



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NYERI

Criminal Appeal 174 of 2009

BETWEEN

1. ISAAC KITHINJI NYAMU
2. PETER KIRIMI NTHENGE .....APPELLANTS

AND

REPUBLIC .....RESPONDENT

*(An appeal from an order of the High Court of Kenya at Meru (Lenaola, J.) dated 3<sup>rd</sup> June, 2006*

in

H.C.C.R.A. NO. 224 & 225 OF 2005)

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JUDGMENT OF THE COURT

*Isaac Nyamu Kithinji* (1<sup>st</sup> appellant) and *Peter Kirimi Nthenge*, (2<sup>nd</sup> appellant), were on 18<sup>th</sup> January, 2005, presented before the Principal Magistrate’s Court at Marimanti, with a charge sheet with one count of robbery with violence contrary to **section 296 (1)** of the Penal Code, particulars of which read as follows:

**“On the 18<sup>th</sup> day of January, 2005 at around 9.00 p.m. at Thiti Location in Tharaka District within Eastern Province together robbed Bruno Muthengi of Kshs.20,000/= and at or immediately before or immediately after the time of such robbery wounded the said Bruno Muthengi.”**

It is obvious from the aforesaid particulars that the prosecution intended to charge both appellants with an offence under the provisions of **section 296 (2)** of the Penal Code. The appellants were not admitted to bail although the statement of the charge showed that the offence with which they were charged fell under **section 296 (1)** of the Penal Code, which is bailable.

The trial court, quite contrary to what was stated in the charge sheet, opened its judgment by stating that both appellants faced a charge of robbery with violence contrary to **section 296 (2)** of the Penal Code, quite clearly indicating that the trial magistrate assumed that that was the charge which the appellants faced. At the conclusion of the judgment

the trial magistrate remarked as follows:

**“The circumstances of the robbery squarely fall under the provisions of a robbery under section 296 (2) since the two accused were armed with dangerous weapons, they wounded the complainant and they were more than one person.**

**The prosecution has proved its case beyond reasonable doubt. I find the accused guilty as charged and convict each of them under section 215 CPC.”**

On sentence the trial magistrate made remarks as under:

**“I have considered nature of offence. The sentence provided in law upon conviction in respect of charges herein is death. Each accused is sentenced to death as per the law established.”**

The sentence provided under **section 296 (1)** of the Penal Code is certainly, not death. The section provides as follows:

**“296 (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.”**

Following their conviction as aforesaid, both appellants, as they were entitled to do, appealed against conviction and sentence to the superior court. They filed separate but identical petitions of appeal with the following grounds:

- “(1) That the learned trial magistrate erred in law and in fact in not realizing that the charge sheet was defective.*
- (2) That the learned trial magistrate erred in law and in fact in convicting me on flawed charges*
- (3) That the learned trial magistrate erred in law and in fact in convicting me on contradicting evidence adduced by the prosecution witnesses on the time and date of arrest.”*

The superior court (Lenaola J), looked at both petitions and the trial magistrate’s record and in his view he did not think the petitions raised reasonable grounds to warrant the appellants’ respective appeals being admitted to hearing. Accordingly he dismissed both the appeals, summarily, and thus provoked the appeals before us.

The power to summarily dismiss an appeal is donated by **section 352 (2)** of the Criminal Procedure Code. In

**John Mwangi v. R. [1983] KLR 652**, this Court authoritatively stated as follows:

**“An appeal falls within section 352 (2) only if the ground of appeal raises any one or both of the following point:**

- 1. the conviction is against the weight of evidence, or**
- 2. the sentence is excessive.”**

**Section 352 (2)** of the Criminal Procedure Code, provides as follows:

**“Section 352 (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.”**

We earlier set out the grounds upon which the appellants intended to challenge their conviction and sentence. Clearly on the basis of those grounds, the appellants’ respective appeals did not fall within the provisions of **section 352 (2)** of the Criminal Procedure Code. As stated earlier there is variance between the offence charged and the offence with which both appellants stand convicted. That alone, *prima facie* showed that the appellants’ respective appeals did not fall within **section 352 (2)** of the Criminal Procedure Code.

Besides, the appellants were convicted of a capital charge and sentenced to suffer death. The nature of the sentence alone, was a sufficient basis for taking the appeals outside the ambit of **section 352 (2)** of the Criminal Procedure Code. The wording of **section 352 (2)** of the Criminal Procedure Code, limits the grounds upon which an appeal may be summarily rejected, to the two which this Court pointed out in **John Mwangi v. R** (supra). Outside these two the grounds for challenging an appeal are limitless and can only be rejected after affording an appellant a hearing.

For the foregoing reasons, it is with justification that Mr. Kaigai, Senior Principal State Counsel, conceded this appeal. Mr. Nderi for the appellants submitted that the sentence meted against each appellant is illegal, and apparently wanted us to so declare. However, considering the decision we have come to which we will shortly hereafter pronounce, we are not inclined to do so. The appellants’ respective appeals were not heard. **Section 3 (1)** of the **Appellate Jurisdiction Act, Cap 9** of the Laws of Kenya provides thus:

**“The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.”**

Appeals from subordinate courts lie to the superior court. The appellants’ respective appeals from the trial court have not been heard at all. We have come to the conclusion that they were improperly summarily rejected. The issue before us was limited to the question of summary rejection. The jurisdiction we have is to order that the superior court admit them for hearing, which is what the superior court was required to do but instead summarily rejected them.

In the foregoing circumstances we order that this matter be remitted back to the superior court with a direction that the appellants’ respective appeals to that court be admitted for hearing before a bench of two Judges pursuant to the provisions of **section 359** of the Criminal Procedure Code. The bench to hear those appeals to exclude Lenaola J. It is so ordered.

***Dated and delivered at Nyeri this 21<sup>st</sup> day of May, 2010.***

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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

**J.G. NYAMU**

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

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

**DEPUTY REGISTRAR**