**Republic v Kenya Anti-Corruption Commission and others *ex parte* okoth**

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

**Date of judgment:** 27 January 2006

**Case Number:** 112/05

**Before:** Nyamu, Ibrahim and Makhandia JJ

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**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Amendment of statutes – Whether the Attorney General has power to make small amendments to statutes.*

*[2] Criminal procedure – Whether a person who has been discharged under section 89(5) of the*

*Criminal Procedure Code can be recharged for the same offence.*

*[3] Interpretation of statutes – Effect of repealing a statute to continuing cases under that statute –*

*Saving provision in the law.*

*[4] Judicial review – Jurisdiction of courts to grant declaratory remedies.*

**JUDGMENT**

**Nyamu, Ibrahim and Makhandia JJ**: The applicant has by an application dated 11 August 2004 sought the following orders: (1) That the applicant be granted an order of Prohibition to prohibit the respondents from hearing, prosecuting or trying the applicant on the basis of the charge filed in the Chief Magistrates court being Anti-Corruption *Republic v Antonine Auma Okoth* case number 5 of 2004 for the alleged offence of corruption in office contrary to section 3(1) of the Prevention of Corruption Act Chapter 65 Laws of Kenya (Now Repealed) as read with section 23(3)(*e*) of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya or any other similar charges or complaint. (2) That this Honourable Court be pleased to grant a declaratory order that the purported “Rectification” by the Attorney General, by Legal Notice number 162 of 2003 of 9 October 2003 of section 23(3)(*e*) of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya is and has at all times been null and void and of no effect. (3) That the costs of this application be provided for. The grounds upon which the relief is sought as outlined in the Statement are *inter alia*:

(*a*) The applicant herein was first arrested and arraigned in court on 28 January 2003 and charged with an alleged offence of corruption in office contrary to section 3(1) of the Prevention of Corruption Act Chapter 65 of the Laws of Kenya.

(*b*) The applicant’s plea was not taken until the Attorney General gave sanction or consent to prosecute the applicant on 28 May 2003. Similarly, the applicant’s trial would not commence before the said consent was given.

(*c*) The law under which the applicant was charged was however repealed when the Anti-Corruption and Economic Crimes Act 2003 was enacted and became law on 2 May 2003. Under this new law the provisions of the Prevention of Corruption Act Chapter 65 of the Laws of Kenya were repealed and prosecutions commenced under it were however not re-enacted or saved. (*d*) When the said case came up for hearing, and before the hearing commenced, the applicant raised a preliminary objection as to the validity of the charge before the court in view of the repeal of the law under which she was charged. The Preliminary Objection was heard and upheld and the applicant was discharged under section 89(5) of the Criminal Procedure Act Chapter 75 of the Laws of Kenya. No appeal was preferred against the ruling. (*e*) In total disregard of the said decision, the second respondent went ahead to arrest the applicant who was again arraigned in court on 3 March 2004 in Chief Magistrates Court Anti-Corruption case number 5 of 2004 charged with the same offence and under the same repealed law, namely the Prevention of Corruption Act Chapter 65 of the Laws of Kenya. (*f*) In preferring the same charges against the applicant the second respondent purported to add to the charge the words “As Read with section 23(3)(*e*) of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya” and have purported to rely on a purported amendment by the Attorney General disguised as “Rectification” of section 23(3)(*e*) of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya through Legal Notice number 162 of 9 October 2003 which purported rectification is and has at all times been null and void and of no effect. (*g*) The charge which the applicant now faces and upon which the respondents intended to prosecute the applicant on 3 July 2004 is a nullity in law for the following reasons:

(i) The statute under which the applicant has been charged, namely the Prevention of Corruption Act Chapter 65 of Laws of Kenya now stands repealed, the repealing statute having come into operation on 2 May 2003.

(ii) There is already a decision, by a court of competent and coordinate jurisdiction given in Chief Magistrates Court Anti-Corruption case number 6 of 2003 on 23 August 2003 rejecting the same charge and no appeal has been preferred against the decision.

(iii) The purported “Rectification” by the third respondent by Legal Notice number 162 of 9 October 2003 of section 23(3)(*e*) of the Interpretation and General Provisions Act Chapter 2 of the Laws of Kenya is null and void and of no effect.

(iv) The Interpretation and General Provisions Act Chapter 2 of the Laws of Kenya is not a penal statute and does not create or define any offence or the offence with which the applicant is charged and cannot validate the charge before the court which is founded on a repealed statute.

(v) The charge has in any event, been framed, signed and filed by a person or body which had and/or has no capacity in law to file any charge or prosecute the applicant. The charge is therefore invalid.

(vi)The applicant’s intended prosecution is therefore illegal and unlawful. The applicant’s liberty is therefore at stake. The following documents have been filed in opposition to the application: (1) An affidavit sworn by Eunice Muriithi on 12 November 2004 and filed on 12 November 2004 Muriithi is a police officer attached to the Kenya Anti-Corruption Commission. (2) Grounds of Opposition dated 17 November 2004 and filed on the same date by the Attorney General. (3) List of Authorities filed on 19 November 2004 by the second respondent together with a Supplementary List of Authorities filed by the same respondent on 27 April 2005. (4) The second respondent’s skeleton arguments dated 5 May 2005. (5) The first and third respondents skeleton arguments – undated but relied on during the hearing. Grounds of Opposition The grounds relied on by the respondents are: (1) A discharge of an accused person under section 89(5) of the Criminal Procedure Code Chapter 75 Laws of Kenya is not a bar to any subsequent criminal charges founded on the same facts. (2) The repeal of the Prevention of Corruption Act, Chapter 65 of the Laws of Kenya on 2 May 2003 did not affect any liability incurred by the applicant under the said Act, before the repeal. (3) The charges preferred against the applicant in Nairobi Chief Magistrate Anti-Corruption are number 5 of 2004 are valid by virtue of section 23(3)(*e*) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya.

(4) The Attorney General’s action vide Legal Notice 162 of 2003 was not an amendment of section 23(3)(*e*) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya but a correction of an error in the said provision. (5) The Attorney General’s action vide the aforesaid Legal Notice was pursuant to powers conferred on him by section 13 of the Revision of Laws Chapter 1 of the Laws of Kenya, to rectify errors in laws and therefore his action did not amount to an amendment of the Law.

(6) The charges the applicant is facing in criminal case number 5 of 2004 are valid and known to law.

(7) The Kenya Anti-Corruption Commission is a body duly established by law and is a competent authority to file the charges against the applicant by virtue of section 23 of the Anti-Corruption and Economic Criminal Act, 2003 which confers police powers, privileges and immunities on the Director or investigator.

(8) Section 73 of the Anti-Corruption and Economic Crimes Act, 2003 empowered the Kenya Anti Corruption Commission to take over operations of the anti-Corruption Police Unit, the body that initially investigated. (9) A declaratory order cannot be granted in an application for judicial review under Order LIII of the Civil Procedure Rules. (10) The applicant’s application is misconceived and an abuse of the court process and the same should be dismissed with costs. Issues The applicant who is charged with the offence of corruption contrary to section 3(1) of the Prevention of Corruption Act (now repealed) has raised the following issues for determination: (1) What is the legal effect of a discharge of an accused person under section 89(5) of the Criminal Procedure Code? (2) What is the legal effect of the repeal of the Prevention of Corruption Act, Chapter 65 by the Anti Corruption and Economic Crimes Act number 3 of 2003? (3) Did the Attorney General properly invoke the powers vested in him by section 13 of the Revision Act through Gazette Notice number 162 of 2003 in making the changes he made to section 23(3)(*e*) of the Interpretation and General Provisions Act, Chapter 2? (4) Are the charges brought against the applicant in criminal case number 5 of 2004, based on the Prevention of Corruption Act Chapter 65 (now repealed) valid? (5) Is the Anti-Corruption Commission competent in law in preferring charges against the applicant? (6) Can a Judicial review court issue the declaratory orders sought in prayer (2) of the application? I. Discharge under section 89(5) of the Civil Procedure Code Section 89(5) of the Criminal Procedure Code reads: “Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reason for the order.” The court is of the view that a discharge under this section does not amount to an acquittal so as to bar a further charge on the same facts. It is clear to the court that the situation covered by the section is before any formal proceedings and it is the very first act the court does to ascertain if there is triable offence as disclosed by the charge or complaint as drawn. It is indeed a threshold act. It is now settled law that discharges arising from section 82(*i*) and section 87(*a*) of the Criminal Procedure Code which are in turn brought about by a *nolle prosequi* and withdrawal respectively are no bar to subsequent proceedings founded on the same facts. These events do not happen at the threshold of the proceedings yet they do not constitute a bar to the institution of fresh charges or proceedings. It follows therefore, by analogy, the rejection of a charge or complaint cannot constitute a bar to any subsequent proceedings. We uphold the Director of Public Prosecution’s submission that the powers granted to the trial court under section 89(5) of the Criminal Procedure Code are exercisable when in the opinion of the court the complaint does not disclose an offence and that the provision does not bar the prosecution from reframing the charges with a view to disclosing an offence be it in terms of supplying better particulars or stating the provisions of law under which the charges are filed. It is also significant to appreciate that a discharge is distinct from an acquittal in terms of consequences as mentioned above. Charge sheet (AA0-2) which was exhibited in these proceedings and which is the subject matter of Anti-Corruption case number 5 of 2004 is a modified version of the charge sheet in the earlier case that is Anti-Corruption case number 6 of 2003 where the applicant herein was discharged. In our view the incorporation of section 23(3)(*e*) of the Interpretation and General Provisions Act Chapter 2 in the charge sheet constitutes additional particulars and also serves to clarify the charge further and cannot be fatal to the framing of the charge. All it means is that if you read the relevant provision of the repealed Act which defines the offence together with section 23(3)(*e*) an offence is disclosed. In our view the magistrate in the Anti-Corruption case number 5 of 2004 was perfectly in order in admitting the charge as framed. On this issue we hold that the discharge of the applicant in the earlier case is not a bar to the charge and the proceedings in ACC case number 5 of 2004. 2. Legal Effect of the Repeal of the Prevention of Corruption Act Chapter 65 by the Anti Corruption and Economic Crimes Act number 3 of 2003 It is common ground that the Prevention of Corruption Act Chapter 65 was repealed on 2 May 2003 by the Anti Corruption and Economic Crimes Act number 3 of 2003. It is the applicant’s case that any liability or offence under the repealed Act cannot outlive its repeal. The applicant’s contention, is principally based on the common law because the rule at common law is that the effect of a repeal was to obliterate the law as if it never existed, but subject to any savings in the repealing Act and also the general statutory provisions as to the effects of repeal. This position is borne out by *Halsburys Laws of England* (4ed) Volume 44(1) paragraph 1296 which states: “To repeal an Act is to cause it to cease to be part of the corpus juris or body of law. The general principle is that except as to the transactions past and closed, an Act or enactment which is repealed is to be treated thereafter as if it had never existed. However, the operation of the principle is subject to any savings made, expressly or by implication, by the repealing enactment and in most cases is also subject to the general statutory provisions as to the effects of repeal.” From the above quotation the savings can either be made in the repealing Act or in a general statute. The same point concerning the mode of saving is repeated and re-emphasised in the work cited to us by the DPP that is, Principles of Statutory Interpretation by Justice Singh at 484-485 where it is observed: “Under the common law, the consequences of a repeal of a statute are very drastic. Except as to transactions past and closed, a statute after repeal is as completely obliterated as if it had never existed. Another result of repeal. . .is to revive the law in force at the commencement of the repealed statute. The confusion resulting from all these consequences gave rise to the practice of inserting saving provisions in repealing statutes and later on, to obviate the necessity of inserting a saving clause in each and every repealing statute, a general provision was made in section 38(2) of the Interpretation Act 1889.” In the context of the Kenyan situation the general provision on repeal of statutes and the subsequent enactment of others is section 23(3)(*e*) of the Interpretation and General Provisions Act Chapter 2 of the Laws of Kenya. The provision after correction of one word “repealed” with “repealing” *vide* the challenged Legal Notice number 162 of 2003 reads as follows: “Where a written law repeals in whole or in part another written law, then, unless the contrary intention appears, the repeal shall not affect any investigation, legal proceedings or remedy in respect of a right privilege obligation, liability, penalty forfeiture or punishment as aforesaid, and any such investigation, legal proceedings or remedy may be instituted, confirmed or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing written law had not been made.” The question therefore is whether there is a contrary intention in the repealing Act ie the Anti-Corruption and Economic Crimes Act 2003. We find no such contrary intention in the repealing Act. In particular transitional, section 71(2) of the Anti-Corruption and Economics Crimes Act of 2003 provides: “This Act other than part V applies, with any necessary modification, with respect to offences described in subsection and for that purpose such offences shall be deemed to be corruption and economic crimes.” We find no intention whatsoever from the provision of the repealing Act that the offences under the Prevention of Corruption Act Chapter 65 were to cease being offences on the repeal of the Act, and since it is not disputed that the offence took place before the repeal of the Prevention of Corruption Act we find that the offences were saved by the Interpretation and General Provisions Act section 23(3)(*e*). We further find that there is no violation of section 77(4) of the Constitution as the offence of corruption and the penalty attached to the offences are defined under a written law as saved. 3. Powers under section 13 of the Revision Act Chapter 1 Turning to the rectification of section 23(3)(*e*) Chapter 2 by the Attorney General pursuant to section 13 of the Revision Act Chapter 1 the learned DPP took us through the history of the Interpretation and General Provisions Act Chapter 2. (*a*) He referred to 1912 Interpretation and General Clauses Ordinance Chapter 1 – under the equivalent section 7(*e*) of the Act the word appearing in (*e*) is “repealing.” (*b*) Under the revised 1964 edition of Chapter 2 ie the Interpretation and General Provisions Act in section 23(3)(*e*) the word is “repealing”. (*c*) Under the 1970 edition of Chapter 2 in 23(3)(*e*), the word is again “repealing.” (*d*) However under the revised 1983 edition of Chapter 2 the word “repealed” is introduced for the first time. There has not been any amendment to the section all these years. By Legal Notice number 162 of 1963 the Attorney General corrected various typographical, clerical or printing errors vide the Gazette Notice. The learned DPP has invited us to note and to hold that the changing of the word repealing to repealed in 1983 was on account of a typographical, clerical or printing error because the subsection as a whole no longer makes grammatical sense when read with the word “repealed” and without the word “repealing”. Indeed a plain and ordinary reading of section 23(3)(*e*) of the revised 1983 edition results in an absurdity. The DPP has also invited us to hold that the rectification of the error did not alter the substance of section 23(3)(*e*) nor is it inconsistent with the powers conferred on the Attorney General under section 13 of the Revision Act Chapter 1 of the Laws of Kenya. Before rectification by the Attorney General *vide* Legal Notice 162 of 2003 the subsection read: “Where a written law repeals in whole or in part another written law, then, unless the contrary intention appears the repeal shall not affect any investigation, legal proceedings or remedy in respect of a right, privilege