IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPLICATION NO. 3 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

AND

JEFFREY OKURI PEPELA AND 24 OTHERS.....RESPONDENTS

(Being an application for leave to appeal against the decision of the High Court at Mombasa (Muya, J.) delivered on 21st August, 2015

in

High Court Criminal Appeals Nos. 122 of 2014, 153 of 2014, 168 of 2014, 169 of 2014, 171 of 2014, 172 of 2014, 173 of 2014, 174 of 2014, 175 of 2014, 176 of 2014, 181 of 2014, 2 of 2015, 3 of 2015, 4 of 2015, 5 of 2015, 6 of 2015, 7 of 2015, 8 of 2015, 9 of 2015, 10 of 2015, 13 of 2015, 17 of 2015, 18 of 2015, 19 of 2015, 21 of 2015, and 22 of 2015.)

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RULING OF THE COURT

[1] At the heart of the application before us is the question whether the applicant has an automatic right of appeal to this Court against the High Court's judgment dated 21st August, 2015 wherein the High Court set aside the respondents' convictions and sentences passed by the court martial. Concomitant to that question is whether we ought to grant leave to the applicant to appeal to this Court in the event we find such leave is not automatic.

[2] In our view, the starting point would be ***Article 164(3)*** of the ***Constitution*** which stipulates:

> ***"The Court of Appeal has jurisdiction to hear appeals from—***
>
> ***a) the High Court; and***
>
> ***b) any other court or tribunal as prescribed by an Act of Parliament."***

The jurisdiction of this Court on the issue of right of appeal has been the subject of judicial discourse in several matters that have been determined before this Court with different judges expressing different views. Some judges have held that **Article 164(3)** (supra) has opened the door wide for any party aggrieved by a decision of the High Court to move to this Court on appeal as of right without need to seek leave. For instance, Kiage J.A in ***Judicial Service Commission & Secretary, Judicial Service Commission vs. Kalpana H. Rawal*** **[2015] eKLR** observed:

> ***"My learned brother M'Inoti J.A was of the same but even more emphatic view that the 2010 Constitution now provides a general right of appeal, so that previous decisions such as ANARITA must be understood in, and confined to, the context of the legislative framework of the time of their decision. I can do no more than fully agree with and quote him thus, in extenso;***
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> > ***"Section 64(1) of the Constitution of Kenya, 1969 conferred jurisdiction in the second form identified above, that is, by establishing the Court of Appeal to hear appeals from the High Court, but leaving it to statute law to determine the precise jurisdiction and powers. That provision was introduced in 1977 to establish the Kenya Court of Appeal following***

the break-up of the former East African Community and the attendant demise of the East African Court of Appeal. Under that Constitution, the jurisdiction of the Court could be expanded or limited by legislation. To claim jurisdiction to hear a particular appeal one was required to identify specific legislation that granted the right of appeal to the Court of Appeal. It was in this context that it was always asserted that there was no right of appeal where none was created by statute.

The Constitution of Kenya 2010, on the other hand confers jurisdiction of the Court in the first form by simply stating that the Court has jurisdiction to hear appeals from the High Court. The new Constitution can be said to have broadened the right of appeal, in the sense that the Constitution itself has expressly provided a general right of appeal from decisions of the High Court, but left it to legislation, if necessary to provide additional right of appeal from decisions of tribunals and other courts established by the Constitution.

In my opinion, the effect of Article 164(3) is, as far as appeals from the High Court are concerned, to make it henceforth unnecessary for a party to first identify specific legislation which confers jurisdiction on the Court of Appeal before the Court can assume jurisdiction. Arguments such as that advanced in Anarita Karimi Njeru that there was no right of appeal from decisions of the High Court under section 84 of the Constitution of Kenya 1969, as it then stood (before introduction of section 84(7) in 1992 to expressly provide for a right of appeal) are no longer tenable." [**Kiage, J.A's** emphasis]

[3] In summing up the foregoing our brother in his own words stated:

> "***I state and hold, unhesitatingly, that both the jurisdiction and the right of appeal from the High Court to this Court are now founded, in the first instance, on the Constitution of Kenya 2010. The jurisdiction invested on this Court is not qualified by words such as 'where a right of appeal arises'. It provides both the right of approach from the High Court and the power to hear those who have so approached. That constitutional right to appeal can only be denied, limited or restricted by express statutory provision properly justified as required by the Constitution itself. The wording of Article 164(3) of the Constitution admits to no other interpretation."*** [Our emphasis]

The learned Judge however seems to agree that the right of appeal contemplated under Article 164(3) is not absolute after all and can be expressly limited or circumscribed by statute. Such was the view held by this Court in ***Nyutu Agrovet Limited vs. Airtel Networks Limited (2015) eKLR,*** where this Court held that Article 164(3) could not be invoked where the primary statute expressly denied a right of appeal.

More recently, this Court (differently constituted) in its decision in ***Ramadhan Mohamed Ali vs. Hashim Salim Ghanim*** **[2016] eKLR** expressed:

> "***Article 164(3) of the Constitution addresses itself to the jurisdiction of this Court…***
>
> ***That Article gives this Court jurisdiction to hear appeals from the High Court. It does not at the same time confer a right of appeal to this Court from all and sundry decisions of the High Court as the appellant appears to assume. The appellant has to have a right of appeal before he can invoke the jurisdiction conferred by article 164(3)."***

Although this decision could be interpreted as shifting the ground laid in the **Judicial Service Commission case** (supra) what comes out clearly in both cases is that a party cannot invoke Article 164 to move this court on appeal where no express right of appeal exists. We shall advert to that issue later in this judgment.

[4] It is against the above principles that we will embark on the determination of the pertinent issues which we have pointed out at the beginning of this ruling. However, before we do so a brief summary of the facts will help to place this application in perspective.

[5] Sometime in the year 2011 the Kenya Defence Forces in defence of our country against terrorism were engaged in an operation dubbed '*operation linda nchi'* within the Kenyan/Somalia border. During the said operation, from what we can gather from the record, the appellants individually wrote letters to their superiors purporting to resign from service for a myriad of reasons some of which disclosed offences under the ***Kenya Defence Forces Act No. 25 of 2012*** (***KDF Act***). As a result, some of those members were arrested, court martialled and charged with the offence of desertion contrary to ***Section 74(1)(a)*** as read with ***Section 74(3)a (i)*** of the ***KDF Act***. Upon conclusion of those cases, the said members were convicted and sentenced to life imprisonment. Aggrieved by the said decision, the respondents herein filed a total of 25 separate appeals in the High Court challenging both conviction and sentence.

[6] The High Court (Muya, J.) in a judgment dated 21st August, 2015 allowed the respondents' appeals by setting aside and substituting the conviction for the offence of desertion and the life sentence with a conviction for the offence of absence without leave contrary to ***Section 75*** of the ***KDF Act*** and a sentence of imprisonment for 2 years.

[7] The applicant was not happy with that decision thus it filed a Notice of Appeal on 28th August, 2015 intimating its intention to appeal the impugned decision. The applicant then filed memoranda of appeal in respect of all the 25 appeals on 3oth September, 2016 and 3rd October, 2016. Subsequently, the records in respect of the 25 appeals were issued by the High Court to the applicant on 24th October, 2016. The appeals were assigned serial numbers of this Court. However, before the said appeals came up for hearing, the applicant filed the application at hand seeking leave to appeal against the impugned judgment. The application is predicated on the grounds that the ***KDF Act***, 2012 (repealed) was silent on the procedure to be adopted by the applicant who desired to prefer the appeal in question.

[8] According to the applicant it could appeal to this Court as of right, but since the Act did not expressly state so, it decided to file this application seeking leave "out of abundance of caution". According to the applicant, the intended appeal raises arguable points which

warrant the consideration of this Court. In a nutshell, the applicant's position is that the impugned decision has the effect of curtailing the court martial's power as a disciplinary mechanism within the Kenya Defence Forces and this compromises National security. The learned Judge is also faulted for *inter alia* misinterpreting what constitutes an offence of desertion under ***Section 74(1)(a)*** of the ***KDF Act***; consolidating the 25 appeals in the impugned judgment without an order to that effect; failing to properly appraise the evidence tendered at the court martial and that it was in the interest of national security as well as public interest for the leave sought to be granted.

[9] In response, the respondents vide grounds of opposition and affidavits on record, contended that the application was an abuse of the court process and devoid of merit. In their view, the applicant had no right of appeal to this Court under the ***KDF Act*** or any other legislation. In addition, the application was filed with unreasonable delay.

[10] At the plenary hearing, Mr. Muteti, Senior Assistant Director of Public Prosecutions appeared with Mr. Yamina, Principal Prosecution Counsel for the applicant; Mr. Gekonde appeared for the 3rd, 7th and 17th respondents; Mr. Odhiambo appeared for the 4th, 6th, 8th, 9th, 13th, 14th, 15th, 16th, 19th, 22nd and 24th respondents; Miss Murage appeared for the 10th respondent; while Mr. Kurauka and Mr. Mwanyale represented the 11th respondent and also held brief for Mr. Kamunda who is on record for the 1st and 2nd respondents.

[11] Asserting that military discipline is the cornerstone of any organized defence force Mr. Yamina urged that it is for that reason that court martial proceedings are separated from the ordinary civil and criminal proceedings. He went on to state that we ought to consider the application at hand with the special mandate of the court martial in mind.

[12] Delving into the merits of the application, counsel submitted that the State has a right to appeal to this Court by virtue of ***Section 361*** of the ***Criminal Procedure Code*** and that the current application was filed out of abundance of caution. Mr. Yamina opined that the fact that ***Section 186*** of the ***KDF Act*** was silent on the State's right to appeal to this Court prior to its amendment **(vide Section 26A of the KDF (Amendment) Act, 2016)** did not bar such a right of appeal as the express bar had been removed. He submitted further that the finality clause notwithstanding, if the judgment was a nullity, which they contend it was, a party could not be barred from moving to this Court on appeal. We understood him to mean the impugned judgment was for setting aside *ex debito justitiae*.

[13] Expounding further on this issue, Mr. Muteti drew a comparison of ***Section 186*** prior to its amendment, with the ***Armed Forces Act*** which was repealed by the ***KDF Act***. ***Section 115 (1)(3)*** of the repealed Act, which categorically provided that the decision of the High Court on any appeal under the said Act was final and not subject to any further appeal. According to the learned Senior Assistant Director of Public Prosecutions, the exclusion of the finality clause in the ***KDF Act*** prior to its amendment was an express intention of the legislature to open up a further appeal from the High Court's decision to this Court. Mr. Muteti added that there must be equality of arms for parties intending to appear before this Court on a second appeal. To bolster the proposition that there was nothing barring the State from appealing against the impugned decision, reference was made to the following sentiments of this Court in ***Republic vs. Danson Mgunya*** **(supra).**

> ***"The trial system, it is be contended, is not some Russian roulette and the State ought to have a free hand to appeal against acquittals where they are based on errors and mistakes, otherwise tainted acquittals will de-legitimize the criminal trial process and irreparably undermine the administration of justice. Secondly, ignoring the argument founded on equality of arms, it is contended that if the accused person is entitled to appeal in a bid to correct errors and mistakes by the trial court, why should the State not enjoy the same right?"***

[14] On his part, buttressing Mr. Muteti's submissions that the intended appeal was not frivolous, Mr. Yamina referred the Court to the depositions of Brigadier Kenneth Okoki Dindi, the then Director of Military Prosecutions, where he highlighted the impact of the impugned judgment on the ability of the Kenya Defence Forces to check and discipline its members for the offence of desertion. He reiterated that the learned Judge had erroneously consolidated the respondents' appeals in the impugned judgment without an order to that effect. As a result of the consolidation, the learned Judge failed to carry out his duty as a first appellate court thus occasioning miscarriage of justice. More particularly, the learned Judge made an omnibus finding without reappraising the evidence tendered in respect of each appeal. Moreover, when the State raised objection to the consolidation of the appeals the learned Judge invited them to proceed before this Court on that issue which direction the applicant assumed was certification by the High Court to appeal to this Court.

[15] Opposing the application Mr. Odhiambo urged that the ***KDF Act*** did not give the State the right to appeal against the decision of the High Court. ***Section 348A*** of the ***Criminal Procedure Code*** prior to its amendment in 2014 only gave the State the right to appeal against an acquittal in a trial by the High Court. This right of appeal did not extend to a decision of the High Court sitting as appellate court against a decision of a court martial. To that extent reliance was placed on the case of ***Republic vs. Danson Mgunya (supra).*** Counsel also contended that ***Section 361*** of the ***Criminal Procedure Code*** did not take precedence over the ***KDF Act***.

[16] He argued that had the legislature intended, as contended by the applicant, that in the absence of an express exclusion of an appeal to this Court under ***Section 186*** of the ***KDF Act***, the State had a right to appeal against the decision in issue, it would not have amended the said provision in 2016 to expressly allow second appeals to this Court. Besides, the amendments to ***Section 186*** the ***KDF Act*** and ***348A*** of the ***Criminal Procedure Code*** could not apply retrospectively to this case. Further, ***Article 164(3)*** of the ***Constitution*** confers this Court with the jurisdiction to hear appeals from any other court or tribunal as prescribed by any Act of Parliament. At the material time there was no Act of Parliament that gave this Court the jurisdiction to entertain an appeal against the impugned decision.

[17] Mr. Odhiambo urged that the applicant should have dealt with the issue of consolidation immediately the High Court issued the said orders. The decision in issue did not have a negative impact on the Kenya Defence Forces ability to check and deal with indiscipline within the forces as alluded to by the applicant. Likewise, the intended appeal did not raise any public interest issue to warrant the leave sought being granted.

[18] On her part, Miss Murage submitted that the application turned on two issues namely, whether the applicant had a right of appeal against the impugned judgment; and whether the circumstances justified the exercise of our discretion in favour of the applicant. She stated that ***Article 164(3)*** of the ***Constitution*** does not grant a party an automatic right of appeal to this Court. A party seeking leave to appeal must demonstrate the statutory provisions that accord him/her that right. In support of that line of argument we were referred to the case of

Ramadhan Mohamed Ali vs. Hashim Salim Ghanim **(supra)** wherein this Court expressed:

> ***"Article 164(3) of the Constitution addresses itself to the jurisdiction of this Court…***
>
> ***That Article gives this Court jurisdiction to hear appeals from the High Court. It does not at the same time confer a right of appeal to this Court from all and sundry decisions of the High Court as the appellant appeals to assume. The appellant has to have a right of appeal before he can invoke the jurisdiction conferred by article 164(3)."***

Counsel contended that in determining whether the applicant has a right of appeal we ought to pay regard to the provisions of the ***KDF Act*** as the primary and applicable statute. We were asked to juxtapose ***Section 186(1) (a)*** of the ***KDF Act*** which grants an accused person who has been convicted in the court martial the right to make a second appeal to this Court with ***186(2)*** which restricts the State's right to appeal against the decision of the court martial to the High Court on grounds of acquittal or sentence. Relying on the latin maxim of *expressio unius est exclusio alterius* (the explicit mention of one thing is the exclusion of the other), counsel asserted that it was clear that the legislature did not intend to confer the State with any right of appeal to this Court. It follows therefore, that the applicant has no right of appeal to this Court.

[19] Similarly, Miss Murage submitted that the amendment to ***Section 186*** of the ***KDF Act*** in 2016 could not apply retrospectively to the case at hand and referred to this Court's decision in ***Mary Wafula vs. British Airways PLC*** **[2015] eKLR**. Even assuming ***Section 361*** of the ***Criminal Procedure Code*** was applicable an appeal thereunder is limited to points of law unlike the intended appeal herein which raises issues of fact. Counsel contended that the applicant's conduct was undeserving of the exercise of this Court's discretion in its favour. This is because the applicant had failed to first seek leave to appeal to this Court from the High Court and the application for leave had been filed with inordinate delay of about one year. Taking into account the foregoing we were asked to dismiss the application.

[20] Last but not least, Mr. Mwanyale and Mr. Gekonde submitted on more or less similar grounds as Mr. Odhiambo and Miss Murage.

[21] We have considered the record, the arguments put forth on behalf of the parties as well as the law. It has been demonstrated in the preceding paragraphs of this ruling that ***Article 164(3)*** of the ***Constitution*** confers jurisdiction to this Court to hear appeals from a decision of the High Court; and any other court or tribunal as prescribed by an Act of Parliament. This Court elucidated this point in its decision in ***Twaher Abdulkarim Mohammed vs. Mwathethe Adamson Kadenge & 2 others*** **[2015] eKLR** where we succinctly stated:-

> ***"Whereas Article 164(3) is the constitutional foundation of this Court's jurisdiction and in broad terms states, inter alia, that its jurisdiction is to hear appeals from the High Court, no inference can be drawn contrary to all other textual and contextual evidence that it was the intention of the framers of the Constitution that all appeals whatsoever from the High Court would lie to the Court of Appeal."***

We are not persuaded that this provision confers a right of appeal to every person who wishes to appeal to this Court against any decision even where leave to appeal is a pre-requisite before an appeal can lie to this Court. In other words, it is not a *carte blanche* for all decisions of the High Court to be appealable to this Court as of right. This right of appeal may be restricted by statute. **Ouko, J.A** in the ***Judicial Service Commission case (supra)*** appreciated as much by stating:

> ***"Clearly there is a general consensus from the cases so far decided under the current Constitution and from clear reading of the Constitution that Article 164(3) (a) does not provide for appeal from all and sundry decisions of the High Court; that the right of appeals to this Court can also be conferred or restricted by statute in specific circumstances, so long as that conferment or restriction is consistent with the Constitution."***

The above is in our view the correct position in law. We are apt to note however that the applicant is not seeking to rely on Article 164(3) of the Constitution to move this Court on appeal.

[22] Having laid out the law as we understand it to be, we now come to the elephant in the room. Was the applicant's right to appeal against the impugned judgment restricted by statute? According to the respondents, the applicant's right of appeal to this Court was restricted by ***Section 186*** of the ***KDF Act*** prior to its amendment. The limitation could be inferred from the provision's silence on such a right as opposed to express provision of the right of appeal conferred to a convicted person. The provision read as follows:

> ***"186***
>
> ***(1) If a person has been convicted by a court martial-***
>
> ***a) the person convicted may appeal to the High Court and make subsequent appeals to any other superior court, against the conviction, the sentence, or both; or***
>
> ***b) the Director of Public Prosecutions may appeal to the High Court against the sentence.***
>
> ***(2) If a person has been acquitted of a charge by a court martial, the Director of Public Prosecution may appeal to the High Court against the acquittal."***

[23] In our view, the aforementioned provision must be interpreted in the correct context to establish the intention of the legislature. As was stated by the Supreme Court of Canada in ***David Dunsmuir –vs- New Brunswick*** **(2008) 1 S.C.R 190**:-

> ***"The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law."***

See also this Court's decision in ***Narok County Government & another vs. Richard Bwogo Birir & another*** **[2015] eKLR**.

It is common ground that the ***Armed Forces Act*** which was repealed by the ***KDF Act*** expressly excluded any further appeal from the decision of the High Court. The provision in question, ***Section 115(3)*** stipulated:

> ***"The decision of the High Court on any appeal under this Act shall be final and shall not be subject to any further appeal."***

It is significant to note that the above exclusion of the right of appeal to this Court applied to both parties, i.e the accused person and the state. We note further that the exclusion was not imported to ***Section 186*** of the ***KDF Act***. Furthermore, there was no provision in the ***KDF Act*** barring the State from appealing against the decision of the High Court. It is not in doubt that although the right of appeal by the D.P.P was not expressly conferred through this amendment, it was not expressly denied either. This is where in our view, the issue of contextual interpretation comes in. What was the intention of the legislature? Was the amendment meant to open the upward movement for one party and not the other? If that was the case, why did Parliament not categorically state that an appeal by the D.P.P to the High Court would be final; and why did it do away with the finality clause which was expressly stated in the Armed Forces Act?

[24] It is imperative to note the KDF Act was enacted in 2012 after the Constitution of Kenya 2010 had come into force. The Act was therefore supposed to adapt or mirror the changes and values embraced by the Constitution. One of the most important fundamental right introduced by the Constitution 2010 is the right against discrimination as espoused under **Article 27**. This Article decrees equality of all persons before the law, and the right to equal protection and equal benefit of the law. Parity or equality of arms is a cardinal tenet in any fair trial. When the D.P.P appears in court as a party, he has the same rights as the other parties and must benefit from the same rights accorded to the other parties.

[25] We are persuaded that the need to conform with the Constitution is what precipitated the subsequent amendments to the KDF Act, and even the Criminal Procedure Code to allow the D.P.P the same right as the other appellants to move to this Court on second appeal in matters arising from court martials and other subordinate courts. We endorse the following sentiments of the Ugandan Supreme Court in ***Baku Raphael Obudra and Ors vs. Attorney General*** **(Constitutional Appeal No. 1 of 2005) [2006] UGSC 5:**

> ***"Where, as is alleged in this case, Parliament intends to abolish or restrict a citizen's right which is apparently granted or implied by the provisions of the Constitution which is a superior law, Parliament must do so expressly and its will must be clearly manifested in the words used in the Act. Such intentions or will cannot be breathed into the Act by mere judicial reasoning."***

[26] Further, as stated earlier the right of appeal can be expressly circumscribed or restricted by statute Article 163(4) of the Constitution notwithstanding. With the repeal of the Armed Forces Act, there is no statute that expressly denies the applicant the right of appeal to this Court on second appeal in matters arising from court martials. Consequently, in light of the foregoing we find the applicant has a right of appeal to this Court against the impugned decision. This is a right not derived from the 2016 amendment to the KDF Act, because we agree the said amendment cannot operate retroactively, but because the right was endowed by the Constitution which expressly forbids discrimination, and the same is not outlawed by any statute.

27] Having arrived at this finding, it will not be necessary for us to address the issues as to whether the intended appeal raises any matters of public interest or the other issues which would only have come into play if we were dealing with the Court's discretion as to whether to grant leave to appeal or not. The question as to whether the judgment in question was a nullity is for the bench sitting on the appeal to determine. We also find the question pertaining to applicability of **Sections 348A** and **361** of the Criminal Procedure Code to decisions emanating from court martials is rendered moot by our finding. It is nonetheless an interesting issue and we hope an opportune moment will avail itself in future for this Court to address its mind to it.

28] We think we have said enough to demonstrate that this application has merit. We allow it with no order as to costs and direct that the applicant files the intended appeal within 14 days from the date of this ruling.

Dated and delivered at Mombasa this 11th day of October, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR