



REPUBLIC OF KENYA

IN THE COURT APPEAL
AT NAIROBI

CORAM: CHUNGA, C.J, TUNOI & LAKHA, JJ.A.

CRIMINAL APPEAL NO. 146 OF 2000

BETWEEN

GEORGE OTIENO AWINOAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from an Judgment of the High Court of Kenya at Kisumu (Hon. Mr. Justice Wambilyangah)
dated 11th
August, 1999

in

H.C.CR. APPEAL NO. 69 OF 1999)

JUDGMENT OF THE COURT

The appellant, George Otieno Awino alias Wajamaa , was after trial convicted by the Principal Magistrate, Maseno, on two counts of common assault contrary to **section 250** of the Penal Code and was thereafter sentenced on each count to 5 years' imprisonment. He was also convicted on one count of malicious damage to property contrary to section 339(1) of the Penal Code and on this latter count, too, he was sentenced to 5 years' imprisonment. All the sentences were ordered to be served concurrently.

The appellant then promptly appealed to the superior court against his convictions and sentence. The appeal was, however, summarily rejected under section 352(2) of the Criminal Procedure Code, without the appellant having had the opportunity of being heard in support of it. Section 352 empowers the superior court so to reject an appeal summarily, if and only if, the appeal is brought on the ground

"that the conviction is against the weight of evidence, or that the sentence is excessive."

In his second appeal to this court, the appellant, in his home made grounds of appeal, has averred in the main that the learned judge erred in law in dismissing the appeal summarily when the petition of appeal raised various grave issues of law. We reiterate that a first appeal may be rejected summarily under section 352(2), without the appellant or his advocate being given the opportunity of being heard, only if the memorandum of appeal contains no ground of appeal other than that the conviction is against the weight of evidence or that the sentence is excessive. But, the appeal before us reveals otherwise. Several

questions of law were raised in the petition of appeal to the superior court which, consequently, had no jurisdiction to reject the appeal summarily. We agree with the appellant that his appeal before the superior court was for hearing and not for summary rejection. The course adopted by the learned Judge was wrong and has to be set aside. The sentences, and in order to save judicial time, we do not deem it just to remit this matter for disposal by the superior court. We will invoke the powers given to us by section 3(2) of the Appellate Jurisdiction Act and deal with the appeal substantively.

The prescribed maximum sentence for common assault under section 250 of the Penal Code is one year's imprisonment. Consequently the sentence of 5 years' imprisonment imposed by the Principal Magistrate on Count One is illegal. We set it aside and substitute therefor a sentence of one year's imprisonment.

As far as Count Two is concerned, we are of the view that the sentence of five years' imprisonment is excessive in the particular circumstances of the case. There were no grave circumstances to justify imposing the maximum penalty. We substitute it with a sentence of one year's imprisonment.

In Count Three, there was no complainant and there was no other evidence to sustain the conviction which we quash. We set aside the sentence imposed on the said Count.

The sentences which we have substituted in Counts One and Two shall be served concurrently. To this limited extent the appeal is allowed.

Dated and delivered at Kisumu this 24th day of November, 2000.

B. CHUNGA

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CHIEF JUSTICE

P. K. TUNOI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR