



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, GACHUHI & APALOO, JJ. A.)

CRIMINAL APPEAL NO. 40 OF 1987

BETWEEN

PETER JOHN MAINA GACHIRI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from an order from the High Court of Kenya at Nairobi (B. K. Tanui, J.) dated 23rd January, 1987

in

Criminal Appeal No. 378 of 1986)

JUDGMENT OF THE COURT

The appellant was, on the 29th January, 1986, convicted by the Magistrate's court of stealing and was sentenced to 18 months imprisonment.

He appealed against the conviction to the High Court, as he was entitled to do. The appeal was admitted to hearing and was listed before Mbaluto, J. on the 21st October, 1986. The appellant was absent, so the court adjourned the hearing to the 13th November, 1986. The appellant was thought to be in prison so the judge ordered that he should be brought to court on the adjourned date. On that day the appellant was again absent. Accordingly, the judge adjourned the appeal to "next session."

The appeal finally came before Tanui, J. on the 23rd January, 1987. The appellant was then represented by Mr. Kirundi, Advocates, who informed the court that as the appellant has served his sentence he has withdrawn the appeal. The judge then recorded as follows.

"The file marked as closed".

In view of the withdrawal of the appeal, the learned Judge was disabled from considering the matter on its merits. He, therefore, did not give a decision which he would have been obliged to do under section 354(1) of the Criminal Procedure Code, had the appeal not been abandoned and he had heard argument on the merits.

However, the appellant on the 25th February, 1987, purported to appeal to this court and lodged a memorandum of appeal in which his main complaint was that the learned judge was in error in marking

the file as closed, in his absence, in as much as he did not authorise his advocate to withdraw the appeal. The appellant admitted that Mr. Kirundi was at the material time his advocate but his grievance was that he proceeded to withdraw the appeal without his express authorisation. The question, therefore, is whether the appellant's authority or consent was required as a matter of law for his advocate to withdraw appeal? In his opinion, no such authority was required. The settled legal position is:

"The clients consent is not needed for a matter which is within the ordinary authority of counsel.: this if, in court, in the absence of the client, compromise or settlement is entered into by counsel whose authority has not been expressly limited, the client is bound." (see Halsbury's Law of England 3rd Ed. Page 649 paragraph 1181.-

In withdrawing the appeal, Mr. Kirundi must have felt, using his professional judgment, that the appeal stood no chance of success and was not worth pursuing especially as his client, the appellant, had already served his sentence and regained his liberty. The decision to withdraw the appeal was, in the circumstances, binding on the appellant.

In view of the withdrawal, the High Court did not exercise its appellate jurisdiction and did not, therefore, reach a decision on which appeal to this court can be based in accordance with section 361(1) of the Criminal Procedure Code Act. That being so, in our judgment, no proper appeal lay before this court. The purported appeal is incompetent. And ought to be and is accordingly struck out.

Dated and delivered at Nairobi this 10th day of July, 1987.

J.O. Nyarangi

Judge of Appeal

J.M. Gachuhi

Judge of Appeal

F.K. Apaloo

Judge of Appeal

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

Deputy Registrar