



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Platt, Apaloo JJA & Masime Ag JA)**

**CRIMINAL APPEAL NO 168 OF 1987**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**SHEM ANGUNGO & 5 OTHERS..... RESPONDENT**

**JUDGMENT**

*(Appeal from an Order of the High court at Kisumu, Omolo J)*

June 23, 1988, **Platt JA** delivered the following judgment.

This appeal raises two questions; the first is whether on an application to the High court in relation to its appellate jurisdiction, the applicant should be present in court or whether the court has any power to review the matter if the application has been heard *ex parte* without fault on the part of the applicant. The second question is whether this Court may entertain an appeal arising out of an application having been heard *ex parte*, and the application being refused.

The broad facts of the case are that the applicant, now appellant sought to appeal to the High court from orders given in the Resident Magistrate's Court as a result of a private prosecution. The appeal was delayed and the applicant sought leave to appeal out of time. The application having been refused, the applicant appealed to this court, but was met with the provisions of Section 361(8) of the Criminal Procedure Code, which provides that a refusal by the High court to admit an appeal out of time under Section 349 shall be final.

Nevertheless the appellant contends that the refusal is final only if the refusal results from a properly constituted court, hearing the application in accordance with the rules of natural justice. It does not apply, the appellant argued, when the applicant through no fault of his was shut out from a hearing. In the appellant's view the *ex parte* order was *ultra vires* because the rule of natural justice *audi alteram partem* had not been complied with.

The situation which faced the court was that on 15th March 1985 the applicant's prosecution was dismissed for want of prosecution. The trial Magistrate acting under Section 202 of the Criminal Procedure Code acquitted the Respondents in the absence of the applicant. It follows that an appeal against this order had to be made in fourteen days in accordance with Section 349 of the Criminal Procedure Code. But 29th March 1985 passed and on 4th July 1985 the applicant filed an application for enlargement of time to appeal. Section 349 would allow him to do so provided that he showed good cause and satisfied the court

that the appeal should be admitted in connection with obtaining copies of proceedings.

The applicant's affidavit discloses that he did not know the trial hearing date. Having become aware of the judgment, he instructed his counsel to appeal against it, on or shortly after 25th March, 1985. It appears as if counsel had time to appeal but he did not. Another counsel was engaged on 25th April 1985. This advocate is alleged to have refused to appeal possibly in collusion with the other side. Then the applicant acted for himself; he applied for certified copies of proceedings and judgment on 25th April, 1985 and they were ready on 8th May 1985. The applicant then applied for extended time on 4th June 1985.

Schofield J heard the application on 10th July, 1985. He found that there had been confusion as to the hearing date of the trial, and he thought that the delay in preferring an appeal not unreasonable. One would have thought that he would have granted the application in those circumstances; but instead he temporized and proposed to ask Mr. Menezes whether there had in fact been confusion over the hearing date. Nothing apparently happened until 21st March 1986 when Butler-Sloss J ordered the attendance of Mr. Menezes on 2nd April 1986 to give evidence in lieu of an affidavit.

That date was extended to the 18th June 1986. On this date the applicant appeared, but not with an Advocate. The matter was stood over generally for Mr. Owino Opiyo to appear. Before Mr. Owino Opiyo arranged a date Mr. Onyango Otieno urged the court to set a date. The court then wrote to the parties announcing a hearing date, but Mr. Owino did not receive that letter. He was able to demonstrate to this court that the wrong address had been used. Thereupon Mr. Gumba-Onywera was good enough to accept Mr. Owino Opiyo's contention for the purposes of the argument that he knew nothing about the hearing date.

On the other hand, on 25th September 1987 when the matter came before the High court in the absence of the applicant but in presence of the respondents, the court noted that the application was by then 2 years old. The court said that it was the Respondents who had asked that the application be fixed for hearing, and the court declared that it was the court which "duly fixed" the application for hearing with notice to the Advocate of the applicant. But neither the applicant nor his Advocate had appeared to argue the application and since the applicant had had enough time to prosecute his application, the application was dismissed.

If it is now accepted that the letter to the advocate of the applicant had been wrongly addressed and could not have reached Mr. Owino Opiyo, a matter of which the High Court must have been in ignorance, it could not have been a case where the hearing date of the application had been "duly fixed." Of course, if the court merely writes a letter and there is no return of service or record in the registry that the date has been accepted, the usual procedure has not been carried out. It was, therefore, a case of hearing the respondents' advocate, with the applicant unaware that it was being heard, and therefore a matter taken *ex parte* which ought to have been *inter partes*. In such circumstances the rule of natural justice *audi alteram partem* was infringed with the result that the dismissal was *ultra vires*.

Nor was it fair to state that the applicant had had enough time. The delay was largely caused by the court itself seeking information from Mr. Menezes which proved difficult to get. At any rate, up to the 18th June it was not the applicant's fault at all and from then it was a question of fitting in with Mr. Owino Opiyo's diary. In truth, the applicant generally deserves sympathy because Schofield J had very nearly decided the application in his favour in July 1985. Nevertheless, even in these deserving circumstances the appellant is said to have no right of appeal.

There are not a great number of interlocutory applications in criminal proceedings. But there are some, and the general rules apply to them as they do in civil procedure. Apart from specific rules allowing the restoration of applications dismissed *ex parte* for want of appearance, there is the inherent jurisdiction of the High Court, to set aside *ex parte* orders on cause being shown why the party could not attend. Indeed if the party has never been served with notice of the hearing, the default order is set aside *ex debito justitiae*.

In *Magon v Ottoman Bank* [1968] EA 156 the situation arose where judgment had been granted in default for want of filing a defence. But the fact proved was that the Ottoman Bank had extended time within which to file defence by its letter dated 28th February 1967. The letter was received on 16th March, 1967 and so judgment having been given on 20th March it was irregularly obtained. The time for filing defence had not yet passed and therefore the appellant was entitled to have the judgment set aside *ex debito justitiae* (as per Duffus JA at p 158). Sir Clement de Lestang VP in characteristic terms, observed that although order 9 rule 10 (as it then was) had been couched in wide language it was still a moot point whether it had been designed to apply only to judgments regularly obtained. But as the point had not been argued, he did not propose to decide it.

Indeed he found it unnecessary to do so “since the power to set aside in a case like the present one stems clearly from the court’s inherent jurisdiction.” In *Craig v Kanseen* [1943] 1 All ER 108, summons was not served upon the defendant/appellant. The address for service was wrong. Lord Greene MR. made this point at p 113-

“The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based is a mere irregularity, or whether it was something worse which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex parte* proceedings, the idea that an order can validly be made against a man who had had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which in my opinion, cannot be sustained”.

The order was set aside and as the note summarises the situation, where the order is a nullity, the person affected by it is entitled to have it set aside *ex debito justitiae*. *Craig’s* case is pertinent in the context of the present case. The general explanation is that by the rules of natural justice, where a person is entitled to appear in person to present his application or defend himself, he must be given the requisite notice of the date of the hearing to be able to do so. It may be objected that the above authorities deal with civil cases whilst the instant case concerns criminal procedure.

But nothing turns on that distinction. There cannot be any difference in principle between an application to appeal out of time in a civil case and such an application in a criminal case, from the point of view of convening the court with notice to the parties. Its within the inherent jurisdiction of the courts to prevent injustice and abuse, and to set aside orders made *ex parte* which ought to have been *inter partes*, as Sir Clement de Lestang pointed out.

Depending upon the same principles that in matters designed to be *inter partes*, a man must not be judged behind his back is the philosophy of construing finality clauses strictly. It is a simple matter to grasp. Parliament has by Section 361(1) of the Criminal Procedure Code provided for appeals from decisions. Then Section 361(8) provided that a refusal to extend time shall be final. That may mean that there shall be no appeal. Parliament has also provided by section 349 of the Code, that there shall be a right to apply to extend time. That can only mean that the court will arrange a proper time and place for the hearing at which the applicant can attend, and be able to present his application (see the excellent approach in *Yusuf v R* (1950) 17 EACA 131). Parliament cannot have intended that the provisions of Section 349 could be subverted and ignored at the whim of the court. There has therefore grown up a body of authorities which distinguish between orders given after a constitutional hearing, even though the decision may appear wrong, and orders given after an unconstitutional hearing, which are in law null. It is said that parliament could never have contemplated perpetuating null orders.

Mr. Owino Opiyo put forward this argument supported by the following passage in *Wade’s Administrative Law*, 3rd Ed pp 149 and 150:-

“In order to preserve their control the courts have made it a firm rule to put a narrow construction on the finality clauses which are commonly found in Statutes. If it is provided that decisions shall

be final or shall be final and conclusive, this is interpreted to mean that there is no further appeal. But that decision is still subject to judicial control if it is *ultra vires*, or even if it merely shows error on the face of the record. Parliament only gives the impression of finality to the decisions of the tribunal on condition that they are reached in accordance with the law. The same principle applies equally to certiorari and to the grant of a declaration. This robust attitude virtually deprives finality clauses of meaning for that purpose, since there is no right of appeal anyway unless expressly given by statute.”

I shall consider the criticism of the principle when dealing with Mr. Gumba-Onywera’s address to the court.

Finality clauses, as they are called, are to be found in many statutes, and although one would think that the same principle would apply to all, that does not seem to be the experience of the courts in Kenya. On Mr. Owino Opiyo’s side there is *Nyakinyua & Kang’ei Farmers’ Co Ltd v Kariuki & Gathecha Resources Ltd*, Civil Appeal No 16 of 1979 Potter JA set out his thoughts as follows:-

“It was submitted to us by Mr. Gautama who appeared for the appellant on this appeal, that even if the Land Control Board was wrong, its decision cannot now be challenged because Section 8 of the Act provides “the decision of a land control board shall be final and shall not be questioned in any court”.

Mr. Lakha, who appeared for the Respondent, provided us with the answer to this submission. He referred us to the English cases of *Anisminic Ltd v The Foreign Compensation Commission* [1969] 1 All ER 208 and *Pearlman v Keepers and Governors of Harrow School*, [1979] 1 All ER 365. I agree with Mr. Lakha that the effect of those cases, which I consider to represent the law of Kenya also, is that the formulae of words designed to protect a tribunal from interference with its ‘final’ decision, such as the well known formula used in section 8 of the Act, are not effective to protect a decision which the tribunal had no jurisdiction to make.

And the issue of jurisdiction can come before the courts in a number of ways. In *Anisminic* the issue was brought before the court by an action for a declaration, in *Pearlman* by certiorari proceedings, and in this case in an action for specific performance.”

That is the opinion of a judge who was responsible for constitutional matters.

The judgment of Kneller JA is of interest because of what will follow, and because he narrows the statement of *Wade* (supra).

“The Act declares that the decision of the board, one way or another, shall be final and conclusive and shall not be questioned in any court, (Section 8(1)). Such words ousting the powers of the High Court to review such decisions must be construed strictly. They do not oust this power if the Board had acted without jurisdiction or if it has done or failed to do something in the course of its inquiry which is of such a nature that its decision is nullity (ie breached the rules of natural justice). *Rev v Northumberland Compensation Appeal Tribunal Ex Parte Shaw* 1 Q. B711, 716 Lord Goddard CJ *Anisminic Ltd v Foreign Compensation Commission* [1969] AC 147 (HL); *South East Asia Fire Bricks Sdn Bhd v Non-metallic Mineral Products & Co* [1981] AC 363 PC.”

The value of Kneller JA’s exposition is that in Kenya, it ends the dispute, engendered by Lord Denning, that the court will review a decision not only if it is *ultra vires* but even if it shows error on the face of the record (see *Wade* (above)). The *South East Asia* case restricted the inquiry to whether the decision was *ultra vires*, and Kneller JA has carried that into effect. The Privy Council were dealing with an exceptionally wide clause; but retained the construction allowing an appeal against an *ultra vires* order.

*Wade* has in effect criticized the strict construction approach, and it may well be that restricting it to decisions which are *ultra vires*, would remove some of the pain felt by those who wish to give a broad natural meaning to the words. At any rate, Mr. Gumba-Onywera took a circumspect view of the matter

and regretted that this court had no jurisdiction. He pointed out that if leave to appeal out of time was not granted to a prisoner convicted of capital robbery, he would not be able to appeal. I would agree with Mr. Gumba-Onywera, that prisoners convicted of capital offences ought to have an automatic right of appeal without the necessity of obtaining leave to appeal out of time. But however that might be, he urged this court to heed the will of Parliament and cited the views expressed in *Oliver N Kabulu v Rep* of 30th July 1984. (It is not easy to trace the exact source). That law provided that:-

“The decision of the High court on any appeal under this Act shall be final and shall not be subject to a further appeal.”

But the present problem did not arise in that case. There was no palpable nullity. It is such an unpalatable argument, that Parliament has “determined” that this Court should not interfere with illegal acts done by the High Court, which may affect the liberty of the subject, that one is caused to pause long before accepting it. There is the law relating to the acceptance of appeals on questions whether a plea was unequivocal. There is the old case of *Chacha s/o Wambura v R* (1953) 20 EACA 339, where this Court’s predecessor allowed an appeal from a plea of guilty to murder and reduced it to manslaughter, because the plea was not unequivocal.

The Tanganyika Criminal Code at that time provided for appeals from the High Court against conviction, on matters of law alone. The construction of a plea was held to be a matter of law; and now in Kenya, if equivocal, it is held to be a nullity and corrected despite Section 379(3) of the Criminal Procedure Code.

There is also the question of putting right on appeal an illegal sentence passed by the High Court, within the powers of Section 361(1) of the Code. It is simply a question of what construction is put on Section 361(1). That is done. A wider construction permits an appeal. A narrower does not.

But if a distinction can be made between lawful though wrong acts, and acts which are null, then the court’s decision in *Ngua v Rep*, Cr App 130 of 1982 is unexceptional. Then Sachdeva, J (as he then was) heard the applicant’s application, even though he thought that the application could not be taken. Presumably in the alternative he dealt with the merits. Having done so this Court could not interfere, even though Madan JA explained that it would have been better to give leave to appeal late.

The decision which causes the greatest concern is *Kariuki & another v Republic*, Criminal Appeal No 177 of 1984. In fact, the applicants, fortunately, not convicted with capital robbery, but apparently simple robbery, wished to appeal out of time. They were escorted to the cells in the court. A letter had been addressed to the court concerning them. It was missed and their presence was unknown to the court and state counsel.

Their applications were heard in their absence. This court on appeal called the situation unfortunate. It could be argued that it was a nullity. The High Court itself ought to have put matters right when the mistake of the court itself was discovered. No court with power to act ought to leave prisoners defenceless when they have been deprived of their rights; and the High Court has ample inherent power.

Whether this court has power to act on appeal, the decision in *Flora Wasike v Destino Wamboko* Civil Appeal No 81 of 1984 illustrates how the court defined the finality clause in Section 67(2) of the Civil Procedure Code to allow appeals from consent judgments. In principle the plea of a criminal is merely his admission and consent to judgment against him. It was the disturbing thought that the litigant had not consented to judgment, or in some cases had been wrongly induced to do so by the court, that caused the finality clause to be construed strictly.

The reality of the situation is that the finality clauses are sometimes construed narrowly and sometimes construed widely. There is no so-called well-known footpath.

A word is due in relation to the outspoken remarks in *Anarita Njeru v Rep* Cr App No 4 of 1979 purporting to overrule *Munene v Rep* [1978] (No 2) KLR 105. The court in *Anarita*’s case, being a court constituted of three judges such as the court in *Munene*’s case, ought to have followed or distinguished

*Munene's* case, unless it was constituted with five judges and so could consider a change in the law. The present situation is that the decision in *Munene's* case is as good as that in *Anarita's* case, and we wait a decision on the point by a bench of five judges.

In the same way we are now bound by *Kariuki's* case. It is certainly on all fours with the instant case; a muddle on the part of the court leading to an *ex parte* decision which ought to have been *inter partes*. It would appear to me that the practice of the court not being uniform as to the construction of finality clauses, there is the possible construction of Section 361 of the Criminal Procedure Code that Parliament did not intend to license illegal decisions to the detriment of the ordinary citizen, on the one hand, as against the severe point of view expressed by the House of Lords, in *Re Racal Communications (Sub nom ... In A Company)* [1981] AC 374 and *Kariuki's* case on the other hand, all of which should surely be considered yet again, by a full bench. At present it is unfortunate that the citizen must lose his rights.

It follows that this court is at present bound to dismiss the appeal. As Apaloo JA agrees in the actual result and as Masime Ag JA also agrees, the appeal is dismissed. As the matter is of considerable importance a direction was given under Rule 32(2) of the Court of Appeal Rules. The thanks are due to the Principal State counsel who assisted us as *amicus curiae* at short notice.

**Apaloo JA.** The facts of this case can lay on no claim to uniqueness. But it has thrown up for consideration, the right of the Court of Appeal to entertain appeals from decisions or orders of the High Court. And as is not unknown for somewhat complex legal questions of this sort, it has given rise to differences of opinion in this court. I will presently address myself to the legal question but before doing so, it is, I think, necessary to relate the relevant facts as they appear on the certified record submitted to us.

The appellant is the registered owner of a piece of land at West Kisumu. He claimed that on the 14th March 1979, the respondents trespassed onto that land with the object of laying water pipes on it. He said in doing so, they damaged his growing crops, to wit, maize. He appears to have reported the respondents' trespass to the police and invited them to put the penal law in motion against them. The latter declined to do so.

Accordingly, he commenced a private prosecution against them. He charged them with forcible entry and willfully and unlawfully damaging property. The respondents denied the charge. This case was tried by the District Magistrate at Maseno in June 1979. On the 2nd July 1979, he convicted the respondents of "trespass" but acquitted them of willfully causing damage to property and imposed fines on them. The respondents were aggrieved by the verdict and appealed to the High Court. In that court, the appeal was allowed, and the case was remitted to the Magistrate's Court for a fresh hearing.

