IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Sir James Wicks CJ, Law JA & Miller Ag JA)

CRIMINAL APPEAL NO 4 OF 1979

BETWEEN

ANARITA KARIMI NJERU .....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

This is an appeal from the decision of the High Court dismissing an application made under section 84(1) and (2) of the Constitution.

Mr Muttu, senior State Counsel, raises a preliminary objection that this Court has no jurisdiction to hear the appeal. Mr Muttu refers us to section 64(1) of the Constitution which provides:

> There shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.

and to section 3(1) of the Appellate Jurisdiction Act which reads:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law,

and contends that, in pursuance of this authority, Parliament has provided for appeals to this Court against decisions of the High Court arising out of the Penal Code in the Criminal Procedure Code and from decisions in civil matters in the Civil Procedure Act; that no jurisdiction has been conferred on this Court to hear appeals from the decisions of the High Court made under section 84 of the Constitution; and that there is none.

Mr Mwirichia, who appears for the appellant, submits that the word “law” as employed in section 64(1) of the Constitution and section 3(1) of the Appellate Jurisdiction Act includes the common law. Further, that this Court has a general supervisory role over the judicial process and, consequently, hears appeals from all decisions of the High Court, and particularly in a case such as this where the High Court sat in first instance. That is, there is a right of appeal to this Court from all decisions of the High Court under section 3(1) of the Appellate Jurisdiction Act, unless it is expressly excluded by statute.

We were referred to the decision of this Court in *Munene v The Republic* (No 2) [1978] Kenya LR 105. In

that case the appellant had been the subject of proceedings before a disciplinary board established under the Medical Practitioners' and Dentists' Act, which provided a right of appeal to the High Court, and the appellant appealed to that Court. There was a preliminary objection that the appeal had been brought out of time, which was upheld, the High Court refusing to extend time. On appeal to this Court, again there was an objection, which was that leave to appeal out of time having been refused there had been an appeal before the High Court and nothing to appeal against to this Court.

The judgment in *Munene's* case was a majority one. In their judgment the Court referred to a submission made by Mr Wilkinson QC ([1978] Kenya LR at page 108):

> Mr Wilkinson who appeared on behalf of the appellant advanced what we consider is an ingenious argument that there is a right of appeal under section 3(1) of the Appellate Jurisdiction Act because it is not expressly prohibited.

This is Mr Mwirichia' s submission, and it was rejected in *Munene's* case ([1978] Kenya LR at page 108) :

> We cannot accept this argument. It is well established that there is no right of appeal apart from statute, either it is expressly granted by statutory authority, or it is not. There is no right of appeal by mere implication or by inference.

This proposition, setting out the jurisdiction of this Court, had remained unquestioned until the decision in *Munene's* case.

We say until *Munene's* case for the reason that, having reviewed a number of authorities from the Courts of other jurisdictions, it was held, "We will not usurp jurisdiction. We will interpret liberally the extent of our jurisdiction" and further that ([1978] Kenya LR at page 112):

> In our view … there is right of appeal from the High Court to this Court because it is a matter of pure law whether there was unreasonable delay on the part of the appellant in presenting his appeal to the High Court.

This Court then assumed jurisdiction, which was not within that conferred by any statute and which had been expressly excluded by statute. With respect, to do so appears to us to do violence to the principles accepted by the Court that there is no right of appeal apart from statute.

This Court's assumption of jurisdiction which is not conferred by statute, arrived at after consideration of extracts from authorities emanating from England, India, Aden and Tanzania is even more remarkable for the reason that a Kenya authority was relied on in *Munene's* case itself, *Mudavadi v Kibisu* [1970] EA 585, and in that case a former President of this Court's predecessor, Sir William Duffus, considering the jurisdiction of this Court is reported as saying (at page 587):

> We were referred to various English authorities but with respect those authorities are not of much assistance as the question of our jurisdiction depends solely on the interpretation of the relevant section of the Constitution and of the laws of Kenya and these in our view clearly define our jurisdiction to hear this appeal.

The authorities of other countries having been accepted as a basis for enlarging this court's jurisdiction, we have no alternative but to review those authorities. That will be a heavy and somewhat wearisome task but we will say at once that each and everyone of those authorities support the general rule governing our jurisdiction set out above, and preclude the possibility that the jurisdiction of this Court can be founded on liberal interpretation or pure law.

We must first refer to the history of this Court as our jurisdiction, originally, emanated from England, and the judicial systems of the countries whose authorities we must consider all follow the English system.

The conferment of jurisdiction on a Court of Appeal takes one of two forms. The first is where the legislature establishes a Court of Appeal and then confers on it jurisdiction to hear all appeals from the High Court. Here, where the Court of Appeal is to be deprived of jurisdiction, that is done specifically in a particular enactment. The second is where the legislature establishes a Court of Appeal expressly without jurisdiction, and reserves the conferment of jurisdiction to other secondary legislation. This secondary legislation can take one of two forms: either by conferring on the Court of Appeal jurisdiction to hear all appeals from the High Court; or by conferring jurisdiction on the Court of Appeal in particular enactments, as considered appropriate.

The first form of conferment of jurisdiction is to be found in England in the Supreme Court of Judicature Act 1873. There the Court of Appeal was established by section 6, and jurisdiction was conferred by section 19, which reads:

> The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as herein-after mentioned of her Majesty's High Court of Justice, or of any judges or judge there...

The jurisdiction of the Supreme Court of India followed that conferred on the Court of Appeal in England by section 19 of the Supreme Court of Judicature Act 1873 (re-enacted in section 27 of the supreme Court of Judicature (Consolidation) Act 1925), and was followed in section 132 of the Constitution of India. It is sufficient for us to say that the operative words in the enactments before independence, and in the Constitution, were to the effect that an appeal should lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India.

The second form of conferment of jurisdiction on Court of Appeal (that is where the legislature establishes a Court of Appeal expressly without jurisdiction and reserves the conferment of jurisdiction to other secondary legislation) is to be found in the East African Protectorates (Court of Appeal) Orders in Council 1902, 1906 and 1909; which in turn were replaced by the East African (Court of Appeal) Order in Council 1921 ; and the latter by the East African (Court of Appeal) Order in Council 1950. By this time the Order applied to the Colony and Protectorate of Kenya, the Uganda Protectorate, the Nyasaland Protectorate, the Zanzibar Protectorate, Tanganyika Territory, the Seychelles and Somaliland. The Court of Appeal was thus established in 1902, successive orders adding new territories and the jurisdiction conferred on it remained, in effect, the same throughout, this being expressed in section 16(1) of the 1950 order as follows:

> The Court shall have jurisdiction to hear and determine such appeals from judgments of courts of the territories (including reserved questions of law and cases stated) and to exercise such powers and authorities as may be prescribed by or under any law for the time being in force in any of the territories respectively.

The reason why the Court of Appeal was established without jurisdiction, it being left to the individual territories to confer jurisdiction, is obvious. Had the jurisdiction been conferred as in the first form (that is, to hear appeals from any judgment or order of the High Court), it would have been necessary to set out in the Order in Council every law in each territory where there was to be no appeal to the Court of Appeal; and, should it be considered desirable in any territory to exclude appeal to the Court of Appeal in any future law, that would have to be done by Order in Council for, had the territory attempted to do this, it would have been *ultra vires* the Order in Council.

To provide for the approaching independence of the territories, and on the eve of the first territory to attain Independence (ie Tanganyika), the East Africa Court of Appeal Order in Council 1961 was enacted. Tanganyika was not included, as a separate Order in Council was passed to come into operation "immediately before 9th December 1961", the day Tanganyika attained independence. Section 5(1) of the order read:

> The Court of Appeal shall have jurisdiction to hear and determine such appeals from the Courts of each territory as may be prescribed by any law in force in that territory.

As the Order in Council would be spent on Kenya attaining independence, and the Court of Appeal would cease to function here, the Appellate Jurisdiction Ordinance (later Act) was enacted in 1962. This Act was expressed "to confer on the Court of Appeal for Eastern Africa jurisdiction to hear certain appeals from the courts of Kenya" and section 3(1) provided:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from the courts of Kenya in cases in which an appeal lies to that Court under the law of Kenya.

The Kenya Order in Council 1963 contained the Constitution of Kenya. Section, 176 provided for the Court of Appeal for Eastern Africa and provided that it;-

> Shall have such jurisdiction in relation to appeals from the Court of Appeal for Kenya or the Supreme Court and such powers in relation to that jurisdiction as may be conferred on it by any law.

We must mention that, at the time, the High Court was known as the Supreme Court and provision was made for Kenya to have its own Court of Appeal, in addition to maintaining the Court of Appeal for Eastern Africa as a final Court.

The 1963 Constitution was replaced by the Constitution of Kenya Act 1969, section 64(1) of which provided that the Court of Appeal for East Africa:

> shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.

This Court was established by the Constitution of Kenya (Amendment) Act 1977 which replaced section 64 of the Constitution, the jurisdiction being identical to that of the old Court. The appellate Jurisdiction Act was replaced in 1977 by the Appellate Jurisdiction Act and, again, the jurisdiction of this Court is identical to that of the old Court. That is, the establishment and jurisdiction of this Court, and its predecessors, has remained, in effect, unaltered from 1902 until the present with the result that we can safely rely on authorities contained in our law reports going back to that date, all of which are authority for interpreting strictly the enactments conferring jurisdiction on this Court and its predecessors.

Aden and Tanzania, as will emerge when we refer to the authorities, adopted the first form of conferment of jurisdiction on the Court of Appeal, that is (in their appellate jurisdiction legislation) jurisdiction was conferred on the Court of Appeal to hear all appeals from the High Court. Kenya adopted the second form of conferment of jurisdiction on the Court of Appeal. In our Appellate Jurisdiction Act the conferment of jurisdiction took the form of, in effect, repeating the provisions of the Constitution, so leaving it to particular statutes to confer jurisdiction on this Court, and these are the Civil Procedure Act and the Criminal Procedure Code.

Turning now to a consideration of the authorities relied on in *Munene's* case, the leading case was *National Telephone Co Ltd (in liquidation) v His Majesty's Postmaster-General* [1913] AC 546. The facts may be summarised as follows. Under the Railway and Canal Traffic Acts 1873 and 1888, the Railway and Canal Commission was established. It was a Court of record and section 17 of the Act of 1888 provided that "saving questions of fact and *locus standi*, an appeal shall lie from the commissioners to a superior Court of Appeal". The Postmaster-General was in the process of establishing a single telegraph service and, to further this object, the Telegraph (Arbitration) Act 1909 was enacted. Section 1 of that Act provided that any difference between the Postmaster-General and telegraph companies was to be referred to the Railway and Canal Commission and "that commission shall determine the same". Section 2 provided that all such differences were to be conducted by the commission in the same manner as any other proceeding was conducted by them under the Railway and Canal Traffic Acts 1873 and 1888. The appellants sold their undertaking to the Postmaster-General, the commission heard and determined the matter, and the Attorney-General sought to appeal to the Court of Appeal on two points of law.

The appellants contended that the right of appeal conferred by section 17 of the Act of 1888 was not open to the Postmaster-General for two reasons: first, the proceedings under the Act of 1909 were, by the title of the Act itself (the Telegraph (Arbitration) Act), arbitration proceedings; and, secondly, the jurisdiction of the commission was set out in the Acts of 1873 and 1888 and the right of appeal was restricted to the work of the commission performed under those Acts.

The first objection was disposed of by Lord Moulton at page 560:

> While it is admissible to use the full title of an Act to throw light upon its purport and scope, it is not legitimate to give any weight in this respect to the short title which is chosen merely for convenience of reference and whose object is identification and not description.

Lord Moulton then pointed out that the full title of the Act was "An Act to give further powers to the Railway and Canal Commission to determine differences with respect to telegraphs (including telephones)".

The passages from the judgments of the case, set out in *Munene's* case, can now be considered in the context of the facts. The first is from the judgment of Viscount Haldane LC at page 552:

> When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches.

Considering the words "when a question is stated to be referred to an established Court", the word "stated" is a reference to the Act of 1909, section 1 of which provided that differences under that Act were to be referred to the Railway and Canal Commission established under the Acts of 1873 and 1888. The words "without more" refer to the circumstance that nowhere in the Act of 1909 is provision made for an appeal from the decisions of the commission to the Court of Appeal. In the expression "the ordinary incidents of the procedure of that Court are to attach ... ", the words "that Court" mean the commission established under the Acts of 1873 and 1888. And looking at these Acts, section 17 of the Act of 1888 provides for an appeal from the commissioners to the Court of Appeal. In relation to the phrase "any general right of appeal from its decisions likewise attaches", the general right of appeal under section 17 of the Act of 1888 "attaches" to a decision of the commission exercising jurisdiction conferred on it by the Act of 1909. We have examined this in some detail and what we have said is made very clear by the *dictum* immediately preceding the quotation:

> My Lords, the substantial question in the case turns on the construction of the Telegraph (Arbitration) Act 1909. That Act provides, by section 1, that any difference of a kind which includes the present case shall be referred to the commission.... Section 2 enacts that such a proceeding shall be conducted in the same manner as any other proceeding is conducted by the commission under the Acts of 1873 and 1888 ... It is contended by the appellants that in a reference under this Act the commission is not in the same position as in a reference under the general Acts establishing it, and that, as no right of appeal is expressly given, none can be presumed.
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> My Lords, if the reference is one on the same footing as a reference under the general Acts, that is, a reference to the commission as a court of record, with a right of appeal expressly provided, this is decisive against the points raised in the argument for the appellants. And I find nothing in the Act of 1909 to cut down the effect of the words at the end of section 1, which appear to provide for a reference to the commission in its usual capacity.

The quotation then follows.

The second passage is taken from the judgment of Lord Atkinson and is at page 555; it reads:

> It is not, in substance, in my view, at all a question of giving a right of appeal by implication. It is

> simply the question of extending the jurisdiction of an existing Court of law, with all its incidents including a right of appeal, to a new matter closely resembling in character those matters over which it has already jurisdiction as a Court of law.

Considering this, the words "It is not, in substance, in my view, at all a question for giving a right of appeal by implication" rule out the possibility of there being a right of appeal other than by statute. In the expression "extending the jurisdiction of the existing Court of law" the existing Court of law was the Railway and Canal Commission established by the Acts of 1873 and 1888, "with all its incidents including a right of appeal". The right of appeal is provided by section 17 of the Act of 1888. The reference "to a new matter", was to the Act of 1909. The phrase "closely resembling in character those matters over which it already has jurisdiction as a Court of law" is a comparison of the objects of the Act of 1909 with those of the Acts of 1873 and 1888. What we have said is put beyond doubt by the passage immediately preceding the quotation, which is:

> Section 1 of the Telegraph (Arbitration Act 1909) ... applies...it provides that the commissioners shall determine the matters referred ... this section only added another item to the several matters which the commissioners have already power as a Court of law to determine just as they determine as a Court of law matters arising under section 9 of the Act of 1873.

The quotation then follows.

There is another *dictum* similar in terms to that of Viscount Haldane and Lord Atkinson and that is in the judgment of Lord Parker at page 562:

> Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction including the right of appeal from its decision, remain the same.

Considering this quotation, the words "where by any statute" refer to the Act of 1909; the words "matters are referred to the determination of a Court of record", refer to section 1 of the Act of 1909, which provided that differences under that Act are to be referred to the commission established under the Acts of 1873 and 1888; the words "with no further provision" refer to there being no provision for an appeal in the Act of 1909; the words "the necessary implication is, I think, that the Court will determine the matters as a Court" mean that the commission established under the Acts of 1873 and 1888 will determine the matter as a Court of record exercising the jurisdiction conferred by the Acts of 1873 and 1888; the words "Its jurisdiction is enlarged" mean that the commission's jurisdiction under the Acts of 1873 and 1888 is enlarged by the jurisdiction conferred on it by section 1 of the Act of 1909; and the words "but all the incidents of such jurisdiction, including the right of appeal from its decision, remains the same" mean that, exercising that enlarged jurisdiction there is a right of appeal from its decisions under section 17 of the Act of 1888. All this is clear from the part of the judgment which precedes the passage referred to:

> My Lords, the question to be determined on this appeal depends entirely on the true construction of section 1 of the Telegraph (Arbitration) Act 1909. That section provides that any body or person under the Telegraph Acts 1863 to 1908 ... shall ... be referred to the Railway and Canal Commission, and that Commission shall determine the same.
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> The Railway and Canal Commission is a Court of record having jurisdiction under the Regulation of Railways Act 1873, and the Railway and Canal Traffic Act 1888 ... under the 17th Section of the Act of 1888 there is in every case a right of appeal from its decision unless such right (as in the case of questions of fact or *locus standi*) is expressly negatived.

Then follows the quotation.

It is a matter of language. With respect to the Lords of Appeal it is sometimes preferable to restrict the explanation of principles of law to the dry-as-dust language of lawyers and to leave expression in simple

terms to the novelist. The extract from the judgment set out above can be found quoted again and again in cases reported in our law reports, in most instances out of context, and in many cases as part of a quotation taken from the judgment of another case. If we may say so, it is a most dangerous practice when considering the meaning of such expressions as “without more” and “with no further provision”.

In legal terms the matter is not difficult. The Supreme Court of Judicature

Act 1873 provided a right of appeal to the Court of Appeal from every judgment or order of the High Court. That is termed a general right of appeal, and, where a statute confers jurisdiction on the High Court, it is unnecessary to provide specifically for an appeal to the Court of Appeal. In the simple language employed by Viscount Haldane LC, it need be “without more”. In cases where jurisdiction is in issue these usually turn on whether or not there was a “judgment or order” of the High Court, as was the case in *Onslow v Commissioners of Inland Revenue* (1890) 25 QB D 465 to which I will refer later. In the *National Telephone* case a commission was established by the Acts of 1873 and 1888 and under the Act of 1888 a right of appeal from the decisions of the commission to the Court of Appeal was provided. That was a special right of appeal in the sense that it was restricted to decisions of the commission exercising the jurisdiction conferred on it by the Acts of 1873 and 1888. The Act of 1909 provided that disputes arising under the Act were to be decided by the commission established by the Acts of 1873 and 1888. The Act of 1909 did not provide for an appeal from the decisions of the commission and, in simple language, it was “without more”. However, in legal terms there was “something more”; and this was a provision in section 2 of the Act of 1909 that all such differences were to be determined by the commission in the same manner as any other proceeding conducted by them under the Acts of 1873 and 1888. This provision converted the special right of appeal provided under the Act of 1888 into a general right of appeal; but restricted to decisions made by the commission under the jurisdiction conferred on it by the Act of 1909. The right of appeal was just as much a statutory one as are appeals from “judgments or orders”of the High Court to the Court of Appeal provided for by the Supreme Court of Judicature Act of 1873.

That the *National Telephone* case did not establish that there was a right of appeal from one tribunal to another apart from statute was demonstrated by the *dicta* of Viscount Haldane LC set out above where he says “with a right of appeal expressly provided”. The words “expressly provided”, in the context of the case, can have but one meaning; and that is “provided by statute”, and this is made clear by another authority referred to in *Munene’s* case, namely *Re A Solicitor* [1934] 2 KB 463. In that case the disciplinary committee of the Law Society, established by the Solicitors Act 1932, made a “finding” of not guilty from which an appeal was brought. Lord Hewart (at page 466) said:

> If it had been intended that there should be an appeal to the High Court, not merely against an order made by the committee under the first part of the Solicitors Act 1932 but also against any findings of the committee, nothing would have been easier than to say so.

Continuing (at pages 466, 467) Lord Hewart CJ referred to the *dicta* of Lord Coleridge CJ in *R v Keepers of the Peace and Justices of the County of London* (1890) 25 QBD 357, 360, when considering the jurisdiction of the Court of Appeal:

> Our decision must be governed by broad and wellrecognised principles of construction. One of these is, that a man acquitted is not to be again proceeded against with respect to the same matter; another principle is that an appeal is never given except by statute.

Then (at pages 468,469) the passage from the judgment of Swift J set out in *Munene’s* case:

> Now it is clear and long-established law that appeal is the creature of statute. There is no appeal from one tribunal to another tribunal unless some statute gives the right to it.

It is difficult to frame a clearer statement of the law than in the rules set out in this case, which were that an appeal is never given except by statute, and that there is no appeal from one tribunal to another tribunal unless some statute gives the right to it.

We must now consider the cases emanating from Indian Courts relied on in *Munene's* case. The first is *Secretary of State for India in Council v Chelekani Rawa Rao* (1916) LR 43 Ind App 192. The facts there were that there was a statutory right of appeal from "any judgment, decree or final order" of the District Court to the High Court. The Forestry Court gave a right of appeal from the decision of the forest settlement officer to the District Court. The district judge on appeal issued a "decree". The Privy Council held that there being a decree, there was a right of appeal to the High Court under its statutory jurisdiction. That is, it was found that there was a general right of appeal provided by statute.

In *Munene's* case, *Rangoon Botataoung Co v Rangoon Collector* (1912) LR 39 Ind App 197 is referred to as an exception; and to do so has caused some uncertainty in cases decided by our former Court. The facts of that case may be summarised as follows. Provision was made under the Land Acquisition Act 1894 for the collector to value lands taken for public purposes. There was provision in the Act for a "reference" to the Chief Court, and also for an appeal to the High Court. The appellants being dissatisfied with the valuation of the collector, demanded that the matter be referred to the Chief Court. Two judges of the Chief Court, sitting as the High Court, heard the reference which occupied forty-five days; over one hundred witnesses were examined, and a mass of documents was put in. The Chief Court made an exhaustive "award" and found that the collector has given the appellants "all and probably more than the full market value of their property" and dismissed the reference with costs. The appellants sought to appeal.

Lord Macnaghten in his judgment said (at page 200):

> It was admitted by counsel for the appellants that it was incumbent upon them to show that there was a statutory right of appeal.

He then approved the judgment of Lord Bramwell in *Sandback Charity Trustees v North S tafordshire Railway Co* (1877) 3 QBD 1 that:

> An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment.

Lord Macnaghten (at page 201) then set out the provisions of section 54 of the Land Acquisition Act 1894, which I should repeat:

> Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from and part of the award of the court in any proceedings under this Act.

and continued:

> That section seems to carry the appellant no further. It only applies to proceedings in the course of an appeal to the High Court. Its force is exhausted when the appeal to the High Court is heard. Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction.

The *Rangoon* case was considered in *Chelekani's* case Lord Dunfermline saying (at page 198):

> The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried and the provisions of the particular statute, it was held that there was no right "to carry an award made in an arbitration as to the value of land" further than to the courts specifically set up by the statute for the determination of that value.

