking any assistance from other agencies in the cause of their investigations. In fact in our law, it matters not how evidence was acquired unless it is shown that it was by some illegal means. Police will normally employ the assistance of informers and other Government bodies in their investigations since the Police are not specialists or equipped in all areas. For example, we have handwriting experts, doctors, pathologists, who assist Police in investigations. EMU is a specialized Government Unit and the investigations related to Government institutions and we find nothing wrong with the employment of EMU in the investigations. No illegality has been specified or pleaded.

In the case of **PROF MEME V REP MISC APP 495/03** in which the Applicant challenged the powers of KACA to investigate, the court held that it was not the preserve of the Police to investigate.

In any event, as was held in the case of **PATTNI V R MISC AP 810/1999**, the question of whether or not the evidence gathered by EMU and the Police was admissible is a question for the trial court but not the Constitutional court to determine. We are of the same view.

It was Mr. Bowry's submission that the court is unlawfully constituted, the prosecutor being from Central Bank of Kenya and the court would therefore not be independent and impartial and the Applicants will therefore be prejudiced. Without seeming to be repetitive, we have found above that the prosecutor in this case is I.P. Ndemwa a Police Officer and qualified to prosecute under Section 85 (2) of the Criminal Procedure Code.

The trial Magistrate who was seized of this matter was a Principal Magistrate and we find this apprehension that the court will not be independent and impartial to be unfounded and baseless. This is a regular court, which will be guided by judicial independence and will arrive at its decision after proper and careful examination of all the evidence and submissions of Counsel before the court.

We come to the final question of whether the charging and prosecution of the Applicants is an abuse of the court process. Under Section 26 of the Constitution the Attorney General's inherent power to investigate or prosecute has to be exercised in accordance with the Constitution or any other law. So that if the Attorney General exercises that discretion in breach of the Constitutional provisions, this court would intervene under Section 123 (8) of the Constitution. For instance, if there is allegation of abuse of the court process by the Attorney General, the court will intervene. In the case of **EMMANUEL KURIA GATHONI & ANOTHER V ATTORNEY GENERAL CRI APP 1384/01** in which the court considered what constitutes an abuse of the court process the court found that the following principles to be relevant;

- " (a) whether a criminal prosecution is instituted for a purpose other than the purpose for which it is properly designed.
- (b) whether the person against whom the criminal proceeding is commenced has been deprived of his fundamental right of a fair trial as envisaged in the provisions of the Constitution.
- (c) Whether the prosecution is against public policy."

In **EX PARTE JARED BENSON KANGWANA HCC MISC 446/95**, Justice Khamoni held that the

court would not permit a party initiating Criminal proceedings to do so in order to exert pressure on the other party to submit to judgment or forego a disputed claim and that the High Court has both statutory and inherent power to intervene and prevent a prosecution which is vexatious or harassment and instituted for the improper purposes or mala fides and therefore an abuse of the court process

In a recent case of **R V ADAN KEYNAN WEHLIYE CR 223/03**, a Constitutional court quashed a nolle prosequi entered by the Attorney General after 11 out of about 40 witnesses had testified on grounds that it was prejudicial to the accused's rights and an abuse of the court process.

We do subscribe to the above principles enunciated in the above cases and find that it is upon the Applicants to demonstrate that the proceedings before the lower court are baseless, vexatious and brought in bad faith. There is no evidence that the Attorney General has been motivated by ill motive or bad faith to commence the criminal proceedings in the lower court.

On the contrary, after investigations there are allegations of loss of quite substantial amounts of public money and it would be in the public interest that the case be prosecuted and a proper determination be arrived at by the trial court after receiving and evaluating evidence of both sides.

Though there were allegations of violations of the Applicants fundamental rights, none has been proved.

Mrs. Ondieki submitted that when one alleges violation of their Constitutional rights they must specifically state what rights are infringed by what action. Counsel did not however support her contention with any authority. The courts have repeatedly stated what requirements must exist for there to be a contravention under Section 84 of the Constitution.

In the case of **MATIBA V AG HC MISC APP 666/90** the court held;

“An Applicant in an application under Section 84 (1) of the Constitution is obliged to state his complaint the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the Section. It is not enough to allege infringement without particularizing the details, and the manner of infringement”.

In another case of **ANARITA KARIMI NJERU V R (1) 1979 KLR 154**, Trevalyan and Hancox J held as follows;

“We would however again stress that if a person is seeking redress from the High Court on a matter which invokes a reference to the Constitution, it is important, (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

Finally, in the case of **CYPRIAN KUBAI V STANLEY KANYONGA MWENDA NRB MISC 612/02**, Justice Khamoni had this to say;

“An Applicant moving the court by virtue of Section 60, 65 and 84 of the Constitution must be, precise and to the point not only in relation to the Section, but also to the subsection and where applicable the paragraph and subparagraph of the Section out of 70 and 83, allegedly contravened plus relevant act of that contravention so that the Respondent knows the nature and extent of the case to enable the Respondent prepare accordingly and also to know the exact extent and nature of the case it is handling.....”

The Applicants made general references to breach of their fundamental rights and mention was made of Section 76 and 77 but the same were not specifically pleaded as per the requirement set out in the authorities considered above.

So, can this court grant any of the prayers sought? The prayers were

- (1) That the trial of the accused persons in NRB CRM Cases 887/00 be declared unconstitutional, null and void and an abuse of court process and
- (2) That the rights of the accused have been infringed and the court should grant a permanent stay of the criminal proceedings.

After carefully considering all submissions and case law referred, we find that none of the allegations raised by the Applicants have been proved as the prosecution of the above case has been undertaken by or under the authority of the Attorney General who has both investigative and prosecutorial powers under Section 26 of the Constitution. The charges were preferred after proper investigations were carried out. There is no evidence to support the claim that the trial is an abuse of the process of court. There are criminal charges preferred which should go to full trial for the court's determination.

So far there is no evidence in support of the claim that any fundamental rights have been violated or infringed by the Attorney General, the Central Bank of Kenya or the court. In fact there was no Constitutional question for interpretation as the Central Bank of Kenya Act is clear and Central Bank of Kenya never overstepped its bounds under the Act that creates it.

We accordingly dismiss this reference and direct that the trial of the CR.C 887/00 do proceed before the Chief Magistrate's Court Nairobi.

We wish to thank Mr. Bowry and Mrs. Ondieki for their detailed submissions and case law that were of great assistance to the court.

Dated and delivered this 6th day of **October** 2006.

J.G. NYAMU

JUDGE

R.P.V. WENDOH

JUDGE

ANYARA EMUKULE

JUDGE