

LEGAL OPINION

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MUXUU YAHAY SAAMEYNTA SHARCIYEED EE KA DHALATA MAQNAASHAHA XAFIISKA DACWAD-OOGISTA XILLI DACWADDA LA MUDDEEYEY?



LEGAL
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CENTRE



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Hordhac

Maqnaanshaha dacwad-oogaha ee maxkamadda wuxuu si weyn u saameyn karaa horumarka iyo si la mid ah natiijo la'aanta dacwaddaha. Dacwad-ooguhu wuxuu door muhiim ah ku leeyahay soo bandhigista caddeymaha iyo ku oogidda dacwadaha ciqaabta ah.

Qodobka 12(4) ee Xeerka Habka Ciqaabta ee 1973, wuxuu xusay in Xafiiska Xeer Ilaaliyaha Guud uu sharci ahaan mar kasta oo dacwad socoto awood u leeyahay inuu la wareego baaritaanka ama dacwadda kiis kasta.

Qodobka 8aad ee Nidaamka Garsoorka wuxuu isna dhigayaa in Xafiiska Xeer Ilaaliyaha Guud lagu waajibiyey inuu bilaabo ama abuuro (*Initiate*), hoggaamiyo ama ka qeybqaato (*Conduct*), iyo in uu kormeero (*Oversee*) dhammaan dacwadaha ciqaabta ee ka socda maxkamadaha. Doorkan ma aha door ikhtiyaari ah, balse waa waajib sharci ah oo si cad ugu xusan sharciga.[1]

Waddan kasta oo dunidan saaran wuxuu la nool yahay duruufo u gaar ah, balse Soomaaliya waa ay ka sii xeel dheer tahay marka ay timaaddo bahda ka shaqeysa garsoorka, gaar ahaan xafiiska xeer-ilaalinta. Waxaa dhici karta in hal xeer-ilaaliye ku-xigeen uu soo oogo dacwado cul culus oo ku soo oogo eedeysanayaal badan sida dil, ka qayb qaadasho fal-dembiyeed, ama fududeynta dambiyadaas iyo kuwa la mid ah.

Si kasta uu xeer ilaaliyaha u yahay xeel dheere sare oo faqiikh ah balse ma ahan hab-dhaqanka ugu wanaagsan (best practice) waa in ay ugu yaraan ay ka qeyb qaataan 2 dacwad-ooge si loo daboolo baaxadda ama culayska dacwadda iyo caddeymaha fara badan oo ka imanaya markhaatiyada. Halka waddamo qeybtood ayba soo kireystaan *Private prosecutors*. Si shaqo hufnan ah loo qabto.

[1] *Fiiri*, Qodobka 47 ee Xeerka Habka Madaniga ah ee 1974, “... waa in uu tixgeliyaa danta guud iyo baahida loo qabo in aan nidaamka sharciga ah lagu tagrifalin...” (Abuse of Legal Process).

Muxuu yahay Dacwad-oogaha Gaarka ah?

Dacwad-oogaha gaarka ah (**Private Prosecution**), waa qareen ay dawladdu si ku-meelgaar ah u shaqaaleysiiso marka loo baahdo, si uu dacwad ciqaabeed wakiil ugu noqdo ama u fuliyo asagoo adeegsanaya magaca Xafiiska Dacwad Oogaha Guud ee Qaran, mana matalo dantiisa gaarka ah, Tani waxay si gaar ah u khuseysaa xaaladaha soo socda:[2]

(a) Marka Dacwad oogaha guud ay mashquul yihiin ama aysan heli karin waqti ku filan;

(b) Marka ay jiraan dano is-khilaafsan (conflict of interest) oo ka hor istaagi kara xafiiska xeer-ilaalinta inuu si madax bannaan u guto waajibaadkiisa.

Tusaale, Maxkamadda Racfaanka ee Kenya **Cox & 2 Others v Okello**, waxay si cad u xaqiijisay in dacwadaha gaar ah (private prosecutions) ay yihiin kuwo sharci ahaan loo oggol yahay sida uu dhigayo sharciga dalka Kenya, inkasta oo ay leeyihiin ka reebis (*exception to the rule*) ee xeerka guud ee dacwad-oogista dadweynaha.[3]

Awoodaha Guud ee Garsooraha ku aaddan dhageysiga dacwadaha

Garsoorayaasha maxkamadaha waxay mas'uul ka yihiin ilaalinta nidaamka iyo hubinta in geeddi-socodka garsoorku uu si habsami leh u socdo. Go'aannadoodu waa inay dheelitiraan danaha caddaaladda iyo u hogaansanaanta habraacyada sharciga, iyaga oo tixgelinaya in maqnaanshuhu yahay mid cudurdaar leh oo aan ku iman dayacaad shaqo.[4]

[2] Tixraac: Black's Law Dictionary (11aad, 2019)

[3] (Criminal Appeal E025 of 2022) [2024] KECA 1693 (KLR) (22 November 2024)

[4] Legal Clarity, 'What Happens if the Prosecutor Doesn't Show Up for Court?' (2025), <https://legalclarity.org/what-happens-if-the-prosecutor-doesnt-show-up-for-court/>.

Waxaan booqday 13/Luulyo/2025

Maqnaanshaha dacwad-oogaha ee maxkamadda wuxuu si weyn u saameyn karaan dacwaddaha. Si kale haddii loo dhigo, Xafiiska Xeer Ilaaliyaha Guud waa dhinac muhiim ah oo aan laga maarmin dhammaan dacwadaha ciqaabta ah, si la mid ah eedeysanaha.[5] Sida ku cad **Qodobka 128-F ee Xeerka Habka Ciqaabta**, maqnaanshaha eedeysanaha wuxuu keeni karaa in dacwadda lagu qaado isaga oo maqan (trial in absentia), sababtuna waxay tahay in caddaaladdu aysan u baaqan karin maqnaansho ula kac ah oo uu sameeyo eedeysanuhu.

"Su'aal dhextaal ah"

‘Haddii eedeysanaha ay maxkamaddu dhageysato isagoo maqan, sababo la xiriira dayac kaga yimid eedeysanaha, maxaa xeer-ilaaliyaha loogu ekeyn waayay isla habkaas marka uu isna maqnaado’.

*‘If the accused fails to appear after being officially summoned at the **specified date/time/place**, and the court proceeds in his absence, why shouldn't the Attorney General (as prosecutor) also be held to the same standard?’*

Maadaama Maxkamadahu guud ahaan ay leeyihiin awood asal ah (inherent powers)[6] taas oo ay ka mid tahay awoodda ay u leeyihiin in ay ganaaxaan shakhsi kasta, oo ay ku jiraan madaxda dowladda IWM, haddii ay ku guuldareystaan inay imaan waayaan maxkamada horteeda markii ay maxkamadu ay muddaysay dacwadda iyo waqtiga la hor imaanayo maxkamadda sida ku cad **Qodobka 89 ee Xeerka Habka Ciqaabta**, haddaba arrinkaas waxaa ka dhalan kara in maxkamaddu adeegsato **Qodobka 95aad ee Xeerka Habka Ciqaabta**, oo u dhigan sidan: ...

[5] Mohamed Hassan, Somali Democratic Republic Commentary On the Criminal Procedure Code (1973) at page, 105, ama tixraac qodobka 91 faqradiisa (b) ee Criminal Procedure Code.

[6] Fiiri, Qodobka 105aad ee Dastuurka 2012, wuxuu caddaynayaa in awoodda garsoorku u xil saarantahay Maxkamadaha

‘Qof kasta oo ku guuldareysta inuu fuliyo amar ay bixisay maxkamad, guddoomiyaha maxkamadda, ama garsoore, iyadoo la raacayo qodobbada xeerkan, wuxuu muteesan ciqaab haddii falkaasi uusan noqonin dembi ka culus xabsi gelin gaadhaya ilaa 3 bilood ama ganaax lacageed oo gaadhaya ilaa Sh.So. 3,000....’

Fasiraadda Qodobkaan labo Arrin ayaa ugu Muhiimsan

1. **Qof kastaa** (*any person*) ama qof walba (*everyone*) – ha ahaado saraakiil dawladeed ama muwaadiniinta caadiga ah, iwm ma jiro qof ka sarreeya sharciga.[7] Erayga "**qof kastaa**" wuxuu muujinayaa in cid walba ay hoos timaado sharciga, oo aanay jirin cid ka baxsan waajibaadka iyo mas’uuliyadda uu xambaarsan yahay.[8]

2. Gunaanadka qodobkan waxaa ka muuqda **shardi** ah: Haddii waxa uu qofku sameeyey ay dhab ahaantii tahay dembi ka culus kan lagu sheegay qodobkan, markaas lama saari doono ciqaabtan fudud oo keliya balse waxaa lagu eedeyn doonaa dembiga ka culus ee uu galay.

[7] Fiiri, Qodobka 11aad ee Sinnaanta, Dastuurka 2012.

[8] Fiiri, go’aanka Maxkamada Gobolka Banaadir ee ka soo baxay 8/7/2025, lifaaqa ugu hooseeya

Tusaale, Maxkamadu waxay muddeysay dacwada ama waxey soo saartay ogeysiis iyo wicitaan sharci ah oo loogu yeerayo dacwad-oogaha si uu u hortago maxkamadda una sii wado dacwad ciqaabeed oo horay u soo gudbiyey isla Xafiiska, haddana dacwad-ooguhu wuu ku guuldareystay inuu kasoo qeyb galo ama uusan bixin wax cudurdaar ah, waxay keeneysaa xaalad sharciyeed oo u baahan in maxkamaddu ka fiirsato tallaabooyinka ku habboon si loo ilaaliyo geeddi-socodka caddaaladda.

Inkasta oo aanay jirin qodob sharci ah oo si toos ah uga jira xeerarka dalka u yaal oo sheegaya in dacwad la tuuri karo (*Dismissal*) marka dacwad-ooguhu uusan imaanin, haddana waxaa jira mabaadi'yo arrinta laga fahmi karo:

1. Maxkamaddu waxay leedahay ikhtiyaar ay dacwadda dib ugu dhigto si fursad loogu siiyo dacwad-oogaha inuu ka soo qaybgalo. Maxkamaddu waxay amri kartaa in dib loo dhigo furitaanka ama sii wadidda dhageysiga dacwadda, haddii ay u aragto in ay lagama maarmaan ama habboon tahay, sababo la xiriira maqnaanshaha markhaatiyaasha ama sabab kale oo macquul ah, sida uu qeexayo **qododbka 101 ee Xeerka Habka Ciqaabta**.

2. Haddii dacwad-ooguhu si joogto ah ugu guuldareysto inuu kasoo muuqdo maxkamadda, markaas maxkamaddu waxay leedahay awood sharciyeed oo ay tuurto dacwadda ama laasho dacwadda sababo la xiriira in aan la wadin kiiskaan. (*Dismissal for Want of Prosecution*)[10]

[10] Dib-u-dhac aan caadi ahayn oo sababi kara natiijo la'aan ku timaadda geeddi-socodka gal-dacwadeedka, wuxuu noqon karaa ku takri-fal nidaamka maxkamadeed (abuse of court process). Xaalado noocan oo kale ah waxay sababi karaan in maxkamaddu go'aamiso in dacwadda oo dhan la laalo.

(Eeg: *Verkouteren v Savage* 1918 AD 143 at 144; *Gopaul v Subbamah* 2002 (6) SA 551 (D) at 558; *Sanford v Haley* NO 2004 (3) SA 296 (C) farq. 8; *Golden International Navigation SA v Zeba Maritime Co Ltd* 2008 (3) SA 10 (C); iyo *Zakade v Government of the RSA* [2010] JOL 25868 (ECB)).

Laalista Dacwadda Sababo La Xiriira In Aan La Wadikarin

Laalista Dacwadda Sababo La Xiriira In Aan La Wadikarin (*Dismissal for Want of Prosecution*), oo micnaheedu yahay go'aan ay maxkamaddu gaarto si ay u joojiso ama u xirto dacwad, sababtoo ah xeer-ilaalinta (ama dacwad-oogaha) uu ku guuldarraystay wadida dacwadda.[11] Tani waxay tilmaamaysaa xaalad ay xeer-ilaalintu ka gaabiso ama dayacdo howsha dacwadda, tusaale ahaan:

- *Imaansho la'aanta fadhiga maxkamadda*
- *Keeni la'aanta caddeymaha*
- *Diyaarin la'aanta markhaatiyaasha ama*
- *Si guud ay ugu guuldarreysato horumarin la'aanta kiiska*

Annagoo tusaale u soo qaadaneyna in maxkamaduhu ay leeyihiin awood dabiici ah (inherent powers), waxaan soo amaahaneynaa kiisas ka dhacay dalka Kenya. Sababtu waxay tahay in sharcigeenna xitaa uu oggol yahay in la adeegsado xukunnada maxkamadaha dalal kale (Case law) si loo xoojiyo fahamka guud ee mabda'a, sida ku cad qodobka 40aad ee Dastuurka 2012.

Qodobka 40aad. “...Maxkamaddu waxey tixgelineyaan ... go'aannada maxkamadaha dalalka kale, inkasta oo ayan qasab ku ahayn inay raacdo go'aannadooda....’

Garsoorkan ku saleysan xukunkii hore ee ***Football Federation v. Kenya Premier League Ltd & 2 Others***. Maxkamaddu waxay sheegtay in xeerarkii hore ee sharciga (kuwaas oo ka yimid UK oo Kenya horay ugu dhaqmi jirtay) ay waajib ka dhigayeen in marka hore la siiyo ogaysiis rasmi ah xafiisyada sharciga ugu sarreeya ee dowladda sida **Xeer Ilaaliyaha Guud ama Xafiiska DPP (Dacwad-ogaha Qaranka)** ka hor inta aan la gudbin dacwad ku saabsan ku xadgudub amar maxkamadeed (Contempt of court).

[11] Priyanga E., 'Dismissal for want of prosecution: charting a course between the scylla of binding principles and the charybdis of a discretion at large' (1996), Deakin Law Review, page 223-236

Laakiin sharciga hadda ka jira Kenya ma dammaanad qaadayo shuruuddaas ogaysiiska ah. Xeerarka cusub waxay meesha ka saareen baahidaas. Sidaas darteed, kiiskan gaarka ah, maxkamaddu waxay go'aamisay inay si buuxda oo sharci ah dacwad loogu furo DPP iyadoo aan hore loogu digin.[12]

TALO SOO JEEDINO

1. Xafiiska Xeer Ilaaliyaha Guud waa in uu dejiyo habraacyo gudaha ah (*internal protocols*) oo lagu xaqiijinayo joogitaanka dacwad-oogayaal ku filan marka dacwado ciqaabeed la dhageysanayo, gaar ahaan marka si rasmi ah loo yeero.

2. Waa in la adeegsadaa tignoolajiyada casriga ah ee fogaan aragga ah (*virtual hearings*), si dacwad-oogayaashu uga qeyb qaato fadhiyada, haddii ay jiraan caqabado jireed ama masaafo.

3. Dowladdu waa in ay kor u qaaddaa tirada dacwad-oogayaasha, si loo daboolo baahiyaha dacwado badan oo mar isku wakhti ah soconaya, iyada oo aan hal qof lagu khasbin dhowr dacwadood culus.

4. Waa in la dhiirrigeliyaa ka faa'iidaydiga adeegyada Dacwad-oogayaal Gaarka ah (Private Prosecutors) marka xaaladaha culus dhacaan, iyadoo loo marayo sharciyo nidaamiya oo cad, si ay u matalaan dowladda marka dacwad-oogaha dadweynuhu maqanyahay ama dano is khilaafsan ay jiraan.

5. Maxkamadaha waa in ay helaan awood sharciyeed oo cad oo lagu maareeyo kiisaska ay dacwad-oogayaashu si joogto ah uga maqnaadaan, si aysan u dhicin dib-u-dhac sharci darro ah ama ku takri-fal nidaamka garsoorka.

[12]High Court of Kenya (Milimani Commercial Court [2015] KEHC 6221 (KLR)

QORAAGA MAQAALKAN

- Ahmed Kheir Osman, waa qoraa iyo qareen, wuxuu si joogto ah uga qayb qaataa qorista iyo falanqaynta arrimaha xasaasiga ah ee saameeya cadaaladda iyo dowladnimada, kuwaas oo ku saleysan sharciyada iyo nidaamyada garsoorka dalka. Sidoo kale, Ahmed waxa uu wax ka dhigaa jaamacadaha dawliga ah iyo kuwa gaar loo leeyahay ee magaalada Muqdisho, isagoo kaalin muuqata ka qaata kobcinta fahamka sharciga ee ardayda iyo bulshada guud ahaan.

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