IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: HANCOX JA, CHESONI & PLATT Ag JJA)

CRIMINAL APPEALS NOS 117 & 118 OF 1983

JOHN NDERITU MWANGI ……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

Chesoni JA The two appellants John Nderitu Mwangi (first appellant) and John Gichohi Wachira (second appellant) were jointly charged, with four other men, with robbery with violence contrary to section 296(1) of the Penal Code (cap 63). Nderitu was alone in the second count charged with unlawful use of a motor vehicle contrary to Section 294 and Wachira was in an alternative charge to count 1 charged with handling stolen property contrary to section 2 of the Penal Code. Nderitu was convicted on the first count of robbery with violence and the second count and sentenced to six years' imprisonment with twenty four strokes on the first count and a fine of Kshs 3,000 in default to serve six months' imprisonment on the second. Wachira was acquitted of robbery with violence but convicted of handling by dishonestly receiving one television set and a singer sewing machine and sentenced to seven years' imprisonment. They both appealed to the High Court against conviction and sentence, but their appeals were summarily rejected under section 352(2) of the Criminal Procedure Code. These are, therefore, second appeals and we have consolidated them.

Before a judge summarily dismisses an appeal he must ask himself question: Does the appeal fall within the provisions of Section 352(2)?

That section provides as follows:

"Section 352(2). Where an appeal is brought on the ground that the conviction is against the weight of the evidence, or that the sentence is excessive, and it appears to a judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was rightly or lead him to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing, be summarily rejected by an order of the judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground for complaint."

An appeal falls within Section 352(2) only if the ground of appeal raises any one or both of the following points:

1. the conviction is against the weight of evidence or

2. the sentence is excessive.

In that case the judge then peruses the record and proceeds to consider the evidence and/or the sentence, and, if it appears to him that the conviction is supported by enough evidence and it is right and there are no circumstances which lead him to form the opinion that the sentence should be reduced he may summarily reject the appeal. An appeal, the grounds of which raise not merely questions of the conviction being against the weight of the evidence or the sentence being excessive but, in addition, other questions whether of fact or law or of mixed fact and law e.g. wrong identification, equivocal plea of guilt, alibi etc, cannot be summarily dismissed.

In *Mulakh Raj Mahan v Reginam* [1954] 21 EACA 383 the appellant's appeal to the High Court (then Supreme Court) which was against conviction and sentence was not brought on the grounds that the conviction was against the weight of the evidence or that the sentence was excessive. The memorandum of appeal contained at least three other points raising matters which, if points of substance, would vitiate conviction. The appeal was summarily rejected by the High Court under Section 252(2). The then Court of Appeal for Eastern Africa allowed the appeal against summary rejection and said:

"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 case under the provisions of section 352, sub-section (2), of the Kenya Criminal Procedure Code. The appeal 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 sub-sections."

This decision was followed recently by the Kenya Court of Appeal in *Nahashon Marenya v Republic* Criminal Appeal No 123 of 1982 (unreported) and *Bernard Marandavu Aggrey v Republic* Criminal Appeal (1982-88) 1 KAR 374. We agree with the opinion expressed by the predecessor of this court in the case of *Osongo v Republic* [1972] EA 170 at p 171 letter F that:

"What the judge of the High Court has to do … 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 that 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."

Again we think a judge of the High Court would be justified to hold that an appeal fall within section 352(2) and summarily reject it, if the ground of appeal is too vague to exclude the appeal from the provisions of the sub-section. We here have in mind as example the ground that "the learned magistrate erred both on a point of law and facts." Such a ground of course fails to comply with section 150(2) of the Criminal Procedure Code which requires every petition of appeal to contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is to have erred (see *Arnold Pudo s/o Aranda v R* [1960] EA 380 at 381).

When the substance of the grounds of appeal by Nderitu in the High Court are looked at it is to be observed that they raise the question of his identification by the complainant's wife, Njeri Kamangara (PW 16); in other words if Virginia's identification of the 1st appellant is, whether he could a convicted on the identification by a single witness at night. An alibi is also raised though it was not put forward at the trial through crossexamination or in the appellant's unsworn statement. We queried identification and ownership of the stolen goods and proof that the motor vehicle was converted to the 1st appellant's own use. On identification the Court of Appeal for East Africa said in the case of *Kamau v R* [1975] EA 139 where the appeal had been dismissed summarily (at p 140):

"Whether or not a conviction can be supported, when based on the evidence of a single identifying witness in circumstances of difficulty is, in our opinion, not a mere question of fact but is a question of mixed fact and law. In these circumstances we do not think with respect, that the appeal to the High Court should have been dismissed summarily."

The second appellant raised the question of where the two items are found. He said they were found in a house used by someone else. The TV was found locked in a store and there was the question of whether he was guilty of handling by receiving, or obtaining. The appellant said he handled the TV in the course of his employment. As to the sewing machine Jemima (PW 11) paid the money to Irene (PW 12) and not the appellant. Irene said the appellant said he could not issue a receipt because it was a "magendo" sale yet Jemima said he promised to send the receipt through Irene. Through cross-examination of Margaret Njoroge he put forward the explanation that the two items belonged to a tenant who had not paid rent and those goods had been distrained. This explanation does not appear to have been considered and a finding made whether it was reasonable in the light of *Kipsaina v R* (1975) EA 253 that a charge of receiving stolen property is not established if the explanation given by the accused is reasonable and might possibly be true even if the court is not convinced that it is true.

We have considered the petitions of appeal of the two appellants and we are satisfied that the appeals ought not to have been summarily dismissed because, as has been said before, the exercise of this power is strictly limited to cases where the appeal is brought only on the ground that the conviction is against the weight of evidence or the sentence is excessive which were not the only grounds in these appeals and thus as conceded by Mr Chunga for the Republic the appeals were removed from the scope of section 352(2). As there was no jurisdiction for the High Court to deal with appeals summarily under section 352(2) we allow the appeals, set aside the orders summarily dismissing them and remit the cases to the High Court with the direction that they be admitted for hearing.

Dated and Delivered at Nairobi this 3rd Day of November, 1983

A.R.W. HANCOX

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JUDGE OF APPEAL

Z.R. CHESONI

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JUDGE OF APPEAL

H.G. PLATT

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Ag. JUDGE OF APPEAL