



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT MOMBASA**

**Criminal Appeal 361 of 2008**  
**JUSTINE TUNJE MBARU.....APPELLANT**

**AND**  
**REPUBLIC.....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Malindi (Ombija, J)  
dated 12<sup>th</sup> February, 2008*

**in**

**H.C.CR.A. NO. 80 OF 2006)**  
**\*\*\*\*\***  
**JUDGMENT OF THE COURT**

According to the judgment of the Resident Magistrate's Court at Kilifi, the appellant **JUSTIN TUNJE MBARU**, was convicted of the offence of rape contrary to **Section 140** of the Penal Code it being alleged that he had unlawful carnal knowledge of E.D without her consent. The appellant was also charged with an alternative count of indecently assaulting the complainant by touching her private parts, 'vagina', contrary to **Section 144 (1)** of the Penal Code.

What is alleged to have taken place was that while the complainant was walking home, the appellant caught up with her and grabbed her by the neck and threatened her with death. The appellant forcefully took the complainant to the bush stripped and raped her. He released her naked and she ran back to her home where she was met in that state by her daughter **M . M** said she heard her mother cry that **Mbaru (the appellant)** had raped her. The matter was reported to K police station where the complainant was given a P3 form and thereafter the Police arrested the appellant. The Senior Resident Magistrate's Court found as a fact that the appellant and the complainant knew each other before the rape incident found the charge of rape proved and convicted the appellant.

The appellant appealed to the superior court on both conviction and sentence complaining that the conviction and sentence was harsh and inordinately excessive taking into account all the circumstances of the case. The superior court (*Ombija J*) summarily rejected the appeal and hence this second appeal to this court in which the appellant faulted the summary rejection of his appeal in that the learned Judge erred in law and fact by failing to note that the 20 year sentence imposed was inordinate and excessive when the circumstances of the offence were taken into consideration. The learned Judge is similarly faulted for summarily rejecting the appeal without considering that the attack on the complainant was at night and that she did not identify the appellant.

When the appeal came for hearing before us, *Mr. Ondari*, learned Assistant Public Prosecutor, properly in our view, did not seek to support the summary rejection of the appeal because according to him there were triable issues raised in the appeal like proof beyond reasonable doubt. We would in those circumstances observe that the learned Judge of the superior Court misdirected himself in summarily rejecting the appeal on the supposed basis that there were no sufficient grounds for complaint. We think the appeal was not brought on the

ground that the conviction was against the weight of the evidence or that the sentence was excessive; Ground 1(b) in the appellant's petition of appeal in the High Court complained that:-

***“The complainant’s evidence was not corroborated by any other independent evidence”***

That was a complaint based on law and it took the appeal outside the provisions of **Section 352(2)** of the Criminal Procedure Code.

This Court had this to say regarding summary rejection of an appeal in the case of ***OMBENA VS REPUBLIC [1981] KLR 450:-***

***“We are concerned that in this case as in the Wakelin case and the Adan case, the appeal to the High Court was summarily rejected under section 352 (2) of the Criminal Procedure Code. In the Wakelin case the court, in 1951, raised the question whether under the conditions by then obtaining in Kenya, the existence of section 352 of the Code really served any useful purpose. We would hesitate to endorse such a strong view, especially since we are aware of the extreme pressure under which the resident Judge in Kisumu has to work. But we would commend to the attention of future resident Judges in Kisumu the following passage from the judgment in the Wakelin case at p 187:-***

***“If the object of the section is to save time the present case is a good example of how easily the object can be defeated. Further more we should have thought, where an appeal is brought either against conviction or sentence when on the face of it the appeal appears frivolous or without merit, the appeal could be disposed of just as expeditiously by two or one judge, as the case may be, sitting in open court, as by a single Judge perusing the record in his chambers.”***

We also draw attention to the decision of this Court in the case of ***JOHN MWANGI VS REPUBLIC [1983] KLR 652*** in which this Court pointed out at page 656:-

***“We have considered the petitions of appeals of the two appellants and we are satisfied that the appeals ought not to have been summarily dismissed because, as has been said before, the exercise of this power is strictly limited to cases where the appeal is brought only on the ground that the conviction is against the weight of evidence or the sentence is excessive which were not the only grounds in these appeals and thus as conceded by Mr. Chunga for the Republic the appeals were removed from the scope of section 352 (2). As there was no jurisdiction for the High Court to deal with appeals summarily under section 352 (2) we allow the appeals, set aside the orders summarily dismissing them and remit the cases to the High Court with the direction that they be admitted for hearing.”***

We, on our part, agree that where there are other complaints in addition to conviction being against the weight of the evidence or the sentence being excessive, an appeal is taken out of the ambit of **Section 352 (2)** and this appeal ought not to have been summarily rejected. We allow the appeal and set aside the order summarily rejecting it and remit the appeal to the High Court and direct it be admitted for hearing before a Judge other than *Ombija J.*

***DATED and DELIVERED at MOMBASA this 23<sup>rd</sup> day of July 2010.***

**R.S.C. OMOLO**

.....  
**JUDGE OF APPEAL**

**M. OLE KEIWUA**

.....  
**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**