As we have said, India followed England in the conferment of jurisdiction on the Court of Appeal. In

Chelekani's case it was held that, where there was a statutory right of appeal, there was a right of appeal; and the *Rangoon* case was in parallel with the English case *Re A Solicitor* [1934] 2 KB 463 as demonstrating the rule that where there is no statutory right of appeal, there is no right of appeal.

We must now consider the cases referred to in *Munene's* case which were decided by this Court. First, I will refer to cases not concerning Kenya.

Reference was made to *The Attorney-General of Tanganyika Territory v Buhemba Mines Ltd*, 1 TLR 679 and to *dicta* of Wilson J (at page 682):

> Before proceeding to discuss the merits of the appeal I may mention that I originally had some doubts as to whether any appeal lay to the Court of Appeal for Eastern Africa from a decision of the High Court of Tanganyika under section 62 of the Stamp Ordinance 1931. As was said by Swift J in *Re A Solicitor* [1934] 2 KB 463,468,469: "It is clear and long-established law that appeal is a creature of statute. There is no appeal from one tribunal to another tribunal unless some statute gives the right to it". If such a statutory right exists one would expect to find it conferred either by a particular provision in the Stamp Ordinance itself, or under the general provisions of the Appeals to the Court of Appeal Ordinance. Now, Part VI of the Stamp Ordinance provides a ladder of appeal in stamp duty matters by way of case stated from the Revenue authority to the commissioners and from the latter to the High Court. But no further rung is there provided, and some measure of finality is suggested for the High Court's decision by the provision in section 62 that: " ... the commissioners shall, on receiving such copy (of the judgment of the High Court), dispose of the case conformably with such judgment". There is here however no express provision that the High Court's decision shall be final, such as is contained, for example, in section 325 of the Tanganyika Criminal Procedure Code. The most that can be said is that Part VI of the Stamp Ordinance 1931 does not specifically create a right of appeal from the High Court to the Court of Appeal for Eastern Africa. But it is perhaps pertinent here to quote the words of Lord Parker in *National Telephone Co Ltd (in liquidation) v His Majesty's Postmaster-General* [1913] AC 546, 562: "Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same".

We have already considered the first part of *Re A Solicitor* and the last part the *National Telephone* case and it is unnecessary for us to repeat what we have said. As regards the other part of the quotation, having referred to the right of appeal to the High Court, it is said "no further rung is ... provided". This is correct as there is no provision in the Stamp Ordinance 1931 for an appeal from the decision of the High Court.

What was the jurisdiction of the Court of Appeal in Tanganyika? As we have pointed out, the Orders in Council established the Court expressly without jurisdiction and reserved the conferment of jurisdiction to the legislature of the individual territories, and that the legislation of individual territories could be one of two forms: either by conferring on the Court of Appeal jurisdiction to hear all appeals from the High Court, or by conferring jurisdiction in particular enactments as considered appropriate. Tanzania followed the first of these forms by enacting the Appellate Jurisdiction Ordinance. Section 7(1) of the Ordinance provided:

> In civil proceedings, except where otherwise provided by any other Ordinance for the time being in force, an appeal shall lie to the Court of Appeal (a) against every decree, including an *ex parte* or preliminary decree, made by the High Court in a suit under the Code of Civil Procedure in the exercise of its original jurisdiction ... (c) with the leave of the High Court or the Court of Appeal against every other decree, order, judgment, decision or finding of the High Court.

It would seem that the further rung referred to by Wilson J is provided by section 7(1)(c) of this Ordinance. In fact this is what Wilson J says (at page 683):

> Turning now to the Appeals to the Court of Appeal Ordinance (Tanganyika) one finds that section

> 8(1) (c) reads as follows: "In civil proceedings, except where otherwise provided by any other Ordinance for the time being in force, an appeal to the Court of Appeal shall lie ... with the leave of the High Court against every other decree, order, judgment, decision, or finding of the High Court".

The section is numbered "8" but its content is exactly the same as in section 7 above. Again, as we have said, to adopt the first form of legislation is to put the jurisdiction of the Court of Appeal in the same position, regarding jurisdiction, as the Court of Appeal in England, and this is made clear by Wilson J (again at page 683):

> It may be added here, by way of analogy, that in England, although section 13 of the Stamp Act 1891, makes no provision for any further appeal from a decision of the High Court, on a case stated by the Commissioners of Inland Revenue, such decision is in fact appealable under the Supreme Court of Judicature (Consolidation) Act 1925, being treated as "an order or decision made ... in any other matter not being an action". (Order LVIII, rule 9, RSC) (*Onslow v Commissioners of Inland Revenue* (1890) 25 QBD 465).

We have set out above the jurisdiction conferred on the Court of Appeal by section 19 of the Supreme Court of Judicature Act 1873. This is reenacted in section 27 of the Supreme Court of Judicature (Consolidation) Act 1925, referred to by Wilson J and, as he found at page 684 "there is a general right of appeal conferred by this sub-section" (ie section 7(1) (c).

Another case referred to in *Munene's* case was *Cowasjee Dinshaw & Bros Aden Ltd v Cowasjee' s Staff Association* [1961] EA 436. A passage from the judgment of Newbold J A (at page 442) is set out and it reads:

> In the present case the requirements which permit of an appeal to this Court exist unless it falls within the principle of the Rangoon group of authorities. This principle, I think, can be stated thus: does the established Court in hearing the appeal from the extra-judicial authority exercise a special jurisdiction? If it does, then no further appeal lies merely by reason of the fact that an appeal lies from its decisions in the exercise of its ordinary jurisdiction. The question, therefore, is: in this case was the Supreme Court, Aden, exercising a special jurisdiction in hearing the appeal upon points of law from the Industrial Court? It is true that the functions of the Industrial Court are functions of a special nature and in many respects are similar to arbitration proceedings. It is also true that in its proceedings the Industrial Court is not bound by the rules of evidence. If the right of appeal to the Supreme Court had been one which brought under review all aspects of the Industrial Court, then it may well be that the Supreme Court was invested with a special jurisdiction. But the right of appeal to the Supreme Court is specifically limited to points of law, a matter within the peculiar purview of the ordinary jurisdiction of the law Courts, and in my view this imports the ordinary jurisdiction of the Supreme Court in a matter which, by the municipal law of Aden, is specifically appealable to this Court.

A point was made in the judgment in *Munene's* case of the distinction between special jurisdiction and ordinary jurisdiction of this Court.

Aden (as did Tanganyika) followed the first form of secondary legislation that I have mentioned and this is to be found in the appeals to the Court of Appeal Ordinance. The part of the judgment of Newbold JA set out above that concerns the jurisdiction of this Court, is the last sentence which concludes "specifically appealable to this Court". With respect, these words rule out any suggestion that there was a right of appeal to this Court other than by statute. This is made clear from an earlier passage of Newbold JA's judgment (at page 441):

> Section 6 of the Appeals to the Court of Appeal Ordinance (Aden) provides that, subject to certain conditions which do not arise, an appeal shall lie in civil cases as of right from any final judgment (which by definition includes order) of the Supreme Court.

The issue was whether or not there was an "order" of the Supreme Court. Having held that there was an "order", it followed that there was the statutory right of appeal to this Court under section 6 of the Appeals to the Court of Appeal Ordinance.

So, both Tanzania and Aden followed the general rule that this Court is a creature of statute and that there is no right of appeal apart from statute. The position is the same in Uganda. In *Uganda v Lule* [1973] EA 362, 364, when striking out an appeal as being incompetent, the considered judgment of the Court was:

> As was pointed out in *Shah's* case this Court only has such jurisdiction as is expressly conferred by the legislature. It is only once that jurisdiction is shown to exist in relation to any matter that this Court becomes vested with the powers of the court from which that matter originated.

We must mention that in section 40(1) of the Judicature Act of Uganda there is a reference to the jurisdiction of the court "under any written law". As will be seen later, "law" so far as the jurisdiction of this Court is concerned is consonant with "written law" and "statute".

The legislature of Kenya followed the second form of subsidiary legislation that we have mentioned. From the establishment of the predecessor of this Court in 1902 to the present time the Court of Appeal has been established without jurisdiction; and, as we have set out above, this Court was established by section 64(1) of the Constitution to have "such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law". That jurisdiction is not in any way increased by section 3(1) of the Appellate Jurisdiction Act which reads:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.

What is the meaning of the word "law" as employed in the context of those provisions?

In *Bullows v Dubois* (1924) 10 KLR 140, 141, Guthrie-Smith J said (Sir Jacob Barth CJ concurring):

> Under article 2 of the Order in Council of 1921 establishing the Court of Appeal for Kenya Colony and the other territories, jurisdiction is given to hear and determine appeals from the Court of the territories in all causes and matters in which under any law for the time being in force in any of the said territories an appeal lies to the Court of Appeal.

and:

> It appears to us that the Order in Council leaves it to local legislation to determine in what cases an appeal to the Court of Appeal shall be permitted.

This is clear authority for saying that "law" is consonant with "statute". This decision was followed by this Court and its predecessors for over fifty years until *Munene's* case where it is expressed:

> It is well established that there is no right of appeal apart from statute; either it is expressly granted by statutory authority, or it is not. There is no right of appeal by mere implication or by inference.
>
> The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with … the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897, and the procedure and practice observed in Courts of justice in England at that date.

As is well known, jurisdiction has been conferred on this Court in civil matters by the Civil Procedure Act and in criminal matters by the Criminal Procedure Code.

Mr Mwirichia submits that there is a right of appeal to this Court at commonlaw; and refers us to section 3(1) of the Judicature Act which provides:

The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with ... the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897, and the procedure and practice observed in Courts of justice in England at that date.

We must look at the law of England to discover whether or not by "the substance of the common law" or "the doctrines of equity" there was a right of appeal from the High Court to the Court of Appeal before 12th August 1897.

As we have seen, section 19 of the Supreme Court of Judicature Act 1873 conferred a right of appeal from any judgment or order of the High Court to the Court of Appeal. In the result, any such appeals are by statutory authority.

In the *National Telephone* case [1913] AC 546, the decision was that there was a statutory right to appeal. The corollary is that, where there is no statutory right to appeal, there is no right of appeal. This was established in *Re A Solicitor* [1934] 2 KB 463, where it was held that "there is no appeal from one tribunal to another tribunal unless some statute gives the right to it"; with the result that, there being no statutory right of appeal, there was no right of appeal. This is re-enforced by the decision in the *Keepers of the Peace* case (1890) 25 QBD 357 where it was held that an appeal is "never given except by statute". Clearly there never was a right of appeal from the High Court to the Court of Appeal, either by the substance of the common law or by the doctrines of equity in England before or after 12th August 1897.

Further, "there being no right of appeal apart from statute; either it is expressly granted by statutory authority, or it is not" leads to the inescapable conclusion that, as employed in section 64(1) of the Constitution and section 3(1) of the Appellate Jurisdiction Act, the word "law" is restricted in meaning to statute or the Acts of the Parliament of Kenya.

Mr Mwirichia's last submission is that this Court has a general supervisory role over the judicial process and hears appeals from all decisions of the High Court. This proposition is the *ratio decidendi* in *Munene's* case [1978] Kenya LR 105, and to consider it we must refer to the issues in that case. As we have said, the appellant had been the subject of proceeding before a disciplinary board established under the Medical Practitioners' and Dentists' Act which provide for a right of appeal to the High Court. There was a preliminary objection that the appeal had been brought out of time, which was upheld. The issue before the High Court was one of fact, whether or not the appeal had been brought out of time, and the decision of the High Court was one of fact.

In the judgment section 361(1) of the Criminal Procedure Code was set out; this reads:

> 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.

