**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, MWERA & MWILU, JJ.A.)**

**CRIMINAL APPEAL NO. 227 OF 2011**

**BETWEEN**

**MUEMA NDETI……..……..…....…… APPELLANT**

**AND**

**REPUBLIC……...…….....…….…… RESPONDENT**

***(Appeal from the Judgment of the High Court of Kenya at Machakos (Lenaola, J.) dated 24th November, 2009***

***in***

***H.C.CR.A NO. 70 OF 2009)***

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**JUDGMENT OF THE COURT**

**Muema Ndeti** (appellant) was tried, convicted and sentenced to twenty (20) years imprisonment for the offence of defilement of a girl under the age of 16 years contrary to **Section 145(1)** of the **Penal Code** by the Principal Magistrate, Makueni Court.

The said conviction and sentence followed a full trial in which five witnesses testified for the prosecution while the appellant made an unsworn statement of defence. Being dissatisfied with the conviction and sentence, he filed an appeal before the High Court sitting in Machakos in which he proffered five grounds of appeal as hereunder:-

> ***(1) The learned trial Magistrate erred in law by proceeding with a trial based on a law that did not exist namely Sections 144(1) and 145(1) of the Penal Code Cap 63 Laws of Kenya. At the time of charging the appellant on 6th October 2006, the Sexual Offences Act No. 3 of 2006 had already come into operation meaning that Sections 144(1) and 145(1) of Penal Code Cap 63 had already been repealed.***

***Accordingly, the trial against the appellant was null and void in that the charge sheet was incurably defective.***

***(2) The learned trial Magistrate misdirected herself in law and fact by convicting the appellant on an uncorroborated evidence of a minor before satisfying herself as to where the minor was telling the truth or not.***

***(3) The learned trial Magistrate erred in law for failing to find and hold that the evidence of prosecution witness number five (PW5) was inadmissible in evidence and therefore incapable of being relied on to convict the appellant.***

***(4) The learned trial Magistrate erred in law by not giving the appellant an opportunity to make any submissions after close of the prosecution and defense case thus prejudicing his position which led to miscarriage of justice.***

***(5) The learned trial Magistrate erred in law by convicting the appellant on evidence that was patently doubtful and also based on hearsay.***

The file was placed before the learned Judge (Lenaola, J) for perusal and directions under **Section 352** of the **Criminal Procedure Code** (Cap 75 of the Laws of Kenya).

After perusing the file, the learned Judge decided that the appeal in question was for summary dismissal and therefore, dismissed the same under **Section 352(1)** of the **Criminal Procedure Code.** It is important to recapitulate the provisions of Section 352 here in order to bring this appeal into its proper perspective.

**Section 352(1)** provides as follows:-

***"Where the High Court has received a 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 provision of Section 350 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 the appeal except:***

***(i) In case falling within sub-section 2 of this Section."***

The sub-section referred to above provides as follows:-

***"352(2) When an appeal is brought on the ground that the conviction is against the weight of evidence or that the sentence is excessive, and that 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."***

Thus summary rejection of an appeal under Section 352 may be based on two grounds only namely that:-

***(i) the appeal is against the weight of evidence, and that***

***(ii) the sentence is excessive.***

See also **Aggrey v Republic 1983 [KLR] 649.**

Before a Judge can exercise his powers to summarily reject an appeal pursuant to **Section 352(2)** of the **Criminal Procedure Code**, he/she must be satisfied that the evidence relied upon to secure the conviction was overwhelming and that the grounds of appeal raised cannot in anyway have any impact on the appeal. If however, on perusal of the record and the grounds of appeal raised, the Judge is satisfied that there could be some issues that require to be ventilated on appeal, then the appellant ought to be given an opportunity to be heard. This is more so in a case such as this one where the appellant was sentenced to a long term of incarceration. We have considered the grounds of appeal raised before the High Court. We are of the considered view that they were serious enough to merit a hearing before the learned Judge.

For these reasons, we are satisfied that the learned Judge misdirected himself in rejecting the appeal summarily. We therefore, allow this appeal and direct that the appellant's appeal be admitted for hearing and that the same be heard and determined on its merit.

We direct that the original file and the High Court file be remitted to the High Court in Machakos for compliance with this order.

***Dated and delivered at Nairobi this 18th day of October, 2013.***

**W. KARANJA**

**…….…….**

**JUDGE OF APPEAL**

**J. W. MWERA**

**…….…….**

**JUDGE OF APPEAL**

**P. M. MWILU**

**…….…….**

**JUDGE OF APPEAL**

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

***DEPUTY* REGISTRAR**