



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, ONYANGO OTIENO & NYAMU, JJ.A.)

CRIMINAL APPEAL NO. 178 OF 2010

KIOKO KIMATA MUTUKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from conviction and sentence of the High Court of Kenya at Machakos (Lenaola, J.) 14<sup>th</sup> January 2010*

in

**H.C.CR.A.NO.181 OF 2009**

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**JUDGMENT OF THE COURT**

In the trial court before (the Principal Magistrate Makueni,) the appellant, **Kioko Kimata Mutuku** was charged with committing unnatural offence contrary to **section 162(a)** of the Penal Code. The particulars of the offence were that on 4<sup>th</sup> June 2007 at **[particulars withheld]** location, **Kathonzweni** Division in **Makueni** District, he had carnal knowledge of **M. M** against the order of nature. After a full trial the trial court convicted him and sentenced him to serve fifteen (15) years imprisonment. Aggrieved by the conviction and sentence, the appellant filed an appeal in the superior court and in the petition he raised the following grounds:-

1. ***“That the learned magistrate erred in law and in facts in convicting me for an offence which was not proved beyond reasonable doubt.***
2. ***That the learned magistrate erred in law and in facts by meeting (sic) out sentence which is manifestly excessive against the appellant.***
3. ***That the learned magistrate erred in law and in facts in deciding the case against the weight of evidence adduced.***
4. ***As I cannot recall all what transpired in court during my conviction, I request the court to avail me the court proceedings and judgment to enable me raise more grounds to be adduced during the hearing of my appeal.***

Pursuant to the provision of **section 352(2)** of the Criminal Procedure Code, the superior court (Lenaola,

J.) summarily dismissed the appeal.

The appellant came before this Court by way of appeal against the summary rejection of his appeal on 6<sup>th</sup> May 2010 when he filed a memorandum of appeal consisting of the following grounds:-

**1) That my fundamental rights to fair trial under section 77 of the constitutional (sic) and section 352(1) Criminal Procedure Code were infringed upon since I was not granted an opportunity to argue my appeal.**

**2) That the learned Judge erred in law by holding that the offence charged was proved beyond reasonable doubt against me the appellant.**

**3) That the learned Judge erred in law by failing to declare the entire trial a nullity since section 72(3)(b) of the Constitution was infringed when I was illegally held in custody for more than the stipulated period.**

**4) That I intend upon receipt of my trial proceedings to adduce supplementary grounds of appeal.**

**5) That I intend to be present in person at my appeal hearing.”**

At the hearing before us the appellant appeared in person and the State was represented by **Mr V.S. Monda**, Senior State Counsel, State Law Office. In his submissions the appellant relied wholly on the grounds set out in the petition in the superior court. On his part Mr Monda in supporting the summary rejection submitted that the petition did not raise any serious points of law and that the Judge was perfectly entitled to summarily reject the appeal. Upon being asked by the Court whether the severity of the sentence imposed was not a legal issue he was quick to concede that a sentence of 15 years was on the lower side.

We have reflected fully firstly on the provisions of **section 352(1)** and **(2)** and secondly on the provisions of **section 162(a)** and its proviso. It is apparent to us that where the unnatural act is done without the consent of the complainant the sentence is twenty one (21) years but the trial court had imposed a sentence of fifteen years as stated above. The consequences of this analysis is that it is quite obvious that the issue of legality of the sentence was a matter which should have been heard by the superior court. In addition in view of the appellant's contention that the conviction was against the weight of evidence, the Judge ought to have fully reviewed the record with provisions of **section 352(2)** in view. The subsection states:-

**“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 to 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.”**

With respect to the Judge we note that he did not detect that the sentence imposed by the trial court might not be lawful in view of the penalty provision of **section 162** of the Penal Code. In the circumstances, it is our view that the Judge did not discharge his duty under the section because he failed to consider the legality of the sentence and although we have to refrain from saying anything more in view of the verdict we intend to give, our inclination is that the Judge did not give consideration as to whether the appellant's points touching on the evidence were arguable. In our view a casual perusal of the evidence would not be sufficient to discharge the court's duty concerning summary rejection of an appeal under the section. All in all, we think that there cannot in any event, be a summary rejection of an appeal in a situation where it is apparent that an unlawful sentence could have been imposed by the trial court. For these reasons, we uphold the appeal and set aside the order of summary rejection dated 14<sup>th</sup> January 2010. The appeal is

accordingly remitted to the superior court with a direction that it shall admit the appellant's hearing and determine the same according to law.

***DATED and delivered at Nairobi this 11<sup>th</sup> day of February 2011.***

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**J.G. NYAMU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**