IN THE COURT OF APPEAL

AT KISUMU

(Coram:Hancox JA, Platt & Gachuhi Ag JJA

CRIMINAL APPEAL NO 88 OF 1985

BETWEEN

AZOLOLO..APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from the High Court at Kisumu, Schofeld J)

JUDGMENT OF HANCOX JA

The appellant had been employed for some ten years as a civilian clerk in the Provincial Police Headquarters at Kisumu. He was one of four persons so employed at the material time in a section which was under the charge of Paul Mutua Masila, PW 6, the Provincial Executive Officer. The second in command of that section was David Heyi, PW 2, in whose custody the police road travel warrants book was kept and who was a signatory to those warrants. Six of those travel warrants formed the subject of the forgery charges against the appellant in this case. The charges of stealing by a person employed in the public service, contrary to section 280 of the Penal Code, represented (save in two instances) the amounts shown on the travel warrants which the appellant was alleged, and indeed the magistrate so found, to have misappropriated to his own use. There were thus six separate transactions, each represented by a forgery charge and a theft charge, with which the appellant was faced when he appeared before the Acting Resident Magistrate at Kisumu on April, 4 1984. All the offences were alleged to have occurred in the months of March, April and May, 1983, and it was the appellants contention at his trial that he had been instructed to prepare the travel warrants by Heyi, who brought him the travel warrants book and a list of the personnel to be transferred. At least four of the travel warrants in question were admittedly signed by Heyi, against whom the trial magistrate obviously felt there was a degree of suspicion.

The magistrate found that the details inserted in the warrants by the appellant were false, in the sense that they were for journeys that were never made by the police officers concerned, and in one instance that the officer named x in the travel warrants does not even exist. He went on to hold that the travel warrants were false in themselves, that there was clearly an intent to defraud proved against the appellant and forgery was established contrary to section 349 of the Penal Code. He held that the appellant therefore forged all the six travel warrants which were the subject of counts 1, 3, 5, 7, 9 and 11, convicted him on those counts and sentenced him to twelve months imprisonment concurrently on each count.

As regards the charges of stealing by a person employed in the public service, counts 2, 4, 6, 8, 10 and 12, the magistrate found that the appellant had inserted his own vehicle, a Peugeot Saloon No. KND 841, in the travel warrants for journeys that were never made, and that the inference was irresistible that he had stolen the amounts stated in the stealing charges, which should rightfully have been paid into the Provincial Police Headquarters' coffers at Kisumu. In some cases he used the fictitious name of H.A. Mugobe, but not in respect of the cheque for Shs 2,609/-, which was cashed for him by Winifred Achieng' (PW 9) at the Kenya Commercial Bank in May, 1983. Accordingly the magistrate convicted the appellant also on counts 2, 4, 6, 8, 10 and 12, and awarded him eighteen months' imprisonment on each count, to run concurrently with each other and with those passed on the forgery counts.

The learned Judges on the first appellate court allowed the appellant's appeals on counts 9, 10, 11 and 12, representing two transactions, on the basis that the roll which allegedly showed that there was no such officer as P. C. Patrick Onyango was never produced at the trial, that his nonexistence was therefore not satisfactorily proved and consequently the falsity of the travel warrants in respect of those two transactions had not been established. They, however, held that all the other travel warrants, forming the subject of counts 1, 3, 5 and 7, did not merely contain false statements but were false documents in themselves, within the definition in section 347 of the Penal Code and within a passage which they then cited from *Kenny's Outlines of Criminal Law*, 19th Edition at page 387.

In respect of the stealing charges the High Court held as follows:

> "The appellant received money on the basis of these travel warrants four of which were proved to be forged. He received the money in five cases by cash and in one case by cheque, after the relevant documentation had been approved. He may have obtained the money on the basis of improper documentation, but he did not steal the money. There was no taking or conversion on this part, and theft was not proved .
>
> Accordingly we allow the appeal in respect of counts 2, 4, 6, 8, 9, 10, 11 and 12".

