



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: KWACH, BOSIRE & KEIWUA, J.J.A.)**

**CRIMINAL APPEAL NO. 92 OF 1999**

**BETWEEN**

**JULIUS MWANZIA MUTHIANI .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from the Judgment of the High Court of Kenya at Mombasa (Lady Justice Ang'awa) dated 13th October, 1997**

**in**

**H.C.CR.A. NO. 71 OF 1997)**

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**JUDGMENT OF THE COURT**

Julius Mwanzia Muthiani (hereinafter called "the appellant") was charged along with 4 other persons with robbery with violence contrary to section 296(2) of the Penal Code. They also faced an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars of the charge alleged that on 31st January, 1997 at Mayungu Beach, Malindi District in Coast Province, jointly with others not before the court armed with pangas and rungus they robbed Gullutta Bruno of Shs.15,000/= and other items and in the course of this used actual violence on Bruno's night watch-man.

When the accused appeared before the Principal Magistrate at Malindi on 27th February, 1997 for plea the record shows that the substance of the charges and every element thereof was stated by the magistrate and when the accused persons were asked whether they denied or admitted the charges 4 of them denied the charges but the appellant said he admitted the offence. And he was convicted on his own plea of guilty. The prosecutor then stated the facts which the appellant admitted were correct. Following the conviction of the appellant the magistrate imposed on him the mandatory death sentence. The other 4 accused persons were tried and acquitted for lack of evidence. The appellant appealed to the superior court against his conviction and sentence and one of the grounds he put forward was - "(1) That the trial magistrate erred in law and fact when he convicted me without looking at my conduct of pleading guilty before him, on a serious charge which carries only a mandatory death sentence without proper caution as required by law and that occasioned a mistrial."

The appellant's appeal was summarily rejected by Ang'awa J on 13th October, 1997 under section 352

of the Criminal Procedure Code. It is against that decision that the appellant now appeals to this Court and he is urging the same ground of appeal along with others.

The issue in this appeal is whether the learned Judge acted within her jurisdiction when she summarily rejected the appellant's appeal without giving the appellant or his Advocate an opportunity of being heard. As the appeal was not brought on the basis that the conviction was against the weight of the evidence or that the sentence was excessive but that the appellant was not made aware of the sentence that was likely to be imposed, the learned Judge was not entitled to reject the appeal summarily under section 352(2) of the Criminal Procedure Code.

In the case of *Young Charles Okangu v Republic* (1988) 1 KAR 276 this Court decided 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 conviction is against the weight of the evidence or that the sentence is excessive. The appellant's complaint as stated in his memorandum of appeal was that he did not understand the full implications of the plea and that the trial magistrate did not inform him that the charge carried a mandatory death sentence. We think the appellant was entitled to the fullest disclosure on the strength of which he could make an informed decision whether or not to plead guilty to a capital charge. The record does not reflect that he was accorded this facility and this failure, if established, would constitute a gross violation of the appellant's fundamental right to a fair trial which is guaranteed by section 77 of the Constitution of Kenya subsection (2)(b) of which provides -

"(2)Every person who is charged with a criminal offence -

(b)shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged."

An explanation of the nature of the offence must of necessity include the sentence such an offence carries on conviction. It is also a fact that at the date of the summary rejection of the appeal on 13th October, 1997, the record shows that the persons with whom the appellant had been jointly charged with robbery with violence and handling stolen goods had been acquitted for lack of evidence 5 months previously.

From what we have said there can be no doubt that the learned Judge erred in summarily rejecting the appeal. Accordingly we allow this appeal and set aside the order of rejection dated 13th October, 1997 and substitute it with an order that the appeal be recalled and placed before a Judge for admission.

**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.**