



Gichuki & another v Republic (Criminal Appeal E013 & E014 of 2022 (Consolidated)) [2022] KEHC 12214 (KLR) (18 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E013 & E014 OF 2022 (CONSOLIDATED)
FN MUCHEMI, J
AUGUST 18, 2022**

BETWEEN

JULIUS GICHUKI 1ST APPELLANT

JOSEPH IRUNGU 2ND APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants filed separate appeals with applications both dated March 28, 2022 brought under section 356 (1) of the *Criminal Procedure Code* seeking for orders of stay execution of the orders on sentence made on March 16, 2022 in Nyeri Chief Magistrate Civil Suit No. E324 of 2021.
2. The respondent later filed preliminary objection and grounds of Opposition dated May 6, 2022. The respondent argues that the court has no jurisdiction as the remedy sought in the instant appeal lies in a civil court and not a criminal court because the appeal arose from Nyeri Chief Magistrate Civil Suit No. E324 of 2021. The respondent further argues that it was not a party to the proceedings in CMCC No. E324 of 2021 and therefore should not be a party to the instant proceedings. Further, the mandate of the Office of the Director of Public Prosecutions under article 157(6) of *the Constitution* extends only to criminal and not civil proceedings.
3. In reply to the respondent's preliminary objection and grounds of objection, the applicants states that pursuant to section 10(7) of the *Magistrate's Court Act* 2015, the magistrates courts have powers to punish for contempt of court and any person may appeal against an order of contempt as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the court. Further, the applicant contends that section 347 of the *Criminal Procedure Code* allows for an appeal from a conviction and sentence in the lower court to be filed in the High Court.



4. The two appeal files No's E013 and E014 both of 2022 were consolidated for purpose of hearing and determining the two matters which arose from the same case Nyeri CMCC No. E324 of 2021. Parties hereby disposed of the preliminary objection by way of written submissions.

The Applicants' Submissions

5. It is the applicants' case that on March 16, 2022, he was convicted for contempt of court and sentenced to pay a fine of Kshs. 100,000/- or to serve a sentence of 6 months imprisonment. The same arose from orders issued by Hon. F. Muguongo SRM on November 17, 2021, in Nyeri CMCC No. E324 of 2021, in exercise of the court's original criminal jurisdiction. The applicant states that he was aggrieved by the said conviction and sentence and lodged an appeal before this Honourable court.
6. The applicants rely on section 10 (1) of the *Magistrates Court Act*, 2015 and submits that courts have powers to punish for contempt of court. Further section 10 (7) of the Act provides that any person may appeal against an order of the court by way of punishment for contempt as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the court. As such, the applicant contends that an appeal lies with this court sitting as a criminal court and not a civil court.
7. Further, the applicants contends that when the magistrates' court is exercising its ordinary original criminal jurisdiction, an applicant can only appeal to the criminal division of the High Court and not the civil court. Moreover, section 347 of the *Criminal Procedure Code* provides that an appeal from a conviction and sentence in the lower court is to be filed in the High Court.
8. The applicants further submits that contempt of court is a criminal offence under the Magistrates Court and the *Penal Code*. The reading of section 10 of the *Magistrates Court Act* shows that the magistrates court have concurrent jurisdiction to handle contempt of court when it comes to civil proceedings as provided by section 10 (3) of the Act. The applicant further contends that contempt proceedings are quasi criminal in nature although they may arise out of civil proceedings. The applicant makes reference to the case of *Gatharia Mutkika vs Babarini Farm* [1985] KLR 227 and submits that contempt of court is an offence of a criminal character and one may be sent to prison. As such, an appeal from such an order ought to be handled by a court clothed with criminal jurisdiction.
9. The applicants submits that pursuant to section 10 (7) of the *Magistrates Court Act*, there is a presumption that when the magistrates court is dealing with contempt proceedings it is exercising both civil and criminal jurisdiction and the ODPP need not be a party to the said contempt of court proceedings in the first instance. To support his contention, the applicant cites the case of *Ramadhan Salim vs Evans M. Maabi t/a Murby Auctioneers & another* [2016] eKLR. The applicant further submits that the Attorney General cannot be enjoined in the instant proceedings, as the national government was never a party in the contempt of court proceedings.
10. The applicants further submits that the preliminary objection dated May 6, 2022 is designed to forestall the applicant's undoubted right of appeal against his conviction and sentence. He further states that said conviction and sentence was illegal and unlawful as it was premised on the *Contempt of Court Act* 2016 which has been declared unconstitutional and of no legal effect. Additionally, the application for contempt was premised on section 5 of the *Judicature Act* which is the only statutory basis for contempt of court law in so far as the Court of Appeal and High Court are concerned and not the magistrates court.



The Respondent's Submissions

11. The respondent submits that it is not in dispute that the instant appeal arose from Nyeri CMCC No. E324 of 2021 and not a conviction and sentence from a criminal trial. The applicant has extensively mentioned that the conviction and sentence was punishment for civil contempt of court. The respondent concedes that the applicant has a right of appeal to the High Court against the orders for civil contempt of court but further submits that the High Court's constitutional mandate in this appeal is not linked to a criminal case.
12. The applicants brought the instant application pursuant to section 347 of the *Criminal Procedure Code* and is guided by section 10(7) of the *Magistrates Court Act* however, the trial magistrate in making her orders relied under section 4(1) as read with section 6(c) of the *Contempt Act* No. 46 of 2016. Moreover, section 347 of the *Criminal Procedure Code* only applies to criminal cases and for the applicant to benefit from the High Court's mandate under section 347 of the *Criminal Procedure Code* he must first demonstrate that he was a person convicted on a criminal trial by a subordinate court and that the trial was conducted in compliance with sections 89 and 134 of the *Criminal Procedure Code* having arose from a formal complaint or charge.
13. The respondent submits that the Office of the Director of Public Prosecutions was not a party to the proceedings in Nyeri CMCC No. E324 of 2021 and by default the ODPP should not be a party to the instant proceedings. At all material times, the plaintiff was Samuel Maina Muriuki and the 1st and 2nd defendants were 5K Sacco Cabs and Nyekesha Self Help Group respectively. As such, the respondent states that it is a stranger to these proceedings and is at a disadvantaged position having being ceased of this matter at the appeal stage.
14. The respondent states that its mandate is expressly provided for under article 157(6) of *the Constitution* and it extends to criminal proceedings and not civil proceedings. Though contempt proceedings are criminal in nature, the application and the appeal ought to have been served upon the Attorney General pursuant to article 156(4)(b) of *the Constitution*, as the applicant seeks to have the orders of a judicial officer reversed.
15. The respondent submits that the application is misconceived in law and an abuse of the court process and ought to be dismissed. The respondent further urges the court not to admit the appeal for hearing as such.

Issues for determination

16. The two main issues for determination herein are:-
 - a. Whether the court has jurisdiction to entertain the appeal.
 - b. Whether the ODPP is the rightful respondent to these proceedings.
 - c. If the court finds that it has jurisdiction, whether the applicants are entitled to the orders sought.



The Law

Whether the court has jurisdiction to determine the dispute

17. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows:-

I think that is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

18. Clearly if this court lacks jurisdiction the matter will come to an end as the court will have to down its tools and take no further step.
19. A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
20. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia vs KCB & 2 others*, Civil Application No. 2 of 2011 stated thus:-

“A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

We agree with Counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application No. 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

21. It is not in dispute that the instant appeal arose from Nyeri CMCC No. E324 of 2021. The applicant has sought an appeal against the decision made by the trial court on March 16, 2022. The trial court found the applicant in contempt of court and specifically held in its ruling that “This court has power to punish for civil contempt of court under section 4(1) as read with section 6(c) of the *Contempt of Court Act* No. 46 of 2016.” It is apparent from the record that the court was punishing the applicants for civil contempt of court.
22. Notably, section 4 of the *Contempt of Court Act* No. 46 of 2016 provides:-
Contempt of court includes:-



- a) Civil contempt which means wilful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of an undertaking given to a court;
 - b) Criminal contempt which means the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which-
 - i. Scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;
 - ii. Prejudices or interferences or tends to interfere with, the due course of any judicial proceeding; or
 - iii. Interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice.
23. It is my considered view that since the contempt orders are civil in nature, the appropriate forum to hear and determine this appeal is the High Court civil division and not the criminal court. Furthermore, section 8 of the Act is very clear on how one can institute criminal contempt proceedings. It provides:-
- Proceedings for criminal contempt of court shall not be instituted except by or with the consent of the Director of Public Prosecutions, with the leave of the court or on the motion of a court having jurisdiction to deal with criminal contempt of court.
24. In this appeal, the plaintiff in CMCC No. E324 of 2021 followed the procedure of filing Civil contempt by first seeking leave of the court to file the relevant application and proceeded to prosecute the said application within the same civil case that was before the court. The requirements set out in Section 8 for filing a criminal contempt proceedings were not followed by the plaintiff for the reason that they were not applicable.
25. It is imperative to note that as per the provisions of Section 8, the office of the Director of Public Prosecution (ODPP) must be involved by any person filing an application for court contempt of criminal nature. In the proceedings before the magistrates court, the ODPP office was not involved. The said office having not taken part in the said proceedings cannot be cited as a respondent in this appeal as the applicant's have done herein. Citing the respondent herein amounts to calling him to answer to a matter which he was not involved which is against the rules of natural justice. The ODPP was wrongly cited being a stranger in the appeal.
26. The applicants cites section 347 of the [CPC](#) as the law under which the appeals are brought. Section 347 of the [Criminal Procedure Code](#) provides:-
- Save as is in this Part provided:-
- A person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court;
- It is therefore apparent that for one to appeal to the High Court in a criminal appeal, one must have been convicted on a criminal trial held by a subordinate court which arose from a formal complaint or a charge.
27. It is correct to say that the magistrates court has jurisdiction to punish for contempt of court in respect of orders made by them as provided for by section 10 of the Magistrates Court's Act.
28. It is my considered opinion for the foregoing reasons, this application and appeal as consolidated are misconceived and thus incompetent.



29. Consequently, the appeal as consolidated is hereby struck out with no orders as to costs.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 18TH DAY OF AUGUST, 2022.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this day of 18th AUGUST, 2022

