



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: OMOLO, WAKI & VISRAM, J.J.A.)**

**CRIMINAL APPEAL NO. 52 OF 2010**

**BETWEEN**

**HENRY SIMIYU WATITWA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Kitale (Ombija, J) dated 22<sup>nd</sup> February, 2010***

**in**

**H.C.CR.A. NO. 59 OF 2008)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

A magistrate at Kapenguria tried and convicted the appellant herein, **Henry Simiyu Watitwa**, on a charge of shop-breaking and stealing contrary to **sections 304 (1)** and **279 (b)** of the Penal Code. Upon the conviction, the magistrate imposed an omnibus sentence of five years imprisonment without specifying whether that sentence was imposed on each limb of the charge. The normal practice is to impose a sentence on each limb of the charge and order them to run concurrently. Because the superior court (Ombija, J) summarily rejected the appeal under **section 352 (2)** of the Criminal Procedure Code, he did not deal with that issue.

Mr. Oluoch, learned Senior Deputy Public Prosecution Counsel, also pointed out to us the fact that after police constable Peter Komu (PW2) had given his evidence in chief, the appellant told the magistrate that he (appellant) needed the Occurrence Book for Kapenguria Police Station before he could cross-examine the witness. The magistrate granted an order that the Occurrence Book in question be produced to enable the appellant to cross-examine the witness. The matter was then adjourned and when the hearing eventually resumed, constable Komu did not return to testify with the result that the appellant never cross-examined him.

Once again the superior court, in summarily rejecting the appeal, deprived the appellant of the right to address him on that issue. Accordingly, we have come to the conclusion that the learned Judge was not entitled to summarily reject the appellant’s appeal under **section 352 (2)** of the Criminal Procedure Code. We allow the appeal, set aside the order for summary rejection made by Ombija, J on the 22<sup>nd</sup> December, 2010 and order that the High Court at Kitale shall admit the appellant’s appeal to hearing and then determine it according to law. That shall be our order on the appeal.

***Dated and delivered at Eldoret this 17<sup>th</sup> day of February, 2011.***

**R. S. C. OMOLO**

.....

**JUDGE OF APPEAL**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of original.

**DEPUTY REGISTRAR**