IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KNELLER, HANCOX & NYARANGI JJA)

CRIMINAL APPEAL NO 177 OF 1984

BETWEEN

KARIUKI & ANOTHER ..... APPELLANT

AND

REPUBLIC..... RESPONDENT

JUDGMENT

(Appeal from an Order of the High Court at Mombasa, Bhandari J)

July 25, 1985, **Kneller, Hancox & Nyarangi JJA** delivered the following Judgment.

We have consolidated these two appeals. The two appellants were charged jointly before the Acting Resident Magistrate at Mombasa with robbery contrary to section 296(1) of the Penal Code. They were convicted and each sentenced to four years' imprisonment plus four strokes corporal punishment. The offence involved a quantity of Kenya and foreign money, local and foreign cheques to a total value of Shs 355,359.15 representing takings for the Jadini Hotel and African Sea Lodge on the South Coast, which were to be banked by the accounts clerk of the former at Barclays Bank, Nkrumah Road, Mombasa. The money was placed in the glove box of a Volkswagen Mini Bus, KVU 284, which was conveying tourists into Mombasa.

The driver of the mini bus stopped at the Castle Hotel in Moi Avenue to enable the accounts clerk to collect a counter signature on one of the cheques from the manager. While he did so two men entered the Mini Bus and at gun point threatened the driver, closed the sliding door to the bus and instructed him to drive away. The money was found in an envelope in the glove box and the two men separately left the vehicle. The offence took place during the morning hours of the January 18, 1983.

It is worthy of significance that the driver of this vehicle, the accounts clerk, and the driver of another minibus belonging to the same group were arrested as suspected of being involved in this offence. However, on March 1, the driver of the original mini-bus said he recognized the first appellant in the Castle Hotel and the police were called. Eventually the three original suspects were released and the two present appellants charged with the offence.

Both appellants were represented at their trial by Mr S K M Mwangi, advocate, and the date of their respective sentences was the March 27, 1984. Neither of the appellants appealed to the High Court within the 14 days period of the sentence as stated in section 349 of the Criminal Procedure Code. Accordingly they applied under the priviso to that section for the admission of their respective appeals out of time by applications dated July 19, 1984. Their petitions of appeal, filed on the July 23, 1984, each contained lengthy grounds, but in particular attacked their respective identifications by the prosecution witnesses, upon which of course, their convictions mainly depended.

Their applications came before Bhandari, J, on the August 23, 1984, on which occasion it was stated that the appellants were absent and unrepresented, and that Mr Metho appeared for the Republic, as he did in this Court. The reason each appellant gave for the delay in preparing his appeal until July, 1984, (not July, 1983, as the record erroneously states) was that he was waiting to hear from his advocate, meaning Mr S

K M Mwangi. The learned judge was not impressed by these reasons, and held that the delay was inordinate and that, in effect, good cause had not been shown for the admission of the respective appeals out of time under the proviso to section 349.

When the two appellants' appeals from the decision of Bhandari J came before this court for hearing it was disclosed that there was in existence a letter from Mr S K M Mwangi dated June 16, 1984 to the prison authorities stating that he had represented the appellants in the Magistrate's court and that they instructed him to appeal against their convictions and sentences. The advocate further stated that a memorandum of appeal had been filed and that a hearing date was due to be fixed by the High Court registry. Mr Metho, learned Principal State Counsel, informed us that he was not aware of this letter when the application came before the High Court, and that had he been aware of it he would not have opposed the granting by the judge of leave to appeal out of time. He also said that the judge was not aware of the letter. It is therefore more than a reasonable possibility that if the judge had known of this letter he would have exercised his discretion under section 349 differently. It is perfectly clear, as Mr Metho submitted before us, that an exercise of discretion upon incomplete or mistaken facts could amount to a matter of law upon which a party to an appeal from a subordinate court to the High Court could appeal to this court under subsection (1) of section 361 of the Criminal Procedure Code, if that provision is applicable.

However sub-section (8) of section 361, added by the Statute Law Miscellaneous Amendments Act, 1978 specifically states that the section shall not apply to a refusal by the High Court to admit an appeal out of time under section 349, and that such refusal shall be final. Subsection (1) is expressly stated to be subject thereto. It has been said many times by this Court that we have no inherent jurisdiction, and that we can only hear an appeal if the right thereof is conferred by statute. As section 361 is specifically stated not to apply to a decision such as the one appealed from in this case, it follows that we have no jurisdiction to entertain these appeals.

We have considered the appellants' supplementary grounds of appeal to his court in which, *inter alia*, they each emphasize that they had no communication with their advocate for periods of one and half and two months respectively. We have also considered their oral submissions to this Court, in the course of which the second appellant drew to our attention that on the August 23, 1984, the date of the hearing of their applications before Bhandari J, each of them had been taken to the cells of the court at Mombasa, but they had not been taken before the learned judge. This led to his recording of the fact that they were absent and unrepresented.

Though we have summarized the facts of it, we are not presently concerned with the circumstances of the offence or of the appellants' substantive appeals from their convictions thereof, but only with their appeals from the judge's refusal to admit their first appeal 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 clearly have no jurisdiction in the matter and it follows that both appeals must be dismissed as incompetent.

July 25, 1985

KNELLER, HANCOX & NYARANGI JJA