



IN THE COURT OF APPEAL

AT ELDORET

CORAM: ONYANGO OTIENO, KARANJA & KOOME, JJ.A.

CRIMINAL APPEAL NO. 88 OF 2011

GABRIEL BARASA OMAR.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (Ombija, J) dated 30th July, 2009

in

H.C.CR.A. NO. 38 OF 2008)

JUDGMENT OF THE COURT

This is a second appeal and it is against sentence only. The appellant **GABRIEL BARASA OMAR** faced a charge of defilement of a girl contrary to **Section 145(1)** of the Penal Code in the subordinate Court at Kitale. In the alternative, he was charged with the offence of Indecent Assault on a female contrary to **Section 144(1)** of the Penal Code. The particulars for that charge were that ` , **2004 at Transnzoia District within Rift Valley Province, unlawfully and indecently assaulted BM a girl under the age of sixteen years by touching her private parts namely vagina.**”

He denied the main charge and the alternative charge but after full trial before the learned Senior Principal Magistrate, (W.A. Juma) he was found guilty of the alternative charge of indecent assault contrary to **Section 144(1)** of the Penal Code. The particulars reproduced herein above, he was convicted and sentenced to serve ten(10) years imprisonment: He was not satisfied with that conviction and sentence and he lodged an appeal in the High Court vide High Court Criminal Appeal No. 38 of 2008. That appeal was placed before *Ombija J.* who on 30th July, 2009, rejected it summarily under **Section 352** of the Criminal Procedure Code. The appellant was still not satisfied and hence this appeal which as we have stated, is only on sentence.

The appellant and **JM, (PW1)** the mother of the complainant **BM (PW2)** were neighbours. On 12th November, 2004 at 3.30 p.m. J left home for the church. She left B and her siblings at home. B was eight (8) years old. It would appear that there was sort of a kiosk within J place where cigarettes could be sold and bought. Whatever was the case, immediately after J left for the church, the appellant sent a child called Collins to go and call B. B said in evidence that Collins told her that the appellant was calling her. She obliged and went to the appellant's home. The appellant gave her Kshs.10/= to go and buy a cigarette for him. She went and bought a cigarette for him worth Kshs.2/= leaving a change of Ksh.8. The

appellant then held B hand and took her to his bedroom. He removed her pants, and removed his trousers also. Then as B says:-

“He inserted his organ of urinating in mine and I felt pain and I cried.”

After he finished, he gave B Kshs.7, telling B not to tell anybody. B went home and did not tell anybody what happened on that day for fear of any reprisals. She did not tell her mother as well, but although her mother J returned home at 7 pm and did not discover anything as she was not told anything relevant on the issue, the following morning she saw B crying. She asked her why she was crying and B said she was suffering from stomachache. However her sister H, betrayed her, and said B had 7/= the previous day with which she bought *sukari nguru* which she ate. On enquiring, B said it all. The appellant had given her the money and had defiled her. J reported to her husband who called for the help of a village elder. The child B was taken to hospital and the matter reported to police. A P3 form was issued and B was examined by **Linus Ligare (PW4)** a Clinical Officer at Kitale District Hospital who formed the opinion that there was an attempted rape. He was thereafter charged with the offence as stated above.

In his defence which was given in an unsworn statement, he narrated how on 13th March, 2004 two elders hired him to go to a Corporal at Sikhendu Police post and when he accompanied them to the Police post, he was arrested, handcuffed and taken to Kitale Police station from where he was taken to Kitale Hospital and thereafter charged with the offences he did not know.

It is the above facts that the two courts below considered and that led to the appellant's conviction by the trial court and a summary dismissal of his appeal by the first appellate court.

In his appeal before us all he is seeking is a reduction of sentence on various grounds, a summary of which is that the sentence was harsh whereas he is a first offender; that he has a family that depends on him; that he is old at the age of 63 and that he does not have enough strength and lastly that his businesses have come to a standstill.

Mr. Chirchir, the learned Senior Prosecutions Counsel opposed the appeal submitting that the court has no jurisdiction to entertain the appeal as this is a second appeal on sentence only since the appellant has not preferred to appeal against summary dismissal of his appeal in the High Court.

We have considered the appeal. In our view, it has no merit and cannot stand. **Section 361(1)(a)** of the Criminal Procedure Code provides as follows:-

“361. A party to an appeal from a subordinate court may, subject to sub-section (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this Section.

(a) on a matter of fact, and severity of sentence is a matter of fact.”

As we have stated, the appeal is only against severity of sentence and it is a second appeal. We have no jurisdiction pursuant to the provisions of **Section 361(1) (a)** above to entertain it.

The High Court dismissed the appeal summarily and there is no appeal brought against that, but even if one were to accept that by summarily rejecting the appeal, the learned Judge also dismissed the appeal against sentence as well, still we are unable to intervene as that would be still in respect of an appeal against sentence on second appeal. In any event the sentence that was awarded of ten (10) years imprisonment was so lenient that we consider he was lucky, in the light of what he did and the age of the child, to have escaped a more appropriate and deserved sentence.

DATED and DELIVERED at ELDORET this 30th day of JANUARY, 2013.

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

W. KARANJA
.....
JUDGE OF APPEAL

M.K. KOOME
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR