



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Githinji JA, Onyango Otieno & Deverell Ag JJ A)

CRIMINAL APPEAL NO 244 OF 2003

HENRY MOMANYI MUCHIRA APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Appeal from judgement of the High Court of Kenya at Nakuru (Rimita J) dated 21.9.2000 in HCCRAPP No 5 of 2000)

JUDGMENT

The appellant, Henry Momanyi Muchira, was the third accused in the Chief Magistrate's Court at Nakuru Criminal Case No 746 of 1999. They were five accused persons. Four of them were charged with offence of stealing by servant contrary to section 281 of the Penal Code in that on diverse dates between 14th and 22nd April, 1999 at Christ the King Academy in Nakuru district within Rift Valley province jointly being servants of Virginia Wanjiku for the Christ the King, stole from the said Wanjiku 21 bags of maize and 13 bags of beans all valued at Ksh70,000/= which came to their possession by virtue of their employment. The fifth accused was charged with offence of stealing the same 21 bags of maize and 13 bags of beans contrary to section 275 of the Penal Code and with alternative charge of handling stolen property contrary to section 322 (2) of the Penal Code in which he was charged with handling 20 empty bags of maize the property of Virginia Wanjiku for Christ the King Academy knowingly or having reasons to believe them to be stolen or unlawfully obtained. They pleaded not guilty but after a full hearing the appellant, together with the 2nd, 3rd , 4th and 5th accused were convicted of the various charges they faced and were sentenced to serve 12 months probation.

The appellant, was not satisfied and filed memorandum of appeal dated 24th January 2000 against the conviction in the superior court. The memorandum of appeal contained only two grounds. These were as follows:-

- “1. THAT the conviction was against the weight of the evidence.
2. That the learned magistrate misdirected himself in basing the conviction entirely on a disputed conviction (sic) of the co-accused .”

The memorandum of appeal was placed before Rimita J for an order under the provisions of section 352 of the Criminal Procedure Code . The learned judge of the superior court having perused the records proceeded to make and did make the following order on 21st September, 2000:-

“ I certify that I have perused the records and I am satisfied that the appeal has been lodged without any

sufficient ground for complainant. Appeal is summarily rejected S 352(2).”

That order is the genesis of that appeal before us. The appellant was not satisfied and has filed this appeal sighting two grounds namely:-

“1. THAT the learned judge erred in law in summarily rejecting the appellant’s appeal under section 352 (2) of the Criminal procedure Code.

2. THAT the learned judge erred in law in failing to admit the appellant’s appeal.”

We have considered the appeal, the submissions of the learned counsel for the appellant and the law. The learned Principal State Counsel conceded the appeal. Section 352 (1) and (2) state as follows:-

“352(1) When the High Court has received the petition and copy under section 350, a judge shall peruse, and, if he considers that there is no sufficient ground for interfering, may notwithstanding the provisions of section 359, reject the appeal summarily: provided that no appeal shall be rejected summarily unless the appellant or his advocate has had the opportunity of being heard in support of the appeal, except:-

(1) In a case falling within subsection(2) of this section.

(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.”

It is clear to us that section 352 (2) allows the superior court to reject an appeal summarily only when the appeal is brought on the ground that the conviction is against the weight of evidence or that the sentence is excessive and the judge finds that the evidence adduced in the Court below is sufficient to support conviction and he entertains no doubt that the conviction was right and that the sentence was proper. In this case however, whereas the first ground of appeal was that the conviction was against the weight of evidence and was covered by the provisions of that section, the second ground of appeal which was that the learned magistrate misdirected himself in basing the conviction entirely on a disputed conviction (which we think was meant to be “evidence” and not “conviction” as that is what would make sense) of the co-accused fell clearly outside that section and the Court in our mind was in error in considering it as falling under that section.

We have on our on perused the proceedings and we are of the opinion that the second ground of appeal warranted proper investigation by way of the appellant being accorded an opportunity of being heard in support of the same ground and thus on the entire appeal. As we have indicated above our reading of that ground is that the appellant was complaining in the memorandum of appeal before the superior court, that the learned magistrate misdirected himself in basing the conviction entirely on disputed evidence of the co-accused. That is clearly an appeal on point of law and we feel such a ground cannot be disposed of summarily under section 352(2) of the Criminal Procedure Code. That section was not meant to take care of such grounds of appeal.

We do not need to say any more for fear of prejudicing the appeal. What we have stated hereinabove is enough to dispose off this appeal. The appeal is allowed: order of the superior court summarily dismissing the appeal is set aside and the appeal is remitted to the superior court with direction that the appeal be admitted to hearing and be disposed off according to law. As the appellant has served his sentence, we will say no more about the sentence. Judgment accordingly.

Dated and delivered at Nakuru this 24th day of September, 2004

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO-OTIENO

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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