



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Misc Crim Appli 14 of 2007

1. JONAH TOROITICH KIPLAGAT

2. DANIEL KOSGEI TOROITICH

3. PHILEMON TOROITICH..... APPLICANTS

VERSUS

REPUBLIC RESPONDENT

RULING

The Applicants had been charged with the offence of Attempted Murder contrary to Section 220 (a) of the Penal code. They were arraigned before the Chief Magistrate’s Court in CM.Cr.C. No. 5739 of 2001.

From the record before this Court, it would appear that the trial of the case commenced before one Magistrate upto the close of the prosecution case. The Court was to decide whether the Accused had a case to answer and whether they should be placed on their defence or not.

At that stage, the Honourable M. K. N. Nyakundi, Senior Resident Magistrate who took over the trial made the following order:-

“I have perused the evidence on record since the same was heard by another court. I have found the following:-

(a) A Police Constable is the one who conducted the hearing and the proceedings are void ab initio since the introduction of the amendment in the Kenyan Laws that the Police in the rank of an Inspector and above should conduct/prosecute the cases in Court on behalf of the Accused person.

(b) Secondly, no directions were taken before matter could proceed further. I therefore find that the case has proceeded irregularly and in order for justice to be done, I order the same to be withdrawn and the same to start afresh.” (sic)

As a result of the said direction/order, the Prosecution proceeded to

apply to withdraw the charges against the accused persons under Section 87 (a) Criminal Procedure Code. The Counsel for the Accused opposed the said application and asked the Court to acquit the accused persons under the provisions of Section 210 of the Criminal Procedure Code.

The Learned Trial Magistrate did not allow the withdrawal of the charges but ordered that in order to see justice done on both parties, his case was to start afresh under Section 200 of the Criminal Procedure Code.

The Accused being aggrieved decided to appeal against such decision. However, they did not file the appeal within the prescribed period and have now filed this application under the provisions of Section 349 of the Criminal Procedure Code for leave to file the appeal out of time.

At the hearing, the Respondent, through the Senior Principal State Counsel Mr. Omutelema raised a preliminary objection on the grounds that:-

1. The Applicants had no right of appeal.
2. Right of appeal is only given to a person convicted or sentenced – S. 347 (a) of the Criminal Procedure Code.
3. Order that case starts de novo/afresh is not a conviction or sentence.

The Applicants through their Counsel Mr. Cheptarus argued that:-

1. The High Court has unlimited jurisdiction.
2. Section 65 (2) of the Constitution gave the High Court Powers to supervise Subordinate Courts.

I have considered all the submissions regarding the aforesaid point of law. Section 347 (a) provides that:-

“A person convicted on a trial held by a Subordinate Court of the first or second claim may appeal to the High Court

From the foregoing and in the absence of any other provision, I am of the view that a right of appeal only arises or accrues to an accused person after conviction. There is no provision to appeal against orders made during the trial e.g. taking of pleas, placing the accused on his defence, rejection of evidence etc.

The appellate jurisdiction of the High Court is conferred by statute and not on the basis of an inherent jurisdiction or exercise of other discretion. The right of appeal is a serious matter that must be specifically be provided for by the Constitution or other written laws.

In the case of SYDNEY GRANT RALPH –V- R (1960) 1 EA 310, at 310 – 311 referred to by the Respondent, the Court of Appeal held that:-

“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

This Court is bound to follow and apply the said ratio decidendi.

I am also of the view that this Court cannot invoke or use its supervisory powers over Subordinate

Courts under Section 65 (1) of the Constitution, to admit the appeal therein out of time. In this case, it is the provisions of Section 349 which has been invoked yet there is no right of appeal. The trial Court in that respect has done nothing wrong or improper. That could only be dealt with possibly if there was a right of appeal.

In the circumstances, I do hereby dismiss the application to file the appeal out of time. There was no right of appeal in the first place and there is nothing to extend. Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 14TH DAY OF JUNE, 2007.

M. K. IBRAHIM

JUDGE