



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(Coram: Kneller JA, Chesoni and Nyarangi Ag JJ A)

CRIMINAL APPEAL NO 46 OF 1984

BETWEEN

GEORGE STEPHEN GUCHUAAPPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the summary rejection of an appeal by the

High Court of Kenya at Kakamega (GICHERU J) dated October 1983

in

Criminal Appeal Case 350 of 1983)

JUDGEMENT OF THE COURT

This is, we now discover, for it was not clear from the record of the appeal, another appeal from a summary rejection of a first appeal and a plea for it to be sent back to the High Court for hearing. And something will have to be done about the revision order in it.

George Stephen Guchua, the appellant, was charged with two counts of stealing by a person employed in the public service contrary to Section 280 of the Penal Code and a third substantive count of, 'having or conveying' stolen property contrary to Section 323 of the same Code. He pleaded not guilty and after a trial by one of the Resident Magistrate at Kakamega he was convicted of the three substantive counts and sentenced to 3 years' imprisonment on each count, and the sentences were made to run concurrently. This was on October 5 1983. He appealed to the High Court on October 11 1983, and in his petition raised, among others, these points:

1. The police searched his unoccupied rooms at Kakamega without warning, and in his absence (because he was in the cells at Kisumu Police Station from November 6 1982)
2. Some articles (such as 19 rounds of ammunition) alleged to have been discovered in there, were not produced at the trial.
3. Kiganjo Police Training College Library books were never reported to be missing.

4. Two witnesses for the Republic – Stephen Munya and Sergeant David Cheboi – had testified to the contrary, on material matters in a previous trial of the appellant in Kisumu Criminal Case 109 of 1983, on a different charge.

Now, whether or not the learned Judge, when he read the proceedings in the subordinate court, found the evidence sufficient to support the conviction and that there was no material in the circumstances of the case which could raise a reasonable doubt, whether the conviction was right, and he was satisfied the appeal had been lodged without complaint, the fact is that, here, the appeal was not brought on the grounds(s) that the conviction was against the weight of the evidence, but on complaints that, the articles alleged to have been found in his rooms were planted, the theft of the library books was not proved and the credibility of two witnesses was challenged. So, this was not, with respect, an appeal that could properly be rejected under section 352(2) of the Criminal Procedure Code.

The same reading, might have persuaded the learned Judge that, the first count, alleging stealing by a person employed in the public service of 25 text books together valued at Shs.380 on divers dates between October 3 1977, and September 4 1981, (a period of 4 years), was or was not covered by the provisions of Section 137(1) of the Criminal Procedure Code relating to charging someone with stealing a gross amount of property, without specifying particular times or exact dates. Likewise, whether or not the charge (as opposed to the particulars) in the third count, was ‘duplex’. These would be further reasons for not rejecting the appeal summarily, or so we think.

Turning to the revision order, we have respectfully to point out that, the learned Judge misdirected himself when he wrote that, the appellant was not charged with three counts. He was. There were two of stealing by persons employed in the public service and one of conveying stolen property.

When the judge summarily rejected the appeal and made this revision order, before or after the rejection: it is not clear) it was an order made to the prejudice of the appellant, for it removed a matter or matters that the appellant could have urged on appeal and so the revision order, even if correct, should not have been made in the absence of the appellant: Section 364(2) Criminal Procedure Code. Can this Court, in such an appeal, deal with an order made by the High Court in a first appeal in the exercise of it’s revisionary jurisdiction? For the purpose of a second appeal, such an order is deemed to be a decision of the High Court in its appellate jurisdiction: Section 361(7) (ibid). The answer to the question is, ‘yes’. It follows, therefore, that, the appeal must be and is allowed, the revision orders are quashed, the petition of the appellant to the first court is remitted to the High Court for admitting to hearing, according to law. Those are the orders of this court.

Dated and delivered at Kisumu, this 22nd day of June 1984.

A KNELLER

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JUDGE OF APPEAL

R CHESONI

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ACTING JUDGE OF APPEAL

O NYARANGI

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ACTING JUDGE OF APPEAL

I certify that this is a true copy of the original

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DEPUTY REGISTRAR