REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, AGANYANYA & NYAMU, JJ.A.)

CRIMINAL APPEAL NO. 539 OF 2010

BETWEEN

ALBANUS KIOKO MUSEMBI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos (Lenaola, J.) dated 24th January, 2008

in

H.C.Cr.A No. 186 of 2007)
****

JUDGMENT OF THE COURT

Albanus Kioko Musembi*, the appellant was charged at Kilungu Resident Magistrate's** Court with the offence of defilement of a child aged fifteen years contrary to ***section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 13th day of November 2006 in Makueni District within Eastern Province he unlawfully defiled ***P. K.N***, a girl aged fifteen years.

P. K.N (PW1) was a girl aged 15years old in standard 8 at K[...] Primary School. Voir dire examination was administered on her before she testified in the case. She was found fit to testify on oath. She told the Resident Magistrate *(P.M. Kariuki)* that on 13th November 2006 at around 11 a.m. she had come home from collecting firewood from the surrounding area. The appellant who is her cousin went to check on her when she called to show him the injury she had sustained on the palm as she searched for the firewood. Instead of assisting her, the appellant carried her to the house and placed her on the sofa set where he tore her under pant and raped her. She then went to her room and locked herself therein as she screamed. Later she went out and found her mother ***A.N.N*** (PW2) to whom she related what had happened. The same information was relayed to ***P.N.M*** (PW3) her father. The incident was then reported to Kilome Police Station where ***Pc. Peter Musyoki*** (PW6) issued PW1with a P3 form in respect which she was examined by ***Dr. Florence Kokwanyo*** at Machakos District Hospital on 13th November, 2006. She found PW1's labia majora bruised and her hymen torn. There was also a whitish discharge from her vaginal orifice. It was ***Dr. Ludwig Kithya*** (PW5) who later produced the P3 form with Dr. Kokwanyo's findings thereon to the court. The appellant was then arrested and charged with the offence subject to this appeal.

When put on his defence the appellant denied the offence in an unsworn statement and said that on the day of the alleged incident he was not at home but was at Grogan Road in Nairobi where he worked as a mechanic. That on 16th November, 2006 he was from work going home when he met PW3 in town but when he went to greet him the latter told him there was a funeral of his aunt at home. The appellant then boarded the motor vehicle of PW3 to go to the funeral but when they reached Kilome market, PW3 said he wanted to obtain a burial permit from Kilome Police Station. Once at the police station, the appellant was handed over to the police as a wanted person in connection with rape committed against PW1, which the appellant knew nothing about.

The learned Resident Magistrate heard and recorded the evidence in the case and wrote the judgment which he delivered on 1st November, 2007. In the said judgment the learned magistrate concluded as follows:-

"Having gone through the evidence of both prosecution and defence I do find the evidence of PW1 credible and she positively identified the accused whom they were staying together as cousin as accused parents are deceased and said she was defiled and her pants torn and her petticoat had spermatozoa and this was corroborated by PW2 who saw the pant and the petticoat which still has spermatozoa. The

Doctor i.e. PW5 who confirmed defilement did take place and the hymen was torn and also PW1 stated the accused threatened to kill her if she told anybody and chased her for a distance of 1 kilometre. This was also confirmed by PW4 who saw the girl running and the accused following her and when he saw him he turned backward. Also after the incident accused ran away from home and went to Nairobi where he purported to have been employed. All in all the prosecution evidence was well corroborated and accused defences a mere denial and an afterthought but to demonise PW3 evidence who had gone all the way to bringing him up the accused *(sic)* ***even after his parent passed away and on that note I do find the accused guilty of the offence and convict him accordingly."***

Upon such conviction, the appellant was sentenced to 20 years imprisonment. He was aggrieved by the conviction and sentence. He appealed to the superior court *(Lenaola, J.)* which appeal was rejected summarily, hence this appeal before this Court. The appeal was based on what the appellant calls ***"GROUNDS OF APPEAL"***filed herein on 23rd August 2011 containing 7 grounds of appeal and supplemented by supplementary grounds of appeal which had 5 grounds of appeal accompanied by written submissions.

When the appeal came up for hearing before us on 26th July 2011 the appellant stated that he would like his appeal to be taken back to the High Court for a proper hearing since he had important points to raise there and that he had not been given an opportunity to be heard on them. ***Ms Nyamosi,*** learned Principal State Counsel expressed the view that the appellant's defence had not been considered.

Section 352 of the Criminal Procedure Code which provides for summary rejection of appeals by the High Court states as follows:-

"352(1) when the High Court has received the petition and copy under section 350, a Judge shall peruse them, and, if he considers that there is no sufficient ground for interfering, may not withstanding 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 support of the appeal, except:-

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

Sub-section 2 of ***section 352*** of the Criminal Procedure Code provides as follows:-

"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 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."

It follows therefore that summary rejection of a criminal appeal may be based on two grounds only, namely; that the:

(i) Appeal is against the weight of evidence,

(ii) Appeal is against excess of the sentence.

Although the exercise of the power of summary dismissal under ***section 352(2)*** of the Criminal Procedure Code is strictly limited to the two grounds listed above, see ***Aggrey v Republic [1983] KLR 649***, it is not a prerequisite that for an appeal to fall under the ambit of the section the petition should expressly use those specific words. It is sufficient if the substance of the grounds of appeal clearly indicate that conviction is against the weight of evidence – see ***Osongo & Another v Republic [1972] E.A. 170.***

But when the appellant filed his petition to the High Court he cited 4 grounds, 2 of which were:-

"(3) That the learned trial magistrate erred in overlooking the fact that there was no conclusive medical examination reports to justify the judgment given by the court.

and

(4) That the learned trial magistrate erred both in law and fact in failing to consider the defence raised by me."

These are some of the grounds he has raised in his grounds and supplementary grounds of appeal and written submissions filed before this Court. These grounds fall outside the ambit of ***section 352(2)*** of the Criminal Procedure Code and therefore it is our view that the grounds raised were substantial and they required that the appellant be afforded an opportunity to be heard on them on appeal before the said superior court and it was not within the learned judge's mandate to reject such an appeal summarily.

In the circumstances we allow this appeal and direct that the appellant's appeal to the superior court be admitted and heard on its merit as soon as is practicable. In the meantime the appellant will be held in custody pending the hearing of his appeal as herein directed. It is so ordered.

Dated and delivered at Nairobi this 14th day of October, 2011.

E. M. GITHINJI

.....
JUDGE OF APPEAL

D. K. S. AGANYANYA
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL
I certify that this is a true copy of the original.

DEPUTY REGISTRAR