The case returned to the Magistrate's Court for a hearing *de novo* as ordered by the High Court, and was listed before the Magistrate for the first time on the 2nd February 1983. For a variety of reasons for which both sides were blamable in equal degree, the case was adjourned from time to time on no fewer than 15 occasions. It was finally listed for hearing on the 15th March 1985. On that day, the appellant was absent. The respondents were represented by their advocate Mr. Onyango Otieno. Counsel then pointed out to the court that it was 6 years since the retrial was ordered and that on at least 5 occasions when the case was listed for hearing the appellant was unavailable. So he invited the court to dismiss the case for want of prosecution. The learned Magistrate concurred. He said no excuse was given for the absence of both the appellant and his counsel. So he proceeded to dismiss the case and in accordance with section 202 of the Criminal Procedure Code, acquitted the respondents.

If the appellant wanted to set on foot a competent appeal against the order of dismissal to the High Court, he was obliged to do so within 14 days of the order, that is on or by the 29th March, 1985.

He did not do so. About 4 months afterwards, that is, on the 4th July 1985, he filed an application before the High Court for enlargement of time to appeal. Section 349 of the Criminal Procedure Code empowered that court to grant such extension "for good cause". In order to show such cause, the appellant deposed that he was not aware of the hearing date. He said since becoming aware of it, he instructed his

counsel to appeal against it, presumably within the statutory period. He said his counsel, in collusion with the respondent's counsel, refrained from appealing. Mr. Onyango Otieno for his part, deponed in a replying affidavit, that the appellant in truth knew that the hearing of his case was fixed for the 15th March, He swore that the appellant was present in court when the case was fixed by the Magistrate and that the court Clerk is his own presence and that of his then advocate Mr. Menezes, definitely informed him of the hearing date.

He took strong exception of the appellant's claim that he was in collusion with Mr. Menezes to deny the appellant his right of appeal.

The application for extension of time came for hearing before Schofield J on the 10th July 1985. On considering the papers put before him, the judge thought there must have been some confusion in the dates and could, if he had wished, granted the appellant the extension sought. But he seems to have had some misgiving. So he sought an affidavit from Mr. Menezes as to why he did not attend the hearing on the 1st March 1985. For a reason which is unclear, no such affidavit was filed by Mr. Menezes when the matter came before Butler-Sloss J on the 21st March and 18th June respectively. The application was again fixed for hearing on the 25th September, 1987. This time, it was placed before Omolo J. On that day Mr. Onyango Otieno and all the respondents except one who was said to have died, appeared in court.

Neither the appellant nor his advocate appeared. So as he did in the Magistrate's Court, counsel again invited the learned judge to dismiss the application. He then related to the court the history of the matter, the length of time it had been pending in court and the privations the respondents had suffered from the prosecution from which they were acquitted. He then informed the court that after this application was stood down indefinitely, the court "fixed it for hearing today and notified both parties". He prayed for its dismissal.

Apparently, it was at the respondents' behest that the application was fixed for hearing on September 1987. The learned judge thought the appellant was not really interested in prosecuting the motion and that it had been pending in court for over two years. The judge then observed:

"It was the advocate for respondents who asked for hearing and the court duly fixed it for hearing with notice to the applicant's advocate. Neither the applicant nor his advocate is here today to argue the application.

The applicant has had enough time to prosecute his application and since this matter has been pending since 1979, there should be an end to it. I accordingly dismiss the application".

The upshot of this was, that the learned judge found "no good cause" for granting enlargement of time and declined to do so in the exercise of his discretion. Had there been a competent appeal to this Court from the exercise of the judge's discretion on these facts, I would, for my part, find no difficulty in declining to disturb the exercise of that discretion. On the contrary, I would unhesitatingly support him. This fact should be borne in mind because one of the main grounds on which it was said the judge's decision was "irregular and void" was that the proceedings before Omolo J contravened the rules of natural justice and was bad on that account and that although section 361(8) (b) denied an appeal like the present, it was said the supervisory, jurisdiction of the court could be invoked to "take an appeal".

The question of natural justice and the great learning on the court's resistance to ouster or finality clauses arose in this way: When this appeal was opened for hearing before us on the 17th March last, Mr. Owino Opiyo replaced Mr. Menezes for the appellant and Mr. Gumba Onywera stood for the respondents. Mr. Opiyo then informed the court that neither her nor his client was served with a hearing notice before the motion was disposed of in the High Court and there could be no valid "hearing" in law without their being served. This fact was not deponed to in an affidavit, so the respondent's Advocate had no opportunity of investigating, and if need be, challenging it. Mr. Gumba Onywera disclaimed any knowledge of it, but said, as in any event, he was relying on a legal point to defeat the appeal, he would, for purpose of his submission, accept counsel's statement as correct. He then proceeded to advance legal

argument to show why this court was bereft of jurisdiction to hear the appeal. The upshot of this, was that we listened to legal argument *de bene esse* although the facts of the non-service of the hearing notice in the High court was neither established nor admitted by the respondents. That being the position, had I felt able to hold that this Court has jurisdiction to entertain the appeal, I would have felt the greatest reluctance in assenting to a judgment that disposes of this matter on the merits. But as I would seek to show, counsel for the respondents was, in my view humble view, right in contending that this Court has no jurisdiction to entertain this so-called appeal.

I must now address myself to the following legal questions namely, First can this court entertain an appeal if its right to do so is not conferred by statute and the corollary of this question is has this court a general supervisory jurisdiction over the High Court? Second, has the legislature in the instant case denied a right of appeal to this Court? Third, if the answer to the second question is in the affirmative, can the beneficial facility of judicial review be invoked to render the High Court proceedings void and thus give this Court jurisdiction to entertain this appeal?

On the first question, the orthodox and generally accepted statement of the legal position is that appeal is the creature of statute. There is no appeal from one tribunal to another tribunal unless some statute gives the right to it. A right of appeal cannot be implied. How does the position stand in Kenya? Section 64(1) of the Constitution enacts that:-

“There shall be a Court of Appeal which shall be superior court of record and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law”.

It is to be noticed that the Constitution did not confer a total and all embracing jurisdiction on the Court of Appeal to entertain all and every appeal from the High Court. Its only those specifically conferred by enacted law.

Section 3(1) of the Appellate Jurisdiction Act, also confers jurisdiction in the Court of Appeal in these words, that is:-

“The Court of Appeal shall have jurisdiction to hear and determine appeals from the High court in which an appeal lies to the Court of Appeal under any law”.

It follows that if a person exercised or purported to exercise a right of appeal from the High Court to this Court and this Court’s jurisdiction is challenged, he must, to sustain the appeal, be able to point to some enacted legislation which confers this right on him. This, in effect is the consistent trend of judicial decisions in this country and indeed throughout Eastern Africa and elsewhere. If the intending appellant could point to no such law, *cadit quaestio* that must be the end of the matter. On this statement of principle, judicial decisions are legion.

I think it is only necessary to mention four, namely *Nealon v Rep* (1950) vol 17 EACA 120, *Sydney Ralph v Republic*, *Mudavadi v Rep* and *Munene v Rep* [1978] (No 2) KLR 105. In the latter case, although the court said:-

“We cannot accept that argument. It is well established that there is no right of appeal apart from statute, either it is expressly granted by statute or it is not. There is no right of appeal by mere implication or by inference”.

And although no law was pointed to by the appellant as the statutory authorization of the appeal this Court, by majority, Madan and Law JJA (Wambuzi JA dissenting) held that:-

“We will not usurp jurisdiction. We will interpret liberally the extent of our jurisdiction. We are satisfied that we have jurisdiction to entertain the appeal”.

The court then heard the appeal, allowed it and remitted it to the High Court to be heard on its merits.

This decision was rendered in May 1978. Just exactly a year afterwards, the same question that is, whether this court can entertain an appeal from the High Court if it is not specifically empowered by statute to do so arose in *Anarita Njeru v Republic*, Criminal Appeal No 4 of 1979. The decision in *Munene's* case a year previously, was brought to the attention of the court.

The court then re-examined the question in great depth and reviewed and referred to cases in England, Uganda, Nyasaland, Zanzibar, Seychelles, Somaliland and this country and in a judgment which ran into 37 pages of typescript, held that on no account could this Court entertain an appeal which is not specifically provided for by statute. It did not mince words in its disapproval of the *Munene's* holding. The court, Wicks CJ and Miller Ag JA (Law JA dissenting) said:-

“We are satisfied that the principles of pure law have no application in the determination of the jurisdiction of this Court, and we have grave doubt that such law has any application in a Court of Law. Further, we are satisfied that there is no substance in the proposition that the Court may interpret liberally the extent of its jurisdiction. With respect, we are of the view that the decision in *Munene's* case is bad law and should not be followed”.

The Court then concluded as follows:-

“From the authorities we have referred to emanating from countries other than Kenya, it is abundantly clear that this principle has been rigidly adhered to and never departed from”.

That principle is that an appeal being a creature of statute, cannot be entertained unless a statute expressly authorized it. It is to be noted that Law JA dissented from that decision. Being a party to the majority holding in *Munene's* case, this is not surprising. The court also held in the *Njeru* case that:-

“We are satisfied that it has not been established that this Court (meaning the Court of Appeal) has a general supervisory role over the judicial process and that this Court enjoys only that jurisdiction which is conferred on it by statute”

These holdings wholly accord with my own view of the matter and I have never known it to be otherwise. How does this case stand judged against that authoritative pronouncement of the law? This is a second appeal and second appeals to the Court are granted by section 361(1) of the Criminal procedure Code (as amended) in these terms:-

“Any party to an appeal from a subordinate court may, subject to subsection 8, appeal against a decision of the High Court in its appellate jurisdiction on a matter of law”.

Clearly, such a second appeal can only lie to this Court. What is meant by a matter of law within the contemplation of this section, was explained by Gould JA in *Ralph v Rep* [1960] EA 310 in these words:-

“The order of the Supreme Court (meaning the present High Court) in the present case refusing to admit an appeal out of time, though made in pursuance of powers incidental to the appellate jurisdiction of the “High court” was not itself the decision of an appeal. It was an order refusing to extend time within which an appeal might be brought, and as such, it did not fall within what we have held to be the primary purpose of the section, the authorizing of further appeals from the substantive decisions of the High Court (then called Supreme Court) on appeals from lower courts”.

That means, the refusal by the High court to extend time to appeal is not “a matter of law” on which a second appeal was permitted. Accordingly, the court declined jurisdiction and concluded that:-

“... we find that we have no jurisdiction to entertain the appeal which is accordingly struck out as incompetent”.

The facts of *Ralph's* case are on all fours with the instant case. As I have already narrated it, the appellant

being out of time, sought the exercise of the High Court's discretion under section 349 to enable him lodge a competent appeal. That Court declined him the exercise of its discretion.

He then appealed to this court and invites us to reverse the High Court. If *Ralph's* case is still good law, and nobody suggests otherwise, it concludes this matter against him and we should deny him our aid.

Since *Ralph's* case was decided, the Legislature has sought to deny expressly the right of appeal in a case like the present by an amendment which creates a new subsection to section 361 – the enabling section. It adds subsection 8(b) which enacts that:-

“This subsection shall not apply to a refusal by the High Court to extend time.”

As *Ralph's* case has already held that refusal by the High Court to extend time to appeal is not appealable, subsection 8(b) of section 361 would appear, on the face of it, to be otiose. It is a fair inference that the legislature sought to do expressly what it had already done by necessary implication.

The result of an analysis of the case law and the interpretation put on the various subsections by the courts, is that not only is a right to appeal to this Court in a case like the present not conferred, but was expressly barred.

Two cases decided by this court in 1983 and 1985 show that this is the Court's appreciation of the matter. In *Ngua v Rep* Criminal Appeal No.130 of 1982 the appellant applied to the High court to appeal out of time against his conviction and sentence. That application was brought under section 347(1) of the Criminal Procedure Code. The High Court refused to entertain the application, holding that it was incompetent and did not lie. The appellant then appealed to this Court against the refusal. This court thought the application to the High Court was not incompetent and that it was expressly authorized by section 347. But by reason of subsection 8(b) the High Court's refusal to entertain the application, though erroneous, was final. So this Court concluded that:-

“We have no jurisdiction to entertain the appeal before us. We order it to be struck out as incompetent”.

This holding was unanimous (Madan, Potter, JJA and Hancox, Ag JA) dated 12th January, 1983.

In the later case of *Kariuki and another v Republic* Criminal Appeal No. 177 of 1984, in substantially similar circumstances, this Court differently constituted (ie Kneller, Hancox, and Nyarangi, JJA) on the 25th July 1985, unanimously reached the same result. In that case, the appellants applied for extension of time to appeal against their conviction for robbery by the Resident Magistrate. They were in custody and although they were escorted to Court and placed in cells, they were not brought to the well of the court when their application for extension of time came before Bhandari J. The judge thinking that they were absent and were unrepresented, proceeded to dismiss the motion. The appellant appealed to this Court against the judge's refusal. This Court felt that the dismissal of the application was unfortunate and had it conceived itself as clothed with jurisdiction to entertain the appeal, it would have ruled in the appellant's favour. But it declined to do so and delivered itself as follows:-

“Though we have summarized the facts, we are not presently concerned with the circumstances of the offences ... but only with their appeals from the judge's refusal to admit their first appeals out of time. We can only say that in our considered view, the situation is unfortunate in that due to a series of events, the appellants were deprived of a reasonable chance of the exercise of the judge's discretion in their favour, and, accordingly, of their appeals at least being heard whether or not they were eventually dismissed. However, for the reasons stated, we have clearly no jurisdiction in the matter and it follows that both appeals must be dismissed as incompetent”.

That this Court has no jurisdiction to entertain an appeal like the present, is the beaten track of the decisions and we must loyally follow it. I think it is impossible to tread too faithfully in footsteps so wisely placed.

If my appreciation of this matter is right, my answer to the first question, is that this Court has no jurisdiction to entertain an appeal from the High Court unless such appellate right is conferred on it by statute, and my answer to the corollary of that question, namely, whether this court has a general supervisory jurisdiction over the High Court must be in the negative. As to the second question, whether a right of appeal in a case like the present was statutorily barred, my answer is in the affirmative.

As to whether this Court has jurisdiction to supervise and control the decisions of the High Court by the well-known prerogative remedies, that question was answered in the negative by a passage in the *Njeru* case to which I have referred. I respectfully agree with that answer and should, for myself, have thought that answer was self-evident for the very sufficient reason that apart from this Court not being clothed with jurisdiction to control and supervise the High Court or indeed any court, the High Court being a superior court of record, is not and has never been amenable to supervision by the prerogative writs or orders. The only method known to me in criminal jurisprudence by which a party aggrieved may be relieved of the infirmities of a judgment or order of the High Court, is the process of appeal. And as I said, *ad nauseam*, such right can only be granted by statute.

The result of this case, is that this appeal fails and in my view, for two reasons, first, a right of appeal to this Court in the instant case was not conferred, and second, it was expressly barred. Parliamentary supremacy requires obedience to the clearly expressed wish of the legislature. And this is so regardless of the fact that this Court may think the decision of the High Court was plainly wrong or that it offended its own ideas of justice. I would respectfully dissent from any suggestion that this Court can, by a so-called “wide construction” confer a right of appeal on itself.

Such a notion was roundly rejected in the *Anarita* case with which I am in respectful agreement.

I have, for my part, not felt the need to make any excursus into what are commonly known as exclusionary, ouster or privative clauses and the great learning that has grown around them in construing finality legislation.

The fact that the High Court in its unlimited and inherent jurisdiction, evolved prerogative remedies as its ultimate machinery to protect the rule of law and to keep subordinate courts within their jurisdiction, does not follow that this Court, which is a statutory creature with limited powers, can confer a right of appeal onto itself.

On the general merits of this appeal, I confess that the result we have reached, gave me complete satisfaction. To my mind, this was a harassing litigation in which the respondents who were acquitted on a comparatively minor charge as long ago as 1979, were obliged to attend court at the behest of a vengeful private prosecutor on no fewer than 17 occasions between 1979 and 1987 with its attendant trouble and expense. After all, it is in the public interest that there should be an end to litigation.

In my opinion, Mr. Gumba Onywera was right in his contention that this Court has no jurisdiction to entertain this appeal. It is, in my opinion, incompetent and should be dismissed on that ground. My only regret is that we have no power to award costs against a failed private prosecutor.

Had this Court such a power, I would, for my part, not have scrupled in exercising it in favor of these much persecuted respondents.

**Masime JA.** I have had the advantage of reading in draft the judgments of Platt and Apaloo JJA. I agree that this appeal should be struck out on the ground that this Court has no jurisdiction to entertain the appeal such jurisdiction having been taken away by section 361(8) of the Criminal Procedure Code.

I would add that like Platt JA I am apprehensive that in situations referred to in his judgment this legislative removal of jurisdiction is bound to lead to injustice when this court is prevented from correcting decisions that are null and void for failure to accord a hearing to litigants as happened in the present case. Yet that situation can only be rectified by appropriate legislation. Before that is done however I consider that the party affected may usefully advert to the general principle that *ex parte* orders

are always open to revision or reconsideration.

That is a principle of natural justice meant for the protection of a party from the effects of an order made when he had no opportunity of being heard and is particularly applicable in the circumstances disclosed in the decision which it was intended unsuccessfully to appeal against – see *Cozens v North Devon Hospital Management Committee and another* [1966] All ER 799 per Danckwerts LJ.

**Dated and delivered at Kisumu this 23rd day of June , 1988**

**H.G. PLATT**

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**JUDGE OF APPEAL**

**F.K APALOO**

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**JUDGE OF APPEAL**

**J.R.O MASIME**

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**Ag JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**