

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Misc Crim Case 22 of 2007

CHARLES KEAGO AREBA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant herein is seeking from this court leave to appeal out of time under section 349 of the Criminal Procedure Code. The application is opposed by the learned counsel for the state who argues that there is no automatic right of appeal in a case such as this one as section 349 only applies to situations where there has been a conviction. He argues that there was no conviction in this case and so a right of appeal did not lie in the first place.

Counsel for the applicant however argued that the right of appeal is a constitutional right. He did not however tell the court the sections of the constitution that create that right. On this point, I tend to agree that the right of appeal in criminal matters is derived from section 347 of the Criminal Procedure Code and not from the constitution. It is not therefore a constitutional right as it were contrary to what Mr. Onchiri would like to believe. Be that as it may however in my considered view, two pertinent issues arise out of this application.

Firstly does a person who is punished summarily for contempt of court have a right of appeal? I have gone through the proceedings before the subordinate court which led to the punishment of the applicant. All I can say at this stage is that although the magistrate found and rightly so that the applicant's conduct amounted to contempt on the face of the court, he proceeded to invoke the provisions of section 77 (8) of the constitution to punish the applicant. Section 77 (8) of the constitution does not give power to punish for contempt. Contempt on the face of the court should be punished pursuant to section 121 (2) of the Penal Code. I do not wish to delve into the details as to how this should be done at this stage. It is nonetheless a summary procedure where the person in contempt is summarily found guilty for contempt of court and punished. This procedure can in my view be equated to a summary trial and the punishment to a sentence. This would therefore bring the contemtor at par with an accused person for purposes of section 347 (1) of the Criminal Procedure Code. He would therefore have an automatic right of appeal under that section. Section 349 would therefore be available to him too. In this case, the applicant has clearly explained on his grounds on the face of the application in the supporting affidavit the reasons why he could not file the appeal on time.

The certificate of delay is annexed and the same is self explanatory. For these reasons, I am satisfied that the application for leave to appeal out of time has merit. Accordingly, I allow the same. The applicant to file the appeal in question within 7 days of the date of this order.

W. KARANJA

JUDGE

7/11/2007Delivered today in open court in presence of Mr. Situma for the applicant and

Mr. Ndege for the state.