



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Platt & Apaloo JJA)

CRIMINAL APPEAL NO 45 OF 1988

BETWEEN

JOPLEY CONSTANTINE OYIENG..... APPELLANT

AND

REPUBLIC..... RESPONDENT

JUDGMENT

(Appeal from an Order of the High Court at Nairobi, Aragon J)

November 24, 1988, **Nyarangi, Platt & Apaloo JJA** delivered the following Judgment.

This is an Appeal against the order of the High Court made by Aragon J on 12th February, 1988. The order was after a short hearing on a preliminary issue raised by Mr Chunga, the D.P.P., that the application which was made under sections 67 and 84 of the Constitution of Kenya was incompetent.

The facts of the matter can be stated quite shortly.

The appellant lost his job in the Civil Service. It is not altogether clear when but the appellant formed the opinion that his colleagues had schemed against him and that consequently a crime had been committed so in 1986 the appellant went before the Chief Magistrate for permission for private prosecution.

The Chief Magistrate declined to grant leave. In 1987 the appellant applied yet again for leave but the Chief Magistrate refused to oblige. As a result of those proceedings the appellant filed Criminal application number 467 of 1987 in the High Court, Nairobi.

Before us the appellant put forward the argument that he was not heard by the High Court on the substantive application and that the trial judge erred in his conclusion that the application was incompetent. We do not take that view.

In the situation which presented itself, the appellant's first application to be permitted to prosecute in person is deemed to have been made under section 88(1) of the Criminal Procedure Code. The Magistrate, having formed the opinion that the appellant's complaint did not disclose an offence, made the appropriate order to refuse to admit the complainant under section 89 (5) of the Criminal Procedure Code.

As respects issues of the Constitution, if a question as to the interpretation of the Constitution of Kenya

arose during the proceedings before the subordinate court and the magistrate felt there was substantial question of law involved, the subordinate court could refer the question to the High Court.

So it is the subordinate court which makes the reference under section 67 (1) of the Constitution of Kenya (the Constitution), not the party. All that the party can do is to request the subordinate court to refer the issue to the High Court in which case the subordinate court shall refer as requested.

It is perfectly clear that there was no matter before the Chief Magistrate as to the interpretation of the Constitution. For that reason section 67 of the Constitution did not apply.

So one finds, as we see it, the issue narrowing itself down to one point namely: the subordinate court having not made a reference to the High Court, there could not be anything in the Constitution identified for interpretation.

Back, then, to section 84. That section gives right of different application to the High Court if a person alleges that any of the provisions of section 70 to 83 (inclusive) has been, is being or is likely to be contravened. In the instant case, the appellant was pursuing a right to file a private prosecution. Only the Attorney-General has the right under section 26 of the Constitution to institute criminal proceedings.

No similar right is extended to a private individual and it is obvious that section 88 (1) of the Criminal Procedure Code does not override section 26 of the Constitution. Section 26 (3) contemplates prosecutions by authorized parties in respect of which the Attorney General may act as provided in the sub-section. One hurdle the appellant does not get over even under section 84 of the Constitution is that he fails to show he is within sections 79 to 83 (inclusive) of the Constitution.

For the reasons we have stated, the application under sections 67 and 84 of the Constitution was incompetent. Even if the matter before the High Court was the provision of section 67 (1) of the Constitution, there would be no appeal as no such right has been given. Right of appeal can only be given by statute. This therefore, was not a criminal appeal. We hold that the appeal is incompetent and is struck out.

Dated and delivered at Nairobi this 24th day of November , 1988

J.O. NYARANGI

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JUDGE OF APPEAL

H.G. PLATT

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR