

Kenya School of Law

ADVOCATES TRAINING PROGRAM

2015-16 ACADEMIC YEAR

Trial Advocacy

CONTEMPT OF COURT

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Outline

Sources of Law on Contempt

Types of Contempt

Prerequisites

Case Law

Sources of law on Contempt

Judicature Act Cap. 8

5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

Powers of the High Court

Constitution of Kenya

Art. 165 (3)

The High Court has

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

Constitution of Kenya (1969- Repealed)

Sec. 77(8)

(8) No person shall be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed, in a written law. Provided that nothing in this subsection shall prevent a court from punishing a person for contempt notwithstanding that the act or the penalty therefor is not so prescribed.

NOTE: No similar provision identifiable in the Constitution of Kenya 2010.

Constitution of Kenya 2010

Art. 50(2)

(*n*) not to be convicted for an act or omission that at the time it was committed or omitted was not—

- (i) an offence in Kenya; or
- (ii) a crime under international law;

Magistrates Courts Act Cap. 10

16. The Chief Justice may make rules of court, not inconsistent with any other written law, for regulating the procedure and practice of magistrates' courts.

Appellate Jurisdiction Act Cap. 9

Sec. 5- Power of Rules committee to make rules for regulating the practice and procedure of the Court of Appeal with respect to appeals and, in connection with such appeal, for regulating the practice and procedure of the High Court.

Court of Appeal Rules

Rule 31. *On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs.*

Supreme Court Act Cap. 9A

Contempt of court.

28. (1) A person who—

- (a) assaults, threatens, intimidates, or willfully insults a judge of the Supreme Court, the Registrar of the Court, a Deputy Registrar or officer of the Court, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court; or
 - (b) willfully interrupts or obstructs the proceedings of the Supreme Court, in the Court; or
 - (c) willfully and without lawful excuse disobeys an order or direction of the Supreme Court in the course of the hearing of a proceeding, commits an offence.
- (2) A police officer, with or without the assistance of any other person, may, by order of a judge of the Supreme Court, take into custody and detain a person who commits an offence under subsection (1) until the rising of the Court.
- (3) The Supreme Court may sentence a person who commits an offence under subsection (1) to imprisonment for a period not exceeding five days, or to pay a fine not exceeding five hundred thousand shillings, or both, for every offence.
- (4) The Supreme Court shall have the same power and authority as the High Court to punish any person for contempt of Court in any case to which subsection (1) does not apply.
- (5) Nothing in subsections (1) to (3) shall limit or affect the power and authority referred to in subsection (4).

Types of contempt

- Contempt *ex facie curiae* - Punishable summarily by all courts
- Contempt of a court order- punishable usually at the instance of the aggrieved party
- General contempt
- Punishable only by the High Court and Court of appeal

Prerequisites

- ❖ Decree or order extracted
- ❖ Penal notice
- ❖ Personal service.

Punishments for contempt

- Imprisonment or fine or both
- Attachment of property
- Denial of audience
- Exclusion from proceedings-gag order

Some cases on Contempt

David Makali-Court of Appeal

Tony Gachoka-Court of Appeal

Eric Mutua-Supreme Court

Deputy SG Muthoni Kimani

David Makali

R v David Makali and 3 others 1994(Eklr)

An article published or attributed to the respondents in the issue no 56 of The People dated 6th – 12th March, 1994 under the heading, “Court of Appeal’s ruling on Dons case reeked of State Interference”. President of the Republic had stated that the lecturers would not be allowed to register a union, yet the matter was in court. The Court of Appeal had refused to overturn refusal of stay by High Court to injunct University of Nairobi from evicting striking lecturers from subsidized housing. The Court held that the article was a scurrilous and unjustified attack upon the Court of Appeal and was calculated to bring into disrepute and contempt the administration of justice in Kenya.

Punishments meted in the Makali case

1st Resp. David Makali-4 months imprisonment, or Fine Ksh.300,000/-;Apology.

2nd Resp. Bedan Mbugua, Chief Editor of “The People”-5 months imprisonment or Fine Ksh.400,000/- and apology.

3rd Resp. Independent Media Services Ltd—Fine Ksh.500,000/-.

4th Resp. GBM Kariuki Advocate-6 months imprisonment or Fine Ksh.500,000/-, apology.

Judgment of Cockar CJ, and Judges of Appeal Omolo and Tunoi.

Republic v Tony Gachoka (1999)eKLR

CoA Criminal Application No. 4 of 1999

Publications in “The Post on Sunday ” January 31` - February 6, 1999 and February 7 – 13, 1999., contravening the *sub judice* rule by commenting on ongoing Goldenberg cases.

Application for punishment for contempt was done by Bernard Chunga the then DPP on behalf of the Attorney General.

Tony, the 1st Respondent was sentenced to 6 months imprisonment on 20/8/1999.

The second Respondent “The Post Ltd” was fined Ksh. 1 Million for a “scurrilous and unjustified attack upon the court , calculated to bring into disrepute and contempt the administration of justice in Kenya”.

Issues in Tony Gachoka case

- ❖ Was heard by 7 judges of Appeal. Only Justice Evan Gicheru dissented. All the others- Kwach, Omolo, Tunoi, Shah, Lakha (now deceased) and Effie Owuor found the Respondents guilty of contempt.
- ❖ Justice Gicheru said Contempt of Court involves two ideas-Contempt of Court and Contempt of their authority.
- ❖ Stated that it is not the judges' cause but the cause of the public that is being vindicated in contempt proceedings.

Reasons for Justice Gicheru's dissent

- ❖ Failure to allow 1st Respondent to give oral evidence was a material irregularity as it denied him a fair trial to which he was entitled.
- ❖ The Court of Appeal being (at the time) the Court of last resort in the Country offered no opportunity to re-agitate the matter.

Tony Gachoka-contd.

The offending articles in “The Post on Sunday”:

Jan 31-Feb 6, 1999- “Chesoni implicated in an orgy of Judicial anarchy and Ksh.30 Million bribe”.

Feb 7-13, 1999- “Judiciary in panic as Chesoni falls out of favour and sues...”

Tunoi, JA's definition

Quoting from Halsbury's Laws of England Vol. 9:
Scandalising the court is "Any act done or writing published which is calculated to bring a court or a judge into contempt, or to lower his authority or to interfere with the due course of justice or the lawful process of court"

Said:

1st Respondent was free to criticize judges so long as ...
"keeps within limits of reasonable courtesy and good faith"...and "is not acting in malice or attempting to impair the administration of justice".

Lady Justice Effie Owuor 's judgment

“ Criticism of a judge’s conduct or conduct of the court, even if strongly worded is not contempt provided that the criticism is fair, temperate, and made in good faith and not directed to the personal character of a judge or to the impartiality of a judge or court”.

Reason for caution in contempt:

1. Offender risks going to prison.
2. Contempt is a matter in which the court is directly involved.

Shah, JA

“The article is venomous and clearly meant to bring into disrepute the administration of justice in this country...the ordinary person reading the article would conclude that the judiciary...is not only corrupt but is weak-kneed enough to lend itself to manipulations by the Hon. Chief Justice”.

Kwach, JA

“Any act done or writing published which is calculated to bring a court or a judge into contempt or to lower his authority, or to interfere with the due course of justice or the lawful process of the court is a contempt of court”

Lakha, JA

“The Law on this subject (of contempt) must be founded entirely on public policy”.

Omolo, JA

Quoting Justice Frankfurter, “Freedom of the press is not an end in itself but the means to the end of free society”.

“The courts and the press must learn and accept to live with each other”.

Supreme Court-Eric Mutua case

During pendency of Supreme Court Petition 5, the Court had directed that matters not be prosecuted in any other forum other than the court. Nation newspaper attributed remarks to Eric Mutua, Chair, LSK that decision to expunge an 839 page affidavit was setting wrong precedent.

On 24 Oct 2013 in an interlocutory application, court rules it was not *functus officio* as summons were issued during pendency of main hearing.

On 13 March 2014 Court ruled “*We have looked at the full statements and are satisfied that there was nothing contemptuous to undermine the dignity of this court. It was positive and fair comment on the decision we made and therefore dispense with the summons we had issued*”.

Deputy SG Muthoni Kimani

James H Gitau Mwara v Attorney General & another
[2015] eKLR

Decree holder /Applicant had on 9 Jun 2010 been awarded damages Ksh.4,008,100/- plus costs and interest arising from a suit for negligent treatment while detained at Kamiti Prison. Ministry of Home Affairs sent the Money to Deputy SG who refused to release it to the Decree holder.

Onyancha, J on 7 May 2015 held her to be guilty of contempt of court.

Q and A

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