



IN THE COURT OF APPEAL

AT NYERI

(CORAM: O'KUBASU, GITHINJI & WAKI JJ A)

CRIMINAL APPEAL NO. 54 OF 2004

BETWEEN

JOSEPH KINOTI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nyeri (Khamoni J) dated 2nd February, 2004

in

HCCRA No 71 of 2002)

JUDGMENT

Joseph Kinoti, a police officer under interdiction, was charged and tried before Nyeri Senior Resident Magistrate's Court for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. It was alleged that he unlawfully assaulted three different persons and occasioned them bodily harm on 7th October, 2000 at his bar in Naro Moru town. He had also been charged with one count of unlawful confinement contrary to section 259 of the Penal Code, the allegation being that he unlawfully confined two of the persons he supposedly assaulted, at Naro Moru Police Station.

The trial court acquitted him of the charge of unlawful confinement and one on assault, but convicted him on two counts of assault and sentenced him to a fine of Shs 5,000/= on each count, in default 90 days imprisonment.

Kinoti was not satisfied with the decision of the Senior Resident Magistrate although he paid the fine. So, on 18th February, 2002, he filed a Petition of Appeal in the superior court and a Supplementary Petition of Appeal on 23rd October, 2002. The appeal was not frivolous and was admitted to hearing on 12th May, 2003.

The first hearing date was fixed for 15th November, 2003 but there was no appearance for the appellant

or the State. It was adjourned to 12th November, 2003. On that day only counsel for the appellant appeared but there was no appearance for the State. It was adjourned to 2nd February, 2004. This time round, it was the appellant who had a problem. His advocate, Mrs Ntarangwi instructed another advocate to apply for adjournment for the reason that she was unable to travel from Meru where she is based, to Nyeri in time for the hearing. State counsel did not oppose the application for adjournment.

But the learned judge, Khamoni J, refused to grant an adjournment and proceeded to dismiss the appeal for failure to prosecute it. That is the order that provoked the appeal to this Court.

Before us, learned counsel for the appellant Mrs Ntarangwi and Senior State Counsel Mr Orinda submitted, and we think rightly so, that the course open to the appellant upon dismissal of his appeal for want of prosecution was to take out a Memorandum of Appeal to this Court: That is because there are no provisions in the Criminal Procedure Code (cap 75 Laws of Kenya) for setting aside such dismissal before the same court. Indeed, there is no provision for determination of an appeal that has been admitted to hearing without consideration by the Court of the merits or demerits thereof.

We think section 352 (1) of the Criminal Procedure Code underscores the gravity of rejection of an appeal filed by a convicted person which is on grounds other than that the conviction is against the weight of the evidence, or that the sentence is excessive. In relevant part the section provides:

“352 (1) When the High Court has received the petition and copy under section 350, a judge shall peruse them, 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-

(Underlining is ours).

The appeal before the superior court had gone beyond section 352, and was governed by section 353 and 354. Section 353 which relates to “Notice of time and place of hearings” had been complied with and is couched in mandatory terms. Not so section 354 which relates to the “powers of the High Court at the hearing of the appeal”. It states:

“354 (1) At the hearing of the appeal the appellant or his advocate may address the Court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the Court.

(2) The Court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.

(3) The Court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may”.

(Underlining is ours).

In our view, there is no mandatory requirement that either the appellant or his advocate, or the State should address the Court. It is nonetheless incumbent on the Court to consider the appeal and make a determination in accordance with section 354 (3) of the Criminal Procedure Code.

With respect, the learned judge of the superior court was in error in dismissing the appeal summarily. We are of the further view that the grounds advanced by the appellant’s advocate in seeking an adjournment were, in the circumstances of this case, reasonable. The appellant had previously manifested his seriousness in pursuing the appeal and the solitary absence of his counsel would not have caused any prejudice. The State, in addition, was not opposed to the adjournment.

For those reasons, we allow the appeal, quash the order dismissing the appeal and remit the record back to

the superior court for hearing and determination in accordance with the law.

Dated and Delivered at Nyeri this 5th day of November 2004.

E.O.O'KUBASU

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JUDGE OF APPEAL

E.M.GITHINJI

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JUDGE OF APPEAL

P.N.WAKI

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR