



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 212 OF 2010

BETWEEN

AYUB OKOBOLA WABUTIAPPELLANT

AND

REPUBLIC..... RESPONDENT

(An Appeal from a judgment of the High Court of Kenya at Kakamega (Lenaola, J.) dated 6th day of May, 2010

in

HCCR.A. NO. 57 OF 2010)

JUDGMENT OF THE COURT

1. The appellant, Ayub Okobola Wabuti was on 6th March 2009 convicted by the Magistrate's court at Butere for the offence of defilement of a child contrary to section 8(3) of the Sexual Offences Act. No. 3. of 2006. He was subsequently sentenced to a prison term of 20 years.

2. Having been granted leave by the High Court (Lenaola, J)on 11th March 2010 to appeal out of time based on his application in that regard dated 21st October 2009, the appellant presented a petition of appeal to the High Court at Kakamega on 11th March 2010. His grounds of appeal to the High Court included complaints that the trial magistrate erred by basing the conviction on the evidence of a single identifying witness; that the prosecution did not prove its case beyond all reasonable doubt; that the evidence tendered by the prosecution did not support the charge; that crucial witnesses were not called; that the evidence regarding the date when the alleged offence was committed was contradictory; and that the trial court failed to evaluate his defence.

3. On 6th May 2010, the High Court (Lenaola, J), which had a few months earlier granted the appellant leave to appeal out of time, summarily rejected the appeal under section 352(2) of the Criminal Procedure Code on the grounds that the appeal had been lodged without any sufficient ground for complaint.

4: Thereafter the appellant filed a notice of appeal on 3rd June 2010 expressing his desire to appeal to this

Court against the said decision of the High Court given on 6th May 2010.

Although that notice would appear to have been filed outside the time period permitted, it is not clear whether leave to do so was obtained. That however is not an issue before us.

5. The appellant, who appeared in person, framed his grounds of appeal and urged his appeal before us as though the High Court had determined his appeal on merits. Mr. L.K. Sirtuy, learned Principal Prosecution Counsel for the respondent when opposing the appeal also addressed us on the appellant's substantive complaints against the decision of the trial court. Considering, however, that the appellant's appeal was summarily rejected by the High Court under section 352(2) of the Criminal Procedure Code, and having regard to the circumstances of this case, we will refrain from addressing the substantive complaints. The only question that we shall therefore determine is whether the learned Judge of the High Court was right to summarily reject the appellant's appeal. !

6. The summary rejection of the appellant's appeal by the High Court under section 352(2) of the Criminal Procedure code was on the grounds, as already indicated, that the appeal had been lodged without any sufficient grounds for complaint.

Section 352(2) of the Criminal Procedure Code provides for summary rejection of appeal where the appeal is brought on the ground that the conviction is against the weight of evidence, or that the sentence is excessive. If it appears to the judge that there is sufficient evidence to support the conviction, and there is no material to raise doubt on the conviction or to warrant the reduction of sentence, the judge may without setting the appeal for hearing reject it summarily. The judge does that, as was the case here, by making an order certifying that he has perused the record and is satisfied that the appeal has been lodged without sufficient grounds for complaint. In that event the appellant need not be given opportunity by the High Court to urge his appeal.

7. It was held in **Aggrey vs. Republic [1983] KLR 649** that the exercise of the power to summarily reject an appeal under that provision is strictly limited to cases where the appeal is brought on grounds that the conviction is against the weight of the evidence or the sentence is excessive.

Where other substantial grounds of appeal are raised the powers under Section 352(2) of the Criminal Procedure Code should not be invoked. See also **Ouma v Republic Criminal Appeal No. 91 of 1985[1986] eKLR.**

8. The grounds on which the appellant sought to challenge the decision of the trial court before the High Court, as already mentioned, included complaints that the trial magistrate erred by basing the conviction on the evidence of a single identifying witness; that the prosecution did not prove its case beyond all reasonable doubt; that the evidence tendered by the prosecution did not support the charge; that crucial witnesses were not called; that the evidence regarding the date when the alleged offence was committed was contradictory and that the trial court failed to evaluate his defence. Those complaints went beyond the grounds set out under section 352(2) of the Criminal Procedure Code.

9. In the words of Madan JA in **Obiri vs. Republic [1981] 493** cited with approval in the recent decision of this court sitting in Malindi in the case of **Moses Rafiki Kazungu vs. Republic [2015] eKLR** the power to summarily reject a criminal appeal conferred by section 352(2) should be rarely exercised and should be exercised only in the clearest of cases.

10. Having regard to the grounds of appeal raised by the appellant, and what we have just stated, this was not, in our view, a proper case for the exercise of the powers under section 352(2) of the Criminal Procedure Code. For that reason, the appellant's appeal succeeds. The summary rejection of the appeal by the High Court is hereby quashed.

The appellant's appeal to the High Court is hereby returned for admission to hearing and thereafter to be heard by the High Court, by a judge other than Lenaola, J on a priority basis.

Dated and delivered at Kisumu this 18th day of June 2015

D.K. MARAGA

JUDGE OF APPEAL

S.GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR