



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.....APPLICANT

AND

REPUBLICRESPONDENT

(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)

RULING

We have before us a motion on notice filed on June 12, 1984 by Oliver Munyaka Kabulu (Kabulu) expressed to be brought under rules 4 and 40(b) of the Court of Appeals Rules. On August 1, 1982 he was 28 and he had been in the Kenya Air Force for nearly 5 years. He was arrested that morning at the roundabout from which Haile Selassie Avenue and the Uhuru Highway radiate in Nairobi and charged with taking part in a mutiny contrary to section 85(2) of the Armed Forces Act (cap 199).

A court martial convicted him of this offence and sentenced him to 8 years imprisonment together with dismissal from the armed forces services on November 22, 1982 and both his conviction and sentence were confirmed the next day. Mr Justice Gicheru heard the appeal on February 10, 1984 and in his judgment of March 23, 1984 dismissed it.

Kabulu asks this Court to extend the time which he believes he had to apply for a certificate of appeal and file a second appeal and the certificate itself. His advocate, Mr Mukolongolo of Nairobi made his submissions to the learned judge in Kakamega on February 16, 1984 and asked Mr Shitusama, an advocate who practices in Kakamega, to hold his brief for the judgment which was to be delivered on February 20, 1984. Mr Shitusama went to receive it on that day but it was not delivered and it seems, no fresh date set for it. When it was delivered, on March 23 this year Mr Mukolongolo and Mr Shitsama were absent because neither knew it would be delivered on that date. It then took Mr Mukolongolo until May 14, 1984 to get copies of all the documents he thought he required for filing a second appeal. The probable grounds of this purported second appeal would include grounds that the judge erred in law in upholding the conviction and sentence of the court-martial when the charge did not disclose the alleged offence or any offence and, if it did then, because it was not an absolute one, the Republic had failed to

prove beyond any reasonable doubt Kabulu guilty of it for lack of *mens rea*.

Rule 4 permits this Court in its discretion on such terms as it thinks just to extend the time limited by its Rules for the doing of any act authorised or required by these Rules. Rule 40 provides that where no appeal lies unless the superior court certifies that a point of law of general public importance is involved application for such a certificate may be made informally at the time when the decision against which it is desired to appeal is given or by 1 motion or chamber summons according to the practice of the High Court within fourteen days of its decision. Rule 41 (which was not mentioned on this motion) stipulates that whenever an application may be made either to the court or to the High Court it shall, in the first instance, be made to the superior one, provided that in any criminal matter this court may, in its discretion, on application or of its own motion, give leave to appeal or extend the time for the doing of any act, notwithstanding the fact that no application has been made to the superior court. Although the notice of motion is expressed to be brought under Rule 40(b) and the penultimate paragraph of the supporting affidavit mentions such a certificate. Mr Mukolongolo did not refer us to any substantive provisions which require a certificate that a point of law of general public importance is involved before an appeal to this court lies. This part of the application is therefore inappropriate. In our view an appeal lies or it does not lie and there is no question of any certificate.

On May 4, 1983 this Court held that there was no statutory provision for a second appeal from a court martial to the Court of Appeal so any such purported appeal by Kabulu would be dismissed as incompetent for want of jurisdiction on our part to entertain it unless overtaken by an appropriate amendment to the Armed Forces act (cap 199) conferring it. *Leonard Esbon Omolo Onyango v Republic* Criminal Appeal No 69 of 1982 (unreported). So armed with this authority Mr Mbai raised a preliminary objection to the application which was that because this Court had no jurisdiction to deal with the appeal so it must reject this application. Today, however, we have been referred to *Munene v The Republic* (No.2), [1978] KLR 105 and *National Telephone Co Ltd (in Liquidation) v His Majesty's Postmaster-General* [1913] AC 546 HL(E) which were not cited to the court in *Leonard Esbon Omolo Onyango v Republic* Criminal Appeal 69 of 1982 and we are faced with an alternative argument and approach to the jurisdiction of this court to hear and determine a second appeal from a court martial, namely; that instead of holding that there is no appeal from one tribunal to another unless same statute gives the right to it there is such a right unless the relevant statute forbids it as section 121 of the Armed Forces Act (*ibid*) did until it was replaced.

We recall that *Onyango* was the unanimous decision of three judges, and *Munene's* of a majority of two with the third not signing it but in the exercise of our discretion we deem it proper to refer the application to a full bench of 5 judges. We do not consider it proper to decide on the application until it is clear either by legislation or by a decision of the full court as to whether or not there is the right of a second appeal to this Court from a decision of a court martial.

The application is, therefore, adjourned for the issue to be resolved in the manner we have proposed.

Dated and delivered at Nairobi this 30th day of July , 1984.

A.A KNELLER

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JUDGE OF APPEAL

A.R.W HANCOX

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JUDGE OF APPEAL

H.G PLATT

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR