IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, OMOLO & TUNOI, JJ A

CRIMINAL APPEAL NO 88 OF 1995

BETWEEN

KAMLESH MANSUKLAL DAMJI PATTNI ……..APPELLANT

AND

REPUBLIC …….....……RESPONDENT

(Being an appeal from orders of the High Court at Nairobi (Hon. Justice V.V. Patel) on 23rd and 30th August, 1995)

in

H.C.CR. REVISION NO.48 OF 1995 CONSOLIDATED WITH MISC. CR. A. NO. 376 OF 1995)

RULING

Kamlesh Mansuklal Damji Pattni, the appellant herein, together with other persons who are not before us, faces numerous criminal charges before the Chief Magistrate of Nairobi. The appellant is yet to be tried on those charges. He has, in the meantime, been released on bond on certain stringent terms and among such terms are orders that the appellant do deposit his passport with the police officer investigating his case and another one that he must not leave the jurisdiction of then court during the pendency of the criminal charges against him. These terms were imposed by two different Judges of High Court (Patel & Oguk, JJ) each of whom he has had occasion to deal with the appellant's various applications for bail in that court. Sometime in August 1995, the appellant felt the need to seek a review of the two conditions requiring him to deposit his passport with the police and restricting him to remain within the jurisdiction of the trial court. So 18th August, 1995, after the Chief Magistrate had completed a certain ruling Mr. Rebelo who was then acting for the appellant applied to the Chief Magistrate for an order lifting the two conditions Mr. Chunga, for the Republic, vigourously opposed the application. The Chief Magistrate ordered that:-

a. The appellant be allowed to go out of the jurisdiction of the court.

And

b. The appellant's passport deposited by him with the police was to be released to him temporarily for that purpose and the passport was to be returned to the court on or before the 11th September, 1995.

The Republic was clearly aggrieved by the Chief Magistrate's ruling. They, that is, the Republic could not, however, appeal against the ruling because there is no right of appeal in the Republic against such an order. So on 22nd August, 1995, Mr. Chunga, on behalf of the Republic, addressed a letter to the Deputy Registrar of the High Court asking that the file of the Chief Magistrate be called for by the High Court so that that court could satisfy itself as to the correctness, legality or propriety of the orders recorded by the Chief Magistrate on 21st August, 1995. We would at once say that a letter such as that written by Mr. Chunga is a perfectly valid method of invoking the revisionary jurisdiction of the High Court given by section 362 of the Criminal Procedure Code, "the Code" hereinafter. Section 364 (1) of the Code is to the effect that I file:-

i. Can be called for by the High Court;

ii. Can be reported for orders to the High Court;

And

iii. Can otherwise come to the notice of the High Court.

A letter such as that written by Mr. Chunga is a way of bringing a matter to the notice of High Court. What happened next? Once the file was brought to the notice of the High Court by Mr. Chunga's letter it was placed before Patel, J. on the same day the learned Judge made the following order:-

> "Ct: Proper application for Revision be filed and served. It be heard on 28th August, 1995. The Chief Magistrate's order stayed till then."

We do not know if Mr. Chunga was present when this order was made but the appellant was certainly not present as were his advocates. We are aware that section 365 of the Code provides that:-

> "No party has a right to be heard either personally or by an Advocate before the High Court when exercising its powers of revision.",

but it must not be forgotten that section 364 (2) provides that:-

> "No order under this section shall be made to prejudice of an accused unless he has had an opportunity of being heard either personally or by an advocate in his defence."

The ex-parte order made by Patel, J staying the orders of the Chief Magistrate was obviously an order prejudicing the rights of the appellant. Mr. Chunga told us that the order was not a final one and therefore, could have been made in the absence of the appellant. Section 364 (2) which we have set out does not draw any distinction between final and temporary or interlocutory orders. We would ourselves emphatically assert that ex-parte orders have very little room in the criminal process, unless of course, they are made for the benefit of the person accused. An obvious example of where an ex-parte would be granted in a criminal trial is when a warrant for the arrest of the accused is sought so that he can be brought before the court to take his trial or on those very rare occasions when the accused person, by his own conduct, has made it virtually impossible for the court to hold the trial in his presence and the court has dispensed with his attendance. The ex-parte order made by Patel, J was not such a one and we think it ought not to have been made in the absence of the appellant.

Be that as it may, a formal application for revision was duly filed by the Republic and the appellant in turn also filed a formal application seeking the setting aside of the ex-parte order to which we have made reference. The two applications were eventually consolidated and heard on 28th August, 1995. After full arguments which lasted up to 30th August, 1995, the learned Judge ruled on the same day that the Chief Magistrate was wrong in making the two orders and he reversed those orders. The Judge went so far as to say that the Chief Magistrate had no jurisdiction to vary the terms of the appellant's bail because those terms had been imposed by the High Court and only that court could vary them. We very much doubt the

correctness of this proposition but in view of the stand which we have taken on this matter, it Is not necessary for us to determine that issue conclusively.

The appellant's appeal before us arises from the order of the High Court reversing the orders made by the Chief Magistrate. Mr. Chunga has taken the preliminary point that there is no right of appeal to us and that we accordingly have no jurisdiction to hear the appeal. Mr. Rao who represented the appellant before us contended that the appeal to us is by virtue of section 361 (7) of the Code. The provisions of section 361 of the Code cover second appeals to this Court and section 361 97) provides:-

> "For the purposes of this section, an order made by the High Court in the exercise of its revisionary jurisdiction or a decision of the High Court on a case stated shall be deemed to be a decision of the High Court in its appellate jurisdiction."

Mr. Rao argues that Mr. Chunga invoked the revisionary jurisdiction of the High Court and having done so the parties to the proceedings before Patel, J were the appellant and the Republic. By virtue of section 361 (7) the proceedings before Patel, J are deemed to have been conducted pursuant to the appellate jurisdiction of the High Court and accordingly the appellant who was a party to the proceedings before the learned judge, argues Mr. Rao, is entitled to appeal to this Court a second time. Mr. Rao squarely relies in section 361 97) of the Code as the legal basis for the appeal before us and in support of his contention that the appeal lies to us, he referred us to the Criminal Procedure (Amendment) Bill, 1959 which became the Criminal Procedure (Amendment) Ordinance 1959 which introduced section 361 (7) of the Code. Mr. Rao referred us to the objects of the 1959 Bill which was stated [as regards section 361 (7) as follows:-

> "Clauses 38 and 39 make important provisions as to appeals to the Court of Appeal from judgments of the Supreme Court in its appellate and original jurisdiction, replacing sections 360 and 378 of the Code in their present form. The existing provisions are considered inadequate and lacking in definition of the powers of the court. Clause 38 has the effect, inter alia, of making it possible for an order of a Judge on revision to be appealed against. Clause 39 introduces a new power to appeal to the Court of Appeal against an acquittal."

The objects stated of the 1959 Bill clearly support Mr. Rao's contention that a new right of a second appeal was being introduced particularly in respect of orders made on revision by a judge of the High Court judge in his revisionary jurisdiction were to be deemed as orders made pursuant to his appellate jurisdiction were to be deemed as orders made pursuant to his appellate jurisdiction and a second appeal to the Court of Appeal lay from such orders.

This argument on its face looks extremely attractive to us but in the end we have come to the conclusion, with some reluctance we must admit, that the proposition cannot be right. Both Mr. Rao and Mr. Chunga agree on one thing, namely that a party coming to this Court must show an express statutory provision conferring him on the right to appeal. That right cannot be implied and cannot be inferred. It must be expressly given by statute. The dispute in cases such as MUNENE V THE REPUBLIC (NO. 2) [1978] K.L.R 105 on the one hand and ANARITA KARIMI NJERU V THE REPUBLIC (NO. 2) [1979] K.L.R. 162 on the other hand, is not whether the Court of Appeal can assume jurisdiction in the absence of an express statutory provision giving the Court jurisdiction to hear an appeal. Both sets of courts in the two cases are agreed that an express statutory provision conferring, jurisdiction with the majority in MUNENE's case holding that such express statutory authorization is to be found in section 66 of the Civil Procedure Act, Cap 21, while the majority in NJERU's case thought that section 66 of the Civil Procedure Act does not provide a basis for the assumption of jurisdiction by the court. Which side will eventually prevail is not a matter for us in this appeal but the two cases only go to show that before we in this Court can assume jurisdiction, we must be shown an express statutory authorization. That was the basis of Mr. Chunga's objection to our jurisdiction.

Mr. Rao points to section 361 (7) of the Code as constituting that statutory authorization. That section merely says that the orders made thereunder by the High Court shall be deemed to have been made pursuant to the appellate powers of that court. The section does not expressly state that all such orders

shall be appealable to this Court. If it had done that, the controversy before us would not have arisen. As Mr. Chunga correctly asked: what was the subject matter of the dispute before the Chief Magistrate and subsequently before both court was whether the appellant's passport deposited with the police pursuant to the terms of his bail should be released to him and whether the appellant should be allowed to travel out of the jurisdiction of the court trying him. These are clearly issues related to bail. It was agreed that this Court has no jurisdiction to grant bail to a person who is awaiting trial either in a subordinate court or in the High Court. This court can only grant bail to persons whose appeals are pending before it. We think it would be a ridiculous proposition to say that a person who ahs been refused bail in the subordinate court and in the High Court cannot come to this court and yet one who ahs been granted bail on certain terms and conditions can come to the Court as regards those terms and conditions. We do not think section 361 (7) of the Code was intended for such purposes and we agree with Mr. Chunga that before one can make use of that section, one must be able to show to the Court that one's subject matter is itself appealable to Court. The submission by Mr. Chunga that before we assume jurisdiction under section 361 (7) of the Code we must look at the subject matter of the order made by the Judge in revision must be correct, because if it is wrong, this Court would start entertaining appeals on bail, a matter which it has hitherto never had any jurisdiction to deal with. Were we to adopt the position contended for by the appellant, the Court would, in effect be encouraging persons who have been refused bail by a magistrate to go to the High Court, not under the provisions of section 123 of the Code but under section 361 of the Code. They would then ask the High Court to revise the order of the magistrate refusing them bail and if the High Court refused the revision application, they could then come to this court under section 361 (7). That is not a situation this Court would wish to encourage and we have no doubt that that section was not intended for this sort of appeal.

We are satisfied there is no statutory authorization for the appellant's appeal to us and we accordingly uphold the preliminary objection raised by Mr. Chunga. We have no jurisdiction to hear and determine the appeal before us and as this Court has itself said where it has no jurisdiction, it must down its tools. We hope that the trial of the appellant will not be duly delayed as his being deprived of his passport amounts to a form of punishment. The appeal before us is incompetent as having been filed without any legal basis and we accordingly order that it be and is hereby struck out. Those shall be the orders of this Court.

Dated and delivered at Nairobi this 6th day of November, 1995

R.O KWACH

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JUDGE OF APPEAL

R.S.C OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL