

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Application No NAI 9 of 1987

MuyongaAPPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

Judgment.

November 10, 1987, Nyarangi, Platt & Apaloo JJA delivered the following Judgment.

This matter raises the question whether the court has jurisdiction to entertain it. The applicant seeks to stay the hearing of the R.Ms court criminal case number 2826 of 1985 against the applicant now pending before Ang'awa (Miss), senior resident magistrate Nairobi, until the hearing and disposal of an appeal challenging the orders of the High Court (Aragon J) in the High Court miscellaneous criminal application number 379 of 1987.

It is common ground that in the middle of the trial before the magistrate, the applicant alleged that the trial magistrate had shown bias against him. An application under section 81 of the Criminal Procedure Code, for an order to transfer the case to another criminal court was heard and refused by Mr Justice Aragon.

We were much pressed by Mr Adala for the respondent to invoke the jurisdiction under rule 1(3) of the rules of this court. We do not consider it necessary to encumber this ruling citation of numerous authorities.

We can feel no doubt that rule 1(3) concerns inherent powers exercisable in an appeal which is properly before the court. Rule 1(3) cannot and does not confer jurisdiction. We derive some comfort from an earlier decision of the predecessor of this court in East African Railways corporation v Hugges Ltd, Civil Application No 37 of 1974 (unreported).

The only remaining point is that Mr Adala urged us to deal with the matter on the basis of substantial justice. We decline for a simple reason and a good reason: without jurisdiction, there is no basis for applying the principle of substantial justice.

It was accepted by counsel that rule 31 relates to appeals before the court. For these reasons, the matter is incompetent and is struck out.

Order accordingly.