



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 262 OF 2012

BETWEEN

FIDELIS WANDERA MAKOKHA OUMA &

NICODEMUS DEDE MAGIO.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Busia

(Muchemi, J.) dated 5th May, 2009

in

H.C.CR.A. NO. 7 OF 2009)

Consolidated with

CRIMINAL APPEAL NO. 263 OF 2012

BETWEEN

NICODEMUS DEDE MAGIO..... APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Busia

(Muchemi, J.) dated 5th May, 2015

in

JUDGMENT OF THE COURT

1. **FIDELIS WANDERA MAKOKHA OUMA** (the 1st appellant) and **NICODEMUS DEDE MAGIO** (the 2nd appellant) were charged with the offence of robbery with violence contrary to **Section 295** as read together with **Section 296(2)** of the Penal Code. The 1st appellant was in the alternative charged with handling stolen property contrary to **Section 322(2)** of the Penal Code.

2. After trial the appellants were convicted on the main charge of robbery with violence and sentenced to death. Their appeal to the High Court was summarily rejected thus provoking the two appeals before us.

3. At the hearing the two appeals were consolidated and Mr. Sirtuy, learned Principal Prosecution Counsel, conceded them arguing that there was no sufficient ground for rejecting the appellants' appeal summarily.

4. On their part, Messrs Onyango and Odeny, learned counsel for the appellants, citing several authorities in support of their submissions, argued that the appellants' appeals to the High Court raised substantial points of law which merited a plenary hearing. They therefore faulted the learned Judge for rejecting them summarily and urged us to allow this appeal.

5. **Section 352(2)** of the Criminal Procedure Code authorizes a Judge of the High Court to summarily reject an appeal after perusing the record if it is based on the ground that

“the conviction is against the weight of 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 ...”

6. In this case both appellants raised the issue of identification/recognition which is a point of law. Besides that, in their memoranda of appeal, they both applied for copies of proceedings to enable them “raise more grounds” of appeal which could very well have been further points of law.

7. In the circumstances, we agree with counsel for the appellants and the Principal Prosecution Counsel that the learned Judge erred in rejecting the appellants' appeal summarily. Consequently, we allow these appeals and direct that the appellants' appeals in the High Court be heard afresh by a Judge other than Muchemi, J. We further direct that the appellants be supplied with copies of the proceedings to enable them amend their memoranda of appeal to the High Court as they had requested.

DATED and delivered at Kisumu this 19th day of June, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR