



**IN THE COURT OF APPEAL  
AT ELDORET  
(CORAM: OMOLO, WAKI & VISRAM, J.J.A.)  
CRIMINAL APPEAL NO. 199 OF 2010**

**BETWEEN**

**JOSEPH IMANA KALENG .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal against an order of summary rejection of the High Court of Kenya at Kitale (Ombija, J) dated  
4<sup>th</sup> May, 2010  
in*

**H.C.CR.A. NO. 16 OF 2010)**

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**JUDGMENT OF THE COURT**

*Joseph Imana Kaleng*, the appellant herein, was charged in the Senior Resident Magistrate’s Court at Lodwar with the offence of defilement contrary to **section 8 (1)** as read with **section 8 (2)** of the Sexual Offences Act, 2006. The particulars of the offence were that on the 23<sup>rd</sup> June 2008 at L[...] township in Turkana Central District he unlawfully and intentionally caused penetration of genital organs (sic) of F.W, a girl aged seven years. The prosecution called five witnesses and after hearing their evidence, as well as the sworn evidence of the appellant, the learned Senior Resident Magistrate (Mr. T. Nzyoki) delivered judgment on 19<sup>th</sup> February 2010 in which he found the appellant guilty, convicted and sentenced him to 20 years imprisonment. He promptly lodged an appeal at the superior court, citing five grounds, in a home-made memorandum of appeal, as follows:-

- “1. *That I did not plead guilty at trial.*
2. *That I have been under major operations (sic) for five times (sic) and since this implication (sic) occurred I became weak and confused.*
3. *That the doctor did not state if the complainant was bruised in her private parts regarding (sic) her young age.*
4. *That the honourable magistrate based his verdict on the witness (sic) one of whom I (sic) was her employee and had refused to pay my monthly wages.*
5. *That I beg your honourable court to allow and order for a retrial of this matter.”*

However, by an order dated 4<sup>th</sup> May 2010, the superior court (Ombija, J) summarily rejected the appeal under **section 352 (2)** of the Criminal Procedure Code. That section empowers the Judge to summarily reject the appeal if, in his opinion, and after he has perused the record, he is satisfied that the evidence is sufficient to support the conviction, and that the appeal has been lodged without any sufficient ground for complaint.

It is against the above order of summary rejection of his appeal, that the appellant is before us seeking that his appeal be heard on merit by the superior court. He has outlined the following 13 grounds of appeal to support his case:-

- “1. That your lordship, I did not plead guilty at the trial court.**
- 2. That your lordships, (sic) the trial magistrate erred in law since he did not consider the evidence adduced in court was hearsay.**
- 3. That your lordship, the trial magistrate erred in law by not allowing me the appellant to cross examine PW1 and therefore denying me justice.**
- 4. That your lordship, the trial magistrate erred in law by not considering the contradictions of evidence of PW2 and PW3 evidence in that PW2 stated that her (sic) and PW3 got me red handed in the act but PW3 stated that he heard a quarrel between me and PW2 is when he went there to find out what was going on.**
- 5. That your lordship, the trial magistrate erred in law by not rejecting the evidence of PW1 who stated she was threatened by knife and the alleged knife was not recovered.**
- 6. That your lordships, PW1 stated that she entered into a room and I went there defiled her but the PW2 stated that she found me without a pair of trouser on in the corridor and a room.**
- 7. That your lordship, PW2 stated that she examined PW1 (sic) private parts and saw a whitish mucus substance coming out of PW1 vagina while doctors evidence stated that no (sic) presence of any discharge.**
- 8. That your lordships, the trial magistrate erred in law by not considering the evidence adduced by PW2 contradicts with PW5 the clinical officer who gave evidence on behalf of the doctor that the approximate age of injuries is not indicated and the probable type of weapon(s) causing injury was none. (sic)**
- 9. That your lordship the trial magistrate erred in law since he did not consider if there was no weapon used to cause injury and therefore there is no harm which could be caused.**
- 10. That your lordships, also (sic) erred by not asking for medical records how the complainant was first treated before the P3 was filled.**
- 11. That your lordships also trial magistrate erred by not considering that I was a victim of complaining for my non payment of seven years salaries.**
- 12. That your lordships, the trial magistrate erred in law by refusing/rejecting the appellant (sic) defence on which the appellant stated he did not defile the minor (sic) it is just a fabrication so as to deny his rights for payment of seven years (sic) salaries.**
- 13. That your lordship, the honourable court also erred by summarily rejecting my appeal and yet I had good grounds for my appeal.”**

At the hearing before us on 14<sup>th</sup> February 2011, the appellant relied on the above grounds of appeal. Mr. A. O. Oluoch, learned senior deputy prosecution counsel, conceded the appeal, stating that the appeal had raised arguable points, including the fact that the appellant had not been given the opportunity to cross-examine the prosecution’s first witness in the trial court, after the witness had been stood down, following her examination-in-chief.

We are in agreement with Mr. Oluoch that this was not the proper case for summary rejection under **section 352 (2)** of the Criminal Procedure Code. In addition to the grounds of appeal outlined by the

appellant, and the submissions made by Mr. Oluoch, we would note that the sentence of 20 years imprisonment imposed on the appellant was by itself a factor that ought to have guided the superior court, when it rejected the appeal summarily. We think the learned Judge erred in his decision to do so and we hereby allow this appeal, and remit the case back to the superior court for hearing and determination of the appeal. It is so ordered.

*Dated and delivered at Eldoret this 17<sup>th</sup> day of February, 2011.*

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**