



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 7 OF 2013

BETWEEN

CHARLES MULAMA 1st APPELLANT

GIDEON ICHELA MULAMA2nd APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega (I. Lenaola, J) dated 17th March, 2011

in

KAKAMEGA HCCRA NO. 147 OF 2010)

JUDGMENT OF THE COURT

The appellants Charles Mulama and Gedion Mulama were charged before the Chief Magistrate's Court, Kakamega, on two counts. On the first count they were charged with the offence of Assault Causing Actual Bodily Harm contrary to Section 251 of the Penal Code in that on 27th February, 2009 at Ituhubu village of Kakamega East District they unlawfully assaulted Monicah Awinja causing her actual "violence". The duo were charged on the second count with the offence of Malicious Damage to Property contrary to Section 339 (1) of the said Code particulars being that on 14th February, 2009 at the said Ituhubu village they willfully, unlawfully and maliciously damaged the house of the said complainant valued at Kshs. 50,000/=. Because they pleaded not guilty; a trial took place before a Resident Magistrate (P. O. Ooko) who in a judgment delivered on 8th July, 2010 convicted the appellants and sentenced them to pay fines in default to serve periods of imprisonment. Being dissatisfied with those findings the appellants filed an appeal being High Court Criminal Appeal No. 147 of 2010 whose grounds of appeal were:-

- 1. THAT the learned trial magistrate erred in not finding that there was no case for the Appellants to answer..
2. THAT the learned trial Magistrate erred by convicting the appellants in the light of material conflicts evident in the evidence adduced by key prosecution witnesses.

3. THAT the learned trial Magistrate erred by shifting the burden of proof to the Appellants.

4. THAT the learned trial Magistrate erred by ignoring the Appellant's defences.

5. THAT the learned trial Magistrate erred by handing down upon the Appellants erroneous sentences.”

The record shows that on 17th March, 2011 the record for the said appeal was before I. Lenaola, J, in Chambers for admission and the learned Judge made the following order:

“ Order by the Judge under section 32 (sic) of the Criminal Procedure Code. I certify that I have perused the record and I am satisfied that the appeal had been lodged without any sufficient grounds for complaint.

Appeal summarily rejected under section 352 (2).”

In a Memorandum of Appeal to this Court the appellants cite two grounds of appeal being:-

“1. THAT the learned Judge did not consider all the legal grounds which were listed in the Petition of Appeal dated 21st July, 2010.

2. THAT the learned Judge erred in law by not complying with the provisions of 352 (3) of the Criminal Procedure Code.”

Mr. Richard Onsongo, the learned counsel who held brief for Mr. S. B. A. Mukabwa for the appellant, in urging the appeal before us submitted that the grounds of appeal set out in the petition of appeal before the High Court raised weighty issues of law and facts which the learned Judge should have considered and he should not have dismissed the appeal as he did under the provisions of Section 352 (2) Criminal Procedure Code.

Mr. C. A. Abele, the learned Assistant Director of Public Prosecutions submitted, like counsel for the appellant, that had the learned Judge scrutinized the Petition of Appeal he would have noted that there were weighty issues raised. Counsel in the event conceded the appeal.

Section 352 (2) Criminal Procedure Code provides that:-

“(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.”

This provision was the subject of consideration by this court differently constituted way back in 1983 in **Aggrey v Republic [1983] KLR 649** where the appellant had been convicted by a magistrates court on an offence of stealing. He was convicted and appealed to the High Court where he complained that the evidence by the prosecution consisted of fabricated lies and was unreliable. The appeal was summarily rejected and he appealed to the Court of Appeal. It was held that the exercise of the power to summarily reject an appeal under Section 352 (2) Criminal Procedure Code is strictly limited to cases where the appeal is brought on the ground that the conviction is against the weight of evidence or the sentence is excessive.

In the instant case the appeal to the High Court raised such issues as that there were material

conflicts in the evidence adduced by prosecution witnesses. It was also alleged in the appeal that the burden of proof had been shifted; that defences were ignored and that sentences handed down were erroneous.

Considering the issues raised in the petition of appeal to the High Court we are of the respectful considered view that the same when looked at fairly raised matters of law and had the learned Judge given them a proper consideration he would not have rejected the appeal summarily. In rejecting the appeal summarily the learned judge clearly fell into error and the appeal should succeed and is hereby allowed. The proper course to take, and we hereby so order, is that we remit the appeal to the High Court with an order that the same be admitted to hearing.

Dated and Delivered at Kisumu this 19th day of September, 2014.

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR