REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL APPEAL NO. 222 OF 2013

ROSELYNE MIANO.....1ST APPELLANT

JULIUS MATHENGE KABUE.....2ND APPELLANT

-VERSUS-

EDWARD KARIUKI NGIGE.....1ST RESPONDENT

HELLEN NYAMBURA KARIUKI.....2ND RESPONDENT

BONIFACE WAITHAKA NGUGI.....3RD RESPONDENT

JOANNE ROMBA KIBE.....4TH RESPONDENT

MARGARET WANJIRU NJOROGE.....5TH RESPONDENT

MWANGI GITHAIGA.....6TH RESPONDENT

JUDGMENT

1. The Notice of Motion dated 16th October 2014 has been brought under **Sections 348A** and **349** of the **Criminal Procedure Code**. The Applicants have asked the court to strike out the Petition of Appeal filed on 27th September 2013 with costs.

2. The application is supported by the affidavit of the 1st Respondent sworn on 16th October 2014 and is premised on the grounds that:

(a) the appellants have no *locus standi* to file this appeal;

(b) the appeal has been filed outside the fourteen days prescribed under the Criminal Procedure Code without leave of court;

(c) in any event, the appellants have not given any satisfactory reason for filing the appeal out of time.

(d) it is only fair that this incompetent appeal is struck out with costs.

3. Despite being served, the appellants did not file any document in response to this application and it is in the circumstances deemed unopposed.

4. The Applicants' Counsel's submissions are that this appeal is incompetent and should be struck out. He argued that under **Section 348A** of the **Criminal Procedure Code, Cap 75**, it is only the Attorney General, whose functions have now been taken over by the Office of the Director of Public Prosecutions, who has the right to appeal against a judgment or order of the subordinate court.

5. This right of appeal being one created by statute cannot be inferred and a litigant cannot confer upon himself the right. Further neither that section nor any other section in the Criminal Procedure Code, provides for an appeal against an interlocutory order.

6. Counsel also submitted that **Section 349** of the **Criminal Procedure Code** provides that an appeal against an acquittal, refusal to admit a complaint or formal charge must be filed within fourteen days. The High Court has powers to extend this period if sufficient cause is shown for the delay. In this case, the ruling was delivered on 27th August 2013 whereas the Petition of Appeal was filed on 27th September 2013.

7. The appellants did not seek the leave of the court to file out of time nor have they presented any reason for the delay. Therefore, the appeal should be struck out.

ANALYSIS

8. As there was no Replying Affidavit filed, the facts as alleged are deemed not controverted. If this were a civil claim I would have allowed it for being uncontested. However, being a criminal case, its peculiar nature calls for a more analysis although the claim is not disputed.

9. There are two issues that have been raised for determination in this application. The first is whether the appellants have *locus standi* to present the appeal and the second is whether the petition is incompetent for being filed out of time.

WHETHER THE APPELLANTS HAVE LOCUS STANDI TO FILE THE APPEAL

10. The right of appeal is not automatic and must be expressly provided for the law, statute or constitution. This p**osition was stated by the Court of Appeal in Kakuta Maimai Hamisi V. Peris Pesi Tobiko & 2 others** [2013] eKLR wherein it considered the right to appeal against a ruling of the High Court on an interlocutory application in an election petition. The court held as follows:

> **"The question of a right to appeal goes to jurisdiction and is so fundamental we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at** Article 159 (2) (d) **of the Constitution. We do not consider** Article 159 (2) (d) **to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation....**
>
> **The conclusion is inescapable by necessary and logical implication that unless an appeal lies to this Court it is bereft of jurisdiction to entertain any purported appeal. It behoves an intending appellant to be able to show under which law his right of appeal is donated. Unless such appeal-donating law can be found, no appeal can lie."**

11. The right of a citizen to institute private prosecutions is both a statutory right under **Section 88(1)** of the **Criminal Procedure Code** and a Constitutional Safeguard under **Article 157 (6) (c)**. (See **Otieno Clifford Richard** V. **Republic** [2006] eKLR).

12. **Section 88(1)** of the **Criminal Procedure Code** provides-

> **"A magistrate trying a case may permit the prosecution to be conducted by any person, but**

no person other than a public prosecutor or other officer generally or specially authorised by the Attorney-General in his behalf shall be entitled to do so without permission.

Any such person or officer shall have the same power of withdrawing from prosecution as provided by Section 87, and the provisions of that section shall apply to withdrawal by that person or officer.

Any person conducting the prosecution may do so personally or by an advocate."

13. The above section does not expressly allow an applicant to appeal against the decision of the trial court. Therefore, the **Section 348 A** of the **Criminal Procedure Code** which provides for filing appeals from the subordinate court to the High Court must be examined . It states:

"348A. When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney-General may appeal to the High Court from the acquittal or order to on a matter of law."

14. The decision of the trial magistrate pursuant to **Section 88(1)** may not be appealed under Section 348 A above. That is not to mean that it is absolute and may not be subjected to scrutiny by this court. Section 362 grants this court the power to review "**any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court ."**

15. The order of the trial court is a decision within the meaning of **Section 362** and must be exercised in accordance with the law. The principles governing the decision to grant permission have been enunciated in several cases, to name a few, **Kimani** V. **Kihara,** [1983] eKLR, **Justus Korir Sambu** V. **Republic** [2008] eKLR, **Floriculture International Limited & Others,** High Court Misc. Civil Application No. 114 of 1997 (cited in **Otieno Clifford Richard** V. **Republic,** *supra)* and **Gregory & another** V. **Republic thro' Nottingham & 2 others,** [2004] eKLR. These decisions, in summary, state that:

a) the power of the trial court to grant permission to a private person to conduct a prosecution under **Section 88(1)** is discretionary and must therefore be exercised justly on the material presented;

b) the court should ascertain itself that a report has been made to the Attorney-General (now the office of the Director of Public Prosecution) or the Police and the results;

c) the powers of prosecution are vested in the Director of Prosecution. Therefore a permission will be granted to a private prosecutor in limited cases and where the Director has, without reasonable cause, refused to act, he has maintained a more than usual reticence; and either the decision or or reticence must be clearly demonstrated;

d) unless the suspect is prosecuted and prosecuted at that given time, there is a likelihood of a failure of public and private justice;

(e) the applicant has a sufficient interest in the matter that is he has suffered injury or danger and is not motivated by malice, politics or some other ulterior motive devoid of good faith;

f) it generally excludes serious criminal matters and applies where limited private interests are involved;

16. From the above, it is clear that the discretion is not absolute and must be exercised judicially and in terms of the law. Therefore, the decision of the trial court granting or refusing an application of a private prosecutor, cannot be deemed as final and is one which can be examined by this court under **Section 362** of the **Criminal Procedure Code.**

17. In addition, although it is not possible to clearly articulate the substance of the application that gave rise to this appeal because neither the application nor the proceedings before the lower court have been attached, it appears from the ruling of the lower court attached and the Petition of Appeal, that the appellants have not only appealed against the decision of the Chief Magistrate at Nakuru refusing to grant the appellants permission to conduct criminal prosecution against the Respondents but also that the trial court unfairly refused to admit the appellants' complaint. This is an issue that may be appealed against, on matters of law, to this court under **Section 348 A.**

18. On the question whether the appellants have *locus standi* I refer to the provisions of **Section 365**:

> **365. No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:**
>
> **Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364 (2).**

19. The Appellants being parties in the proceedings in the subordinate court may be heard by this court if in its opinion it is in the interest of justice. In the instant case, I find that the interest of justice will only be served if the appellants are heard and therefore it is one case where the discretion of the court should be applied in their favour.

20. In addition the fact that it is only the Attorney-General (now Director of Public Prosecutions) who is named under **Section 348 A** as the person who may file an appeal does not exclude a private prosecutor. To find so would be a narrow interpretation of the provision. Taking into account that a private prosecutor in essence conducts the proceedings on behalf of the public prosecutor, it follows then that he has the right granted to the public prosecutor to appeal against the decision of the subordinate court.

21. To further buttress my position, I wish to rely on, in as far as it is applicable, the Court of Appeal's decision in **The Republic, through Devji Kanji Vs Davendra Valji Halai** [1976-80] 1 KLR 938**.** In this case, the appellant filed an application for permission to institute prosecution before the subordinate court. When his application was rejected he applied to the High Court for revision of the order of the subordinate court. The High Court upheld that decision. He then appealed to the Court of Appeal. In the appeal the question was raised of whether a private prosecutor has powers to appeal. The court held:

> **"..by section 361(1) of the Criminal Procedure Code any party to an appeal from a subordinate court may appeal against the decision of the High Court to this Court. A private prosecutor is such a party. Section 361(7) equates an order of the High Court made in its revisional jurisdiction with a decision made in its appellate jurisdiction. We are accordingly satisfied that a private prosecutor as a party to proceedings in the High Court has a right of appeal to this court, subject to the residual control by the Attorney-General over any criminal case under the provisions of Section 82 of the Criminal Procedure Code."**

WHETHER THE PETITION IS INCOMPETENT FOR BEING FILED OUT OF TIME

22. **Section 349** of the **Criminal Procedure Code** provides for a time limit of fourteen days within which to file an appeal. The decision which has been appealed against was delivered on 27th August 2013 whereas the Petition of Appeal was filed 31 days later on 27th September 2013.

23. Clearly the appeal was filed out of time. The same provision allows this court to admit an appeal out of time if the appellant demonstrates that it was failure to comply with the provision was because of his inability or of his counsel to obtain a copy of the judgment or order appealed from, and a copy of the record, within reasonable time.

24. The appellants have not bothered to offer any explanation for failure to comply. Nonetheless, the court should only strike out petitions in the clearest of cases. The delay was of only 17 days and cannot be deemed inordinate. Despite the lack of an explanation it would be unjust to strike out the Petition on the

ground of the delay alone.

25. Further, the petition also invokes the revisionary jurisdiction of this court. There is not time limit imposed under the Criminal Procedure Act within which the High Court may review an order of the subordinate court.

DETERMINATION

26. For the above reasons I find that this petition is properly before the court. The Appellants have the requisite legal standing to challenge the decision of a trial magistrate made under **Section 88(1)** of the **Criminal Procedure Code.** That decision is one which this court has power under **Section 362** to review.

27. I also find that the appeal is not incompetent for being filed out of time because in addition to raising a question which is subject to the time limit under **Section 349** it raises an issue for review under **Section 362** of the **Criminal Procedure Code** for which no time limit is provided. In addition a delay of 17 days in my view, is not so inordinate that it makes the appeal an abuse of court process.

28. The Appellants should endevour to prosecute the appeal within a period of six (6) months. In default the Respondents are at liberty to apply for dismissal.

29. No orders as to costs.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 15th day of April, 2015.

A. MSHILA

JUDGE