



**IN THE COURT OF APPEAL OF KENYA**

**AT NAKURU**

**Criminal Appeal 254 of 2009**

**BETWEEN**

**JAMES MBOGA OLUOCH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from an order of the High Court of Kenya at Kericho (Ang'awa, J.) dated 6<sup>th</sup> October, 2009  
in*

**H.C.C.R.A. NO. 43 OF 2009)**

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**JUDGMENT OF THE COURT**

The appellant, formerly a police officer based at Ongata Rongai police station in Kajiado District, was on 5<sup>th</sup> August, 2009 convicted by Senior Principal Magistrate at Kericho of the offence of stealing contrary to **section 275** of the Penal Code and sentenced to two (2) years imprisonment.

Being dissatisfied with the judgment, he on 10<sup>th</sup> August, 2009 filed *Criminal Appeal No. 43 of 2009* in the High Court of Kenya at Kericho against conviction and sentence. The petition of appeal contained nine grounds of appeal namely:-

- “1. The learned trial magistrate erred in law and in fact in convicting the appellant on a defective charge sheet.***
- 2. The learned trial magistrate misdirected himself in evaluating the evidence on record.***
- 3. The appellant conviction was against the weight of the evidence on record.***
- 4. The learned trial magistrate erred in law and in fact in imposing a higher burden of proof against the appellant requiring him to prove his case beyond reasonable doubt.***
- 5. The learned trial magistrate erred in law in fact in failing to find that the prosecution witnesses' testimonies/evidence were contradictory and could not sustain the charge and the subsequent conviction.***
- 6. The learned trial magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt.***
- 7. The learned trial magistrate erred in law and in fact in nursing a formed opinion against the appellant.***
- 8. The learned trial magistrate erred in law and in fact in failing to record evidence and submissions that favoured the appellant's case.***
- 9. The learned trial magistrate erred in law and in fact in failing to discern that the evidence given by the***

***prosecution was tainted with elements of bad faith.”***

However, on 6<sup>th</sup> October, 2009, his appeal was summarily rejected by the superior court (Ang’awa, J.) under **section 352 (2)** of the Criminal Procedure Code (C.P.C.).

This appeal is against the summary rejection of the appeal by the superior court and the main ground of appeal states that the superior court misdirected itself on legal principles pertaining to rejection of appeals to the prejudice of the appellant.

Mr. Ondieki, learned counsel for the appellant, submitted at the hearing of the appeal that the petition of appeal contained nine grounds of appeal some of them raising legal issues and that where an appeal raises legal issues, the appeal cannot be rejected summarily. He relied on this Court’s decision in ***Momanyi v. Republic* [2004] 2 KLR 136**.

Mr. Mugambi, learned State Counsel, on his part conceded the appeal.

By **section 352(2)**, Criminal Procedure Code, a Judge of the High Court is authorized to reject an appeal summarily where the 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 was right or lead him to the opinion that the sentence ought to be reduced.”***

Although the exercise of the power of summary rejection under **section 352(2)** of Criminal Procedure Code is strictly limited to cases where the appeal is brought on the ground that the conviction is against the weight of the evidence, or that the sentence is excessive as held in ***Aggrey v. Republic* [1983] KLR 649**, it is not a prerequisite that for an appeal to fall within the ambit of **section 352(2)** Criminal Procedure Code the petition should expressly use those specific words. It is sufficient if the substance of the grounds of appeal clearly indicate that the conviction is against the weight of evidence. That was clearly stated by this Court in ***Osongo & Another v. Republic* [1972] EA 170** where the Court said in part at page 171 **para F:-**

***“..... What the judge of the High Court was to do, ..... is to look at the substance of the grounds of appeal and that if, fairly looked at, they amount to no more than a submission that the conviction is against the weight of evidence and the judge is satisfied that the evidence is sufficient and that there is material raising a reasonable doubt that the conviction was right, he may summarily dismiss the appeal.”***

We have studied the grounds of appeal in the petition of appeal filed in the superior court. We are satisfied that, in addition to the complaint that the conviction was against the weight of evidence, the appellant raised several points of law such as the legality of the conviction based on defective charge; failure by the trial magistrate to evaluate the evidence, shifting of burden of proof and the issue of bias on the part of the trial magistrate.

Those points of law fall outside the ambit of **section 352(2)** of Criminal Procedure Code and, the learned State Counsel has quite correctly conceded the appeal.

Mr. Ondieki has asked us to acquit the appellant. However, the proper course where an appeal against summary rejection of an appeal is allowed is to remit the appeal to the High Court for admission to hearing (see ***Aggrey v. Republic*** (supra), page **651 para 1.**)

We are of the view that remission is the appropriate order in the circumstances of the case.

For those reasons, we allow the appeal, set aside the order of the superior court dated 6<sup>th</sup> October, 2009 rejecting the appeal summarily and in lieu thereof order that the appeal be admitted to hearing on a priority basis.

***Dated and delivered at Nakuru this 1<sup>st</sup> day of April, 2010.***

**J.E. GICHERU**

.....  
**CHIEF JUSTICE**

**E.M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**