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No. 39 of 1955.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

MAHARAJ KRISHAN BHANDARI . . . *Appellant*

AND

THE ADVOCATES COMMITTEE . . . *Respondent.*

Case for the Respondent.

RECORD.

10 1. This is an appeal by leave of the Court of Appeal for Eastern Africa from a judgment of that Court (Nihill, P., Worley, V.-P., Corrie, J.) dismissing the Appellant's appeal from a finding and order of the Supreme Court of Kenya that the Appellant, an advocate had committed professional misconduct and that he be admonished. The said finding and order of the Supreme Court were made upon consideration of a report of the Advocates Committee established under the Advocates Ordinance, 1949 (Ordinance No. 55 of 1949 of the Colony and Protectorate of Kenya). pp. 123–130.

2. This appeal raises points on the true construction and effect of the Kenya Advocates Ordinance, 1949 (as amended). This Ordinance sets
20 up an Advocates Committee and by Section 9 (1) (*b*) it is provided that applications to require an advocate to answer allegations shall be made to and heard by the Committee. By Section 9 (3) (iii), if the Committee, after giving the advocate an opportunity of appearing before it, is of opinion that a *prima facie* case of any misconduct on the part of the advocate has been made out, the Committee must lay a signed copy of its report before the Supreme Court of Kenya together with the evidence taken and the documents put in evidence at the hearing. By Section 15 (1) of the Ordinance the Court, after considering the evidence taken by the Committee and its report and having heard the Committee and the advocate, may
30 (*inter alia*) admonish the advocate. By Section 15 (2) of the Ordinance (inserted by Section 5 of the Advocates (Amendment) Ordinance, 1950) it was provided that any advocate aggrieved by the decision or order of the Court may appeal to the Court of Appeal for Eastern Africa. Annexe, p. 9 hereto. Annexe, p. 10 hereto. Annexe, p. 10 hereto. Annexe, p. 10 hereto.

3. The Court of Appeal for Eastern Africa, by an Order dated the 8th August, 1955 granting conditional leave to appeal from their decision

in this case to Her Majesty in Council, limited the appeal to three points of law which are set out in the said Order (quoting the Affidavit filed on behalf of the Appellant applying for leave to appeal) as follows :—

Separate document.

(A) The question of degree of proof required to sustain a finding of professional misconduct against an advocate, and particularly whether proof which falls short of proof beyond reasonable doubt can suffice.

(B) The question of extent of the authority of the Advocates Committee in Kenya under the Advocates Ordinance, and particularly whether its finding that a *prima facie* case against an advocate has been made out can amount in substance to a finding that such advocate has in fact been guilty of professional misconduct.

(C) The question of the scope and extent of the functions of Her Majesty's Supreme Court of Kenya in considering a report by an Advocates Committee and whether such functions are merely revisionary or confirmatory.

4. The Appellant was at the material time an advocate of the Supreme Court of Kenya and a partner in a firm of advocates named Messrs. Bhandari and Bhandari, Advocates of Nairobi, Kenya. On the
p. 1. 24th December, 1954, the Acting Registrar made an application to the Advocates Committee that the Appellant should be required to answer
pp. 3–7. allegations made against him by Mr. Justice Hooper a Judge of the Supreme Court.

5. On the 29th January, 1955, the Committee (Mr. John Whyatt, Q.C., Attorney-General, Mr. Griffith-Jones, Q.C., Solicitor-General, Mr. Mangat, Q.C., and Mr. Sorabjee, Advocate) heard the allegations against the Appellant. The Appellant was represented at the hearing by an
pp. 29–33. advocate, filed an Affidavit sworn by himself, and gave evidence on his own
pp. 42–60. behalf. The Committee being of opinion that a *prima facie* case of disgraceful and dishonourable conduct on the part of the Appellant had been
pp. 60–73. made out, laid their report dated the 3rd February, 1955, before the Supreme Court. The Supreme Court (O'Connor, C.J., and Bourke, J.) heard the advocates for the Committee and the Appellant and by their
pp. 95–112. Judgment delivered on the 22nd March, 1955, came to the same conclusion as the Committee on their findings and held that the Appellant had been guilty of professional misconduct and, as stated above, admonished him.

6. It is submitted that owing to the limits of this appeal it is not necessary to consider in detail the allegations against the Appellant or the evidence on which those allegations were based. It is sufficient to state that the allegations concerned the Appellant's conduct in the course of presenting an *ex parte* application for writs of certiorari and mandamus, which application came before Mr. Justice Hooper in Chambers on several
p. 69, ll. 17–20. dated in December, 1954. It was alleged, and so found by the Committee, that it was the duty of the Appellant to bring to the attention of Mr. Justice
pp. 10–29. Hooper the substance of a judgment delivered in the presence of the Appellant at the end of November by Mr. Justice Cram, an Acting Judge of the Supreme Court, and that the Appellant did not disclose the substance

of this earlier judgment because he intended to deceive Mr. Justice Hooper as to its effect. By his Judgment Mr. Justice Cram had dismissed a declaratory suit brought by the Appellant on behalf of the same client relating to the same subject matter and had decided, or at any rate expressed a considered opinion, against the Appellant's client on a number of points which were the basis of the Appellant's later *ex parte* application to Mr. Justice Hooper. The Appellant had filed an appeal against Mr. Justice Cram's Judgment before making the application to Mr. Justice Hooper. The Appellant in his evidence before the Committee alleged that he intended to refer Mr. Justice Hooper to the previous Judgment, but the Committee having considered the contents of affidavits prepared by the Appellant and sworn by his client and filed in support of the application and the Appellant's conduct before Mr. Justice Hooper, decided that the Appellant did not intend to disclose to Mr. Justice Hooper the substance of the earlier judgment, but indeed attempted to deceive and mislead the learned Judge. This finding by the Committee was the basis of their opinion that there was a *prima facie* case that the Appellant had been guilty of professional misconduct.

p. 45, ll. 19–20.
p. 49, l. 29.
p. 43, ll. 16–17.
p. 72, l. 25.
p. 72, ll. 31–34.
p. 73, l. 27.

7. From the judgment of the Supreme Court it appears that most of the arguments put before the Supreme Court on behalf of the Appellant were to the effect that there was no duty on the Appellant to disclose to Mr. Justice Hooper the earlier judgment of Mr. Justice Cram. The Court rejected this argument and held that it was the Appellant's " duty to apprise the Judge " (Mr. Justice Hooper) " of all relevant facts including the existence and nature of the judgment of Cram, J."

p. 111, ll. 13–16.

8. The Court then considered whether the Appellant had performed this duty and in dealing with this the Court decided as follows :—

" Having considered all the evidence and affidavits before the Advocates Committee, and all the arguments in favour of the Respondent addressed to us, we have come, with great reluctance, to the same conclusion at which the Committee arrived, namely, that the Respondent intended to deceive and mislead the Court. We think that the affidavits drawn by the Respondent were deliberately misleading ; that the Respondent knew his duty to disclose the Cram judgment, and must have known that disclosure of that judgment and of the appeal against it would inevitably result in the dismissal or indefinite postponement of his application for discretionary prerogative writs ; that the Respondent did not suppress mention of the Cram judgment altogether, but misrepresented its effect and refrained from making disclosure of its full contents : and that he postponed until he could postpone no longer giving the Judge a reference which would enable him to discover its true contents.

p. 111, l. 29.

We think that the Respondent may have had some muddle-headed idea in his mind that he could ' pursue concurrent remedies,' or (as he told Hooper, J.) that having failed before one Judge, he could apply to another on the lines of an application for *habeas corpus*. But we do not believe, and he does not himself aver, that the Respondent did not know that he was under a duty to disclose to

> Hooper, J., the existence and the complete contents of the judgment of Cram, J. This he refrained from doing, and we think that the way in which the Affidavits are drawn shows that he did not intend to disclose the full contents of this judgment until he was forced to do so, and that the intention to mislead the Court was deliberate. This amounts to professional misconduct."

It is clear, therefore, that the Supreme Court agreed both with the findings of the Committee as to the Appellant's intention and with their opinion that his conduct amounted to professional misconduct.

9. Turning to the three points raised in this appeal. The first point is whether professional misconduct must be proved against an advocate beyond all reasonable doubt as though it were a criminal charge. There is nothing in the Record of the proceedings to show that it was argued on behalf of the Appellant before the Committee that they must be satisfied beyond all reasonable doubt before forming an opinion that the Appellant had committed misconduct. Further there is nothing to indicate that this point was taken by the advocate who represented the Appellant before the Supreme Court. The Chief Justice's Notes of the argument show that the Appellant's advocate did say—

p. 82, l. 39. > " What is alleged against the Respondent " (now the Appellant) " is a criminal offence—subornation of perjury—and should be proved beyond reasonable doubt."

10. This argument only applied to part of the Appellant's misconduct, namely, his action in procuring his client to swear an affidavit to be filed in support of the application. It is submitted that this would only be subornation of perjury if the client knew that the statement in the affidavit was false. Further this argument is not consistent with the Appellant's present case that all misconduct by advocates must be proved beyond reasonable doubt, presumably even if the misconduct does not amount to a criminal offence. The argument before the Supreme Court appears from the report to have been that only misconduct which amounted to a criminal offence should be proved beyond reasonable doubt.

11. However, this point was argued on behalf of the Appellant before the Court of Appeal for Eastern Africa. In their judgment the Court of Appeal dealt with the point as follows :—

p. 126, l. 8. > " Mr. O'Donovan for the advocate has addressed us at length on the standard of proof required to establish professional misconduct and on our function as an Appellate Court in a proceeding of this nature. He has submitted that since these proceedings involved the application of penal sanctions the standard of proof must be as high as in a criminal case, and that since the advocate's explanation is not an impossible or improbable one the Committee and the Court had no right to reject it even if not wholly assured as to its truth. We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn

on a mere balance of probabilities. That is not the same thing as saying that the allegation must be proved beyond any reasonable doubt. We think the standard required should approximate to the kind of standard a civil court would look for before finding against a party on an issue of fraud. Certainly there is authority to show that proceedings of like disciplinary committees in England are not governed by the rules of criminal law, whether or not such proceedings can properly be described as quasi criminal. See for example *In re a Solicitor* reported in [1945] K.B. at page 368. The following passage is taken from the judgment of the Court at page 374 :—

> ' This brings us to a contention, most strenuously argued by Mr. Paull, that proceedings before the disciplinary committee are governed by the rules of criminal law, or that such proceedings are, at any rate, quasi-criminal. On this footing he suggested that the proceedings were irregularly conducted in certain respects. Whether the proceedings can properly be described as quasi-criminal or not, in our opinion there is nothing in the statutes or rules which binds the disciplinary committee to the rules of criminal law.'

Likewise there is nothing in the Kenya Advocates Ordinance. In the much older case of *In re Hardwick A Solicitor* 12 L.R. [1883–4] Q.B. 148 the Court of Appeal held that when the High Court makes an order ordering a solicitor to be struck off the rolls for misconduct, it does so in the exercise of a disciplinary jurisdiction over its own officers, and not of a jurisdiction in any criminal cause or matter. In any event Mr. O'Donovan has not been able to show us that either the Committee or the Court applied too low a standard of proof. It is quite apparent from the long and careful report submitted to the Court that the Committee appreciated that the crux of the case turned on the issue of intention and that they applied correct principles before coming to a finding. Neither has Mr. O'Donovan been able to show us, apart from the two minor matters mentioned above, anything in the nature of a misdirection on the evidence either by the Committee or the Court."

12. The Respondent respectfully submits that the Court of Appeal's judgment quoted above was correct. There is no need to prove the misconduct beyond all reasonable doubt as if it were a criminal charge. Alternatively it is clear that both the Committee and the Supreme Court were completely satisfied as to the Appellant's misconduct and if they had to be satisfied beyond reasonable doubt, they were so satisfied.

