

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 22 OF 2014

BETWEEN

MARK ODHIAMBO OTOM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Ruling in Criminal Case No. 1134 of 2012 of the Chief Magistrates Court at Homa Bay, Hon. S. Ongeru dated 9th May 2014)

RULING

1. This appeal is for striking out. A party who wishes to appeal must point to a statutory right of appeal as was held in the case of **Sydney Grant Ralph v R [1960] 1EA 310** where the court stated as follows, “*Before there can be any question of or considering the merit of the appeal we must be satisfied that we have jurisdiction to entertain it and for that purpose it is necessary to examine the relevant sections of the Criminal Procedure Code. This court has no inherent power to exercise jurisdiction where no right of appeal is provided and the right of appeal in criminal matters in Kenya is governed by the Criminal Procedure Code.*” (See also **Jonah Toroitich Kiplagat and Others v Republic Eldoret HC Misc. Crim. Appl. No. 14 of 2007 (Unreported)**).
2. The appellant herein was charged with the offence of attempted defilement contrary to **section 9(1)(2)** of the **Sexual Offences Act, 2006** and an alternative charge of indecent assault of a child contrary to **section 11(1)** of the **Sexual Offences Act**. After hearing of the prosecution case and after submissions on no case to answer under **section 210 and 211** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**, the appellant was acquitted on the main count and put on his defence on the alternative charge. The appellant now appeals against the ruling.
3. The right of appeal under the **Criminal Procedure Code** is only given to a person who has been convicted and sentenced under **section 347(1)** of the **Act**. There is no right of appeal conferred against the provisional ruling on a submission of a no case to answer such as that made under **section 211** of the **Act** and now appealed against.
4. In **Thomas Gilbert Cholmondeley v R CA Criminal Appeal No. 116 of 2007 [2008]eKLR**, the Court of Appeal expressed its view on interlocutory appeals in criminal matters as follows, “*In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; Muga Apondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal.*”
5. In the circumstances, the appeal is struck out. The appellant shall appear before the Principal Magistrates Court in Mbita as scheduled for the trial to proceed in accordance with the law.

DATED and DELIVERED at HOMA BAY this 24th day of July 2014.

D.S. MAJANJA

JUDGE

Mr Nyauke, instructed by Nyauke and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.