



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Shah & O’Kubasu JJ A)

CRIMINAL APPEAL NO 172 OF 2002

OKELLOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from an order of the High Court of Kenya at Busia (Ringera J)

dated 10th May, 2002 in High Court Criminal Appeal No 53 of 2001)

JUDGMENT

Judgment of **Shah & O’Kubasu JJ A** was delivered under rule 32(2) of the Court of Appeal Rules.

This is second appeal against the conviction recorded and sentence passed by the senior resident magistrate S O Omwega Esq at Busia. The appellant was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. He was alleged to have unlawfully caused grievous harm to one Joanes Juma Okello on 13th day of February, 2000 at Bumuturu village, Central Marachi location in Busia District of Western Province of Kenya. He was, on 24th October, 2001, convicted of the offence and fined Shs 20,000/= in default of which payment he was to serve a term of two year imprisonment. We are told he paid the fine.

The appellant’s appeal, against both the conviction and sentence, was summarily rejected by the Superior Court (Ringera J) on 10th May, 2002.

Such rejection was under section 352(2) of the Criminal Procedure Code.

This appeal is against the said rejection. There is only one ground of appeal which reads:

“That the learned judge erred in law in summarily rejecting the appeal in the Superior Court when the petition of appeal raised both points of law and fact that required hearing on merits.”

It becomes necessary for us, therefore, to look at the grounds of appeal which were before the Superior Court which are:

“1 The trial magistrate failed to hold that the appellant was (sic) ought to have been complainant against PW 1.

2. The trial magistrate did not record the appellant's evidence properly and hence triable issues did not come out properly.
3. The trial magistrate did not record answers given by police witnesses to questions by the appellant in cross-examination to the effect that he had visible and serious physical injuries on his body at the time he had made a report to the police immediately after he was assaulted at his home.
4. The trial magistrate did not appreciate that the police made a total black out of the fact that it was the appellant who was seriously assaulted and that he was the first to make a police report.
5. The trial magistrate did not at all analyse defence evidence and failed to make a finding that the prosecution had not proved their case against the appellant, beyond reasonable doubt.
6. The trial magistrate did not consider mitigating factors, favourable to the appellant.
7. The sentence of Kshs 20,000/= fine with alternative sentence of 2 years was manifestly excessive regard being had to the fact the appellant had been provoked and seriously injured."

The appellant's primary complaint is that the learned trial magistrate did not sufficiently or at all consider his defence and that he considered the prosecution case in isolation, that is to say, without considering the effect of the defence case on the prosecution case. There was evidence before the magistrate to the effect that the appellant was injured and that the age of the injuries was such as to lead one to believe that the same were inflicted on the appellant at the time he was alleged to have assaulted the complainant.

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 387. Also see *Young Charles Okang v Republic* (1982-88) 1 KAR 276. These principles were earlier inunciated in cases like *Obiri v Republic* [1981] KLR 489 and *Kariuki v Republic* [1981] KLR 14.

We think the appellant was entitled to the benefit of a full hearing by the Superior Court. It is clear that he was injured. It appears that the magistrate did not sufficiently consider the defence of the appellant.

Although we were asked by Mr Wanga who appeared for the appellant to invoke our powers under section 3(2) of the Appellate Jurisdiction Act, cap 9, Laws of Kenya and determine the appeal on merits we do not think it would be proper for us, in this case, to consider the full merits of the appellant's grounds in his petition to the Superior Court. The grounds do show that the issues raised are not confined to weight of evidence only. Mr Musau who appeared for the respondent, quite properly conceded that the appeal in the Court below did not qualify for a summary rejection.

This appeal is allowed. The summary rejection of the appeal in the Superior Court is quashed and a direction is given that the appellant's appeal to that Court should be returned for a judge to admit it to hearing and we so order. We also direct that the said appeal be heard as expeditiously as possible. This judgment is delivered pursuant to provision in rule 32(2) of Rules of this Court.

Dated and delivered at Kisumu this 28th day of March, 2003

A.B.SHAH

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR