



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Sir James Wicks CJ, Wambuzi & Law JJ A)**

**CRIMINAL APPEAL NO 28 OF 1978**

**REPUBLIC(thro' DEVJI KANJI ).....APPELLANT**

**AND**

**DAVENDRA VALJI HALAI.....RESPONDENT**

***(Appeal from the decision of Sachdeva J in Revision Criminal Case No 4 of 1978)***

**JUDGMENT**

The appellant brought a private prosecution in the Senior Resident Magistrate's Court, Nairobi, against the respondent. Both parties were represented by counsel and, at the close of the prosecution case, counsel for the respondent took the objection that the private prosecutor had not obtained permission from the Court to prosecute the case, as required by section 88(1) of the Civil Procedure Code. The Senior Resident Magistrate upheld the objection, relying on *Mohanlal Karamshi Shah v Ambalal Chhotabhai Patel* (1954) 21 EACA 236, and held the proceedings to be a nullity. He was upheld by the High Court (Sachdeva J) exercising revisional jurisdiction which had been invoked. This appeal is against the High Court decision.

Mr PN Khanna, who appeared for the appellant, argued that both courts below were wrong on the authority of *Kyagonga v Uganda* [1937] EA 486.

In our view, reference was made in *Shah's* case to section 88 of the Criminal Procedure Code to the effect that no person can conduct a private prosecution without permission of the magistrate; but the case was decided on different points. In this case it appears from the record that the charge sheet was drafted by an advocate practicing in Nairobi, was signed by the magistrate and does not refer to any parties. The written complaint on oath cites the parties, the appellant as the complainant and the respondent as the accused. It does not refer to the Republic as the complainant. On 17th May 1977 counsel for the complainant applied for a warrant of arrest of the respondent which was refused by the chief magistrate and a summons for personal appearance issued instead. The parties appeared in Court on a number of occasions before the trial, which started about December 1977, when the complainant called four witnesses, all of whom were cross-examined, and closed his case. As appears from the record, all concerned knew that this was a private prosecution; but the question of permission was never raised until the closure of the prosecution case. In *Kyagonga's* case, no formal leave of the Court for the prosecution was recorded, but the complainant was allowed to lead evidence. It was held that the fact that he was allowed by the Court to adduce evidence in support of the charge must mean that such leave had been given to him. The relevant provisions of the law requiring permission were the same as our provisions. Sachdeva J on revision said

that he was not bound by that authority, and apparently he was not persuaded by it either. The same point, however, arose in *Nunes v R* (1935) 16 KLR 126. It was held:

The learned Resident Magistrate must have been aware that the case was instituted by a private prosecutor, who could not conduct it without his permission, and in all the circumstances we are of the opinion that it should be assumed that he gave his permission when he allowed the trial to proceed.

This decision was made over forty years ago and its authority has never been challenged. It was referred to by the Court of Appeal in *Shah's* case (1954) 21 EACA 236 without disapproval. With respect, we think that these two decisions correctly interpret the law. *Nunes' case* (1934-35) 16 KLR 126 was not brought to the attention of the judge and we think that, had it been, he would have come to a different conclusion.

We now turn to the preliminary point raised by Mr R Kapila that the appeal was not competent as to the Attorney-General had not been served or did not appear. In counsel's view, the appellant who is a private prosecutor has no *locus standi* in this Court. He based his submission on *Shah's* case in which it was held that:

A private prosecutor is not entitled to be heard on appeal even if the Attorney-General has intimated that he does not wish to be heard, the proper respondent in every criminal appeal being the Crown represented by the Attorney-General or someone instructed by him.

The decision in that case was based on section 353 of the Criminal Procedure Code which (as then in force) required notice to be given to the Attorney-General. This section was amended in the Schedule to the Criminal Procedure Code (Amendment) Act 1967 by deleting from it the requirement of service upon the Attorney General. The result is that now service upon the respondent or his advocate is sufficient. In these circumstances this authority is not helpful. Further, by section 361(1) of the Criminal Procedure Code any party to an appeal from a subordinate court may appeal against the decision of the High Court in its appellate jurisdiction to this Court. A private prosecutor is such a party. Section 361(7) equates an order of the High Court made in its revisional jurisdiction with a decision made in its appellate jurisdiction. We are accordingly satisfied that a private prosecutor as a party to proceedings in the High Court has a right of appeal to this Court, subject to the residuary control by the Attorney-General over every criminal case under the provisions of section 82 of the Criminal Procedure Code. For these reasons we dismissed the preliminary objection.

We allow the appeal, set aside the rulings of the High Court and of the Senior Resident Magistrate and order that the proceedings be placed before the Chief Magistrate for a date to be fixed for the trial to be continued and completed by the Senior Resident Magistrate from the stage immediately before his ruling.

Mr Khanna has asked for costs and cites as his authority sections 171 and 172 of the Criminal Procedure Code. In our reading of these sections, this Court has jurisdiction to give costs in a criminal appeal in cases where costs have been awarded either in a subordinate court or the High Court and an appeal has been brought against the order of costs. That is not the position here and accordingly there will be no order as to costs.

*Order accordingly.*

Dated and delivered at Nairobi this 5th day of October 1978.

**SIR JAMES WICKS**

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**CHIEF JUSTICE**

**S.W WAMBUZI**

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**JUDGE OF APPEAL**

**E.J.E LAW**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**