The matters with which the court, on the second appeal, is now concerned, accordingly, are an appeal from the High Court's dismissal of the appellant's first appeal on the first four forgery charges (counts 1, 3, 5 and 7) and a purported cross appeal by the Republic, filed during the course of the hearing, against the same court's decision allowing the appellant's first appeal in respect of the stealing charges (counts 2, 4, 6 and 8). I say "purported appeal" because although there have been instances in which the Republic has preferred a second appeal against the High Court's decision on an appeal from a subordinate court, notably in *Republic v Francis Otieno Oyier,* Criminal Appeal 158 of 1984, and *Republic v Zacharia Shilisia Agweyu,* Criminal Appeal 64 of 1979, the point as to whether there is jurisdiction to entertain a second appeal by the Republic through the Attorney-General does not appear to have been specifically decided. In this connection I note that this court's predecessor said in *Chandaria v Republic* [1966] EA 246 at p 248 (an exchange control case on appeal from the High Court of Kenya):-

> "It may be observed in passing that the rules of this court make no provision for cross-appeals in criminal appeals. We think, however, that it was clearly right to give notice to the court and to the appellant of the intention to raise this matter and it was immaterial whether it was formally done by notice or informally by letter."

In that case, as I understand it, however, the Republic was not substantively appealing against the allowance of an appeal by the High Court (which had dismissed the first appeal), but against that portion of the High Court's judgment which had held that certain immigration forms completed by the appellant were inadmissible. In other words the Republic put forward an opposing contention in law to set against that of the appellant, but within the appellant's appeal. The point as to whether the opening words of sub-section (1) of section 361 of the Criminal Procedure Code namely–

> "A party to an appeal from a subordinate court may, subject to sub-section (8), (which is irrelevant here) appeal against the decision of the High Court in its appellate jurisdiction on a matter of law…"

permit the Attorney-General so to appeal, has never been the subject of a considered decision by this court.

Before I deal with the aspect of jurisdiction, however, I propose to consider the appellant's appeal against the dismissal of his appeal on the forgery charges. The learned judges of the High Court correctly appreciated the law as to when a document is properly said to be forged, but did they correctly apply those principles of law which they stated to the travel warrants with which we are concerned in the instant case?

In my view, applying the passage quoted from *Kenny's Outlines of Criminal Law* by the High Court, which is in agreement with *Russel on Crime*, 12th Edition at page 1225, *et seq* and the cases therein set out, the travel warrants in question were that which they purported to be, namely warrants authorising the journeys respectively by P.C. Ismail Obati and his wife, P.C. H. Amira and his wife and family and sergent James Odhiambo and his wife and family, on the dates and to the destinations stated in them. Each warrant obviously contained numerous false statements and the basis for each, namely the journey said to be authorised, was false. But it cannot be said that the warrants were false in themselves, in that they purported to be what they were not. I think the situation is precisely covered by the penultimate sentence of the passage quoted from *Kenny*.

Very probably the evidence would have established charges of fraudulent false accounting within section 330(a) of the Penal Code, a travel warrant being a document which belonged to the appellant's employers. Unfortunately no such charges were brought, and we do not think that sub-section (4) of section 361 of the Criminal Procedure Code enables us to substitute a conviction under section 330. The appellant is therefore entitled in law to succeed on his appeal in respect of counts 1, 3, 5 and 7.

I therefore now turn to the cross-appeal by the Republic. The Republic objects to the findings at the conclusion of the High Court judgment, that, notwithstanding that the appellant (who is now also, of course, the respondent to the cross-appeal), had received the money stated in each theft charge on the basis of the travel warrants, there was no taking or conversion on his part and theft was not proved.

Before this court can consider this it is necessary to be satisfied that we have jurisdiction to entertain an appeal (whether it be, by way of a substantitive or a cross-appeal) by the Republic. I have already set out the opening words of sub-section (1) of section 361 of the Criminal Procedure Code. It is well settled that a right of appeal to any party does not exist unless it is conferred on him by a statute. Accordingly, does sub-section (1) apply to the Republic? In my view it cannot be gainsaid that the Republic was a party to the appeal from the subordinate court in this case. The sub-section does not contain limiting words such as are to be found in sub-section (3), which refers to a party to an appeal who has, or has not, as the case may be, been properly convicted by the subordinate court. Similarly, sub-section (4) limits the party to the appeal by providing:-

> "Where a party to an appeal has been convicted of an offence .."

There are no such limiting words in sub-section (1), and I conclude, therefore, that that sub-section must be given its plain meaning, and that it is not necessary to look elsewhere for a restricted meaning. It is not permissible, in my view, to resort to rules of construction or interpretation if the words are plain, and I quote from Lord Somin L.C's judgment in the Privy Council case of *King-Emperor v Bondari Lal Sharma* [1945] 1 All ER, 210 at p. 216 as follows:-

> "Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used".

In my view the phrase "A party to an appeal from a subordinate court" is not confined to a convicted person. Accordingly the Republic, having been a party to the first appeal from the subordinate court, is in my judgment entitled to appeal to this court from a decision of the High Court allowing an appeal. This conclusion would appear also to gain support from *Uganda v Khimchand Kalidas Shah* [1966] E.A. 30

where the Uganda Public Prosecutor appealed from a High Court decision quashing the Respondent's conviction. Furthermore, in the recent case of *Republic v Wariara Kimani & Others*, Criminal Appeal 91 of 1984, though admittedly not after full argument, this Court consisting of Kneller and Nyarangi JJA and myself said, in relation to a preliminary point taken by the respondents on an appeal by the Attorney-General from a decision of the High Court :-

> "Mr Otieno's submission is that the Attorney could not appeal from the decision of the learned judge because he had in effect decided nothing save to say that the trial by the magistrate was a nullity and we should begin committal proceedings. The Attorney's appeal lay under section 348A Criminal Procedure Code and that was not applicable to anything the High Court decided for it was confined to a subordinate court's order and the provisions of that section ousted those of section 36(1) of the Code which were confined to any party to an appeal from a decision of the High Court in its appellate jurisdiction. Mr Chunga's point is that section 348A is nothing to do with this appeal and it is a simple appeal by the Attorney on behalf of the Republic, which was a party to the appeal from the learned judge of the High Court's decision in its appellate capacity, and therefore within the provisions of section 361(1) of the Code. We agree with Mr Chunga's submission. It is well within the provisions of section 361 of the Criminal Procedure Code".

I therefore proceed to consider the ground of the cross-appeal to which I have already referred. The magistrate's finding on the stealing aspect of the case was that the appellant received the monies stated in the six stealing counts; namely counts 2, 4, 6, 8, 10 and 12, in his own name or that of H.A. Mugobe. We are, of course, no longer concerned with counts 10 and 12. He went on to find that none of the three police officers, P.C. Ismael Obati, Corporal E Amira or Sgt James Odhiambo, had made the journeys stated in the respective travel warrants which were the subject of counts 1, 3, 5 and 7 and in respect of which the theft charges were brought as count 2, 4, 6 and 8. There was evidence on which he was entitled so to find. Though the travel warrants were not, in law, forgeries, they were undoubtedly fraudulent in the sense that they contained false statements and were issued in respect of journeys that were never made. The magistrate concluded by finding, in effect, that the inference was irresistible that the appellant had stolen the respective amounts which were the subject of the stealing charges. I entirely agree. As this Court said in *Republic v Francis Otieno Oyier* (supra) it was a finding based on credibility of the witnesses, and unless no reasonable tribunal could make such a finding or the magistrate had erred in his findings, or had acted on wrong principles, the first appellate court should have respected it.

I consider the High Court erred when it said that the appellant did not steal the monies. The circumstantial evidence in my view established beyond reasonable doubt that he did and it was incapable of explanation upon any other reasonable hypothesis. In my judgment the Republic is therefore entitled to succeed on its cross-appeal.

The result is, then that we allow the appellant's second appeal on counts 1, 3, 5 and 7, quash the convictions thereon and set aside the sentences imposed. I would also allow the Republic's cross-appeal as regards counts 2, 4, 6, and 8 and restore the convictions thereon and I would make the same order as we did in *Republic v Francis Otieno Oyier*, where the aspect of sentence, (which was then, as here, a ground of appeal to the High Court), was not decided upon (because the appeal had been erroneously allowed) and remit the case back to the High Court for consideration of the sentence by another judge. However, the majority of the court take a different view and the cross-appeal is therefore dismissed.

Platt Ag JA. I would happily agree with the result of this appeal as set out by Hancox JA in his judgment, but for an acquittal by the High Court on first appeal to it, from a decision of the subordinate court. As Hancox JA has pointed out, it is well-settled that a right of appeal does not exist unless it is conferred by Statute; and in the instant case, that depends on section 361(1) of the Criminal Procedure Code; which provides that:-

> "A party to an appeal from a subordinate court may, subject to sub-section 8, appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence".

