IN THE COURT OF APPEAL
AT KISUMU

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

CRIMINAL APPEAL NO. 249 OF 2009

BETWEEN

D.O……..APPELLANT

AND

REPUBLIC ……..……RESPONDENT

(Appeal from the Order of the High Court of Kenya at Kisii (Bauni, J.) dated 22nd February, 2006

in

H.C.Cr.A. No. 100 of 2005)
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JUDGMENT OF THE COURT

This appeal is against the summary rejection of the appellant's appeal by the High Court at Kisii *(Bauni, J.)* on 22nd February, 2006. ***D O***, the appellant was convicted for the offence of defilement for having unlawful carnal knowledge of a girl under the age of sixteen years within Nyanza Province on 5th May, 2005. The facts of the case were that on the day in question, ***S.O*** a girl aged 4½ years was left home by her mother ***R.K*** (PW1) who had gone out to buy soap. On her return, she found the girl sleeping on the appellant's bed and he was apparently having sexual intercourse with her. The girl was naked while the appellant had removed his trousers.

On seeing this, PW1 screamed and her women friends came around and when the appellant attempted to flee, he was detained and G.M (PW2) who also came around took him to Gesongo Police Post where he was booked and later charged with the offence as herein before stated.

The appellant denied the offence on oath and stated that on 15th May, 2005 when he came home from his duties as a herds-boy he found his sister ***E.M*** quarrelling his mother ***M.K***. It is apparent these were not witnesses in the case. He intervened and told off E not to quarrel their mother. Then he left home to go to G, but when he came back later he found E screaming and saying he had defiled her daughter and that she had found them in bed. He was surprised as he was not at home when the incident occurred. He was, however, arrested and taken to Gesongo Police Post then to Kisii Police Station where he was charged. He denied raping the minor child.

In the case before the trial court *(Arika, RM)* the minor did not testify as the court found her so small for anything meaningful to be got from her. However, after hearing other evidence of the

prosecution witnesses, PW1, 2 and ***Pc. Florence Mukua*** (3) and the defence, the learned magistrate held that there was overwhelming evidence that it was the appellant who defiled the minor. He was found guilty, convicted and sentenced to life imprisonment with hard labour. His first appeal to the High Court was rejected summarily hence the present and probably the last appeal before us which was grounded on a homemade memorandum of appeal dated 4th August, 2009. It had the following grounds: namely:-

"1. THAT the trial magistrate erred in both law and facts by convicting me without verifying the violation of my constitutional right as enshrined under Section 72(3) of the Constitution of Kenya.

2. THAT the learned trial magistrate erred in both facts and law when he convicted me without putting the doctor's evidence (which is on record) under consideration. This could have eliminated any doubt as to if the defilement occurred or not.

3. THAT the trial magistrate erred when he relied to convict me on evidence rendered by witnesses who were members of one family. The evidence were not enough as they ought to have just been summed up as single evidence.

4. THAT the High Court Judges *(sic)* ***erred when he rejected my first appeal without exhausting all the areas available. The Judge could have realized that I wrote the appeal just being a lay person in legal matters and that I had not received the trial court proceedings at the time".***

When the appellant lodged his appeal to the first High Court, he relied on the following grounds, namely:

"1. THAT the learned trial magistrate erred in law and facts when he recorded that the prosecution had proved this case beyond any doubt at the close of my trial your lordship.

2. THAT the learned trial magistrate erred in law and facts when he failed to observe that I was not examined by a doctor so as to clear doubt if there was a link in specimen with that of the complainant your lordship.

3. THAT life sentence by all means is overly harsh and illegal for a case that was just framed up your lordship".

The grounds for summary rejection of an appeal are provided for in ***section 352*** of the *Criminal Procedure Code, Cap 75 Laws of Kenya*. It states:

"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.

The subsection 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 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, and/or that the

(ii) Appeal is against severity of sentence.

However, although the exercise of the power for summary dismissal under ***Section 352(2)*** of the *Criminal Procedure Code* is strictly limited to the two conditions set out above – see ***Aggrey v. Republic [1983] KLR 649***, it is not a pre-requisite 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 grounds of appeal clearly indicate that the conviction is against the weight of evidence.

From the appellant's memorandum of appeal to the High Court, the grounds raised therein went beyond an appeal based on the weight of evidence or excess of sentence. In our view, these grounds were substantial and required that the appellant be afforded an opportunity to be heard on them. In the circumstances, we allow this appeal and direct that the appellant's appeal to the High Court be admitted to hearing and heard on its merits as soon as is practicable. Appellant to be produced in the Chief Magistrate's Court at Kisii within 14 days for fixing of a hearing date. It is so ordered.

Dated and delivered at Kisumu this 4th day of November, 2011.

S. E. O. BOSIRE

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JUDGE OF APPEAL

D. K. S. AGANYANYA
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JUDGE OF APPEAL

J. G. NYAMU
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JUDGE OF APPEAL

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

DEPUTY REGISTRAR