

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, GITHINJI & WAKI, JJ.A.)
Criminal Appeal 127 of 2004

BETWEEN

HAMISI KYALO FRED APPELLANT
AND
REPUB LIC RESPONDENT

*(Appeal from an Order of the High Court of Kenya at Mombasa
(Mwera, J) dated 7th July, 2004*

in
H.C.CR.A. No. 127 of 2003

JUDGMENT OF THE COURT

Mwera, J summarily rejected the appeal to the High Court by the appellant and the learned Judge in doing so was purportedly exercising his powers under section 352 of the Criminal Procedure Code. That section only allows summary rejection of an appeal, where the grounds of appeal merely allege that the conviction was against the weight of evidence or that the sentence is excessive. The appellant's appeal to the superior court raised the issue of his identification at the scene of crime and that is always an issue of law. The learned Judge was accordingly not entitled to reject the appeal under section 352 (2) of the Code. Mrs. Mwangi, the learned counsel for the Republic, does not support the learned Judge's decision. She is clearly right in taking that position. We accordingly allow the appeal before us, set aside the summary rejection of his appeal by the superior court and reinstate the appeal in the superior court with a further direction to that court to admit the appeal to hearing according to law. Those shall be our orders in the appeal.

Dated and delivered at Mombasa this 19th day of July, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.