It is to be gathered from those provisions, that "second appeals" as the marginal note calls them, are limited appeals; limited to matters of law, and limited in the case of sentence to cases of excess of jurisdiction beyond section 7 of the Code, unless the High Court has enhanced sentence.

It is by its tenor a restrictive provision in general dealing with an appellant's convictions. It is convicts, of course, who might wish to appeal against sentence. Sub-section (3) deals with the case of a convict not properly convicted on some count, but can be properly convicted on another, in which case the Court of Appeal can affirm, reduce or enhance the sentence in substitution. Sub-section (4) deals with alternative verdicts and lawful sentences which apply to them. Sub-section (5) provides that an appeal may be dismissed, although the point raised might be decided in favour of the appellant, if it considers that no miscarriage of justice has in fact occurred.

It is difficult to see this sub-section as referring to other than the appeal of a convicted person. Sub-section (6) is for granting bail to a convicted person who is a party to the appeal. Sub-section (7) deals with revisions of the High Court. The High Court cannot convert a finding of acquittal into one of conviction. So this can only concern convicted persons. Subsection (8) again emphasizes the limited character of appeals; there are to be no third appeals, and no appeals against a refusal to admit an appeal out of time. The general words "a party to an appeal" were originally employed to cover persons convicted, and others who had had an order made against them, such as costs or forfeiture. Hence, as Hancox JA has pointed out, the question for decision is whether the section can be read as permitting the Attorney-General to appeal against an acquittal by the High Court.

The problem may arise in two ways; the first when the Magistrate's Court has convicted a person, but the High Court on first appeal has acquitted that person; and the second when both the Magistrate and the High Court have acquitted a person, may the Attorney-General appeal to this Court under section 361 of the Criminal Procedure Code? The essence of the argument that the Attorney-General can so appeal, lies in the generality of the words of sub-section (1) – "a party to an appeal from a subordinate court" may appeal against a decision of the High Court in its appellate jurisdiction on a matter of law. It is easily pointed out, that the Attorney-General would be a party to the appeal from a subordinate court, whether or not that court convicted or acquitted. The Attorney- General is always represented on appeals. But it is section 348A of the Code which provided for the first time in 1967 (Act No. 13 of 1967 section 3) that the Attorney-General could appeal from an acquittal (*inter alia*) after a trial held by a subordinate court, to the High Court on a matter of law. It follows then that whether subordinate court convicted or acquitted, the Attorney-General would be either respondent or appellant, with the only difference that, in an appeal by a convicted person, the appeal could be on a matter of fact as well as law (see section 347(2) of the Code); whilst if the Attorney-General appealed against an acquittal, that would only concern a matter of law.

The Attorney-General thus being a party to an appeal from a subordinate court, is it proper to permit him to appeal to the Court of Appeal against either the acquittal of the accused person by the High Court on first appeal, or the double acquittal of the accused by the subordinate and High Courts as a result of the operation of section 348A of the Code?

In my opinion, the Court is not entitled to give the Attorney-General any such right of appeal. But I must express regret at not being able to agree with those decisions, in which this right has been granted to the Attorney- General. In some of those decisions there was no argument on the question now raised. In the latest decision despite the existence of earlier decisions it did not proceed beyond the simple grammatical application of the general words of section 361(1) of Code. It is admitted that a full argument was not addressed to the Court on the question of whether the general words in the section having been originally applied to convict the appellant it should then be widened to include an appeal by the Attorney- General in the case of acquittal. With reference to *Uganda v Shah* [1966], E.A. 30 nothing is said as to the provisions of law in Uganda which justified the appeal against the acquittal by the High Court being entertained by the Court of Appeal for Eastern Africa. There is reasoned no decision of this Court or its predessessor on the point now in question. Therefore it follows that the Court is not bound by decisions in which no reasons were given on this point for allowing the Attorney-General to appeal against an acquittal by the High Court acting in its appellate jurisdiction, and a *fortiori* it is not bound by decisions in which the point was not taken and no reasons were given at all as in the *Uganda* case.

As I have said, the opening words of section 361 are general words. Lord Hodson explained in *Public Prosecutor v Oie Hee Koi* [1968] A C 829, at p. 860 when dealing with an offence for "any person" to have in his possession without lawful excuse in a security area firearms, ammunition or explosives, that it was true the language of section 57 [of a certain Malaysian Act] covers any person; but upon its proper construction, section 57 could not be read so widely as to cover members of the regular Indonesian armed forces, fighting as such in Malaysia in the course of what it had been assumed, was an armed conflict between Malaysia and Indonesia. The Act was an International Security measure, part of the domestic law, and not directed at the military forces of a hostile power attacking Malaysia. That is a vivid illustration of reading too much into general words, which were grammatically applicable, but would if so read, alter the real intention of the Legislature. That case directs attention to the true intention of the Legislature, and I propose to consider the historical background to the Code as well as the presumptions which may legitimately be drawn. The Code must be read as a whole.

One of the fundamental notions of English Criminal Law is that prosecution should not be persecution, so that for instance, a person should have extended to him a fair hearing; he should not be tried again for the same offence, and should not be punished twice for the same offence. Once a person had been acquitted he had acquired his freedom which was not to be taken away lightly. It has not been possible, however, to grant an accused person his freedom on acquittal in all events. There was the procedure of a case stated. In 1959, section 379, of the Code was enacted, whereby if a person tried by the High Court in its original jurisdiction, had been acquitted, the Attorney-General could file a certificate that a point of law of exceptional public importance had arisen, which in the public interest the Court of Appeal should determine. That court would then deliver a declaratory judgment, which would not operate to revise the acquittal, but would bind the courts in the ordinary way as the law to be followed.

By 1959 section 361 of the Code operated only in the case of convicted persons. That appears from the nature of the section in all its parts, as explained earlier, in the context of the Code at that time. The powers of the High Court on an appeal against an acquittal, enacted under section 348A, in 1967, are clearly set out in section 354(3)(c) of the Code, as distinct from appeal against conviction in section 354(3)(a) of the Code. Indeed, the powers of the High Court in an appeal against conviction, against sentence, against acquittal, and from any other Order, are set out separately, from which a coherent code emerges, in relation to the various kinds of appeals which may be lodged before it. Section 361, by contrast, has no such logical development, if it should be that the Attorney-General should be able to appeal against an acquittal in either of the two situations which have been envisaged. Compared with section 354 (3)(c) above, section 361(2) is not especially apt to deal with acquittals, and indeed it is not clear whether bail should be taken to ensure the respondent's attendance for conviction and sentence. In at least one case, the acquitted respondent is still at large awaiting recapture. It is not clear either in what way sentence should be imposed, since this Court has no powers on second appeal to pass sentence. It may be questioned whether it is apt for this Court to enter or cause to have entered a substantive verdict of guilty after an acquittal, having in mind that there is provision for declaratory judgments in section 379 of the Code. It does not appear logical that an acquittal by the High Court should be treated on a first appeal to this Court as a declaratory matter, but after two appeals to a gap with no clear results being provided for. Of course, this court can send everything back to the lower courts, with probably unfortunate delays, and in the case of the Attorney-General losing the appeal under section 348A, after the accused person has been acquitted twice. That circumstance especially causes one to wonder whether Section 361 was really intended to deal with acquittals.

The essence, then, of the objection to extending section 361 to appeals against acquittals, is that while section 348A was carried through to a fairly logical conclusion in section 354, and section 379 received its concomitant provisions in a later sub-section of that section, there are no express provisions for the result of an appeal against an acquittal in section 361.What has happened is that without special provision, the general words of section 361, which were designed to deal with the appeals from convicted persons, and other persons against whom orders were made, are being construed more widely to accommodate appeals against acquittals. It should be said here that in the Court of Appeal Rules, no provision has been made for cross-appeals by the Attorney-General against an acquittal, which has been proposed in this case.

It is a principle of construction that the history of an enactment may be considered. The Court is not to be oblivious of the history of law and legislation in order to fairly ascertain what the intention of Parliament is (see *Maxwell on Interpretation of Statutes*, 12th Ed. P. 47 et seq.). It would be normal to read section 361 as at the time it was passed. (see *Maxwell* ibid p. 85). There is a presumption against creating new and enlarging existing jurisdictions (*Maxwell* p 159). In *Craies on Statute Law* 17th Ed. p. 122 it is said that express language is necessary to add to the jurisdiction of a superior court. "The creation" said Lord Westbury "of a new right of appeal is plainly an act which requires [distinct] legislative authority". (see *Smith v Brown* (1871) LR 6 QB 729, 735 approved in *Seward v Vera Cruz* (1884) 10 App Cas 59; particulary *Attorney–General v Sillem* (1864) 10 HLC 704, 720). A modern example lies in *Gelberg v Miller* [1961] 1 W.L.R. 459. The provisions of section 1(1) of the Administration of Justice Act (1960) that – "for the purpose of disposing of an appeal under this section the House of Lords may exercise any powers of the courts below": does not authorise the House to exercise the powers of the Divisional Court or Court of Appeal (Criminal Division), to certify that a point of law of general public importance is involved in its decision in a criminal cause or matter; (*Maxwell* pp. 160 and 161). On the other hand, if express words are used, jurisdiction will be exercised.

Therefore it is my view, that section 361 having originally been designed to cater for appeals by convicted persons (*inter alia*), and not for appeals brought by the Attorney-General against acquittals, must have been expressly enlarged if such appeals against acquittals are to be fitted into its general words. As section 361 was not expressly enlarged for this purpose since the enactment of section 348A of the Code, it is neither legitimate for historical reasons, nor for reasons of principle based on presumptions which may properly be drawn, to include appeals against acquittals within the general words in section 361. It is certain that the legislature did not envisage or intend section 31 to cater for such appeals before 1967, and there have been no express indications that this must be the case after 1967.

It follows that I would allow the appeal of the appellant, quash all convictions and sentences, and set him at liberty forthwith unless held for any other lawful cause.

Gachuhi Ag JA. I too would agree with the result set out by Hancox JA allowing the appellant's appeal on counts 1, 3 and 7 but do not agree with him on the cross-appeal.

To start with, the point now raised by the cross-appeal has not been argued and decided before and has not really been argued before us. The respondent in the cross-appeal is a layman. I doubt whether he really conceived what would be the result if the cross-appeal is allowed. He was released from prison by the High Court on his appeal having been allowed after serving the sentence imposed on counts 2, 4, 6, 8, 9, 10, 11 and 12. He has been enjoying freedom since then. If cross-appeal succeeds, he has to go back to serve another six months. It does not seem that our Criminal Procedure Code (cap 75) has provided for such eventuality.

For the state to have right to appeal to the Court of Appeal, such right has to be specifically conferred by Statute. To start with the state had no right of appeal against the acquittal by the subordinate court until such right were confirmed by section 348A of the section reads:-

> "When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney-General may appeal to the High Court from the acquittal or order on a matter of law."

This right was the subject of amendment of the Criminal Procedure Act (cap 75) by Act No 13 of 1967.

The same Act brought amendments to section 354(3)(c).

Appeals from an acquittal by the High Court in the exercise of its original jurisdiction is by a certificate signed by the Attorney-General that the determination of the trial involves a point of law of exceptional public importance. The Court of Appeal shall then review the case or such part of it. This provision in section 379(5) of the Criminal Procedure Code (cap 75). The effect of such an appeal is to obtain a declaratory judgment on the point of law without however prejudicing the acquittal. A declaratory judgment shall not operate to reverse an acquittal.

Section 354(3)(c) allows the Attorney-General to appeal from acquittal by the Subordinate Court to High Court. Section 379(5) allows appeal from an acquittal by the High Court to Court of Appeal only for declaratory judgment on a point of law on exceptional public interest. There is no specific provision allowing an appeal by the Attorney-General from an acquittal by the High Court in its appellate jurisdiction.

Section 361 deals with second appeals. It starts with "a party to an appeal from a subordinate court ….." My feeling is that" "a party to an appeal" in this section does not include the Attorney-General. The section gives the convicted person a right of second appeal to the Court of Appeal. The section would also apply where the Attorney-General had appealed against the acquittal, while the other party would appeal to the Court of Appeal. The section would also apply in case of private prosecution appeal.

I am aware of previous decision by this Court on appeal by the Attorney- General, but those appeals were not argued on the point as now discussed in this judgment. Furthermore, there are no reasons given why it was right to allow the Attorney-General to appeal an acquittal by the High Court to the Court of Appeal overlooking the provisions of section 379(5) of the Criminal Procedure Code.

Taking into consideration of all these provisions, I feel that the cross appeal filed by the Attorney-General is not proper and it should be struck out.

Dated and Delivered in Kisumu this 10th day of September 1986.

A.R.W.HANCOX

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JUDGE OF APPEAL

H.G.PLATT

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR