

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 399 OF 1981

CHEGE NJOROGE.....APPELLANT

VERSUS

1. HENRY KARANJA

2. DANIEL MUTURI CHEGE.....RESPONDENT

(Appeal from the District Magistrate’s Court at Kikuyu)

RULING

The respondents were charged, in a private prosecution, with malicious damage to property contrary to section 339(1) of the Penal Code. The case was tried by the Kikuyu District Magistrate II. Both parties were represented by counsel in the lower court. At the close of the prosecution case the defence counsel Karanja Wagithuku submitted that there was no case to answer. The trial magistrate upheld the submission and acquitted the respondents under the provisions of section 210 of the Criminal Procedure Code. The appellant then filed a petition of appeal against the order of acquittal.

When the appeal came up for hearing I asked and both counsel agreed that a preliminary point relating to section 348A of the Criminal Procedure Code, that is, whether or not the appeal was properly before the court, the question being can a private prosecutor like the appellant appeal from an order of acquittal be argued. Mr Kiania Njau for the appellant said that there was a further point to be determined namely whether or not the appellant had permission to prosecute, as required by section 88(1) of the Criminal Procedure Code. He contended that the subordinate court gave the permission when it issued summonses and allowed the case to proceed to hearing. Mr Wagithuku, on the other hand argued that under section 88(1) a prosecution can be conducted by a private prosecutor only with the express permission of the trial court, and the mere issuing of summonses did not constitute such permission. In the case of *Kyagonga v Uganda* [1973] EA 486 no formal leave of the court for the prosecution was recorded but the court allowed the complainant to lead evidence. It was held that the fact that he was allowed by the court to adduce evidence in support of the charge must mean that such leave as was necessary had been given to him. In *Nunes v R* (1934-35) 16 KLR 126 a similar point arose and the court held that the learned resident magistrate must have been aware that the case was instituted by a private prosecutor, who could not conduct it without his permission, and in all the circumstances the court was of the opinion that it should be assumed that the magistrate gave his permission when he allowed the trial to proceed. The two cases I have referred to were referred to in *Republic through Devji Kanji and Davendra Valji Halai* Court of Appeal Criminal Appeal No 28 of 1978 (unreported) in which the court held that those two decisions correctly interpreted the law. The relevant law ie section 88(1) of the Criminal Procedure provides as follows:-

“88(1) Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Attorney-General in this behalf shall be entitled to do so without permission.”

In the present case the magistrate allowed the prosecution to lead evidence until the case for the prosecution was closed and the defence counsel made his submission of no case to answer. The magistrate must have been aware that this was a private prosecution which could not go on without his permission and having allowed the trial to proceed, as it did, he must be taken to have given his permission. I further agree with Mr Njau that this point could have been raised before the trial started in

the lower court or in submission, but if it was not so it must be that the respondents too assumed that the appellant had the court's permission to prosecute.

As regards the right to appeal from an acquittal Mr Njau correctly observed that under section 88(2) of the Criminal Procedure Code a private prosecutor has the like power of withdrawing from the prosecution as is given to the Attorney General under section 87 of the Criminal Procedure Code, but section 348A which gives the Attorney General the right to appeal from an acquittal is silent about the private prosecutor.

In Criminal Appeal No 925 of 1979 *Charles Wainaina v H K Ndegwa* (unreported) which was a private prosecution where the respondent was acquitted the respondent's counsel raised a preliminary point as to whether or not the appeal was properly before this court and he asked the question can a private prosecutor as was Charles appeal against an order of acquittal? Todd J held that a private prosecutor can appeal against an order of acquittal, as in that case, and he allowed Charles' appeal filed to proceed to hearing. He said he held so because he was bound to follow the latest decision on the point which was the Court of Appeal for Kenya in the *Devji Kanji and Davendar Valji Halai* case *ibid*. With respect the Court of Appeal did not decide the question of whether or not a private prosecutor can appeal from an acquittal. The issue before the court was whether or not the private prosecutor had obtained permission of the trial court to prosecute as required by section 88(1) of the Criminal Procedure Code, and, the court held that he had obtained the permission, and, went further to state that a private prosecutor as a party to proceedings in the High Court has a right of appeal to the Court of Appeal by virtue of section 361(1) of the Criminal Procedure Code subject to the residuary control by the Attorney General over every criminal case under the provisions of section 82 of the Criminal Procedure Code. The only case that appears to have decided on whether or not a private prosecutor can appeal from an acquittal is, therefore, *Charles Wainaina v HK Ndegwa supra*. Upon reading section 361(1) which provides that:

“Any party to an appeal from a subordinate court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact”.

I would agree with the decision in the *Devji Kanji and Davendra Valji Halai* case, *ibid*. The provisions of law on which that case was decided are different from the provisions of section 348A. This is so because section 361(1) deals with appeals from the High Court to the Court of Appeal, whereas section 348A deals with appeals from acquittal in a subordinate court to the High Court. The Attorney General cannot, in my opinion, appeal from an order of acquittal in the High Court to the Court of Appeal for Kenya under section 348A of the Criminal Procedure Code. He would have to find his rights under other provisions, if any. I would, therefore not say that the *Devji Kanji and Davendra Valji Halai* case *ibid* is relevant when considering the question whether or not a private prosecutor can appeal from an order of acquittal by a subordinate court to this court as the Attorney General may under section 348A. This section provides that:

“348A. When an accused person has been acquitted on a trial held by a subordinate court,, the Attorney- General may appeal to the High Court from the acquittal ... on a matter of law.”

The law does not say “any party” to a prosecution in a subordinate court may appeal against the decision of the subordinate court to the High Court, but it expressly names the Attorney General. In my view the legislature did not intend to open the door too wide for appeal against acquittal from the subordinate courts to the High Court. Had it been the intention of the legislators that a private prosecutor should be given the right to appeal from acquittal under section 348A, it would as it did in respect of section 88(2) of the Criminal Procedure Code, have said so, but it did not, and, the silence was deliberate. I, therefore, find myself humbly of a different view from that expressed in *Charles Wainaina v HK Ndegwa supra* as I hold that by virtue of section 348A of the Criminal Procedure Code giving power only to the Attorney General, a private prosecutor cannot appeal against an acquittal from a subordinate court to the High Court, and, as the appellant is such private prosecutor his appeal is not properly before this court, notwithstanding that he had permission to prosecute the case. I in the result dismiss the appeal as incompetent. Order accordingly.

Dated and Delivered at Nairobi this 16th day of February 1982.

Z.K.CHESONI

JUDGE