



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: BOSIRE, WAKI & AGANYANYA, JJ.A.)
CRIMINAL APPEAL NO. 107 OF 2009

BETWEEN
ALPHONCE MATHUKU KILONZO.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(Appeal from an order of the High Court of Kenya at Machakos (Lenaola, J.) dated 9th February, 2009
in
H.C.Cr.A. No. 87 of 2008)

JUDGMENT OF THE COURT

This appeal is against summary rejection of the appeal of *Alfonce Mutuku Kilonzo*, the appellant, lodged in the High Court at Machakos on 21st April, 2008. The appellant had been charged at the Chief Magistrate's Court at Machakos with the offence of assault causing actual bodily harm to Nzivulu Munyole on 6th July, 2005 contrary to **section 251** of the Penal Code which he denied. But after a full trial the trial court (*D.G. Karani, R.M.*) found the appellant guilty as charged, convicted and sentenced him to a fine of Kshs.15,000/= or in default to six (6) months imprisonment. The fine was paid but his appeal to the High Court was summarily rejected (*Lenaola, J.*) on 9th February, 2009. This is allowed under **section 352** of the Criminal Procedure Code subject to exceptions specified therein.

The facts of the case were fairly simple. On the day in question *Nzivulu Munyole* (PW1) was grazing her cattle and goats as she drove them home when the appellant who was the Assistant Chief of Syokisinga Sub-Location came there and warned her against brewing of *karubu*, a local brew. A misunderstanding arose after PW1 answered the appellant negatively and he slapped her on the cheeks and also whipped her on the back. PW1 suffered injuries and she reported the incident to Katangi Police Post on 8th July, 2005 where she was issued with a P3 form and was examined by *Peter Wambugu Muthengi* (PW4) at Kitui District Hospital on 27th July, 2005. PW4 classified the injuries suffered by PW1 as harm. The appellant was summoned to Masii Police Station on 16th December, 2006 where he was arrested and later charged at Machakos Law Courts on 2nd January, 2006.

In his sworn defence the appellant denied being at the scene of crime on 6th July, 2005 but that he was in

a meeting at the District Officer's office up to 3.00 p.m. And when he left the meeting he went to Katangi Market where he remained up to 8.00 p.m. He testified, however, that on 4th July, 2005 he had gone to the home of PW1 to warn her to stop brewing Karubu but she told him she would not stop.

The learned Magistrate heard and considered the evidence of the prosecution witnesses and that of the appellant and had no hesitation in accepting the former as true and rejecting the latter as untenable. He found the appellant guilty and sentenced him to a fine of Kshs.15,000/= as herein before stated. He paid the fine but his appeal to the High Court was summarily rejected, hence this appeal before us. It is based on the memorandum of appeal lodged at the court registry on 23rd March, 2011 and had 4 grounds of appeal as hereunder; namely:

(1) The learned superior court Judge erred in law in summarily rejecting the appeal under section 252(2) without certifying that he has perused the record and was satisfied that the appeal had been lodged without sufficient ground or complaint.

(2) The learned superior court Judge erred in law in failing to appreciate that the appeal before him was not based on the grounds that the conviction was against the weight of the evidence and that sentence was excessive.

(3) The learned superior court Judge erred in law in failing to appreciate that an issue of law was raised on the grounds the prejudice and injustice was occasioned to the appellant contrary to the then section 77 of the constitution.

(4) The learned superior court Judge erred in law in failing to scrutinize the record and make a finding as to his having done so.

The appeal was heard by this Court on 20th September, 2011 when brief arguments were advanced by **Mr. Andrew Makundi**, learned counsel for the appellant and **Mr. V.S. Monda**, learned Principal State Counsel for the Republic. This was so because Mr. Monda informed us that he did not support the summary rejection of the appeal as the appellant had been denied an opportunity to ventilate his appeal through counsel. On his part Mr. Makundi submitted that the appeal before the High Court was not suitable for summary dismissal.

When the appellant lodged his appeal to the High Court his petition had the following grounds; namely:-

“1. The learned trial magistrate erred in law in that having indulged the prosecution severally by granting adjournment on their request, proceeded to take the evidence of two crucial witnesses in the absence of the defence counsel and without granting the appellant an opportunity to get his or other counsel to proceed with the defence to the prejudice of the appellant

2. The learned Trial Magistrate erred in law in that even after denying the appellant time to be represented by an advocate during the prosecution case similarly denied the appellant's advocate an adjournment during submissions in spite of being informed of the reasons why he (counsel) had not attended court and thus the appellant was prejudiced.

3. The learned Trial Magistrate erred in failing to appreciate that it was common ground that there was bad blood between the appellant and PW1 and thus failing in deciding whether or not there was any likelihood of a frame-up.

4. The learned Trial Magistrate erred in failing to note and appreciate the material inconsistencies in the prosecution case firstly as relates to where PW2 and PW3 were at the time of the alleged assault of the injuries sustained.

5. The learned Trial Magistrate erred in law and in fact in failing to pose and have resolved the question as to the delay in commencing the proceedings against the appellant.”

In summarily rejecting the appellant's appeal the learned High Court Judge was applying the provisions of **section 352(1)** which provides as follows:-

“352(1) Where the High Court has received a 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 provision of section 350 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 the appeal, except:

(i) In case falling within sub-section 2 of this Section.”

The sub-section referred to above provides as follows:-

“352(2) When an appeal is brought 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 as 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.”

Thus summary rejection of an appeal under **section 352** may be based on two grounds only; namely that

- (i) the appeal is against the weight of evidence, and that,**
- (ii) the sentence is excessive.**

As the exercise of the powers for summary rejection of appeal aforesaid is limited to the two grounds specified, see **Aggrey v. Republic [1983] KLR 649**, it is not a prerequisite that for an appeal to fall under the ambit of that section, the petition should use those specific words and it is sufficient if the substance of the grounds of appeal clearly indicate that the conviction is against the weight of evidence.

Perusing through the petition of appeal filed by the appellant to the High Court, it is apparent that grounds 1, 2 and 3 in particular raised substantially legal grounds which required that he be afforded an opportunity to canvass them before that court and it was a misdirection for the learned Judge to summarily reject the appeal. In the circumstances, we allow this appeal and direct that the appellant's appeal to the High Court be admitted to hearing. The appeal shall be mentioned before the High Court at Machakos within two (2) months from the date hereof so that the Court fixes a hearing date and arranges bond terms for the appellant. Orders accordingly.

Dated and delivered at Nairobi this 14th day of October, 2011

S.E.O. BOSIRE
.....
JUDGE OF APPEAL

P. N. WAKI
.....
JUDGE OF APPEAL

D. K. S. AGANYANYA
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR