



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
MISC. CRIMINAL APPLICATION NO.31 OF 2001

1. LT. COL. J. M. MAINGI)
2. LT. COL. MICHAEL MACHARIA)
3. MAJOR NAKITARE)
4. CAPT. OCHIENG KOJINO).....APPLICANTS
5. W.O.I ISAAC M. MUSSIGISSI)
6. SGT. DERICK KABIE)
7. CPC EYANAI)

VERSUS

1. JOHN TITO)
2. JOHN MASAI KIPTARUS)
3. NAHASHON KILI KIPROTICH).....RESPONDENTS
4. MOSES KIPROTICH KWALIA)

R U L I N G

The material before me show that the applicants had been summoned to answer certain criminal charges brought privately against them by the respondents. There appear to have been procedural difficulties and advocates for applicants raised objections. The learned trial magistrate appeared to agree that the correct procedure was not followed but instead of rejecting the charges she gave the respondents an opportunity to follow the procedure. She also gave the parties the right of appeal.

The applicants promptly appealed through their lawyer and an application was made to stay the proceedings in the lower court.

At the hearing of the application for stay of the proceedings before the trial court, the Advocates who appeared for the respondents raised a preliminary objection.

It was their case that the applicants have no right of appeal at this stage as they had not been convicted. If they have no right of appeal then both the Petition of appeal and the application for stay of proceedings should be struck out.

Hon. Muite, relied on the provisions of the Criminal Procedure Code and case Law. It must be noted that in Kenya Criminal Appeals are generally regulated by the Criminal Procedure Code Cap 75 Laws of Kenya.

An aggrieved party can only appeal if there is an enabling statute. If there is no such statute then the aggrieved party is not in law entitled to appeal. The leading authority in this respect is the case of Anarita Karimi Njeru (NO.2) -vs- R. 1979 K.L.R. 162 in which it was held that the Court of appeal had no jurisdiction to hear appeals from the decision of the High Court under Section 84 of the Constitution of Kenya.

But there have been Judgments of the Court of Appeal which have permitted an intending appellant to appeal in the absence of statutory provisions to that effect. See the two cases of Repulic through Devji Kanji V. Darendra Valji Halai (1978) K.L.R. 178, Commisioner of Lands -vs- M.J. Samuel, Civil Appeal No.109/87 – Kisumu, Munene –vs- R.(2)(1978) K.L.R.105. The provisions of Section 347 of the Criminal Procedure Code are clear. Only a person convicted by a subordinate court of the first or second class may appeal to the High Court.

I think the procedural difficulties encountered by the parties and the order by the Magistrate on how to surmount them is not so prejudicial to the applicants as to make this court to depart from the provisions of section 347 of the Criminal Procedure Code. There is nothing so prejudicial to the interests of the applicants to compel this court interfere even by way of Revision. Even if the charges as laid were rejected by the magistrate at this stage it would not bar the respondents from bringing fresh charges.

For the reasons stated, I find that I have no jurisdiction to interfere at this stage.

The preliminary objection is sustained and upheld. Both the Petition of Appeal and the application dated 9th February, 2001 are struck out.

Dated and delivered at Nakuru this 30th day of March, 2001.

D. M. RIMITA

JUDGE

30.3.2001



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