13. The second point raised in this appeal is whether the finding of the Advocates Committee that a *prima facie* case had been made out amounts to a finding that the advocate has in fact been guilty of professional misconduct. No argument appears to have been addressed to the Supreme Court on behalf of the Appellant on the effect of the Committee's findings or their opinion that there was a *prima facie* case of misconduct. It is clear that the Supreme Court came to their own conclusion on the Appellant's conduct after considering the evidence and the documents admitted before the Committee. The Supreme Court clearly did not

consider that they were in any way bound by the findings or the opinion of the Committee. This point appears to have arisen only in the course of the argument before the Court of Appeal for Eastern Africa as part of the contention put forward on behalf of the Appellant that the Court of Appeal
p. 123, ll. 6–11. should reverse the finding of the Supreme Court. The argument put forward on behalf of the Appellant appears to have been that the Court of Appeal should not consider itself as a second appellate tribunal but should disregard altogether the findings and opinion of the Committee and deal with the matter as though the case had been decided by the Supreme Court as a Court of first instance. The Court of Appeal dealt with this point in the following passage :—

> " Mr. O'Donovan has also argued that because the primary facts are agreed we are in just as good a position as the Court to draw a correct inference. That may be so as far as the Court hearing is concerned, but it must not be forgotten that the Committee had the great advantage of studying the advocate's demeanour when he gave his evidence.
>
> We are left then in this position that, the facts being agreed, we are asked to say as an Appellate Court that the adverse inferences drawn from those facts are so patently unjustifiable, that it is our duty to intervene. This brings us to consideration of the question as to what is the function of this Court in a proceeding of this nature? Again we cannot do better than to go for guidance to the case of *In re A Solicitor* cited above and to quote from a passage in the judgment at p. 373 :—
>
> ' It is important to consider the attitude which the Court of Appeal ought to adopt towards a second re-investigation of the disciplinary committee's findings of fact. There are two reasons for special caution. In the first place the disciplinary committee of to-day is a " specialised tribunal," created by Parliament to deal with questions of professional duty peculiarly within the knowledge of the profession itself, and for that reason constituted of members of that profession specially selected for their knowledge, experience and position by the Master of the Rolls (who in one sense is the head of that profession), or in his absence by the Lord Chief Justice. As Lord Hewart, C.J., said, the intention was to make solicitors as far as possible masters in their own house (*In re a Solicitor* (1928) 72, Sol. J. 368, 369). The second reason is that we ought to apply the general principle on which the House of Lords acts in regard to appeals from concurrent findings of fact of the two lower Courts, viz., that unless such findings are vitiated by some error of law, the House will very rarely interfere with the findings of the first Court. In considering the scope of the first principle, we see no reason why the conclusions of fact reached by the solicitors' statutory tribunal should be given any less weight than the decisions on fact of a Judge of the High Court sitting without a jury. In regard to the second principle it is enough to refer to three decisions of the House of Lords. In *Owners of P. Caland* v. *Glamorgan SS. Co. Ltd.* [1893] A.C. 207, 215 and *McIntyre Bros.* v. *McGavin* [1893] A.C. 268, 276, Lord

Herschell, L.C., held that it was not the practice of the House on appeal by way of rehearing to differ from concurrent findings of fact in two courts below, unless both Courts " have so distinctly erred as to justify (their) Lordships in saying that the concurrent findings of these two courts ought not to stand." '

Mr. O'Donovan has made the point that the profession in Kenya is not armed by statute with such extensive powers of disciplinary control as pertain to The Law Society in England and that the wording of the Advocates Ordinance shows specifically that the function of the Committee is merely to find a *prima facie* case and then to report. We concede this but the analogy which he sought to draw between a preliminary investigation undertaken by a Magistrate which ends in a committal for trial is clearly unsound. The proceedings in the Supreme Court on reception of the report are in no way comparable to a trial in first instance for no evidence is taken unless the Court sees fit to take further evidence. Its statutory duty is to consider the evidence taken by the Committee and the report. In fact, its function is much more akin to an exercise of a confirmatory or revisional jurisdiction than anything else. In spite of the use of the expression ' *prima facie* ' in the Ordinance we see no reason why a decision on facts by the Committee should carry any less weight than a decision on fact by a judge sitting in first instance. If we are right in this, it follows that our status is nearer to that of a second appellate tribunal rather than a first. That being the case we are fully persuaded that it must be shown that the Committee and the Court have so ' distinctly erred ' as to justify us in saying that the concurrent findings of fact of these two tribunals ought not to stand."

14. The Respondent respectfully submits that the Court of Appeal was correct in holding that it was in effect sitting as a second Court of Appeal in a case where there had been concurrent findings of fact by two tribunals. It is clearly the duty of the Committee to make findings of facts on which to base their opinion that there is a *prima facie* case of misconduct and it is clear that in this case the Supreme Court expressly agreed with the Committee's finding of fact. It is submitted, in the alternative, that it is clear that the decision of the Court of Appeal would have been the same had they not held that they were in the position of a second Court of Appeal. In the further alternative the Respondent will submit that the case should be remitted to the Court of Appeal for reconsideration.

15. The third point (namely, whether the functions of the Supreme Court are revisionary or confirmatory) only arose in the passage from the judgment of the Court of Appeal cited in paragraph 13 above. The Respondent submits that the Supreme Court came to their conclusion on the question of the Appellant's misconduct in the manner provided under the Ordinance. It has never before been alleged on behalf of the Appellant that the Supreme Court in any way misconceived its functions under the Ordinance. Indeed, the construction of their function acted on by the Supreme Court is clearly most favourable to the Appellant in that the

Supreme Court considered the case independently of the Committee's findings of fact. The third point only appears to have arisen in this appeal, the Respondent submits, only as another method of stating the second point. Further it is submitted that the functions of the Supreme Court under the Ordinance are correctly described as revisionary or confirmatory of the findings and/or the opinion of the Committee.

The Respondent submits that this appeal should be dismissed for the following (among other)

REASONS

(1) BECAUSE neither the Committee nor the Supreme Court had to be satisfied beyond reasonable doubt that the Appellant was guilty of professional misconduct.

(2) BECAUSE, in the alternative to (1) above, if the Committee and/or the Supreme Court had to be so satisfied it is clear from the report of the Committee and/or the judgment of the Supreme Court that the Committee and/or the Supreme Court were so satisfied.

(3) BECAUSE the Court of Appeal for Eastern Africa correctly exercised its function under Section 15 (2) of the Advocates Ordinance, 1949 (as amended).

(4) BECAUSE the Supreme Court correctly exercised its functions as provided by the Advocates Ordinance, 1949 (as amended).

(5) BECAUSE the Court of Appeal for Eastern Africa correctly interpreted its functions under the Advocates Ordinance, 1949 (as amended).

(6) FOR the reasons given in the judgment of the Court of Appeal for Eastern Africa.

(7) BECAUSE the finding and order of the Supreme Court was correct.

(8) BECAUSE the findings and opinion of the Advocates Committee were correct.

(9) BECAUSE the Appellant was guilty of professional misconduct as alleged.

(10) BECAUSE the findings and opinion of the Advocates Committee were reached and the findings and order of the Supreme Court were made after full and careful hearings in compliance with the provisions of the relevant Ordinances and there is no or no sufficient ground for interfering with either of the findings or the opinion or the order.

D. A. GRANT.

Advocates Ordinance 1949, as amended.

ANNEXE.

ADVOCATES ORDINANCE, 1949.

(Ordinance No. 55 of 1949)

As amended by Advocates (Amendment) Ordinance, 1950 (No. 43 of 1950); Advocates (Amendment) Ordinance, 1952 (No. 20 of 1952); and the Advocates (Amendment No. 2) Ordinance, 1952 (No. 55 of 1952).

4.—(1) There shall be established for the purposes of this Ordinance a committee to be called the Advocates Committee, consisting of—

(*a*) the Attorney-General and the Solicitor-General ex officio, and

(*b*) three unofficial members, being practising advocates nominated by the Law Society of Kenya.

* * * * *

(4) The Attorney-General shall be chairman of the Committee and shall preside at all meetings at which he is present. In the absence of the Attorney-General from any meeting the Solicitor-General shall be chairman of that meeting.

(5) Three members of the Committee, one of whom shall be the Attorney-General or the Solicitor-General, shall form a quorum.

(6) Any question before the Committee shall be decided by a majority of votes of the members present and voting and the chairman of the meeting shall, in addition to his own vote as a member of the Committee, have a casting vote in cases where the votes of the members are equally divided.

9.—(1) Any application—

* * * * *

(*b*) by [any] person to strike the name of an advocate off the Roll, or to require an advocate to answer allegations contained in an affidavit,

Word in brackets substituted by Section 4 of No. 43 of 1950.

shall be made to and heard by the Committee in accordance with rules made under the next succeeding section[:]

[Provided that where, in the opinion of the Committee an application under paragraph (*b*) of this sub-section does not disclose any prima facie case, the Committee may refuse such application without requiring the advocate to whom the application relates to answer the allegations and without hearing the applicant;]

Proviso inserted by Section 3 of No. 20 of 1952.

* * * * *

(3) On the hearing of an application under paragraph (*b*) of sub-section (1) of this section—

[(i) the Committee shall give the advocate whose conduct is the subject matter of the application an opportunity to appear before it, and shall furnish him with a copy of any affidavit made in

Substituted by Section 3 of No. 20 of 1952.

Advocates Ordinance 1949, as amended.

support of the application, and shall give him an opportunity of inspecting any other relevant document not less than seven days before the date fixed for the hearing ;]

(ii) the Committee on the termination of the hearing shall embody their findings in the form of a report to the Court which shall be signed and filed with the Registrar, and shall be open to inspection by the advocate [to whom the application relates] and his advocate (if any) and also by the applicant, but shall not be open to public inspection ;

The words in brackets substituted by Section 3 (*c*) of No. 20 of 1952.

(iii) if the Committee is of the opinion that a prima facie case for the application, or a prima facie case of any misconduct on the part of the advocate [to whom the application relates] has been made out, it shall lay a signed copy of the report before the Court, together with the evidence taken and the documents put in evidence at the hearing ;

The words in brackets substituted by Section 3 (*c*) of No. 20 of 1952.

* * * * *

10.—(1) The Committee, with the concurrence of the Chief Justice, may from time to time make rules for regulating the making, hearing and determining of applications to the Committee under this Part of this Ordinance.

* * * * *

12. The Court may set down for consideration the report of the Committee made under Section 9 of this Ordinance. Not less than fourteen days' notice of the date for such consideration shall be given to the Committee and to the advocate [to whom the application relates]. The Registrar shall forward with the notice a copy of the report. The notice shall be in such form as may be prescribed.

The words in brackets substituted by Section 4 of No. 20 of 1952.

13. Both the Committee and the advocate [to whom the application relates] may be legally represented before the Court.

The words in brackets substituted by Section 4 of No. 20 of 1952.

14. The Court may refer the report back to the Committee with directions for their finding on any specified point.

Subsection (1) substituted by Section 5 of No. 20 of 1952.

15.—[(1) The Court, after considering the evidence taken by the Committee and the report and having heard the advocate for the Committee and the advocate to whom the application relates or his advocate, and after taking any further evidence, if it thinks fit to do so, may admonish the advocate to whom the application relates or may make any such order as to removing or striking his name from the Roll, as to suspending him from practice, as to payment by him of a fine not exceeding ten thousand shillings, as to the payment by any person of costs and otherwise in relation to the case as it may think fit.]

Inserted by Section 5 (*b*) of No. 43 of 1950.

[(2) Any advocate aggrieved by a decision or order of the Court under this section may, within 30 days of such decision or order, appeal therefrom to the Court of Appeal for Eastern Africa.]

No. 39 of 1955.

In the Privy Council.

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Respondent.

Case for the Respondent.

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22 Chancery Lane, W.C.2. N5284–21502