



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Kneller, Nyarangi, JJA and platt, Ag.JA)**

**CRIMINAL APPLICATION NAI 4 OF 1984**

**BETWEEN**

**OLIVER MUNYAKA KABULU.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An application for extension of time and for leave to institute an intended appeal from a judgment of the High court of Kenya at Kakamega (Gicheru, J ) dated March 23rd 1984*

*Criminal Appeal 76 of 1984)*

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**JUDGMENT**

Oliver Munyaka Kabulu by a motion on notice filed on June 12, 1984 expressed to be brought under rules 4 and 40(b) of the Court of Appeal Rules asked us to extend the time limited by rule 40 for instituting his appeal from the judgment of the High Court (Mr Justice Gicheru) at Kakamega on March 23, 1984.

Mr Justice Gicheru dismissed his appeal from his conviction and sentence by court martial in Nairobi on November 22, 1982. He was convicted of taking part in a mutiny contrary to section 25(2) of the Armed Forces Act (Cap 199) (the Act), and sentenced to 8 years imprisonment together with dismissal from the armed forces services. His conviction and sentence were confirmed.

From 1968, a determination by the High Court of an appeal from a court martial was final, and no appeal lay from it to any other court. Section 121 of the Act (*ibid*). This was repealed by section 9 and the Schedule of the Armed Forces (Amendment ) Act 1978 (No 12 of 1978) which commenced on September 29, 1978. It was not replaced until the end of last year.

A differently constituted bench of this court held in Nairobi on May 4, 1983 that the Act did not provide for such an appeal because, *inter alia*, in the absence of a prior statutory provision conferring a right of appeal to the Court of Appeal there is none because this court has no inherent jurisdiction. And it could not be inferred from the repeal of a section that provided no appeal lay to it from the High Court *Onyango v Republic* Criminal Appeal 69 of 1982 (Simpson CJ, Potter and Kneller JJA). The present motion was adjourned on July 30, 1984 by this court to be listed before full court of five to decide whether *Onyango v Republic* was correct.

The matter is now beyond doubt, however, because on December 28, 1984, an amendment to section 115 of the Act this sub-section was added:-

“(3). The decision of the High Court on any appeal under this Act shall be final and shall not be subject to a further appeal.

See section 2 of the Statute Law (Miscellaneous Amendments) (No 2) Act 1984.

Three or five or any other number of judges of this court would have to apply that for it is the law. It was presumably added to the Act following upon the decision *Onyango v Republic* to clarify the position.

On July 29, 1985, the High Court dismissed the applicant’s motion under section 82 and 84(1) and (2) of the Constitution of Kenya to have that amendment declared inconsistent with sections 70(a) and 77(1) of the Constitution, discriminatory and null and void. *Sub nom: Oliver Munyaka Kabulu v Republic* High Court Miscellaneous Criminal Application 188 of 1985 (Simpson CJ, Scholfied and Amin JJ )

Against this background, this application was re-listed before three Judges of Appeal and Mr Mukolongolo for the applicant pressed for it to be relisted before five for sake of good order and to have it decided whether there was a right of appeal before the amendment to section 115 and, if there were, whether the applicant should have more time in which to appeal though, he concluded, the applicant now has no right of appeal. It was, he added, a point of general public importance and apt for leave to be given under rule 40.

The Assistant Deputy Public Prosecutor, Mr Chunga, opposed the reference to Judges because even if eventually leave were given, parliament had said the applicant could not appeal.

Partial as we are to good order, we decline to adjourn this application to a bench of five Judges of Appeal for the latest amendment has made it most assuredly not a matter of public importance as to whether the applicant should have more time in which to file his appeal. He is not allowed by law to appeal.

Mr Mukolongolo has done all he can for the applicant but his latest submissions are an invitation to this court to discuss whether or not the applicant had a right when it is clear he no longer has it and we refuse to embark on such a futile exercise. The time has come for this application to be dismissed, and that is the order of the court.

**Dated and delivered at Nairobi this 19th day of November, 1985.**

**A.A KNELLER**

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**JUDGE OF APPEAL**

**A.R.W HANCOX**

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**JUDGE OF APPEAL**

**H.G PLATT**

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**AG. JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**