

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: CHESONI, C.J. TUNOI & LAKHA JJ.A)
CRIMINAL APPEAL NO. 48 OF 1999
BETWEEN
FATUMA
ASHUR.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(Appeal from order or as the case may be of the High Court of
Kenya at Mombasa (Mr. Justice Waki) dated 25th March 1999

in
H.C.CR.A NO. 380 OF 1998

JUDGMENT OF THE COURT

In this case the appellant who was convicted on a charge of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95(1)(b) of the Penal Code was sentenced to pay a fine of Shs. 3,000/=. Her appeal to the superior court was summarily rejected by Waki J.

She had appealed on three grounds which were that:

- (1)The learned magistrate erred in law and in fact in convicting the appellant.
- (2)The learned magistrate erred in law and fact in fining the appellant Shs. 3,000/= and
- (3)The learned magistrate erred in law and fact in dismissing ALI SAID ALI from giving evidence as a defence witness.

If we may start with ground 3 Ali was disqualified as a defence witness because it was alleged that he had been listening to the proceedings in court.

In the case of YOUNG CHARLES OKANG V. REPUBLIC [1982 - 88] 1 KAR 276 this court held that

"Section 352(2) of the Criminal Procedure Code expressly limited the power of summary rejection to cases where the appeal is brought on the ground that the convictions were against the weight of evidence, or that the sentence was excessive."

In the instant case other issues including disqualification of a defence witness were involved and raised in the memorandum of appeal to the superior court which consequently denied that court the jurisdiction to reject the appeal summarily. Mr Gacivih for the state agrees.

In the result, the appeal is allowed, the summary rejection of it is quashed and it is directed that the appellant's appeal in the superior court be returned to that court for admission to hearing by a Judge of the Court.

We so ordered and delivered at Mombasa this 19th day of July, 1999.

Z.R. CHESONI

CHIEF JUSTICE

P.K. TUNOI

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR