**Musyoka v Chief of General Staff**

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

**Date of judgment:** 7 July 2000

**Case Number:** 84/00

**Before:** Gicheru, Lakha and Keiwua JJA

**Sourced by:** LawAfrica

**Summarised by:** W Amoko

*[1] Judicial review – Application for leave to institute judicial review proceedings – Jurisdiction of the*

*Court – Circumstances in which leave should be granted.*

**JUDGMENT**

**KEIWUA JA:** This appeal is from the ruling of the superior court (Githinji J) delivered on 4 April 2000 in its miscellaneous civil case number 318 of 2000, in which the Learned Judge found that the application for leave, by the present Appellants, to apply for the orders of *certiorari* and prohibition under Order 53 of the Civil Procedure Rules, was frivolous and therefore the Appellants did not deserve to be granted leave and consequently dismissed the application with costs. The application had sought leave of the superior court to remove and quash the proceedings and ruling of the court martial, sitting at Langata barracks, delivered thereto on 24 March 2000, which held that the court martial had jurisdiction to try the Appellants. The application had also sought to remove and quash the order which convened that court martial with effect from 6 March 2000 and signed by the Army Commander on 18 February 2000. It also prayed for leave to apply for an order of prohibition directed to the Respondents to prohibit the convening, reconvening or proceeding with any criminal proceedings or trying the Appellants on the offences the Appellants are alleged to have committed. The application had prayed further, for such leave to operate as stay of the proceedings before the court martial until the proposed application was heard and in the meantime the Appellants be, released from close arrest. The application was supported, as is the practice, by a statutory statement verified by an affidavit of each of the Appellants. The application was grounded on the fact that, the court martial had no jurisdiction to try the Appellants and had acted in excess of its jurisdiction, and there was an apparent error on the face of the record kept by the court martial and that, mandatory statutory provisions had not been complied with during investigations of the charges before that Court which charges were statutorily time barred. The undated ruling of the court martial indicates that that court had previously been convened on 12 April 1999 and lasted for four days before those proceedings were stayed on an application to that effect made by the Appellants to the superior court. That court martial was, after what it called “due consultations”, reconvened early 2000 and the joint trials of the Appellants were set to take place on 6 March 2000, at which hearing the Appellants took objection under Rule 35 of the Armed Forces Rules of Procedure, because they contended that the court martial had no jurisdiction to try them, in that Rule 7 of those Rules had not been complied with, since none of the Appellants had appeared before their respective commanding officer as the Rules require and no investigations were carried out as stipulated under Rule 7(2) and were not cautioned under 9(2). At the time of the offences their commanding officer was not the Commandant Department of Defence and that officer could not appoint Lt Col Murgor, to investigate the charges and did not investigate the charges in accordance with the said Rules of Procedure. The court martial was of the view that the Rules of Procedure had substantially been complied with inasmuch as the Appellants had appeared before the court martial raising objection that they could not be tried by that Court as the charges they were facing had been investigated, a trial held and that those charges were condoned. That objection was not upheld and gave rise to application number 492 of 1999 to have removed and quashed the court martial’s proceedings because the Appellants contended that that court was subjecting them to double jeopardy. In its ruling delivered on 24 March 2000, the court martial for a second time overruled the objection that the charges had not been investigated. That was chiefly because the court was of the view that, the Appellants having in the session convened on 12 April 1999, contended that the charges had already been investigated and they had been tried on them and the charges condoned, the Appellants cannot be heard to contend that those very same charges had not been investigated and that view was bolstered by the ruling of the superior court (Kuloba J) dismissing application number 492 of 1999 which sought to quash the decision of the court martial which found that it had jurisdiction to try the Appellants on the charges which were investigated in the aforementioned manner. The statutory statement accompanying the application for leave, shows that on 6 March 2000 the prosecutor laid nine (9) charges against the Appellants which were signed by the Commandant Department of Defence. In that statement the Appellants contend that under sections 85(1) and 2(1) of the Armed Forces Act, a court martial can only be convened by the Chief of General Staff or by the service commander of the Appellants, in this instance, the convening officer not being such service commander for Appellants two and five, and accordingly did not have power to convene a court martial to try those Appellants and cannot convene a court martial unless the charges have been investigated. A host of other claims had been made in the statement, including the allegation that the second through to the ninth charge are on the face of it barred by statute, namely section 142(1) of the Armed Forces Act, which does not permit a trial by the court martial unless it was commenced within three years after commission of the offence. The foregoing was the position of things when the application for leave was presented to the superior court (Githinji J). Apart from dismissing the application, the Learned Judge was of the view that the Appellants had failed to disclose that the court martial had also been convened on 12 April 1999, and those proceedings were stayed by an order of the superior court and the application was eventually dismissed by Kuloba J. The Learned Judge (Githinji Jwas also of the view that judicial review is directed to the decision making process of an inferior tribunal and not to the merit of the decision itself. He also found that matters in the statutory statement which had required investigations, had been investigated by means of oral evidence before the court martial, which decided that it had jurisdiction to try the Appellants. The Learned Judge was of the view that the facts relied on by the Appellants in the said statement are facts that would have supported an appeal not an application for judicial review for which no *prima facie* case for the grant of leave had been shown. The thrust of appeal is that the Learned Judge applied the wrong test in determining whether to grant leave and that he misdirected himself in failing to appreciate that a court martial is not a permanent or standing court which is an ad hoc court created by a convening order and its jurisdiction is conferred by a specific convening order and that he erred in thinking that the court martial which sat on 12 April 1999 was still in being and was seized of the trial of the Appellants and he fell into error in failing to hold that once a court martial has been dissolved, all the proceedings are nullified. Further the Learned Judge erred in finding that the charges were not statutorily time barred and in failing to appreciate that the unlawful process of convening the court martial divested that court of jurisdiction. In arguments before us, the Respondents in opposition to the application indicated that the court martial’s proceedings had previously been stayed for months by the superior court, pending determination of application number 492 of 1999 and when the proceedings resumed on 6 March 2000 the presiding officer of the court martial had been replaced under Rule 86. It had also been urged that the old charges in respect whereof, objection to the effect that, the charges were time barred had been raised had been amended and accordingly no issue of jurisdiction may now be taken, before or respecting the court martial and the amended charges. The Respondent, however, complained that what the Appellants had exhibited in the statutory statement are the old charges and not the new charges in respect whereof, the Appellants are currently facing. In my judgment, with respect, the Learned Judge had misdirected himself in declining to grant leave to the Appellants to apply for orders of *certiorari* and prohibition. The Appellants had alleged in their application before the Learned Judge, that the old court martial that was convened on 12 April 1999 had been disbanded upon the reconvening of the new court martial which sat on 6 March 2000 to try the Appellants. There are legal and statutory consequences arising from such disbanding or reconvening of a court martial. The allegations that the old charges, the Appellants are required to face, have been amended to show that the court martial, still retained jurisdiction are yet other powerful contentions, which were to be the, focal point in the proposed application for orders of *certiorari* and prohibition. There is also that pivotal argument, to be urged, to the effect that the charges the Appellants were facing had become time barred under the provisions of section 142(1) of the Armed Forces Act which denied a court martial jurisdiction to try such time barred charges. A corollary to the time bar, was the new possibility that the charges, the Appellants are presently facing, are new charges which do not offend the stipulations of section 142 of the Armed Forces Act. There is the question whether the unlawful process (as contended to be by the Appellants) of convening the court martial divested that court of jurisdiction. In view of these weighty contentions, on both sides of the scale, it cannot be properly concluded as was done by the Learned Judge that a *prima facie* case for the grant of leave had not been shown by the Appellants. In my judgment, the Learned Judge had misdirected himself when he dismissed the Appellants’ application. The application, to my mind, was far from being frivolous. The seriousness of the complaints made therein showed that they deserved to be investigated by that Court. I would therefore allow the appeal and set aside the ruling of the Learned Judge delivered on 4 April 2000. I would also grant the application for leave to apply for orders of *certiorari* and prohibition as prayed in the chamber summons dated 29 March 2000. With that leave operating as a stay of the proceedings pending before the court martial until the determination by the superior court of the judicial review application with the costs occasioned by this appeal and the application in the superior court being awarded to the Appellants.

(Gicheru and Lakha JJA concurred in the judgment of Keiwua JA.)

For the Applicants:

*Information not available*

For the Respondents:

*Information not available*