



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 89 OF 2014

BETWEEN

MOSES RAFIKI KAZUNGUAPPELLAN

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 24th September, 2013

in

H.C.Cr.A. No. 89 of 2014)

JUDGMENT OF THE COURT

On the 28th June, 2013, **Moses Rafiki Kazungu** “the appellant” was arraigned before the Principal Magistrate’s Court at Kilifi for the offence of causing death by dangerous driving contrary to **section 46** of the Traffic Act. The particulars of the offence were that:

*“Moses Rafiki Kazungu, on the 14th day of June, 2013 at about 11.30 a.m., at Mtondia along Kilifi-Malindi road, Kilifi County being a driver of a motor vehicle Registration Number KAH 397 C Nissan Matatu did drive the said motor vehicle on the said road recklessly at a speed or in a manner which was dangerous to the public or by leaving any vehicle on a road in such position or in a manner or in such a condition as to be dangerous to the public having regard to all the circumstances of the case including the nature condition and use of the road and the amount of traffic which is at the time or which might reasonably be expected to be on the road in that you reversed the said motor vehicle and knocked down a juvenile pedestrian who was walking off the road killing him instantly namely **Furaha Karisa**”.*

The appellant pleaded guilty to the charge, was convicted on his own plea of guilty and subsequently sentenced to five (5) years imprisonment. The appellant immediately lodged an appeal in person to the High Court citing five grounds of appeal to wit:

“1. That the learned trial magistrate erred in law and fact by convicting me on my own plea of

guilty without considering that I was not accorded adequate time to prepare for the plea I was about to take.

2. That the learned trial magistrate erred in law and fact in finding my conviction and sentence without seeing that I was not informed of the consequences of the charge before pleading guilty.

3. That the learned trial magistrate erred in law and fact by not seeing that I was forced by my arresters to plead guilty in promise that I will be acquitted.

4. That the learned trial magistrate erred in law and fact by not considering the language used in court was not familiar to me hence violation of section 198 of the Criminal Procedure Code.

5. That the learned trial magistrate erred in law and fact in finding my conviction without seeing that I had no legal counsel to defend me.”

Subsequent thereto, the appellant instructed **Messrs Odhiambo S.E. & Co.**, Advocates to act for him. The advocates then filed a Petition of Appeal dated 9th July, 2013 on 18th July, 2013. They advanced three grounds of appeal;

“1. That the learned Honourable Magistrate erred both in law and fact in that he convicted and sentenced the appellant yet the particulars of the charge sheet did not support the charge.

2. That the learned Honourable magistrate erred both in law and fact in that he failed to find that the charge sheet was defective.

3. That the learned Honourable magistrate erred both in law and fact in that he sentenced the appellant to 5 years imprisonment which was inordinately high”.

In our view, these grounds superseded those filed by the appellant in person. The appeal which was against both the conviction and sentence was however summarily rejected by the High Court (**Meoli, J.**) on 24th September, 2013. Such rejection was pursuant to the provisions of **section 352(2)** of the Criminal Procedure Code. This appeal is against the said rejection. The thrust of the appellant’s complaint is that the High Court erred in law in summarily rejecting the appeal filed by his advocates when the Petition of appeal raised both points of law and facts that required hearing on merits.

Mr. Were, learned counsel for the appellant reiterated this complaint before us on 9th February, 2015 when he appeared to canvass the appeal.

Mr. Jami Yamina, learned Principle Prosecution Counsel did not oppose the appeal. In other words, he conceded to the appeal holding that the grounds of appeal filed by appellant’s counsel which were on record at the time of summary rejection of appeal by the High Court raised issues that should have been allowed to proceed to hearing. He only pleaded with us that in the event that we agreed with him and allowed the appeal on that ground, we should remit the appeal back to the High Court for re-hearing. Mr. Were did not see the need to object or oppose the latter proposition by the state. In other words, the appellant was comfortable with the order of re-hearing the appeal.

Section 352 (2) of the Criminal Procedure Code makes provision for summary rejection of appeal where the appeal is brought on the ground that the conviction is against the weight of evidence, or that the sentence is excessive. If it appears to the Judge that there is sufficient evidence to support the conviction and there is no material to raise doubt on the conviction or to warrant the reduction of sentence, the Judge may without setting the appeal for hearing reject albeit summarily the appeal by making an order certifying that he has perused the record and is satisfied that the appeal has been lodged without sufficient grounds for complaint in which case the appellant need not be given opportunity to support the appeal.

As it can readily be seen, the power of summary rejection of an appeal under **section 352(2)** of the Criminal Procedure Code is strictly limited to cases where the appeal is brought only on the ground that

the conviction is against the weight of evidence or that the sentence imposed is excessive. See *John Nderitu Mwangi & John Gichohi Wachira v Republic* [1982-88] 1KAR 387, *Young Charles Okang v Republic* [1982-88] 1KAR 276 and *Obiri v Republic* [1981] KLR 493.

However, it has been said before and we say it again that the jurisdiction to summarily reject an appeal ought to be resorted to or invoked in the clearest of cases where the only ground of appeal is that the conviction is against the weight of evidence or that the sentence is excessive. It should not be resorted to willy-nilly or as a means of clearing backlogs. As *Madan J.A.* said in the case of *Obiri* (supra)...

“Generally speaking, we would say that the power to summarily reject a criminal appeal conferred by section 352(2) should be rarely exercised, that is to say only in the clearest of cases... Human nature being what it is, an appellant whose appeal is summarily rejected must feel, even if unjustifiably, that justice has been denied him...”

He went on to state that the object of the power of summary rejection is to save time and when this power is exercised in non-clear cases, this object is defeated.

Looking at the Petition of appeal filed by Messrs Odhiambo S.E. & Co., Advocates in the High Court, it can readily be seen that it was not solely anchored on either of the two grounds aforesaid. Rather it mainly challenged the competence of the charge, preferred against the appellant in the magistrate’s court. Considering the particulars of the charge as framed and reproduced elsewhere in this judgment, it cannot be said that such challenge should have been summarily rejected. All these were matters of law which could only be determined after a full scale hearing. The appeal was thus not the kind amenable to summary rejection

It is on this basis that we must allow the appeal. The summary rejection of the appeal in the High Court is accordingly quashed and a direction is given that the appellant’s appeal to the High Court is hereby returned for admission to hearing and thereafter be heard as expeditiously as possible.

Dated and delivered at Mombasa this 12th day of March, 2015.

H. M. OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR