



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: CHESONI, C.J. OMOLO & SHAH JJ.A)

CRIMINAL APPEAL NO.63 OF 1997

BETWEEN

SIMION MURUMBWA ONGERI.....APPLICANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a Judgment of the High Court of Kenya at Kisii (Justice Patel) dated 21st
December, 1992**

in

H.C.C.CR. NO.3399 of 1993)

JUDGMENT OF THE COURT

SIMION MURUMBWA ONGERI was convicted of robbery contrary to section 296(1) of the Penal Code and sentenced to four years imprisonment plus eight strokes of the cane. His appeal to the superior court against conviction and sentence was summarily rejected by Patel J. He has preferred a further appeal to this Court.

In his appeal to the superior court Ongeru had disputed his dock identification by ANDREW ONYAMBU (P.W.1) and ZEDEKIAH NYAKUNDI (P.W.2). He said that no identification parade was held, as it should have been the case. He also disputed the serial numbers on the permit for the television set that was produced by the police as exhibit in court. His grounds were not that the conviction was against the weight of the evidence, or that the sentence was excessive. It cannot be said that there was no material in the circumstances of this case which could raise a reasonable doubt whether the conviction was right or lead the superior court judge to the opinion that the sentence ought to be reduced. This Court has said before and we now say it again that section 352(2) of the Criminal Procedure Code expressly limits the power of summary rejection to cases where the appeal is brought on the ground that the conviction was against the weight of the evidence, or that the sentence was excessive see YOUNG CHARLES OKANG V. REPUBLIC [198-88] 1KAR 276. In the instant case the appellant raised questions of law in his petition of appeal to the superior court. Consequently the learned Judge erred in law in summarily rejecting the appeal as he lacked jurisdiction to do so.

Section 3(2) of the Appellate Jurisdiction Act (Cap.9) confers on the Court of Appeal, in addition to any

other power, authority and jurisdiction vested by the said Act in the High Court for the purposes of and incidental to the hearing and determination of any appeal. This Court therefore has power to hear and determine this appeal or to send it back to the superior court for rehearing. We do not think it would be in the interest of justice to remit this appeal back to the High Court.

The robbery with which the appellant was charged and convicted took place at night (at 10 p.m.). There were about fifteen persons involved in the commission of the robbery and they threatened to kill their victims. ANDREW ONYAMBU said he had never seen the appellant before, although he alleged he recognized the appellant with the aid of electric light at the scene of the crime. The police later informed another witness, NYAKUNDI of the appellant's name. This witness did not see the appellant until in September, 1991, but although he had told the police that he could recognize the robbers if he saw them again, the police never held an identification parade. NYAKUNDI said that the serial number of the TV 00619 had been changed to 14993, but there was no proof that that was what had happened. All along the appellant had maintained he bought the TV from a Ugandan. The prosecution telephoned some dealer and asked him to confirm whether the complainant had bought a TV from him (dealer), which the dealer confirmed. The appellant was not given an opportunity to see and cross-examine the dealer whose demeanour the court did not observe either. But the trial Court considered that evidence. Furthermore while the purported owner of the TV never alleged tampering with the TV the police alleged that that had been done. This sums up the evidence on which the trial magistrate convicted the appellant.

After reading over the record of the trial court and we were not satisfied that the appellant's guilt was proved to the standard required in criminal law.

For the foregoing reasons we allow the appeal, quash the summary rejection and the conviction and set aside the sentence. We direct that the appellant be set at liberty unless he is lawfully held, for some other cause. Those shall be our orders.

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

Z.R. CHESONI

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CHIEF JUSTICE

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR