



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 75 OF 2017

BETWEEN

HENRY NYACHIO ONDARA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon. M. M. Nafula dated 10th October 2017 at the Magistrate Court in Ogembo in Criminal Case No. 501 of 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)**, **Munene v Republic (No. 2) [1978] KLR 105** and **Owners of the Motor Vessel Lillian ‘S’ v Caltex Oil Kenya Ltd [1989] KLR 1**).

2. The appellant herein was charged with the offence of obtaining by false pretences contrary to **section 313** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and issuing a bad cheque contrary to **section 316(A)(1)(a)** as read with **section 316(A)(4)** of the **Penal Code**. After denying the charge, the appellant was subject to a full trial and put on his defence. He elected to give sworn testimony. Thereafter, his counsel came on record and applied to re-open proceedings and start the case de novo. The trial magistrate rejected the application thus precipitating this appeal.

3. Appeals in criminal matters are provided for generally under the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**. **Part XI** thereof deals with appeals from the subordinate court to the High Court. The relevant sections provide as follows:

347. Appeals to the High Court

Save as is in this part provided –

(a) A person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court.

(b) Repealed

348. No appeal on plea of guilty, nor petty cases

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence.

348A. Right of appeal against acquittal, order of refusal or order of dismissal

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 Director of Public Prosecutions may Appeal to

the High Court from the acquittal or order on a matter of law.

[Emphasis mine]

4. It is clear from the forgoing that the right of appeal under **section 347(1)** of the **Criminal Procedure Code** is only given to a person who has been convicted and sentenced. There is no right of appeal conferred against an interlocutory ruling such as the one made by the trial magistrate rejecting the appellant's counsel's application to start the case de novo.

5. 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.*"

6. The right of appeal goes to the heart of this court's jurisdiction to intervene in an ongoing criminal trial. As I have set out this appeal is incompetent and is struck out. The matter shall now proceed before the trial court in accordance with the law.

DATED and DELIVERED at KISII this 7th day of February 2019.

D.S. MAJANJA

JUDGE

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.