Two aspects of the interpretation of this provision were relevant. The first was whether or not this Court had jurisdiction to hear an appeal on fact; and the second was whether or not this Court had jurisdiction to hear an appeal in circumstances where there was no appeal before the High Court. Both of these issues related to whether or not this Court enjoyed a general supervisory role over the judicial process.

Before we refer to the decisions of the Court on these matters we must consider the authorities concerned with the interpretation of section 361(1) of the Criminal Procedure Code. The first relates to the jurisdiction conferred on the Court of Appeal by the Orders in Council; it was *R v Jwisi s/o Marwa* (1933) 15 KLR 97. In that case the facts were that the Criminal Procedure Code provided for an appeal to this Court in cases where a sentence of death has been imposed. The appellant had been sentenced to a term of imprisonment which was sought to be appealed against. Having referred to article 2 of the East African Court of Appeal Order in Council 1921, this Court held (at page 98):

> The [Criminal Procedure] Code is silent as to appeals to this Court in the case of sentences other

> than death sentences ... The Court is of opinion that the objection to this court's jurisdiction ... is well founded. The appeal is accordingly rejected.

That is, the statute conferring jurisdiction on this Court was interpreted strictly.

The next authority is *R v Nealon* (1950) 17 EACA 120. There it was held that no right of appeal to this Court having been established under section 360 (now section 361) of the Criminal Procedure Code or any other provision of the code, this Court had no jurisdiction to entertain it. The judgment of the court concluded (at page 121):

> It may well be thought most extraordinary that no appeal should lie from an order purporting to be made in revision either on a point of law or on a point of jurisdiction, but we must take the law as we find it and under the law the right of appeal to this Court from the Supreme Court of Kenya exists only in cases where a right of appeal is provided by the laws of Kenya and there is no such provision applicable to this case. This Court has no inherent power to exercise jurisdiction where no right of appeal is provided.

Again the statute was interpreted strictly.

Nealon's case was approved by this Court in *Ralph v R* [1960] EA 310. 1n that case the Supreme Court (now the High Court) had, as in *Munene's* case [1978] Kenya LR 105, refused to extend the time for appeal. Delivering the judgment of the court, Gould JA (at pages 310, 311) approved the decision in *Nealon's* case as establishing that "This Court has no inherent power to exercise jurisdiction where no right of appeal is provided". He continued (at page 311):

> The order of the Supreme Court in the present case refusing to admit an appeal out of time, though made in pursuance of powers incidental to the appellate jurisdiction of the Supreme Court, was not itself the decision of an appeal. It was an order refusing to extend the time within which an appeal might be brought, and as such it did not fall within what we have held to be the primary purpose of the section, the authorising of further appeals from the substantive decisions of the Supreme Court on appeals from lower courts.

The appeal was struck out as being incompetent.

We turn now to the consideration of the two issues that were before this Court in *Munene's* case [1978] Kenya LR 105 on the interpretation of section 361(1) of the Criminal Procedure Code which we have set out, and to which reference should now be made.

In considering these issues two completely new concepts were accepted as governing the jurisdiction of this Court. The first is that this Court will be guided by pure law; and the second is that this Court will interpret liberally the extent of its jurisdiction. Applying the principles of pure law it was held that:

> In our opinion there is a right of appeal from the High Court to this Court because it is a matter of pure law whether there was unreasonable delay on the part of the appellant in presenting his appeal to the High Court.

That is, applying the principles of pure law this Court determined that it was not bound by section 361(1) of the Criminal Procedure Code which deprived it of jurisdiction, heard the appeal on the facts, and reversed the finding of fact made by the High Court.

Considering the second issue (ie whether or not this Court has jurisdiction to hear an appeal in circumstances where there was no appeal before the High Court), in *Munene's* case it was said "We will interpret liberally the extent of our jurisdiction"; and the decision in *Ralph's* case was disposed of by observing that it was "decided on a strict interpretation of section 360(1) of the Criminal Procedure Code". The Court then held that it had jurisdiction to entertain an appeal where there was no decision of appeal by the High Court. The decisions in *Jwisi's* case, *Nealon's* case and *Ralph's* case were cast aside.

Pure law is not defined; and we can find no reference to it in the authorities, other than in the dissenting judgment of Madan JA in *Mburu v Gachini Tuti* [1978] Kenya LR 69 where it is referred to as "pure justice". In that case the majority decision of the court was that there were no grounds in law for setting aside an *ex parte* judgment. In the dissenting judgment it was said ([1978] Kenya LR at page 71):

> What Mr Khanna said has intensified all the more my determination to try to do justice as a member of this Court, a task which I always perform with total imperturbability and unwavering devotion. I am always prepared to rise higher. It is an exhilarating pleasure to dispense pure justice. On the other hand litigants must appreciate that every appeal is not a Christmas package.

Munene's case was decided after *Mburu Kinyua's* case and it now appears that the *dictum* of Madan JA set out above has been accepted by this Court as the law.

As we have said, "pure law" is not defined, all there is, is an application of it in the proposition set out in *Munene's* case that it is a matter of pure law whether there was unreasonable delay on the part of the appellant in presenting his appeal to the High Court and this Court was not bound by the provisions of a statute expressly depriving it of jurisdiction. Is pure law a body of law that is inviolate, that cannot be abrogated by statute? It would seem to be so. A parallel to its application would seem to be that it is a matter of pure law whether any person has been validly elected as a member of the National Assembly; and section 44(5) of the Constitution which provides that the determination by the High Court of this issue shall not be the subject of any appeal, does not affect this court's jurisdiction to hear such an appeal. We mention this illustration with some hesitation; but we are constrained to do so for the reason that in *Munene's* case, section 44(1) and (5) of the Constitution and section 19 of the National Assembly and Presidential Elections Act 1969 are set out with the observation that this Court has some jurisdiction in election petitions. Was a foundation being laid for extending that jurisdiction by the application of the principles of liberal interpretation and pure law?

Again, the ability to interpret liberally the extent of this court's jurisdiction is not defined. Again, there is but an application of it; which was that a long line of authorities, following the well-established rule that there is no right of appeal apart from statute, was cast aside as having been decided on a strict interpretation of statutes defining the court's jurisdiction.

The subject of the extent of this court's jurisdiction is one of paramount importance. We have examined the matter fully for the reason that *Munene's* case is concerned not only with the issue of the extent of this Court's jurisdiction, it is one of the authorities of this Court, a Court of record. The novel concepts of pure law and liberal interpretation of statutes, establishing that this Court is neither bound by statute nor guided by precedent, will be applied in the determination of all appeals that come before us. Taken to its logical conclusion it establishes that this Court enjoys absolute jurisdiction: it is not bound by statute or precedent, and exercises a supervisory function over the Courts and Parliament.

We are satisfied that the principles of pure law have no application in the determination of the jurisdiction of this Court, and we have grave doubt that such law has any application in a Court of law. Further, we are satisfied that there is no substance in the proposition that this Court may interpret liberally the extent of its jurisdiction. With respect, we are of the view that the decision in *Munene's* case is bad law and should not be followed.

Applying the principles that we have set out, there could be but one decision in *Munene's* case; and that is that no provision having been made in the Medical Practitioners' and Dentists' Act for an appeal to this Court, and there being no provision in that Act that the High Court was to hear appeals as if it was exercising its jurisdiction under the Civil Procedure Act or the Criminal Procedure Code, there is no right of appeal to this Court.

We are satisfied that it has not been established that this Court has a general supervisory role over the judicial process; and that this Court enjoys only that jurisdiction which is conferred on it by statute.

We cannot accept Mr Mwirichia's submission, which is not supported by any authority other than

Munene's case which (as we have said) we should not follow. Mr Mwirichia's submission does violence to the basic principles governing the jurisdiction of a Court of Appeal in countries following the English judicial system expressed in the proposition that a Court of Appeal is a creature of statute with the consequence that no appeal lies to a Court of Appeal unless some statute gives a right to it. From the authorities we have referred to emanating from countries other than Kenya, it is abundantly clear that this principle has been rigidly adhered to and never departed from. The jurisdiction of this Court is the same, and is as expressed in *Munene's* case, which is that there is no right of appeal to this Court apart from statute. We can find no substance in Mr Mwirichia's submission.

We cannot agree with any of Mr Mwirichia's submissions and we are satisfied that this Court having been established by statute enjoys only that jurisdiction conferred on it by statute.

In the case before us, the particular enactment (section 84 of the Constitution), conferred jurisdiction on the High Court. It is necessary to examine the extent of the provision of a right of appeal, from the exercise by the High Court of the jurisdiction conferred upon it by the Constitution, during the years since independence. We must mention that at Independence the High Court was named the Supreme Court.

Section 176(1) of the Constitution of 1963 provided that the Court of Appeal for Eastern Africa (as it then was named) was to have such jurisdiction in relation to appeals from the Supreme Court as might be conferred on it by law. Section 176 (3), provided that jurisdiction should not extend to:

> (a) any question as to the interpretation of the Constitution; or
>
> (b)any question as to the contravention of any of the provisions of sections 14 to 27 (inclusive) of this Constitution (which relate to fundamental rights and freedoms).

Sections 14 to 27 were re-enacted as sections 70 to 83 of the Constitution of 1969; and section 28 (which is concerned with the enforcement of fundamental rights and freedoms) was re-enacted as section 84 of the Constitution of 1969.

Section 180 of the Constitution of 1963 provided that, if a Court of Appeal for Kenya were established, an appeal should lie to that Court as of right from decisions of the Supreme Court in the following cases -

> (a)final decisions in any civil or criminal proceedings on questions of the interpretation of the Constitution;
>
> (b)final decisions given in exercise of the jurisdiction conferred on the Supreme Court by section 28 of the Constitution (which relates to the enforcement of fundamental rights and freedoms).

The Constitution of Kenya (Amendment) Act 1965, section 3, provided that the Kenya Independence Order in Council 1963 which (we have mentioned) sets out, the Constitution should be the Constitution of the Republic of Kenya, and was to be deemed to have come into effect on 12th December 1964.

The Act of 1965 made a number of amendments. Sub-section (3) (set out above) of section was repealed. The effect of the repeal was that Parliament was authorised (by section 176(1)) to confer appellate jurisdiction in these matters on the Court of Appeal for Eastern Africa by Act of Parliament. Parliament did not do so, and no such jurisdiction was conferred on that Court by the Constitution of 1969. In the result, there was no right of appeal from the High Court to the Court of Appeal for Eastern Africa on these matters.

Another repeal effected by the Act of 1965 was of section 180 (set out above), the position then was that, if Parliament established a Court of Appeal for Kenya, it would be for Parliament to confer on that court such jurisdiction in relation to constitutional matters as Parliament saw fit.

As we have seen, Parliament established a Court of Appeal for Kenya by substituting section 64 of the Constitution, and conferred on it jurisdiction by section 3(1) of the Appellate Jurisdiction Act 1977.

Nowhere was the jurisdiction conferred by section 180 of the Constitution of 1963 (and repealed by the Act of 1965) restored, with the inescapable conclusion that this Court has no jurisdiction to hear appeals from the decisions of the High Court exercising its jurisdiction under section 84 of the Constitution of 1969.

This being so we would allow the preliminary point and hold that the appeal is incompetent. Although we heard the appeal on its merits *de bene esse*, from what we have said regarding the jurisdiction of this Court it would be improper for us to observe on the merits.

Appeal struck out.

Dated and delivered at Nairobi this 25th day of May , 1979.

SIR JAMES WICKS

.....

CHIEF JUSTICE

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

…….....

Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR