



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Madan, Miller & Potter JJA)

CRIMINAL APPEAL NO. 58 OF 1981

BETWEEN

JAMES OBIRI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Madan JA This is a second appeal. The appellant was convicted by the Senior Resident Magistrate, Kisii, of stealing 130 packets of hybrid maize, the property of Kenya Farmers Association, Kisii. His appeal to the High Court was summarily rejected under Section 352(2), Criminal Procedure Code. There were three accused in the trial before the magistrate.

The appellant's memorandum of appeal filed on his behalf by his advocates in the High Court, listed eight grounds of appeal. (a) that there was no evidence connecting the appellant with the maize produced in court, therefore there was no proper evidence to support the appellant's conviction; (b) that there was no corroboration of the evidence of PW 2 and PW 3; (c) that the evidence of one of the accused was accomplice evidence to be treated with caution; (d) that the burden of proof was shifted to the appellant; (e) the magistrate's judgment was on matters not on record; (f) the sentence of three years imprisonment was severe.

The memorandum of appeal to us complains about the summary rejection of the appeal by the High Court because there were points of law raised in the contents of the memorandum of appeal filed in the High Court by the appellant's advocates, which could only be determined on a hearing; that where an appellant is represented by counsel it is in the interests of justice to hear the appeal so that counsel may raise such points of law and fact which appear in the interests of the appellant.

Generally speaking, we would say that the power to summarily reject a criminal appeal conferred by Section 352(2) should be very rarely exercised, that is to say only in the clearest of cases, e.g. where there was an unequivocal plea of guilty to the charge by the accused himself. Human nature being what it is, an appellant whose appeal is summarily rejected must feel, even if unjustifiably, that justice has been denied him.

We consider that the learned judge erred in summarily rejecting the appellant's appeal. The memorandum of appeal before him raised both points of law and fact upon which the appellant's advocate should have been heard in open court.

Once again, we commend the following passage from the judgment in *Wakelin v Rex* [1951] 18 EACA, 185 at p 187:

“If the object of the section is to save time the present case is a good example of how easily the object can be defeated. Furthermore, we should have thought, that where an appeal is brought either against conviction or sentence, when on the face of it the appeal appears frivolous or without merit, the appeal could be disposed of just as expectiously by two judges or one judge, as the case may be, sitting in open court, as by a single judge perusing the record in his Chambers.”

We have evaluated the evidence in the case against the appellant for ourselves, the evidence established beyond reasonable doubt that he was a party to theft of the maize in collaboration with the storekeeper who was the first accused in the magistrate’s court. The stolen maize was seen by the manager’s clerk in a vehicle which the appellant had hired to transport it. When asked to produce a receipt authorising him to have the maize on the vehicle, he attempted to bribe the clerk and asked him to help him. The appellant made an unsworn statement in which he denied knowing anything about the maize. The third accused (who was acquitted) was the driver of the vehicle who merely said that his vehicle had been hired by the appellant to transport the maize. He was in no way an accomplice. At no time did the magistrate overlook that the burden lay upon the prosecution to prove the case against the appellant.

We see no merit in the appeal. The sentence was not excessive. The appeal is ordered to be dismissed.

As **Miller** and **Potter JJA** agree, it is so ordered.

Dated and Delivered at Kisumu this 30th day of November 1981.

C.B.MADAN

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR