**Gachiengo v Republic**

**Division:** High Court of Kenya at Nairobi

**Date of Ruling** 22 December 2000

**Case Number:** 302/00

**Before:** Mbogholi, Mitey and Mulwa JJ

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Constitutional Law – Constitutional reference – Independence of judiciary – Consent to prosecute –*

*Powers of the attorney-general – Separation of powers – Whether the appointment of a Judge to a*

*non-judicial post is unconstitutional – Whether the Prevention of Corruption Act deprives the*

*Attorney-General and Commissioner of Police of their powers under the Constitution – Whether the*

*existence of the Kenya Anti-Corruption Authority is contrary to the Constitution – Sections 26, 67(1), 77,*

*84(3) – Constitution – Sections 10, 11B – Prevention of Corruption Act (Chapter 65) – Section 101 –*

*Penal Code (Chapter 63).*

**Editor’s Summary**

The two Applicants were charged before a magistrate’s court by the Kenya Anti-Corruption Authority (“KACA”) with offences relating to the abuse of office contrary to section 101(1) of the Penal Code, Chapter 63, Laws of Kenya. Consent to prosecute was obtained from the Attorney-General pursuant to section 101(3) of the Penal Code. When the matter came up for hearing, various preliminary objections touching on the Constitution were raised and counsel for the Applicants urged the trial magistrate to refer the issues to the High Court for determination. The issues framed by the trial magistrate for determination were (i) whether it was unconstitutional for the KACA to be headed by a High Court judge, (ii) whether such leadership of KACA would prejudice the accuseds’ right to a fair trial, (iii) whether the Attorney-General’s consent to prosecute was valid and (iv) whether the establishment of KACA was contrary to the Constitution. Among the arguments advanced by the Applicants’ counsel were that the accuseds’ right to a fair trial would be prejudiced by the fact that KACA was headed by a High Court judge and that KACA did not have the power to prosecute offences outside the Prevention of Corruption Act. They also contended that as KACA was not under the Attorney-General’s control, any success it enjoyed would not be attributed to the Attorney-General and therefore his consent to prosecute was superficial. Counsel also contended that it was unconstitutional and contrary to the principle of separation of powers for KACA to be headed by a High Court judge. Counsel for the Respondent countered that the argument that judicial officers would be intimidated by the status of the parties appearing before them was spurious and impugned the integrity of judicial officers. Counsel also contended that the validity of the Attorney-General’s consent was not a constitutional issue but one to be decided by the trial magistrate and that KACA as a prosecutorial body was subordinate to the Attorney-General as it could only prosecute with his consent. On the issue of separation of powers, counsel argued that the duties carried out by the head of KACA in that capacity were not performed as a judge but as director and, besides which, no complete separation of powers existed under the Constitution.

**Held** – The courts were under a duty to dispense justice to all parties appearing before them irrespective of their status and the Applicants’ arguments and fears on this issue were misplaced. Sections 10 and 11B of the Prevention of Corruption Act were in direct conflict with section 26 of the Constitution, which provided that the Attorney-General was the principal legal adviser to the government. Additionally, sections 10 and 11B(5) curtailed the powers of the Commissioner of Police in an unconstitutional manner. The existence of KACA thus undermined the powers conferred on both the Attorney-General and the Commissioner of Police by the Constitution. The provisions establishing KACA were therefore inconsistent with the Constitution and by virtue of section 3 of the Constitution, those provisions were rendered void to the extent of that inconsistency. The regular judicial duties of judges should not be interfered with by their appointment to extra-judicial duties. Where a judge took up the post of the head of KACA, the Court could not comprehend how he would feel bound by his judicial oath. Such an appointment would be a direct affront to the judge’s constitutional appointment and contrary to the doctrine of separation of powers. **Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Kimani and another v Kahara Criminal* (Revision) Case Number 11/83

*Kiplagat v Law Society of Kenya* [1996] LLR 860 (HCK)

*Oyieng v Republic* [1988] LLR 1995 (CAK)

*Shah v Patel and others* 21 EACA 236

***Lesotho***

*Law Society of Lesotho v Prime Minister of Lesotho and another* (1986) LRC (Const)

***United Kingdom***

*Director of Public Prosecution v Humpreys* (1975) 2 All ER 496

*Metropolitan Properties Co Ltd v Lannon and others* (1968) 3 All ER