



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**(CORAM: KWACH, BOSIRE & KEIWUA J.J.A)**  
**CRIMINAL APPEAL NO.98 OF 1999**

**BETWEEN**

**1. JOSEPH SHIDA KARISA**

**2. CHARO KARISA NGALA .....APPELLANTS**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from the Judgment of the High Court of Kenya at Mombasa (Lady Justice Ang'awa) dated 19th September,1997**

**in**

**H.C.CR.C. No.104 of 1997)**

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**JUDGMENT OF THE COURT**

This is a second appeal. The appellants' first appeal to the superior court against their conviction on a purported plea of guilty on a charge of robbery with violence contrary to section 296(2) of the Penal Code, and their appeal against the sentences which were imposed on them, was summarily rejected by Ang'awa, J. under section 352(2) of the Criminal Procedure Code. which were outlined in support of the charge against both the appellants were brief. Comeback Bar and Restaurant at Malindi, was on the night of 4th and 5th March, 1997, raided at about 11 p.m. soon after it had closed its business for the day. The raiders attacked and beheaded the night watchman, broke into and carted away an assortment of goods from inside the premises and escaped. The appellants were later arrested in connection with the beheading, breakage into and theft from the bar premises. They allegedly confessed to have committed the acts as a result of which the charge of robbery with violence contrary to section 296(2) of the Penal Code was preferred against them and respecting which they allegedly pleaded guilty to.

In their first appeal, they complained, in written petitions of appeal, that their plea of guilty was not to the offence charged but to the offence of burglary and stealing; that their pleas in mitigation were not considered and that had the trial magistrate done so he would not have sentenced them to the death sentence. Ang'awa J. perused the trial court's record, and came to the conclusion that the appellants' was

not a fit case for the hearing as provided under section 359 of the Criminal Procedure Code and therefore summarily rejected the same and thus provoked these appeals.

Mr Ngombo, for both the appellants, submitted before us, inter alia, that the appellants' respective appeals were improperly rejected under section 352(2), aforementioned, because the appellants were not heard before such rejection. Mr Gumo, learned Senior State Counsel conceded that fact and also the second part of Mr Ngombo's submission that the charge against the appellants having been a capital one, they should have been duly cautioned as to the sentence they would expect if they pleaded guilty.

**Section 352(1) of the Criminal Procedure Code, provides as follows:-**

**"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 - (i) In a case falling within sub-section 2 of this section;**

**(ii) In the case of an appeal against the determination of an appeal under section 11 of the Magistrates' Courts Act, other than an appeal for which the leave of the High Court has been obtained."**

The appellants' respective appeals are not from a determination of an appeal under section 11 of the Magistrates' Courts Act. So paragraph (ii), above, is inapplicable. Nor do their appeals fall within paragraph (i) aforequoted. We say so advisedly. The wording of section 352(2), above, envisages a situation where the decision appealed against was handed down after oral testimony from witnesses, or in cases where the appeal is against severity of sentence. The sub-section, in pertinent part, provides thus:

**"352(2) Where an appeal is brought on the ground that the conviction is against the weight of the evidence (Emphasis supplied), or that the sentence is excessive, and it appears to the 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..."**

To the extent that no evidence was adduced orally or otherwise in support of the appellants' respective convictions, and in view of what we stated earlier regarding the nature of the appellants' appeals it is our judgment that the appellants' appeals did not fall within the provisions of section 352(2) of the Criminal Procedure Code, and the learned Judge of the superior court lacked the jurisdiction to summarily reject the appeals as she did. If any authority for that conclusion is necessary, Young Charles Okang .v. R [1982 - 88] 1 KAR 276 and John Nderitu Mwangi & Another [1982-88]1 KAR 367 are such authorities.

Accordingly, we allow the appellants' respective appeals, quash the summary rejection of their appeals in the superior court, and direct that the rejected appeals be placed before a Judge other than Ang'awa, J. for admission to hearing on a priority basis. We so order.

**Dated and delivered at Mombasa this 26th day of January, 2000.**

**R.O. KWACH**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**M. KEIWUA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**