



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KOOME, OKWENGU & MAKHANDIA, JJ. A)

CRIMINAL APPEAL NO. 21 OF 2012

BETWEEN

SAMUEL OLIMA GOMBEAPPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the Conviction and Judgment of the High Court of Kenya at

Kericho (Ang'awa, J) dated 18th December, 2008

in

H.C.C.R.A. No. 19 of 2008)

JUDGMENT OF THE COURT

Although the appellant **Samuel Olima Gombe** has listed 5 grounds for consideration in this appeal, in reality the main issue is simply whether the learned Judge of the High Court (**Ang'awa J.**) was right in summarily rejecting the appeal lodged by the appellant. Such summary rejection of the appeal was pursuant to section 352(2) of the Criminal Procedure Code.

The appellant was convicted for the offence of defilement of a girl contrary to section 8(2) of the Sexual Offences Act. Upon conviction by the Principal Magistrate's Court at Kericho, he was sentenced to life imprisonment as the victim was aged below 11 years.

Dissatisfied with the conviction and sentence, the appellant preferred an appeal in the High Court of Kenya at Kericho on grounds that the case against him was not proved as required in law; that the proceedings were conducted in a language he did not understand; that the case was a frame up and finally, that the sentence imposed was manifestly harsh and excessive

As already stated, this appeal was summarily rejected on 18th December, 2008 under section 352(2) of the Criminal Procedure Code. The section provides inter alia;

“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 in a case falling within subsection (2) of this section;

(2) 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.

(3) Whenever an appeal is summarily rejected notice of rejection shall forthwith be given to the Director of Public Prosecutions and to the appellant or his advocate.”

From the foregoing, summary rejection of an appeal can only be on the basis that; it discloses no grounds for interference; that the appellant or his advocate must be afforded an opportunity to be heard before summary rejection, unless the appeal is challenging conviction on the grounds of weight of evidence or sentence and the judge considers the evidence sufficient and the sentence proper; that the notice of summary rejection must forthwith be served on the Attorney General (now the Director of Public Prosecutions (DPP), and to the appellant or his advocate.

Having perused the record, we are not satisfied that the learned Judge was mindful to the strict requirements of this provision. The appeal was not brought solely on the grounds that the appellant's conviction was against the weight of evidence or that the sentence imposed was manifestly harsh and excessive. There were other grounds of appeal that we have already set out elsewhere in this judgment.

No wonder when the appeal was called out for hearing **Ms. Chelangat**, learned Prosecution Counsel readily conceded, and rightly so in our view, which was the right thing to do in the circumstances. She submitted that the appeal in the High Court was not frivolous as it raised grounds that should have been allowed to proceed to hearing on merit. She urged us that should we find favour with her submissions, we should allow the appeal but remit the record back to the High Court for admission and hearing on priority basis.

It has been stated time without number that summary rejection of appeals under **section 352** of the Criminal Procedure Code is an exceptional power reposed in a judge of the High Court and should be invoked sparingly and as ring fenced by the provision, and should be exercised in the clearest of cases and, where, on the face of it, there is no merit at all in the appeal in question. It is a power to be narrowly construed as it is drastic and a negation of the right of appeal, which is an integral aspect of fair trial or due process in criminal proceedings. It cannot be exercised with carefree zeal or capriciously. See **Okello v Republic** (2003) KLR 205, **N. K. W v Republic** (2003) eKLR, and **Abdi Wali Hassan Kher v Republic**.

As already stated elsewhere in this judgment, the grounds of appeal raised by the appellant in his appeal in the High Court were not appropriate for summary rejection. The appeal was plainly deserving of full hearing on its merits and more so, considering the sentence of life imposed on the appellant.

Accordingly, the appeal is allowed and the summary rejection of the appeal is quashed. We direct that the appeal be remitted to the High Court and placed before any judge of competent jurisdiction to admit it for hearing expeditiously.

It is so ordered.

Dated and delivered at Nairobi this 7th day of August, 2020.

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR