IN THE COURT OFA PPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 537 OF 2010

BETWEEN

ONESMAS MUSYOKI MUTUNE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Machakos (Lenaola, J.) dated 21st October, 2010

in

H.C.Cr.A. No. 45 of 2009)
****

JUDGMENT OF THE COURT

Onesmas Musyoki Mutune, the appellant, was charged in the Senior Resident Magistrate's Court at Makueni with the offence of defilement of a girl aged 11 years contrary to ***section 8(2)*** of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 23rd July, 2008 at about 0600 p.m. in Makueni District in Eastern Province he committed an act which caused penetration of a child, namely *M. M* aged 11 years into her female genital organ. There was an alternative charge of indecent act with a child contrary to ***section 11(1)*** of the Sexual Offences Act. The particulars of the alternative charge were that on 23rd day of July, 2008 in Mukueni District of Eastern Province he committed an indecent act with M.M, a child under the age of 11 years by touching her private parts.

The case was heard by the trial court *(Nyakundi Ag. P.M.)* who wrote his judgment he delivered on 10th March, 2009, in which the appellant was found guilty and convicted on the main charge of defilement. He was sentenced to 25 years imprisonment. His appeal to the superior court was summarily rejected *(Lenaola, J.)* on 21st October, 2009; hence the present appeal before this Court.

The brief facts of the case were that on 23rd July, 2008 ***M.M*** (PW1) was working in the kitchen of her father's house when the appellant came there and defiled her. ***K. M*** (PW4) came by and saw what was happening through the open door. He raised an alarm and the appellant started running away. He was pursued by PW4 and other children. ***Titus Mbithi Ndetei*** (PW3) who was at his home heard the commotion and when he came out to check he found that some children were chasing the appellant. They included PW4. He assisted in apprehending the appellant whom he took back to the house. He was then

informed of what had happened by PW1 and PW4. PW3 sent for ***Nahashon Musyoki Nalile*** (PW5) the village elder to whom he handed the appellant.

In the meantime ***M. N*** (PW2), the father of PW1 came back home and was told of what had happened to PW1. He then accompanied PW3 and PW5 to take the appellant to Makueni Police Station where ***Pc. Joseph Mugo*** (PW6) re-arrested him and after investigations the appellant was charged with the offence the subject matter of this appeal.

When put on his defence, the appellant denied the offence in an unsworn statement in which he stated that on the day of his arrest he was coming from the shops when he met ***Mbithi Ndetei*** (PW3) who asked him why he had let go of his wife who was suffering. PW3 then told the appellant he would frame him up. He then arrested the appellant and took him to the complainant's home. He was then taken to the chief's camp and later to Makueni Police Station where he was charged with an offence he knew nothing about.

His conviction by the Ag. Principal Magistrate provoked an appeal to the superior court which was as earlier stated, was summarily rejected on 21st October, 2009. The appellant is aggrieved by the summary dismissal and has lodged what he calls *"GROUNDS OF APPEAL"* to this Court listing 10 grounds of appeal as follows:-

"1. That I have been held and kept in police custody for a period of two weeks before being arraigned in court and without any explanation. I was not brought before court within 24 hours of my arrest or released on bond by the officer in-charge of the police station.

2. That I was not informed in language that I understand and in detail of the nature of the offence charged and of the plea.

3. That the court before recording the plea did not satisfy itself that at the time the plea was entered into the accused person was competent and of sound mind.

4. That I was not given adequate time and facilities for the preparation of my defense.

5. That I was not afforded facilities to examine the witnesses called by the prosecution before the court.

6. That I was not assisted with the interpreter.

7. That I was not examined by the doctor to prove the incident alleged.

8. That during passing the sentence the court did not take into account the period which I have been in custody and also probation officer's report.

9. That I was not given a copy of proceedings and judgment for the use to particulate *(sic)* ***the matters of law and facts in regard to which the subordinate court erred when appealing to the High Court or to allow the right to amend my petition of appeal.***

10. That I was not given the opportunity of being heard in support of my appeal.

The appeal was heard before this Court on 26th July, 2011 wherein the appellant referred the Court to the grounds of appeal he filed herein particularly ground 10 which stated that he was not given an opportunity to defend himself. ***Ms. Nyamosi***, learned Principal State Counsel for the Republic opposed the appeal and submitted that the superior court was right in rejecting the appeal summarily, adding that the sentence awarded to the appellant was illegal and it should be enhanced.

We have heard and recorded the submissions of the appellant and those of the learned Principal State Counsel and also perused the record of the trial court and the order for summary dismissal of the appeal by the superior court dated 21st October, 2009 *(Lenaola, J.)*

Section 352 of the Criminal Procedure Code which provides for summary rejection of appeals is couched in the following terms:

"352(1) 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 support of the appeal, except:

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

Sub-section 2 of ***section 352*** of the Criminal Procedure Code 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 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 criminal appeals may be based on two grounds only, namely, that the:

(i) Appeal is against the weight of evidence,

(ii) Appeal is against excess of sentence.

Although the exercise of the power of summary dismissal under ***section 352(2)*** of the Criminal Procedure Code is strictly limited to cases where the appeal is brought on the ground that the conviction is against the weight of evidence or that the sentence is excessive – see ***Aggrey v Republic [1983] KLR 649***, it is not a prerequisite that for an appeal to fall under the ambit of that 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 herein filed the appeal to the superior court he cited ten grounds including ground 7 which stated as follows:

"7 That the trial magistrate erred in fact and in law convicting and sentencing me the appellant to twenty five years despite the fact that my constitutional rights enshrined in section 72(3) had been violated . I stayed in police custody for 168 hours (one week) before being charged in Court e.g. REFENCE (sic) Macharia Githuku v republic [2007] EKLR Court of Appeal at Nairobi before Judge (O.Kubasu) Onyango Otieno and several Juju (sic) April 27, 2007."

This is one of the grounds he has raised in his grounds of appeal filed before this Court. It goes beyond an appeal filed on the basis of the weight of evidence or excess of sentence. It is our view that this ground, amongst others, was substantial and it required that the appellant be afforded an opportunity to be heard on it in the superior court. We are, however, at this stage, unable to comment on Ms. Nyamosi's submission that the sentence imposed on the appellant by the trial court was illegal. 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 shall remain in custody pending the hearing of his appeal as herein before ordered. Those shall be the orders of this Court.

Delivered and dated 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