IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Simpson CJ, Potter & Kneller JJA)

CRIMINAL APPEAL NO. 69 OF 1982

BETWEEN

ONYANGO..APPELLANT

AND

REPUBLIC..RESPONDENT

JUDGMENT

The appellant was convicted by Court Martial on December 8, 1981 on two counts of stealing public property, contrary to section 38(a) of the Armed Forces Act (cap 199), and on a third count of disobedience to standing orders contrary to section 30(1) of the Armed Forces Act. His appeal against conviction and sentence to the High Court was allowed in respect of the two counts of theft, but was dismissed in respect of the third count. The appellant now appeals to this court. The Attorney General, who appeared for the Republic with Mr Bwonwonga, being aware that this court was concerned whether it has jurisdiction to hear a second appeal from a court martial, raised the question as a preliminary point, and gave the court the benefit of his considered opinion.

The Attorney General submits that this court does have such jurisdiction by virtue of section 130 of the Armed Forces Act (cap 199) and of section 361 of the Criminal Procedure Code (cap 75). He further submits that as such second appeals under the Code are limited to matters of law, this appeal is not maintainable because it raises no matter of law. Mr Otieno, who represents the appellant, of course supports the Attorney-General on his first submission but not on his second. We will first deal with the question of jurisdiction.

They Attorney General and this court are in agreement that the jurisdiction of this court, like that of its predecessor, the Court of Appeal for East Africa, is derived from statute, and the court has no inherent jurisdiction. See the Constitution section 64(1); the Appellate Jurisdiction Act (cap 9) section 3(1); *Attorney-General v Shah* (No 4) [1971] EA 50; *Samanis v Shirinkanu* (No 2) [1971] EA 79; *Munene v Republic* [1978] KLR 105; *Njeru v Republic* Cr App 4 of 1979.

The Attorney General's argument is based on section 130 of the Armed Forces Act and section 361 of the Criminal Procedure code. Section 130 of the Armed Forces Act provides as follows:

"130. Subject to this part and to any rules of court, the provisions of the Criminal Procedure Code relating to the hearing of appeals from subordinate courts shall apply to the hearing and determination of appeals under this Part."

The provisions of the Criminal Procedure Code relating to the hearing of appeals from subordinate courts are contained in part XI of the Code and include sections 347 to 361. Section 361 provides that any 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. When the Armed Forces Act was first enacted in 1968 this question could not have arisen, because section 121 of the Act then provided:

"121. A determination by the High Court of an appeal or other matter which it has power to determine under this Part shall be final, and no appeal shall lie from the High Court to any other court."

This section was repealed by the Armed Forces (Amendment) Act 1978 (No 12 of 1978). The Attorney General relies on the fact of this repeal as showing that Parliament intended in 1978 that there should be a second appeal to this court, and gave effect that intention by repealing section 121, thus removing the restriction on the application by section 130 of the provisions of section 361 of the code to appeal from courts martial. The reason suggested by the Attorney General for this repeal was the creation of a Court of Appeal for Kenya by the Appellate Jurisdiction Act (cap 9) which came into operation on October 28, 1977. The exclusion of the Court of Appeal before the repeal of section 121 in 1978 was because the court of Appeal for East Africa was not a territorial court.

They Attorney General conceded that there is no indication in the 1978 Act of the purpose of the repeal of section 121. No such right of appeal had ever existed. The draftsman may have thought that section 121 was surplusage. The Armed Forces (Amendment) Act 1978 contains many amendments to the principal Act. It appears to be a general revision made after some ten years' experience of the operation of the Act. With respect to the Attorney General, we cannot accept his submission that section 121 was repealed in order to introduce a second appeal to this court. This submission involves the proposition that section 130 has a different meaning in the absence of section 121. We do not think it has. The Attorney General submitted that the introductory words in section 130, namely 'Subject to this part …' were in the section in order to subordinate it to section 121, and implied that those words were intended to put the primacy of section 121 beyond doubt, they have another purpose, which is to ensure the primacy of the procedural provisions of part IX of the Armed Forces Act. It is plain to us that the purpose of section 130 is to apply to the hearing and determination of appeals from courts martial to the High Court those procedural provisions of part XI of the Criminal Procedure Code which do not conflict with the procedural provisions of part IX of the Armed Forces Act or of the rules of court made by the Chief Justice. Those provisions of the Code are only to apply to 'the hearing and determination of appeals under this part.' In other words, section 130 does not apply section 361 of the Code so as to create a right of second appeal. It merely provides that where a right of appeal to the High Court is created by part IX of the Armed Forces Act, certain procedural provisions of the Code are to apply to the conduct of that appeal. Express provision is made for appeals from courts martial to the High Court by part IX (sections 115 to 130) of the Armed Forces Act. There is no reference to the Court of Appeal in part IX or anywhere else in the Act. Section 230 of the Act empowers the Chief Justice to make rules prescribing the practice and procedure in appeals under part IX of the Act. The Armed Forces (Court Martial Appeals) Rules were made by Legal Notice 255 of 1969. In those rules references to 'the court' are references to the High Court and there is no reference to the Court of Appeal.

It would be surprising if Parliament had introduced a second appeal to this court without applying to the second appeal any of the procedural provisions applied by part IX of the Armed Forces Act to the first appeal to the High Court. For example, section 120 of the Act empowers the High Court to appoint a person with special or expert knowledge to act as assessor. Section 122 provides that proceedings before the High Court shall be heard in the absence of the appellant, unless rules of court provide otherwise or the High Court gives leave for the appellant to be present. What would the position be on second appeal? If Parliament had intended to amend the Armed Forces Act so as to create a second appeal from courts martial, we are satisfied that it would have made its intention plain. In the absence of any prior statutory provision conferring a right of appeal, a right of appeal to the Court of Appeal cannot be inferred from the repeal of a provision to the effect that no appeal shall lie from the High Court.

In our considered view there is no statutory provision for a second appeal from a court martial to the Court of Appeal, and accordingly we dismiss this appeal as incompetent for want of jurisdiction on our

part to entertain it. In the circumstances we do not make any decision on the Attorney General's second submission.

Dated and Delivered at Nairobi this 5th day of May 1983.

A.H.SIMPSON

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CHIEF JUSTICE

K.D.POTTER

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JUDGE OF APPEAL

A.A.KNELLER

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR.