



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAKURU

I fixed the appeal in presence of both the Advocates for the appellant and the State Counsel. The State Counsel is present. The appellant's advocate is absent. I will dismiss the appeal. Appeal is dismissed."

What is this appeal about?

The Notice of Appeal in this appeal was filed in March 1996. It shows that the appeal is against the decision of the High Court at Nakuru (Rimita, J.) dated *27th April, 1994* dismissing the appeal. However, by the memorandum of appeal dated *9th March, 2004*, the appellant is directly appealing to this Court against the sentence imposed by the trial Magistrate.

The second ground of appeal for instance, which is the main ground of appeal states thus:

"That I implore this honourable court to consider consolidating the two counts and the sentences of the same to run concurrently as the counts refers (sic) to the same complainant."

It is the Notice of Appeal which institutes a criminal appeal in this Court and not the memorandum of appeal (**see rule 58(1)** of the Court of Appeal Rules). The Notice of Appeal is therefore the authoritative document on what the appeal is about. Furthermore, the appeal was not heard by the superior court on the merits. Although the appellant has not stated the grounds on which he is appealing against the order of the superior court, legally and logically this appeal is strictly against the order dismissing the appeal for non attendance and we will confine ourselves only to that aspect.

As we have observed above, the appeal was dismissed by the superior court merely because the appellant's counsel did not attend the hearing of the appeal. It was submitted in this Court that the appellant attended the hearing of the appeal. The proceedings of the superior court of *27th April, 1994* do not show otherwise. Section 354 of Criminal Procedure Code prescribes the powers of the High Court and the procedure to be observed at the hearing of the first appeal in the superior court. By section **354 (1)**, at the hearing of the appeal, the appellant or his advocate may address the court in support of the grounds set out in the petition. The appellant who is in custody is not, however, always required or entitled to be present at the hearing of the criminal appeal. He is entitled to be present if he desires it except where the appeal is on some ground involving a question of law alone in which case leave of the High Court to attend has to be sought. (**See section 354 (4)**).

Furthermore, the right of an appellant who is in custody to be present at the hearing of the appeal is subject to his paying transport charges except where he is exempted by court from paying such charges (see section 354 (5)). It follows that a criminal appeal should be heard in the superior court even in the absence of the appellant. The Criminal Procedure Code does not provide for dismissal of a criminal appeal for non attendance either by the appellant or his advocate. It seems that where the appellant's advocate fails to attend the hearing or the appellant fails to attend when required to do so, the only option the superior court has is either to adjourn the appeal to another day or to hear the appeal in the absence of the appellant or the counsel.

The superior court obviously erred in law when it dismissed the appeal for nonattendance by the appellant's counsel.

For those reasons the appeal is allowed. The order of the superior court dated *27th April, 1994* dismissing the appellant's appeal is set aside and the appellant's Criminal Appeal No. 111 of 1993 is restored on the Register.

We order that the appeal be heard according to the law on priority basis.

Dated and delivered at Nakuru this 25 th day of February, 2005.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

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AG. JUDGE OF APPEAL

I certify that this is a true

copy of the original. DEPUTY REGISTRAR