



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 56 of 2000**

**PHILBERT KALAMA NGUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from an order of the High Court of Kenya at Mombasa (Waki, J.) dated 13th March, 1998**

**in**

**H.C.CR.A. NO. 523 OF 1996)**

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**JUDGMENT OF THE COURT**

The appellant was convicted by the subordinate court of the charge of attempted rape and sentenced to seven years imprisonment. He appealed against this conviction and sentence to the High Court. Three of his four grounds of appeal were to the effect that his conviction was against the weight of evidence. The fourth ground of appeal, however, which was:

***"... the trial magistrate erred in refusing permission to summon my witness, and to take evidence tendered by the chief."***

clearly raised a question of law.

Waki, J, however, then summarily rejected the Appellant's appeal under s 352 of the Criminal Procedure Code as follows:

***"I certify that I have perused the record and am satisfied that the appeal has been lodged without sufficient ground for complaint."***

But such an order can only be made under s 352(2) of the Criminal Procedure Code which provides that:

***"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. "***

The Appellant has now appealed to this Court against the summary rejection of his appeal to the High Court. Whilst some of his grounds of this appeal relate to his conviction being against the weight of evidence and that the sentence was excessive, the following ground of this appeal, relate to the summary rejection of his appeal by Waki, J:

***"Your lordship, being dissatisfied with the summary rejection of my appeal by Hon. Justice Waki of Mombasa High Court, hereby lodge this appeal. "***

What concerns us now is not the merits of the Appellant's appeal to the High Court, but whether, having regard to the fact that one of the grounds of his appeal to the High Court raised an issue of law, the learned judge had jurisdiction to, as he did, summarily reject the Appellant's appeal. It is clear from the Appellant's ground of appeal in the appeal before the High Court already referred to, which raises a question of law, that the learned judge was deprived of jurisdiction to summarily reject the Appellant's appeal. What he should have done was to have admitted the appeal for hearing so as to enable it to be determined whether the point of law raised, was sustainable or not.

In the case of ***Okang v Republic (1982-88) 1 KAR 276*** it was held that:

***"Section 352(2) of the Criminal Procedure Code expressly limited the power of summary rejection to cases where the appeal is brought on the ground that the convictions were against the weight of the evidence, or that the sentence was excessive.***

***In the instant case questions of law were raised in the petition of appeal to the High Court which, consequently, had no jurisdiction to reject the appeal summarily. "***

These holdings were re-emphasised in the recent decision of this Court in ***Peter Mwangi Ndungu Alias Wamami v Republic Criminal Appeal NO. 50 of 1999*** where it was held that:

***"We have considered the grounds mentioned to us by Mr. Nderi for the appellant and Mr. Oluoch for the respondent, namely grounds 2, 4, 5, 6 and 9 of the appellant's petition of the appeal to the High Court. They all raise and deal with the issues of identification and alibi. We are satisfied therefore, that these grounds raised, either individually or cumulatively, matters of both law and fact. Under the circumstances, we are satisfied that the appellant's appeal to the High Court did not come under the provisions of Section 352 (2) Criminal Procedure Code. The appeal was not brought solely on the ground that the conviction was against the weight of the evidence or that the sentence was excessive. "***

In the result, we allow the appeal, quash the summary rejection and direct that the Appellant's appeal to the High Court should be returned to Waki, J to admit it to hearing. It is so ordered.

Dated and delivered at Mombasa this 17th day of January, 2001.

B. CHUNGA

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CHIEF JUSTICE

A. M. AKIWUMI

.....

JUDGE OF APPEAL

M. KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR