



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(Coram: Gicheru, Cockar & Muli JJ A)**

**CRIMINAL APPEAL NO 28 OF 1992**

**Between**

**GEORGE NGARUIYA.....APPELLANT**

**JAMES KOIGI MUNGE ..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(An Appeal from a judgment of the High Court of Kenya at Eldoret (Aganyanya, J) dated 11th day of June, 1990**

**in**

**HCCR Appeal No 10 of 1990)**

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**JUDGMENT**

On 5th December, 1989 the Ag Resident Magistrate at Eldoret, M N Wena, convicted the appellants of willfully and unlawfully damaging property contrary to section 339 (1) of the Penal Code and sentenced each of them to a fine of KShs 2,000/= or in default 5 months imprisonment. The appellants appealed to the High Court at Eldoret against conviction and sentence and put forward 9 grounds of appeal in respect thereof. These grounds were not confined to the conviction being against the weight of evidence or the sentence being excessive. Indeed, some of them concerned unresolved conflicting evidence of the prosecution witnesses; reliance on the evidence of a prosecution witness who had perjured herself; evaluation of prosecution evidence in isolation and disregarding the evidence for the defence; failure to give the appellants the benefit of doubt in view of the prosecution not discharging its onus of proof; the trial magistrate's bias against the appellants; and so on. Nevertheless, on 11th June, 1990 the High Court, Aganyanya, J, summarily dismissed the appellants' appeal under section 352 (2) of the Criminal Procedure Code. The appellants have appealed to this Court against that dismissal, their complaint being that in view of numerous unresolved legal issues by the trial Court which were raised in their petition of appeal and which were in their favour, the summary rejection of their appeal was improper.

An appeal can only be summarily dismissed under section 352(2) of the Criminal Procedure Code by the Superior Court in its appellate jurisdiction where it is brought on the ground that the conviction is against the weight of evidence, or that the sentence is excessive. It is only when appeal to the superior court is

limited to the ground that the conviction was against the weight of evidence or that the sentence was excessive that use can be made of the section aforementioned: and where an appeal is brought not only on the ground that the conviction was against the weight of the evidence or that the sentence is excessive but also on some other ground or grounds, the Superior Court in its appellate jurisdiction has strictly no jurisdiction to deal with that appeal summarily however little merit there may, or may not be in any of the other ground or grounds. Indeed, the jurisdiction to dismiss an appeal summarily even when such an appeal is brought on the ground that the conviction was against the weight of evidence arises only when, in the opinion of the first Appellate Judge, the evidence before the trial Court leaves no reasonable doubt as to the appellant's guilt, and that the appeal is frivolous or without substance. It is not enough that the evidence before the trial Court leaves no reasonable doubt as to the appellant's guilt but that the appellant's appeal must also be manifestly either frivolous or without substance. See *Karioki s/o Gachohi v Rex* (1950) 17 EACA 141; *Lighton alias Mogege s/o Mundekeanye v Rex* (1951) 18 EACA 309; *Mulakh Raj Mahan v Reginam* (1954) 21 EACA 383; and *Raphael v Republic* [1973] EA 473 at page 474 letters A and C.

From what we have pointed out above, the particulars' appeal to the High Court at Eldoret was not restricted to their conviction by the trial Court being against the weight of evidence or to their sentence being excessive. That Court in its appellate jurisdiction had no jurisdiction to deal with the appellants' appeal summarily. Its summary rejection of that appeal was wrong. There is therefore merit in their appellants' complaint to this Court. Accordingly, we allow their appeal, set aside the order of the High Court summarily rejecting their appeal to that Court and order that the said appeal be remitted to the said Court for hearing according to law.

Those then are the orders of the court.

**Dated and delivered at Nakuru this 24th day of October , 1992.**

**J.E GICHERU**

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**JUDGE OF APPEAL**

**A.M COCKAR**

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**JUDGE OF APPEAL**

**M.G MULI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**