obligation, liability, penalty, forfeiture or punishment aforesaid, and any such investigation legal proceedings or remedy may be instituted, confirmed or enforced, and . . . any such penalty, forfeiture or punishment may be imposed as if the repealed written, law had not been made.” We have great sympathy for the submissions made by the learned DPP and we have no hesitation is stating that we sustain his submission on this issue as well. To reinforce the point section 16(1) of the English Interpretation Act of 1978 section 16(1) which is the equivalent of section 23(3)(*e*) of the Interpretation and General Provisions Act has the word “repealing” and not the word “repealed”. In *R v Fisher* [1969] 1 All ER 1 at 100 the Court of Appeal held that if the transitional statute does not show contrary intentions offences and proceedings under a law repealed remain in force. The facts of case were that the appellant was arrested on 28 October 1967 and later charged with being an accessory after the fact to larceny under the provisions of the Accessories and Abettors Act 1861 and the Larceny Act 1861. The enactments were repealed by the Criminal Law Act 1967, which came into force on 1 January 1968. On 2 January 1968 the indictment was signed and the appellant was arraigned on 5 March. The court held: “We can find nothing in the Criminal Law Act 1967 that requires us to hold that the change in law as from 1 January 1968 means that the offence of accessory after the fact has never existed. We are satisfied that the offence did exist at the time the appellant committed it and the statutory provisions providing for its indictment and punishment remained in force. We conclude by saying that without the clearest words we cannot think Parliament intended that accessories after the fact to serious crime, say murder or armed robbery in the latter part of 1967 should not be guilty of any offences.” In the light of the above we are unable to follow our brother Justice Mbogholi J holding in *National Housing Corporation Intex Construction* Nairobi High Court miscellaneous application number 131 of 1996 which was cited by the learned Counsel for the applicant, Mr *Amuga*. It appears to follow the common-law position as stated above hence our departure. To cap this finding even the earlier English Interpretation Act of 1889 section 38(1) had the same wording as per the Revised Edition of 1983 because the operative words are: “. . .as if the repealing Act had not been passed –*Halsburys* Volume 44(1) paragraph 1308” It is also the same position with the Interpretation Act (Chapter 16 Laws of Uganda) which is *in pari materia* with our Chapter 2 – see *Pioneer General Assurance Society Limited v Ziwa* (1974) EACA 161. We hold that the use of the word repealed in section 23(3)(*e*) was a mistake which the Attorney General could correct pursuant to powers conferred on him by section 13 of the Revision Act. Section 13 of Chapter 1 states: “The Attorney General may, by order in the Gazette rectify any clerical or printing error appearing in the laws of Kenya or rectify in a manner not inconsistent with the powers of revision conferred by the Act any other error so appearing.” It follows therefore that the Attorney General has two distint powers under the section: (*a*) The rectification of any clerical or printing errors appearing in the Laws of Kenya. (*b*) The rectification of any other errors in a manner not inconsistent with the powers of revision conferred by Chapter 1. The Attorney General does not have to invoke section 8 of the Act when preparing the annual supplement of the Laws of Kenya. The section reads: “In preparation of the annual supplement to the Laws of Kenya, the Attorney General shall have the following powers. . .to correct grammatical and typographical mistakes.” Through Legal Notice number 162 of 2003 the Attorney General rectified the incorrect use of the word repealed appearing in section 23(3)(*e*) of Chapter 2 by replacing it with the word “repealing”. The Attorney General is not required to explain how the mistake occurred but it is clear to us that both limbs of section 13 do sufficiently empower him to do what he did. Firstly the mistake could have been a printing error or an error not inconsistent with the powers conferred on him by the Act, thus without making the correction the sub-section had no meaning or would not carry the meaning intended by the legislature. This is clearly borne out by the history of Chapter 1 as outlined above and the experience of other jurisdictions with equivalent subsection such as the UK and Uganda as indicated above. The correction was not inconsistent with the Act and it did not change the substance of the law but instead the correction resulted in the meaning intended by the legislature ie the true meaning of the subsection. It did not redefine any offence or create any new offence or impose another penalty for example. The rectification did not effect any changes to the existing law because if it did separate enactment by Parliament would have been necessary. The court is satisfied that there was an error. This distinguishes the case before the court with that prevailing in the case of *Jaramogi Oginga Odinga v The Electoral Commission* High Court civil case number 5936 of 1992 where Mbaluto J took the view that there was no error in the word “less” and the purported rectification under section 13 of the Revision Act Chapter 1 by the Attorney General was sneaked in mischievously. The revision gave a completely different meaning to what the legislature intended, it gave the opposition parties less time to prepare for the General Elections, whereas the section was only intended to provide for a minimum. The position in this case is different in that without the correction the subsection lacks the intended meaning. Rules on Interpretation of Statutes Quite apart from the powers conferred on the Attorney General under section 13 of the Revision Act this Court would have power to correctly interpret the relevant section so as to give effect to the intention of the legislature. Thus, in *The King v Vasey and Lally* 2 KB 750 the court quoting from *Maxwell On The Interpretation of Statutes* (3ed), at 34 observed as follows: “Where the language of a statute is in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence.” The learned author at 750 adds: “The court will endevour to give some meaning to the section and will not allow the error of the draftsman to destroy the clear intention of the Legislature.” Again in *Maxwell on Interpretation of Statutes* (12ed) at 231 it is stated: “Sometimes where the sense of statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act.” Finally there is a general presumption against absurdity and *Halsburys Laws of England* Volume 44(1) paragraph 1447 puts it in very clear words as under: “It is presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of an enactment corresponds to its legal meaning, should find against a construction which produces an absurd result since this is unlikely to have been intended by Parliament. Here absurd means contrary to sense or reason.” The meaning which the word repealed gives to section 23(3)(*e*) is contrary to sense or reason and this Court would not be helpless even if it were to hold that the Attorney General had no powers under section 13, the word “repealing” would have to be inserted under the above rules of construction as well. 4. Validity of charges brought in criminal case number 5 of 2004. For the reasons set out in issues one to three above we find and hold that the charges are valid and were properly brought. 5. Competency of the KACC. The applicant contends that the Commission is not a competent authority to prepare and/or file a charge against her. However it is clear from the charge sheet before this Court that it was prepared and presented to the lower court by an investigator on behalf of the Director KACC. Under section 23(1) of the Anti-Corruption Commission Act an investigator did have the powers to do so. Indeed under the section both the Director and the investigator have all the powers, privileges and immunities of a police officer as set out in section 19 of the Police Act. It cannot reasonably be disputed that a police officer has powers to present a charge or a complaint before a competent court. The charge was in our finding properly laid before the magistrate and the applicant’s objection lacks proper legal basis and the same is disallowed. 6. Whether a declaratory order can issue in judicial review proceedings? Although we have already made a finding concerning the validity of Legal Notice 162 of 2003 of 9 October 2003 rectifying section 23(3)(*e*) of the Interpretation and General Provisions Act Chapter 2 of the Law of Kenya, we must add that the declaration sought in prayer 2 of the application cannot issue because this Court’s jurisdiction under section 8 and 9 of the Law Reform Act Chapter 26 is confined only to the grant of the judicial orders of *certiorari* prohibition and *mandamus.* Declarations are outside the jurisdiction of this Court in judicial review. This is however superfluous in that such a declaratory order would in any event be unmeritorious for the reasons set out above concerning section 23(3)(*e*) of the Interpretation and General Provisions Act Chapter 2. Commanding Heights of the Law It seems to us that on the points determined in this decision the lower court is stuck concerning the way forward. There is need for judicial vigilance in situations such as this in order to point out the way. Judicial vigilance is justified by the fact that public law does exist to serve all the people and it must continually be developed to meet the ever emerging eventualities and situations. The courts and especially the High Court must never retreat from developing public law even in situations where the issues at hand are complex. The court must invoke the commanding heights of the law and point out the way forward. It is our hope that any perceived gap in the law has been closed by this decision by the restatement of the law. For the above reasons the application is dismissed. The upshot is that the lower court is now at liberty to proceed with the trial as appropriate. As the proceedings herein sprang from a criminal process in the court below we decline to make any order as to costs. For the appellant:

Mr *Amuga*

For the respondent:

*Information not available*