



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI

CORAM: GICHERU, TUNOI & KEIWUA, J.J.A.

CRIMINAL APPEAL NO. 28 OF 2000

BETWEEN

EUSTANCE NDUMIA KAMUNYA.....APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from an Order of the High Court of Kenya at
Nyeri (Justice J.V.O. Juma) dated 22nd July, 1999**

in

H.C.CR.APPEAL NO. 220 OF 1999)

JUDGMENT OF THE COURT

This is a second appeal in respect whereof the appellant's grounds of appeal are that the learned Judge of the superior court erred in law in rejecting the appellant's appeal under section 352(2) of the Criminal Procedure Code, despite the fact that the appellant had sufficient grounds for complaint and that the learned Judge erred in law in failing to consider all the grounds raised by the appellant in his petition of appeal and accordingly the appellant prays for the appeal to be allowed and his conviction in the subordinate court quashed and the sentence set aside.

The first appeal which was before the learned Judge had these complaints against the decision of the Senior Principal Magistrate, namely that the learned Magistrate erred in law and in fact in convicting the appellant without any or sufficient evidence to sustain the said conviction and that the learned Magistrate erred in law and in fact in convicting the appellant of the offence of destroying evidence without any or sufficient evidence and the learned Magistrate erred in law and in fact in holding that the appellant was responsible for the disappearance and or destruction of the daily collection register without any or sufficient evidence and the learned Magistrate erred in failing to make a finding whether the charge was defective or not. The prayers in the first appeal were for the appeal to be allowed and the conviction quashed and sentence set aside. The order made by the learned Judge in respect of the first appeal under the provisions of section 352 of the Criminal Procedure Code was as follows:-

"I certify that I have perused the record and I am satisfied that the appeal has been lodged without any sufficient ground for complain. Appeal summarily rejected, section 352(2) ."

It is in respect of that order of the learned Judge that this second appeal to this Court has been preferred. The requirement of section 352 is that all appeals must be heard with the appellant given the opportunity thereof to urge the appeal. However, under section 352(2) a judge is given jurisdiction to summarily reject an appeal where it has been brought on the ground that the conviction is against the weight of the evidence, or that the sentence is excessive and where it appears to the judge that evidence is sufficient to support the conviction and no material had been placed before the judge to raise a reasonable doubt whether the conviction was right.

The learned State Counsel, on behalf of the respondent properly conceded before us, that the appeal should not have been rejected summarily by the learned Judge because and, in our view there is material in the circumstances of the appeal which raises a reasonable doubt whether the conviction was right. The learned trial Magistrate in his judgment said that the appellant was in charge of maintaining a daily collection register at the Nyeri Provincial General Hospital, but that register disappeared and the police assumed without further investigation that it was the appellant who destroyed it. However, the appellant had denied destroying the register, because he had, before being charged, been transferred to another department and had left the register in the department he was transferred from. In our judgment the learned Judge should have realised, before rejecting the appeal summarily, that the learned trial Magistrate had no basis for holding that it was the appellant who had destroyed the collection register. That much was also conceded and properly so, in our judgment, by the learned State Counsel for the respondent. In our judgment section 352(2) of the Criminal Procedure Code only gives jurisdiction to a judge to reject an appeal summarily where the appeal is brought on the ground that the conviction was against the weight of the evidence or that the sentence was excessive. That was the view of this Court in *Young Charles Okang vs R* [1982 -88]1 KAR 276. The learned Judge had no jurisdiction in this matter to reject the appeal as he did because in the words of the appellant, the appeal had sufficient ground for complaint and did not fall under the provisions of section 352(2) aforesaid. Accordingly we allow this appeal, and quash the appellant's conviction in the subordinate court and set aside the sentence.

Dated and delivered at Nyeri this 19th day of May, 2000.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

M. KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR