THE LAW OF CONTEMPT OF COURT IN KENYA

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INTRODUCTION

At Common Law the power of the Court to punish for contempt has a long history dating back to the 13th Century. It was intended to safeguard the integrity of the justice process by preventing unwarranted interference with the administration of justice whether directed at judges, witnesses or others[1]. In Kenya, this position regarding the essence of contempt law was emphasized by the Court of Appeal in *Refrigerator and Kitchen Utensils Limited v Gulabchand Popatlal and others*[2] where it stated thus:

> It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors.[3]

In modern times the power has been substantially circumscribed by the concerns of civil liberties.[4]

This article seeks to provide an outline of the various regimes on the law of contempt of Court in Kenya. The paper takes a critical survey at the court's interpretation of the procedural aspects governing contempt of court in Kenya, the standard of proof in an action for contempt of court, the penalties for a contemnor both for the finding of contempt and to the pending proceedings, in case the contempt is in respect of pending proceedings. We argue that the current state of the law is undesirable mainly because of the multiplicity of the applicable regimes and the complexity of the enforcement procedure. We that there is need to harmonise the law under a single statute.

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1 Gordon Borrie and Nigel Lowe, *The Law of Contempt* (Butterworths London,1983) Arlidge and Eady, *The Law of Contempt* (Sweet and Maxwell, 1982), Miller, *Contempt of Court* (Claredon Press, 1989). See also *Attorney-General v Times Newspapers Limited* [1991] 2 WLR 994, HL.

2 Nairobi, Court of Appeal civil application number Nai 39 of 1990.

3 See also Lord Diplock in *AG v Times Newspapers* [1973] 3 All ER 54 at 71.

4 See the observation in the case of *Gatharia Karanja Mutitika and others v Baharini Farm Limited* now called Nakuru House Development Company Limited, Nairobi Court of Appeal civil application number Nai. 24 of 1985 where the court notes "In England matters relating to contempt are now governed by the Contempt of Court Act of 1981. The Courts, nevertheless take the view that where the liberty of the subject is, or might be, involved, the breach for which the alleged contemnor is cited must be precisely defined. See for instance *Children Districts Council v Keane* [1985] Law Society's Gazette [illegible] ay at 1567.

Criminal versus Civil Contempt

The distinction between civil and criminal contempt was historically an important one. Since the decision of the Court of Appeal of England in *Attorney-General v Newspaper Publishers Plc and others*[5] the utility of the distinction under English Law has been called into question. In Kenya, in the absence of comprehensive legislation like the Contempt of Court Act in England the distinction may still be useful. First, in order to determine the forum before which the complaint ought to be made. Secondly, in order to determine the appropriate penalty, although both forms attract penal consequences. Generally, the most common form of civil contempt is disobedience of a court order by a party to the proceedings, while the most common form of criminal contempt is in the form of conduct obstructing or calculated to prejudice the administration of justice or contempt in *facie curiae* (in the face of the court). In practice the fundamental principles are quite similar and the jurisdiction fairly flexible. It is conceivable that there could be concurrent criminal and civil contempt proceedings. Indeed, as a general rule, a court need not adjourn any contempt proceedings before it to await the outcome of any criminal proceedings arising out of the same set of facts. The court may however wish to do so if convinced that proceeding with both matters concurrently may prejudice the accused person[6].

The various jurisdictions to punish for Contempt of Court

There are four main jurisdictions under which the courts in Kenya have authority to punish for contempt of court. These is under:

(*a*) Civil contempt under the Judicature Act

(*b*) Civil contempt under Order 39 of the Civil Procedure Rules

(*c*) Criminal contempt under the Penal code

(*d*) Contempt *ex facie curiae*

CONTEMPT UNDER THE JUDICATURE ACT

Section 5, of the Judicature Act provides that:

> "(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 of England and that power shall extend to upholding the authority and dignity of subordinate courts."[7]

5 [1988] Ch 333.

6 *Harris v Crisp*. The Times 12 August 1992.

7 Chapter 8 of the La[illegible] enya.

and the court appeared to acknowledge this, that procedure was moving from handmaiden of justice to some form of fetish.

The Application for Leave

Under English Law an application for leave precedes the filing of an application for committal for contempt of court. Order 45, rule 5 of the Supreme Court Rules provides that:

> "... the judgement or order may be enforced by one or more of the following means, that is to say –with leave of the Court a writ of sequestration against the property of the persons; where the person is a body corporate, with leave of the court, a writ of sequestration against the property of any director or other officer of the body subject to the provisions of the Debtors Act of 1869 and 1878, an order of committal against that person or where that person is a body corporate, against any such officer."

In Kenya, as a matter of practice, applications for committal for contempt of court are preceded by an application for leave even where the Court of Appeal is concerned[17]. There is some doubt as to whether this is a strict requirement of the law. In *Isaac Wanjohi v Rosaline Macharia*, Bosire J (as he then was) expressed the view that there was no such legal requirement. In his view the application for contempt falls among those applications which in England would be made to courts other than to Divisional courts.[18] Consequently, no leave would ordinarily be necessary to commence committal proceedings in every case. This view, while probably right, has not received widespread acceptance and most practitioners concerned that the main application should not be lost on the technicality of leave opt to obtain it first. The courts for their part very rarely decline to grant leave. Judges take the view that if any seriously contentious issues exist, they will be resolved at the hearing of the main application.

The Application for Contempt

An application for committal is made by a notice of motion supported by an affidavit. The Motion must specify in sufficient detail the breaches of the court's order which are relied on and the person or persons against whom the order is sought. If the order of the Court required a positive act to be done, the evidence must prove service of the order alleged to have been disobeyed and a copy of the

escape the long arm of the law, let this be a warning that they will not. The law as applied by the courts studiously and unceasingly, will never sleep, and someday will catch up with those who flout the law and walk away unscathed".

17 *R v Tony Gachoka* criminal application number 4 of 1999.

18 Bosire J (as he then was) in *Isaac Wanjhihi v Roseline Macharia* High Court civ e number 450 of 1995.

notice of penal consequences. If the order was to abstain from doing an act it is sufficient to show that the respondent had notice of it and deliberately disregarded it. Where the alleged contemnor has given an undertaking which he has failed to honour there is no necessity for service as he is deemed to have notice of the contempt. But the notice of motion must be served personally on the respondent notwithstanding that he is represented by counsel or has otherwise provided an address for service or he has been present in court, unless the court specifically dispenses with such service. The penalty sought should similarly be stated.

Standard of Proof

In *Dean v Dean*,[19] the court stated that contempt of court, whether civil or criminal, was a common law misdemeanour and it has long been recognised that proceedings for contempt of court were criminal or quasi criminal in nature and that the case against the alleged contemnor must be proved to the criminal standard of proof, namely, beyond reasonable doubt[20]. It would appear from this English jurisprudence that the Court will only punish for an alleged contempt of court if there is proof beyond reasonable doubt that the respondent knowingly disobeyed a clear and unambiguous order. It is however important to note that even though the standard of proof is that applicable in criminal cases, the proceedings nonetheless remain civil proceedings.

The Kenyan position on this question of standard of proof seems to take a different degree. The Court of Appeal of Kenya has expressly differed with the view held by the English courts that the standard of proof for contempt of court should be beyond reasonable doubt. In the case of *Gatharia Karanja Mutitika and others v Baharini Farm Limited*[21] the court of appeal while differing with the views of Denning LJ in *Re Bramblevale Limited* on the issue of standard of proof observed that:

> With the greatest possible respect to that eminent English judge, that proof is much too high for an offence "of a criminal character" and *ipso facto* not a criminal offence properly so defined ...
>
> In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We [illegible]

19 [1987] FLR 517 (Civil Division).

20 See also, the dictum of Denning LJ (as he then was) in the case of *Re Bramblevale Limited* [1967] 3 All ER 1062 at 1063 that "A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt".

21 *Supra* note.

envisage no difficulty in court determining the suggested standard of proof. The stan[illegible] of proof beyond reasonable doubt ought to be left where it belongs, to wit, crim[illegible] cases. It is not safe to extend it to an offence which can be said to be quasi-crimin[illegible] nature."

Although the court of appeal seems to have been logical in its justification o[illegible] applicable standard of proof, that is, not so high as to amount to the bey[illegible] reasonable doubt standard in criminal cases, it is not easy to determine wha[illegible] hybrid standard of proof is ascertainable.

Punishment

Where the contemnor is found guilty, the court may either order that h[illegible] committed to jail for a fixed term or for a writ of sequestration or attachment o[illegible] property. The court may issue an order of committal but suspend it to giv[illegible] contemptor opportunity to comply with the conditions. On the other hand[illegible] court has power to restrain by injunction threatened contempt. Therefore[illegible] court may, where a contempt is threatened, or has been committed, and o[illegible] application to commit, take the lenient course of granting an injunction instea[illegible] making an order for committal or sequestration, whether the offender is a par[illegible] proceedings or not[22]. Where this injunction is itself disobeyed then the court[illegible] deal with that matter under the provisions of Order 39 of the Civil Proce[illegible] Rules.

The court may discharge a person committed for contempt upon such pe[illegible] purging himself of contempt in a manner acceptable to the Court. What the[illegible] will consider acceptable will depend on the facts of each case. An apology[illegible] example, will be considered sufficient where the contempt relates to a[illegible] "intimidating" or "compromising" a witness. Similarly, a restoration of proper[illegible] goods taken in violation of a court order would be considered sufficient.

CONTEMPT UNDER ORDER 39 OF THE CIVIL PROCEDURE RULES

Distinction between Judicature Act and Order 39 applications

The regime of law relating to contempt of court created by Order 39 of the C[illegible] Procedure Rules is independent of the jurisdiction created under the Judica[illegible] Act. Essentially, this is because the scope of the contempt of court provisions un[illegible] Order 39 is limited to circumstances in which there has been a breach of[illegible] injunction.

22 *Oswald on Contempt* (3 ed) at 16, See also *Royal Media v Telkom Kenya* [2001] EA 210.

[illegible]dience of an Injunction

[illegible] rule 2(3) states that:

[illegible] of disobedience or any breach of any such terms, the court granting any [illegible] may order the property of the person guilty of such disobedience or breach to [illegible]ched, and may also order such person to be detained in prison for a term not [illegible] six months unless in the meantime the court directs his release."

[illegible] donated by Order 39, rule 2(3) is available to the court which granted [illegible] respecting which breach is complained of. A subordinate court would, [illegible] exercise powers under that rule to deal with any breach of its orders in [illegible] same way as the Superior Courts.

[illegible] of the apparent straight forwardness of the law as set out above, the [illegible]urt has not been free from conflict in terms of the applicable law for [illegible] under Order 39 of the Civil Procedure Rules.

[illegible] case of *Isaac J Wanjohi and another v Rosaline Macharia*[23] the court expressed [illegible]on to be that:

[illegible]ower donated to the court by Order XXXIX, rule 2(3) (of the) Civil Procedure [illegible] independent of the provisions of section 5 of the Judicature Act. A party [illegible] by the disobedience of an injunction order made under Order XXXIX, rule 1 [illegible] the) Civil Procedure Rules appears to be precluded from invoking the [illegible] under section 5 above. The power donated by section 5 above is only [illegible] by either the High Court or Court of Appeal. The subordinate courts have [illegible]iction to punish for contempt under that section.

[illegible] donated by Order XXXIX, rule 2(3), above, is basically available to the court [illegible]anted the order respecting which breach is complained of. A subordinate court [illegible]efore, exercise powers under that rule to deal with any breach of its orders made [illegible] So in exercising powers under that rule there is no requirement for leave to [illegible] application for contempt and none should be imposed."

[illegible] the pendancy of this jurisprudence that another judge of the High [illegible]oused a diametrically opposed view. This was in the case of *Awadh v* [illegible] where the court in dealing with a question of breach of an injunction [illegible] under Order XXXIX of the Civil Procedure Rules was of the view that [illegible]ntive law governing proceedings in respect of contempt of court is under [illegible](1) of the Judicature Act. It would appear that the decision in *Awadh v* [illegible] is bad law.

[illegible] High Court civil case number 450 of 1995.

[illegible] KLR 454.

Procedure

Under Order 39, there is no requirement for leave to bring an applica[illegible] contempt of court.[25] An applicant is, however, obliged to show that a copy [illegible] order of injunction was served on the person to be bound by it as requi[illegible] Order 5 of the Civil Procedure Rules or that the existence of the order was [illegible] his knowledge. The application for committal for breach of an injunctio[illegible] application within the existing suit, it is therefore brought by way of a ch[illegible] summons supported by affidavit.

Service of Order

The procedural requirements are not always strictly enforced. The cou[illegible] discretion to determine whether in the circumstances of each case the respo[illegible] had knowledge of the existence of the order. Indeed a note in the Supreme [illegible] Practice rules appears to indicate that there are exceptions to the requireme[illegible] personal service and endorsement of a Penal notice on the copy of the [illegible] served. It reads in part as follows:

> "... Where the injunction is to restrain the doing of an act the person restraine[illegible] person who chooses to step into his place to do the act enjoined against [illegible] committed for breach of the injunction, either by his presence in court at the ti[illegible] granting the injunction, or by being served with minutes of the orders verified [illegible] signature of the regiment registrar or by telegram which should be sent by the solic[illegible] the party obtaining through a solicitor at the place where the defendant is, instr[illegible] him to give notice to the defendant of the order or in any other way ..."[26]

Standard of Proof

Although the jurisdiction exercisable under Order 39 is a civil as oppos[illegible] criminal one, the consequences are penal and the standard of proof is ther[illegible] beyond reasonable doubt.[27]

Punishment

Under Order 39 the court on making a finding that there has been contem[illegible] court has two options. One is to send the contemptor to jail for a term [illegible]

25 See note 20 *supra*.

26 1985 Edition paragraph 45/7/8 at 672.

27 In *GR Mandavia v Rattan Singh s/o Nagina Singh* [1962] EA 730.

[illegible] months and the second one is to issue an order of sequestration of his [illegible] assets upon such terms as the court may determine.[28]

[illegible]AL CONTEMPT

[illegible]e of a criminal contempt of court is action or inaction amounting to [illegible] with or obstruction to, or having a tendency to interfere with or to [illegible] due administration of justice.[29] The power of the court in this regard [illegible]us public policy questions relating to the enjoyment of the right of [illegible] criticise public officials and institutions including the judiciary. In [illegible]eneral *v Times Newspapers Limited*,[30] Lord Reid observed that:

> "[illegible] on this subject is and must be founded on public policy. It is not there to [illegible] private rights of parties to a litigation or prosecution. It is there to prevent [illegible] with the administration of justice and it should in my judgment be limited to [illegible]sonably necessary for that purpose. Public policy generally requires a balancing [illegible] which may conflict. Freedom of speech should not be limited to any greater [illegible] is necessary, but it cannot be allowed where there would be real prejudice to [illegible]istration of justice."

[illegible]ction 121 of the Penal Code, a person commits contempt if court if; in [illegible] of any judicial proceeding shows disrespect or interferes with the [illegible] such proceedings and:

[illegible] to give evidence in a judicial proceeding or fails to attend, or having attended [illegible] to be sworn or to make an affirmation, or, having been sworn or affirmed [illegible]uses without lawful excuse to answer a question or to produce a document, or [illegible]ains in the room in which such proceeding is being had or taken, after the [illegible]tnesses have been ordered to leave such room; or

[illegible]ses an obstruction or disturbance in the course of a judicial proceeding; or

[illegible]hile a judicial proceeding is pending, makes use of any speech or writing [illegible]isrepresenting such proceeding or capable of prejudicing any person in favour of or [illegible]gainst any parties to such proceeding, or calculated to lower the authority of any [illegible]erson before whom such proceeding is being had or taken; or

[illegible] publishes a report of the evidence taken in any judicial proceeding which has been [illegible]irected to be held in private; or

[illegible]attempts wrongfully to interfere with or influence a witness in a judicial proceeding, [illegible]ither before or after he has given evidence, in connexion with such evidence; or

[illegible]rder 39, rule 2(3).

[illegible]chbold (at paragraph 3471, (35 ed). In *Patel v Republic* [1969] EA 545, WJ Lockhart *Smith v United Republic* [illegible]965] EA 20.

[illegible]974] AC 273 (HL).

(*f*) dismisses a servant because he has given evidence on behalf of a certain party judicial proceeding; or

(*g*) Wrongfully retakes possession of land from any person who has recently ob possession by a writ of court; or

(*h*) Commits any other act of intentional disrespect to any judicial proceeding, or t person before whom such proceeding is being had or taken; or

Thus a court may deal with contempt on its own motion where the contem committed:

(i) In the court room and witnessed by the Court.

(ii) In the court room and reported to the Court.

(iii) Outside the courtroom and even beyond its precincts and is reported to the and relates to proceedings then in progress or pending before the Court.

It is important to bear in mind that the provisions of the penal code to punis contempt are in addition to and not in derogation from the power of the H Court and Court of Appeal to punish for contempt under the Judicature Act.

Procedure

Although the power of summary punishment for contempt is a necessary pow safeguard the dignity of the Court, as a general rule this power is used sparingly court should not invoke the summary procedure unless there is some urgency the necessity to act immediately. The reason for this is obvious. The summ procedure is not subject to the normal safeguards of a criminal trial. It allows judicial officer to be prosecutor, judge and jury all at once. In all other instance judicial officer ought to leave the matter to the Attorney-General or the aggrie party.

Where the court acts under its summary jurisdiction it ought to take following steps:[31]

(i) the immediate arrest and detention of the offender.

(ii) informing the offender of the substance of the alleged contempt.

31 The observance of this procedure serves three functions; it enjoins compliance with the rules of na justice which require the courts not to condemn a person before he is heard in defence; the appellate c will find it easy, in the event of an appeal, to decide the appeal on merit as the record will indicate cle what transpired in the trial court; and, the procedural requirement have the effect of giving the magis "cooling time" who might otherwise be carried away and act hastily and hence it avoids embarra situations like committing a court clerk for contempt for failing to produce a file or an advocate appea late in court – per B Momanyi, *Procedures in Criminal Law in Kenya*, (East African Educational Publis Nairobi, 1994) at 213.

ccording the offender the right to legal representation.

ranting an adjournment if one is sought.

onsidering the submissions of counsel.

mposing punishment if warranted.

ally, it is essential that the court frames a charge and accords the accused an nity to reply[32]. Where the court has found the offender guilty of contempt, d give the contemptor an opportunity purge his contempt by an apology or wise.

hment

neral punishment for criminal contempt is a term of imprisonment for three Where an offence is committed in view of the court, the court may cause ffender to be detained in custody, and at any time before the rising of the on the same day may take cognisance of the offence and sentence the der to a fine not exceeding one thousand four hundred shillings or in default yment to imprisonment for a term not exceeding one month. Where an e relates to an interference with proceedings under any of paragraphs (*a*), (*b*), and (i) subsection (1) is committed in view of the court, the court may cause ffender to be detained in custody, and at any time before the rising of the on the same day may take cognisance of the offence and sentence the der to a fine not exceeding one thousand four hundred shillings or in default yment to imprisonment for a term not exceeding one month.

NTEMPT *EX FACIE CURIAE*

Constitution of Kenya prohibits any unwritten criminal law but nonetheless ves the rights of Courts to punish for Contempt.[33] This in effect grants the rt power to punish for contempt *ex facie curiae* or contempt in the face of the rt. This form of contempt consists of acts that are said to *"scandalise the court"*. hese include, for example, scurrilous abuse of a judge or court, or attacks on the sonal character of a judge or any act done or writing published which is lated to bring a court or a judge into contempt, or to lower his authority, or terfere with the due course of justice or the lawful process of the court.[34]

In *Jairos v Republic* [1972] EA 434, *Joseph Odhengo Ogongo v R* (1954) 21 EACA 302.

Section 77(8) of the Constitution of Kenya.

See *Republic v Nowrojee* miscellaneou minal application number 461 of 1990.

This offence normally occurs either when the trial is in progress or immediately upon its conclusion.[35] The commonest form of ex *facie contempt* usually takes place through the publication of statements which are likely to be prejudicial to the trial process by prejudging the issues. "Trial by newspapers" poses serious issues of public Law. On the one hand is the right of the public to be informed and on the other is the right of a criminal suspect or accused person to a fair trial.

While public, including newspaper comments on live cases is protected by the Constitution as free speech, commentary that undermines public confidence in the administration of justice or is intended to scandalise the Court is not. Lord Diplock summarized the legal position in the case of *Chokolingo v Attorney-General of Trinidad and Tobago* by observing that:

> "Scandalizing the court is a convenient way of describing a publication which, although it does not relate to any specific case, either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole which is calculated to undermine the authority of the court and public confidence in the administration of justice."[36]

In Kenya, the leading authority on contempt scandalizing the court is *R v Wangari Maathai and others.*[37] In this case, the respondent who was a professor at the University of Nairobi had granted an interview to a magazine in which she had criticised the judgment in her divorce case granted by Mr Justice Chesoni in the following words:

> "What shocked me most of all was the court's acceptance of the divorce on the grounds of adultery. That charge was never proved in court and I will say without fear that there can only be two reasons for the court to have said I committed adultery: Corruption or Incompetence."

Following the publication of the story, the Attorney-General applied to the High Court to have the respondent and the editor-publisher committed to prison for contempt of court.

The court found that the said article was in bad taste as it alleged that the trial judge was corrupt while discharging his judicial functions. It therefore amounted to scurrilous abuse of the judge and was calculated to lower his authority and interfere with the due administration of justice. In her defence the respondent argued that she had no intention on her part to scandalize the court, or to bring its reputation to public ridicule but merely to exercise her freedom of speech. She maintained

35 In England the Law is contained in the 1981 Contempt of Court Act.

36 [1981] 1 All ER 244, 248 PC.

37 High Court miscellaneous civil application number 53 of 1981.

she did not see any exhibition of judicial competence in the findings of the urt.

The court took her defence as a renewed attack on the judge and by extension judiciary. In its view the only sensible inference to be drawn from her words that Justice Chesoni, was corrupt and unworthy of his position. The Court, ile acknowledging that she was entitled to her views even if mistaken, took the w that she was not entitled to vilify those who disagreed with her by way of asive and unfair criticism.[38]

What is remarkable about the *Maathai* case is that while the court set out the rect standard of proof, that is, beyond reasonable doubt, it appeared confused in application. It failed to consider whether indeed the claim made by the accused son had any legal or factual basis, merely content to observe that "there can be greater abuse of a judge than to call him or to suggest him to be corrupt".[39]

Reconciling the protection of the dignity of the court with the protection of speech and the right to scrutinise public institutions presents a complex culus as demonstrated by the case of *Mullery v R.*[40] In this case the contemnor ote poems regarding the Chief Justice Lyon of Seychelles, which implied that he a drunkard, subservient to the executive and tried cases under the influence of ohol and gave decisions arbitrary without regard to the law. The appellant was er charged with *inter alia*; contempt of court and sentenced to two months prisonment but on appeal, the court stated as follows:

> "In a prosecution for contempt, it is necessary to show that something was published or has been done which is calculated to lower the reputation and authority of the court in the eyes of the public and that in order to constitute a contempt by libelling a judge it is not sufficient to communicate the libel to him and to him only."

In dismissing the conviction the court quoted from *Halsbury's Laws of England* and served:

> "Scandalous attacks upon judges are punishable by attachment or committal upon the principles that they are against the public not the judge. In order to constitute a contempt of court, it must have been calculated to cause such an obstruction. Temperate criticism in good faith is immune. The punishment is inflicted not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the attack but of protecting the public and especially those who either voluntarily or by

38 Prof Maathai was set free after purging her contempt by way of an apology to the court.

39 Githu Muigai and Wachira Maina "In Search of a Constitutional Test for Reconciling the Contempt Power with the Freedom of Expression".

40 [1957] EA 139.

compulsion are subject to jurisdiction of the court from the mischief they will incur if authority of the tribunal is undermined or impaired."[41]

The legitimate scope of the courts use of the power of contempt to protect it from public criticism was raised in the case of *Republic v David Makali and othe* The Attorney-General cited the respondents for contempt of the Court of App for publishing a story with the headline "Court of Appeal Ruling on Dons c reeked of State Interference". The respondents first challenged the court of appe jurisdiction to try them for contempt in the first instance. The court, relying on authority of *Re Lonhro Plc and others*[43] where the House of Lords asserted its o right to punish for contempt disposed of that ground without much difficulty.

On the more fundamental question of whether the story in question w contemptuous of the court, the court was unanimous that indeed it was. Omolo opined that:

"I have no doubt whatever in my mind that the Article complained of by the applica clearly constitutes contempt of this court and the matters raised by the responde cannot constitute a valid defence to that contempt. Their malice or *mens rea* is to found in the words used by them within the Article itself. No one can be heard to c the decision of a court dishonest or allege that the court is being dictated upon by t executive or any one else and still claim he had no *mens rea* or malice, unless of course can justify the accusation."

The court therefore took the view that the burden of proof lay with th respondents to prove the truthfulness of what they had asserted. Both counsel a the court proceeded as if there were dealing with a defamation matter.

In *R v Tony Gachoka*[44] (a seven bench) Court of Appeal again sat as a trial cou to determine whether contempt had been committed against it. The Attorne General brought contempt proceedings against Tony Gachoka, a journalist and *Th Post*, a news magazine for publishing two articles, one claiming that:

"Chesoni implicated in orgy of judicial anarchy and of KShs 30 million bribe". and th other claiming that "judiciary in panic as Chesoni falls out of favour and sues."[45]

The state argued that the offending article not only contravened the *sub judice* rule but were also scurrilous unjustified attack upon the court, calculated to bring into disrepute and contempt the administration of Justice in Kenya. Secondly, it was

41 *Ibid* at 141.

42 Criminal appeal number Nai 4 of 1994.

43 [1989] 2 All ER 1100.

44 78 Criminal application number 4 of 1999.

45 Justice Chesoni was the then Chief Justice of Kenya.

ed that the Article implied that Chesoni as Chief Justice, and various judges of Appeal and High Court were involved in an exercise of protecting one nt against the other and that they were doing so because they had been paid therefore they had no moral authority to administer justice.

Gachoka for his part argued that as an investigative journalist he had an interest he *Goldenberg* cases[46] in order to inform the public and encourage public debate matter he considered to be of great public interest.

The courts judgement in six concurring decisions and one dissent makes for esting reading. Owour JA, summarised the courts view that "it is clear that the lisher's motive was to scandalize this court as one whose judges were ready to dictated and influenced by the Chief Justice they were a court and judges who e had stated:

It's dignity has been eroded ... who do not behave in democratic principles, human ghts, fairness and the rule of laws."[47]

begin with ,the majority were unable to give a reasonable explanation as to y the respondent would not be availed the opportunity to adduce oral evidence rovided for in law. Yet the court proceeded to find that the respondent had not en able to justify any of his claims! Without a doubt Gicheru JA s dissent on the int represented the correct legal position. But, more significantly, the court took view that the issue of whether or not an article was contemptuous could be termined by reference to the Article alone and without consideration of any insic evidence. This cannot be good law. If truth be an answer to a claim for el, so must it be to a charge of scandalising the court!

FECT OF CONTEMPT ORDER ON PENDING LITIGATION

Mawani v Mawani[48] following the English decision of *Hadkinson v Hadkinson*,[49] the gh Court held that a party who is in contempt of court may be denied the right audience until such a time as he has purged himself of the contempt, if his ntinued disobedience impedes the course of justice. This is particularly so in roceedings which the party has commenced voluntarily himself and in which he is

46 *Goldenberg* cases are a number of civil and criminal cases before the High Court dealing with the alleged irregular siphoning of public funds from the Government and paid to businessman Kamlesh Pattni with aid of Senior Government officials.

47 *Ibid* at 12.

48 [1977] KLR 159.

49 [1952] All ER 568.

cited for contempt.[50] This is largely the practice although the court reserves the discretion to hear a party even when contempt allegations are made against them if there is good reason. The limitation to this general rule of loss of the right of audience by the contemnor has been a subject of judicial dicta. Most conspicuous of these judicial dicta was Lord Denning's speech in the case of *Hadkinson v Hadkinson* where he observed that:

> "It is a strong thing for the court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance.... I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

There are two sets of applications within which a contemnor will be allowed *ex debito justiciae* to address the court before purging the contempt, namely:[51]

(*a*) An application for the purposes of purging the contempt.

(*b*) An appeal/review application with a view to setting aside the order on which the contempt is founded.

Recommendations and Conclusion

The procedural and substantive law of Contempt of Court in Kenya is by and large borrowed from English Law as it was before 1963. Subsequently, English Law on contempt of court has undergone substantial modification the watershed being the enactment of the Contempt of Court Act in 1981.

One of the major innovations of the 1981 Act is that it divided contempt of court cases into two broad categories namely the strict liability cases and the others. Section 2 of the Act provides that the strict liability rule applies only to publications, which creates a substantial risk that the course of justice would be seriously impeded or prejudiced. In strict liability cases, once the act of contempt is proved, the defendant would not escape punishment by showing that his publication was done in good faith. Section 4 of the Act provides the exception to strict liability rule. It provides that a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.

50 See generally *Gordon v Gordon* [1904-07] All ER 702 where the court, however noted that it was no suggesting that it was in every matter of defence that entitled a person in contempt to be heard. For instance where a party who thought oppressed seeking reversal of the manner in which discretion was exercised, if he be in contempt, cannot be heard to say anything of the sort until he has purged his contempt.

51 See Romer LJ in *Hadkinson v Hadkinson* (*ibid*) at 570.

As is well known, one of the principal functions of the law of contempt is to ensure that proceedings are judged on the basis of evidence adduced in court and not unduly influenced by comments in the news media[52]. However, the press can justifiably complain that the common law of contempt did not give any clear guidance as to when the *sub judice* period began to operate or when it ended in cases such as the *Maathai* case. One of the main purposes of the English Contempt of Court Act has been to remove or at least considerably reduce the uncertainty so as to give the legal advisor a readily identifiable starting point for the commencement of the *sub judice* period. So by section 2(3) of that Act, a contempt by publication under the strict liability rule can be committed only when the relevant proceedings were active at the time of publication[53]. The Act further in the schedule contains detailed provisions as to when this requirement is met; and in [illegible] cases this will be typically be when a suspect is arrested or a warrant of arrest is issued.

Another area in which the English Act makes improvement upon the common law is the question of protection of Journalists and their sources of information. Section 10 of the Act provides that no person (that includes journalists) may be required to disclose the source of information contained in a publication for which he is responsible unless that disclosure is necessary in the interest of justice or national security or for the prevention of crime. By providing this safeguard, the Act not only protects journalistic sources thus encouraging the gathering of important information in the public interest but also meets the Constitutional requirement of unhindered freedom of expression.

In the our jurisdiction though, the lack of a comprehensive Contempt of Court Act continues to complicate contempt proceedings which in certain cases appear to be instigated and conducted on the whims of individual judges. This is despite the widely accepted dicta of Lord Clyde in *Johnson v Grant*[54] that contempt of court is not just about the dignity of the court but about the supremacy of the law. He stated thus:

52 See the *Wangari Maathai* case in note 39 above.

53 See for instance the case of *Attorny-General v Newspaper Publishing Plc* [1987] 3 All ER 276 on what is meant by "proceedings are active".

54 SC 789 at 790.

> "the essential features of the offence of contempt of court are: interfering wit
> administration of the law, impeding and preventing the course of justice ... it is no
> dignity of the court that is offended – a petty and misleading view of the issues invo
> – it is the fundamental supremacy of the law which is challenged."

The case of *Anthony Gachoka* and a number of cases after it have thus b
criticized, and sometimes not unjustifiably so, for having the appearance of be
about the dignity of the judges rather than the supremacy of the law.

The law of contempt of court in Kenya is, undoubtedly, both complicated a
confusing. Time has now come for Parliament to enact comprehensive legisla
in the line of the Contempt of Court Act of England in order to provide a mo
effective regime. Until parliament does so, the Court of appeal may wish to cho
an appropriate case in which to restate the law clearly.