



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU
CRIMINAL APPEAL NO 251 OF 2004

ISAAC MWANGI WANJIKU.....
APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from an order of the High Court of Kenya at Nakuru (D.K. Musing J.) dated 20th February, 2004

in

H.C.CR.A. NO. 379 OF 2003)

JUDGMENT OF THE COURT

The power of summary rejection of an appeal under **Section 352 (2)** of the Criminal Procedure Code must be strictly limited to the clearest of cases and must be brought only on the ground that the conviction is against the weight of evidence or that the sentence is excessive. This is a point that has been considered by this Court in its various decisions. In **Okello v. R** [2003] *KLR* 205 at page 207 this Court stated:

*“The power of summary rejection of an appeal under section 352 (2) of the Criminal Procedure Code is strictly limited to cases where the appeal is brought only on the ground that the conviction is against the weight of evidence or that the sentence is excessive. See John Nderitu Mwangi & John Gichohi Wachira v Republic [1982 – 88] 1 *KAR* 276. These principles were earlier enunciated in cases like Obiri v Republic [1981] *KLR* 489 and Kariuki v Republic [1981] *KLR* 14”.*

Isaac Mwangi Wanjiku, the appellant, was with two others charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. They were arraigned before the Senior Resident Magistrate’s Court at Nakuru on 19th December, 2002 when they pleaded “Not Guilty.” Their trial began on 9th April, 2003, and after its conclusion they were found guilty and convicted on 30th June, 2003. The

appellant and one of his co-accused, Joseph Murigi, were sentenced to suffer death. Murigi, however, died before he lodged an appeal against his conviction. The other co-accused was committed to a Youth Corrective Centre. He appears not to have preferred any appeal, so far.

Being aggrieved by the conviction the appellant filed an appeal in the superior court setting out, inter alia, the following grounds of appeal:-

“1. That the learned trial magistrate gravely erred both in law and to base my conviction while relying on the evidence of P.W.5 the police officer that I was arrested in the house where alleged exhibit were found without considering that no inventory form was produced or the landlord was availed to prove the of the said house where the exhibits were recovered, which is a miscarriage of justice.

2. That the learned trial magistrate gravely erred both in law and fact when relying on the evidence of P.W.1 and P.W.2 made in the dock without any cogent first report of description andconducted parade and the nature of the light which enabled the victim to identify their attackers.

3. That the trial magistrate erred both in facts when concluding that the prosecution had proved their case affirming where there is none she seriously failed to consider my defence as stipulated under sec. 169 CPC.”

It is now common knowledge that the appellant’s appeal was summarily rejected by the superior court (Musinga, J.) on the 21st October, 2005 under section 352 (2) of the Criminal Procedure Code.

Upon that summary rejection the appellant now comes to this Court by way of second and final appeal.

Having considered the grounds set out by the appellant in his first appeal to the superior court, we are of the view that those grounds do show that the issues raised were not merely confined to weight of evidence only. It must, therefore, follow in the circumstances that appellant was entitled to the benefit of full hearing by the superior court.

The learned State Counsel, Mr. Njogu has accepted that this should have been the position and has conceded the appeal.

In the result, this appeal is allowed and the summary rejection of the appellant’s appeal in the superior court is set aside and a direction is given that the appellant’s appeal to that court should be returned for a Judge other than Musinga, J. to admit it to hearing and we so order. Those shall be our orders.

Dated and delivered at Nakuru this 29th day of September 2006.

P.K. TUNOI

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR