



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 320 of 2008

DANIEL OTIENO ORACHA.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from an order of the High Court of Kenya at Kisumu (Karanja, J.) dated 5th August, 2008

in

H.C.CR.A. NO. 79 of 2008)

JUDGMENT OF THE COURT

DANIEL OTIENO ORACHA, the appellant herein, was after trial convicted by the Principal Magistrate, Siaya, of defilement contrary to *section 8 (3)* of the Sexual Offences Act No. 3 of 2006 and sentenced to 21 years imprisonment. He appealed to the High Court of Kenya at Kisumu but the appeal was summarily rejected on 4th May, 2009 by Karanja, J. under *section 352 (2)* of the Criminal Procedure Code. This is therefore the appellant's second appeal.

An appeal falls within *section 352 (2)* aforesaid only if the grounds of appeal raise any one or both of the following points: -

- i) The conviction is against the weight of evidence, or***
- ii) The sentence is excessive.***

Before a judge summarily dismisses an appeal under this section he must first peruse the record and proceed to consider the evidence and/or sentence, and, if it appears to him that the conviction is supported by enough evidence and it is right and there are no circumstances which lead him to form the opinion that the sentence should be reduced he may summarily reject the appeal. An appeal the grounds of which raise not merely questions of the conviction being against the weight of the evidence or the sentence being excessive but, in addition, other questions whether of fact or law or of mixed fact and law, for example, wrong identification, equivocal plea of guilt, *alibi* etc. cannot summarily be rejected. See **MULAKH RAJ MAHAN (1954) 21 EACA 383** and **MWANGI v REPUBLIC (1982 – 88)1 KAR 361.**

A perusal of the grounds of appeal presented to the superior court by the appellant shows that the substance of those grounds raises the question of his identification by the complainant and whether he could be convicted on the identification by a single witness at night. The appellant also queried the value of the medical evidence which he averred, if rejected, then the conviction cannot be sustained.

Having considered the grounds of appeal presented by the appellant before the superior court we are satisfied that the appeal ought not to have been summarily rejected. Consequently, as there was no jurisdiction for the said court to deal with the appeal summarily under **section 352 (2)** of the Criminal Procedure Code, we allow the appeal, set aside the order summarily dismissing it and remit the appeal to the High Court of Kenya, Kisumu, with the direction that it be admitted for hearing. We so order.

Dated and delivered at KISUMU this 5th day of August, 2009.

P.K. TUNOI

.....

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

D.K.S. AGANYANYA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR