



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: GITHINJI, KARANJA & KIAGE, J.J.A)

CRIMINAL APPEAL NO. 49 OF 2015

BETWEEN

ABDI WALI HASSAN KHER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Meru (Emukule, J.)

dated 30th July, 2005

in

H.C.CR.A. No. 4 of 2003)

JUDGMENT OF THE COURT

By this appeal the appellant Abdi Wali Hassan Kher challenges the order of the High Court at Meru (Emukule J) made on 14th February 2008 by which the learned Judge summarily rejected the appellant's appeal to that court.

That appeal had been against the conviction and death sentence meted out to him by the Senior Resident Magistrate's Court at Garissa for the offence of attempted robbery with violence contrary to **Section 297 (2)** of the Penal Code. That attempt was found to have been made on 28th June 2002 in that the appellant, in the company of other persons not before court and while armed with a somali knife did harm to one Gerlus Halume Kitsao.

The rejected appeal had raised some three grounds as set out in the appellant's self-crafted petition of appeal namely;

"1. That pundit magistrate erred both law and fact while being Impressed that I was arrested on spot with a knife without

observing that I ever was charged with the same as per law required in Section 308 (a) of the C.P.C. to prove the same.

- 2. That the pundit magistrate erred both in law and fact while convicting me on charges which weren't adequately proved as per law required on charge of this nature.*
- 3. That the pundit magistrate erred both in law and fact while rejecting my defence without giving cogent reasons in so doing in light of the prosecution's case as per law requires in Section 169 (1) of the C.P.C."*

In the present appeal the appellant complains that the learned Judge erred by;

- Summarily rejecting the appeal in the appellant's absence and without serving him with reasons contrary to **Section 352 (1) (2)** of the C.P.C. and occasioning a failure of justice.
- Summarily rejecting the appeal yet the nature of the offence charged required that the appeal be handled by a two-judge bench.
- Summarily rejecting the appeal some six years after conviction thereby grossly violating the appellant's rights.

Arguing the appeal before us, Mr. Wanjohi, the appellant's learned Counsel stated that no notice of his appeal's rejection was ever served upon the appellant

which was a miscarriage of justice. He continued that the appeal in question did raise points of law not limited to the weight of evidence or severity of sentence and hence outside the proper purview of summary rejection. It therefore deserved to be heard and determined on merit at which hearing the issue of identification was to be challenged the incident having occurred at night. He cited and asked us to apply the principles for summary rejection of appeals as enunciated by this Court in **OKELLO –VS-REPUBLIC** [2003] eKLR; [2003] KLR 205.

For the Republic, **Mr. Musyoka** the learned Prosecution Counsel conceded the appeal. It was the proper thing to do. Summary rejection of appeals under **Section 352** of the Criminal Procedure Code (C.P.C.) is an exceptional power reposed in a Judge of the High Court and is to be used in rare cases strictly and narrowly hemmed in by the C.P.C. and exercisable only in the clearest of cases where, on the face of it, there is no merit or substance in the appeal in question. It is a power to be narrowly construed not just because the C.P.C. limits it, but more because it is a dramatic, draconian negation of the right of appeal which is an integral aspect of fair trial or due process in criminal proceedings. It cannot be at large and cannot be exercised with carefree zeal. It is now circumscribed and exercised within narrow confines as set out in the C.P.C;

"352 (1) When the High Court has received the petition and copy under section 350, a judge shall peruse them, and, if he considers that there is no sufficient ground for interfering, may, notwithstanding the provisions of section 359, reject the appeal summarily:

Provided that no appeal shall be rejected summarily unless the appellant or his advocate has had the opportunity of being heard in support of the appeal, except-

- i. *in a case falling within subsection (2) of this action:*

(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 right 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.

(3) Whenever an appeal is summarily rejected notice of rejection shall forthwith be given to the Attorney-General and to the appellant or his advocate.

What can be gleaned from this provision is that;

- i. A Judge of the High Court may after perusing a petition of appeal and copy of the record, summarily reject an appeal that discloses no sufficient ground for interference.
- ii. A summary rejection may occur even if the appeal is one which would otherwise be heard by two judges.
- iii. The appellant and his advocate must be afforded opportunity to be heard before summary rejection unless the appeal is challenging conviction on the ground of weight of evidence or sentence on the ground of excessiveness and the Judge considers the evidence sufficient and the sentence proper.
- iv. The Judge on ordering summary rejection must certify that he perused the record and was satisfied there was no sufficient ground for complaint.
- v. Notice of summary rejection must forthwith be given to the Attorney General (now Director of Public Prosecutions (DPP) and to the appellant or his advocate.

Having perused the record of appeal herein, we are not satisfied that the learned Judge was faithful to the strict requirements of this provision. His order, as appears from the record, is simply an action on a template or proforma that is not compliant with the section. It reads;

“DATE: 14.02.08

The Attached Appeals is submitted to your Lordship for orders as to admitting for hearing or otherwise”

It is followed by two choices “**Admitted**” or “**Rejected**” and the learned Judge simply crossed out the first, ticked the second, then dated and signed. That is no indication that the judicial function of perusal and consideration followed by certification, occurred in this case. If the problem was the Standard Form presented before the learned Judge with the appellant’s file, the learned Judge ought to have sent it back for correction or ignored it and acted in accordance with **Section 352** of the **C.P.C.** And he should have directed notification to the appellant. In failing to do so, he erred.

We are certain that the issues complained of in the appellants first appeal to the High Court unfitted it for summary rejection. Like in **OKELLO –VS- REPUBLIC** (Supra) that appeal was plainly deserving of full hearing by the High Court on its merits, a need made even more plain upon considering that the appellant was under the ultimate sentence of death and what was rejected was his first appeal.

For the reasons we have set out, this appeal succeeds and is allowed. The order of summary rejection of the appellant’s first appeal is quashed. That appeal is remitted to the High Court at Meru for expeditious hearing before a bench of that court excluding Emukule J.

Orders accordingly.

Dated and delivered at Meru this 24th day of June, 2016

E. M. GITHINJI

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL