REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT KISUMU

Criminal Appeal 164 of 2006

DAVID KAKAI……..…….....…….APPELLANT

AND

REPUBLIC…….....…RESPONDENT

(Appeal from an order of the High Court of Kenya

Kisii (Bauni, J) dated 17th May 2006

in

H.C.CR.A NO. 61 of 2006)

****

JUDGMENT OF THE COURT

David Kaikai, the appellant herein, was tried and convicted by a Senior Resident Magistrate at Kilgoris on a charge of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) (b) of the Penal Code. The particulars of that charge were that on 8th September, 2004 at Osupuko Community health centre in Transmara District of the Rift Valley Province, the appellant created a disturbance in a manner likely to cause a breach of the peace by chasing Everlyne Pereso Siparo and threatening to beat her "by the fist". Upon his conviction, the appellant was sentenced to pay a fine of Kshs5,000/- and in default to serve three months imprisonment. He appealed to the High Court and his petition of appeal to that court and which was drawn and filed by M/s Nyamweya, Osoro & Nyamweya Advocates contained a total of six grounds, namely;-

"**1 The learned trial magistrate erred in law and misdirected himself fundamental (sic), in the first instance, by placing the appellant on his defence when the prosecution had not made out a prima facie(sic) against the appellant.**

2 The learned trial magistrate in law (sic) in not placing sufficient importance to the very glaring contradictions and improbabilities in the prosecution case.

3 The learned trial Magistrate erred in law in considering the prosecution case separately and accepting the same as truthful before purporting to consider the defence case or assigning any reason for rejecting it.

4 The learned trial magistrate made a finding against the weight of evidence.

5 The learned trial magistrate erred in law and misdirected himself fundamentally in shifting the burden of proof to the accused persons.

6 ……"

Kaburu Bauni, J looked at these grounds of appeal and certified that:-

"……..**I have perused the record and I am satisfied that the appeal has been lodged without sufficient ground for complaint. Appeal summarily rejected. S. 352 (2)."**

This order was made pursuant to the provision contained in **section 352(2)** of the Criminal Procedure Code. With great respect to the learned Judge, he was not, on the stated grounds of appeal, entitled to summarily reject the appeal under **section 352(2)** of the Criminal Procedure Code. In the case of **CHARLES SIMIYU MABONDA VS REPUBLIC**, **Criminal Appeal No. 84 of 1992** (unreported) this Court, relying on the earlier decision in **GEORGE NGARUIYA & ANOTHER V REPUBLIC**, **Criminal Appeal No 28 of 1992** (unreported) had this to say and we think it is right to repeat it,:

"**An appeal can only be summarily dismissed under section 352(2) of the Criminal Procedure Code by the superior court in its appellate jurisdiction where it is brought on the ground that the conviction is against the weight of evidence or that the sentence is excessive. It is only when an appeal to the superior court is limited to the ground that the conviction was against the weight of evidence or that the sentence was excessive, that use can be made of the section aforementioned and where an appeal is brought not only on the ground that the conviction was against the weight of the evidence or that the sentence is excessive, but also on some other grounds, the superior court in its appellate jurisdiction has strictly no jurisdiction to deal with that appeal summarily however little merit there may or may not be in any of the other ground or grounds. Indeed, the jurisdiction to dismiss an appeal summarily even when such an appeal is brought on the ground that the conviction was against the weight of evidence arises only when, in the opinion of the first appellate judge, the evidence before the trial court leaves no reasonable doubt as to the appellant's guilt and that the appeal is frivolous or without substance. It is not enough that the evidence before the trial court leaves no reasonable doubt as to the appellant's guilt but that the appellant's appeal must also be manifestly either frivolous or without substance."**

There is really nothing we can add to these remarks as, in our view, they correctly state the circumstances under which the superior court is entitled to reject an appeal under **section 352(2)** of the Criminal Procedure Code. Those circumstances are:-

1 That the appeal is brought on the ground that the conviction is against the weight of the evidence.

OR

2 That the sentence is excessive.

AND

it appears to the judge exercising the power under the section 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 appellant's appeal was not confined to the two grounds we have set out in paragraphs (1) and (2) herein above. As we have said the appeal was lodged by a firm of advocates and it would have been surprising if they had confined their grounds to the two set out in **section 352(2)** of the Code. As grounds 1,2,3, and 5 in the petition, the contents of which we have set out, show there were grounds which took the appeal out of the provisions of **section 352(2)** of the Code. The learned Judge did not, therefore, have any basis to summarily reject the appeal as he purported to do.

Accordingly, we allow the appeal, set aside the summary rejection dated 17th May, 2006 and remit the appeal to the superior court with the direction that it shall admit the appeal to hearing and determination according to the law. Those shall be our orders in the appeal.

Dated and delivered at Kisumu this 15th day of June, 2007.

R.S.C. OMOLO

…….…..…..

JUDGE OF APPEAL

P.N. WAKI

…….……..

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR