



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller Hancox JJ A and Chesoni Ag J A)

CRIMINAL APPEAL NO 37 OF 1984

BETWEEN

GILBERT CHEGE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from an order of the High Court of Kenya at Nakuru (Masime J) dated 25th November 1983 IN

Criminal Appeal No 372 of 1982)

JUDGMENT OF THE COURT

Gilbert Chege, the appellant, was convicted on July 7 1982, by the Resident Magistrate, Naivasha of stealing goods worth more than one hundred shillings in a dwelling house contrary to Section 279(b) of the Penal Code and on July 27th the same year, he was sentenced by the same magistrate to 3 years imprisonment and 6 strokes corporal punishment.

month later his co-accused was put on probation for 3 years by the same court.

His petition of appeal from this conviction and sentence to the High Court in Nakuru was filed on August 11 1983, and summarily rejected just over a year later (on August 13 1983), by Mr Justice Masime. Notice of this was not issued until November 25 1983 (which is a delay of about 67 days).

The appellant's Memorandum of Appeal to this Court was filed in its Nakuru sub-registry on January 23rd 1984, (almost another two months lost there) and we are now hearing this appeal 6 months later.

Returning to the appellant's petition in the High Court the appellant, in effect, appealed against the conviction because there was acute conflict in the evidence of the witnesses for the Republic about where a rifle and two knives were found in his house, some policemen were not called to give material evidence and his identification was shaky and he appealed against the sentence because he was not invited to mitigate before it was passed upon him.

The learned judge was empowered to reject the appeal summarily if it was brought on the ground that, the conviction was against the weight of the evidence or that the sentence was excessive and it appeared to him that it was 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 or lead him to the opinion

that the sentence ought to be reduced. Section 352 Criminal Procedure code. The appellant's Memorandum of Appeal does not limit itself to those two grounds, namely that the conviction is against the weight of the evidence or that the sentence is excessive.

This is a second appeal so it can only be brought on grounds of law and the only one that we can discover at this stage, though it is not in the memorandum, is whether or not the learned judge could summarily reject the petition under Section 352(2) of the Criminal Procedure Code?

The former Court of Appeal for East Africa in *Osongo and another v Republic*, (1972) E A 170, 171 E and F, which was a reference to the full court, said that, it could not agree that if those words had not been used in the petition, the power of summary rejection could not still be lawfully invoked and added - "We think that what the judge of the High Court has to do, and did in this case, is to look at the substance of the grounds of appeal and that, if fairly looked at, they amount to no more than a submission that the conviction is against the weight of evidence and the judge is satisfied the evidence is sufficient and that there is no material raising a reasonable doubt that the conviction was right, he may summarily dismiss the appeal"

And in that application, the appellant's advocate, Mr Owuor, submitted one witness was an accomplice for which that Court of Appeal could find no evidence to support that submission. Mr Owuor also submitted that the identification of the applicants was based on the evidence of only one witness and that other persons who might have given material evidence were not called by the prosecution but that Court of Appeal said those were not matters of law.

Looking at the grounds of appeal here before the High Court, it is clear to us that they include complaints that the appellant was wrongly or not identified as the culprit and that this together with the unsatisfactory nature of the other evidence, make the conviction unsafe.

The appellant has served his sentence and in any event, because it was a lawful one, we could not have dealt with an appeal against its severity or otherwise as this is a second appeal.

We agree, however, that the grounds of appeal were not within the provisions of section 352 of the Code so, the appeal should not have been rejected summarily.

Dated and delivered at Nairobi, this 30th day of July 1984.

A A KNELLER

JUDGE OF APPEAL

A R W HANCOX

JUDGE OF APPEAL

Z R CHESONI

AG JUDGE OF APPEAL

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

.....

DEPUTY REGISTRAR