



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU
(CORAM: GICHERU, TUNOI & SHAH, J.J.A.)
CRIMINAL APPEAL NO. 29 OF 1994
BETWEEN

JETHRO MWENESI NDENDA APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a conviction and sentence of the High Court of Kenya at Kakamega (Justice Osiemo)
dated 15th September, 1992**

in

H.C.CR.C. NO. 127 OF 1991)

JUDGMENT OF THE COURT

On the petition of appeal as presented in the Court below the learned Judge who dealt with the matter clearly exceeded his jurisdiction in summarily dismissing the appeal under section 352(2) of the Criminal Procedure Code. The appeal clearly was not brought solely on the ground that the conviction was against the weight of evidence or that the sentence was excessive, and it is only when an appeal is limited to these grounds that use can be made of the subsection.

The learned Judge therefore erred in taking the course that he took and to order the appeal to be heard by the superior court would occasion injustice to the appellant who is almost serving out the sentence. In the interests of just we shall dispose the appeal forthwith.

The substituted charge sheet upon which the trial proceeded cannot be traced. It is noted that the main ground of appeal taken by the appellant is that he was convicted on a defective charge and in the absence of it no appellate court can determine the issue.

In the circumstance we allow this appeal and quash the conviction. We set aside the sentence of 8 years imprisonment and five strokes of the cane and order that the appellant be released forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 24th day of March, 1998.

J. E. GICHERU

.....

JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.