



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 256 OF 2005

BETWEEN

PETER KITAI WAFULA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from an order of the High Court of Kenya

Kitale (Lady Justice Karanja) dated 12th September, 2005

in

H.C.C.R.A. NO. 47 OF 2005)

JUDGMENT OF THE COURT

The appellant *PETER KITAI WAFULA* was charged before the Senior Principal Magistrate court at Kitale with the offence of defilement of a girl contrary to *section 145 (1)* of the Penal Code. The particulars of the offence were that on the 13th day of May, 2005 at [*particulars withheld*] Farm in Trans Nzoia District within Rift Valley Province, he unlawfully had carnal knowledge of *R.N.*, a girl under the age of sixteen years. When the substance of the charge and every element of it was explained to him by the court in Kiswahili language which he understood and he was thereafter asked whether he admitted or denied the truth of every element of the charge, he stated in Kiswahili language that the charge was true. Facts were then read to him and he admitted the facts as correct adding that he had carnal knowledge of the girl. He was then found guilty on his own plea and convicted. On mitigation, the appellant said he had no problems and the court sentenced him to serve imprisonment for a term of twenty (20) years with hard labour.

He appealed against the sentence to the superior court. His grounds of appeal read as follows:-

“1. That Your Lordship the previous court passed the severe sentence on me without considering my age.

2. That Your Lordship my mitigation in this lower court was not considered.

3. That Your Lordship I am the eldest in the family poor, landless and a dependant.

REASONS WHEREFORE

I pray to this highly esteemed court to allow this appeal and reduce the sentence.”

Thus, there is no doubt whatsoever that the appeal was against sentence only and that the appellant, upto that stage had no complaint against conviction as indeed he had pleaded guilty to the charge. That appeal was placed before the learned Judge of the superior court (Wanjiru Karanja, J) who after full consideration rejected it summarily under *Section 352 (2)* of the Criminal Procedure Code. The appellant was not satisfied with that decision and has filed this appeal premised on four grounds namely:-

- “1. That my Lords I pleaded guilty to the charge.*
- 2. That my Lords the appellate judge did not consider my mitigation and my health in prison.*
- 3. That my lords my parents passed away and I am the only dependant by my children and sisters and brothers.*
- 4. That I humbly pray that the honourable Court of Appeal sympathizes with me and reduce the sentence of 20 years in prison.”*

When the appeal came up before us for hearing the appellant who conducted his appeal in person stated that he wanted his case to be ordered to start *de novo* before the subordinate court on grounds that he pleaded guilty as a result of confusion. He did not explain the nature of confusion he was undergoing when he pleaded guilty but when he was put through his grounds of Appeal both in the superior court and in this Court he stated that the grounds were drafted for him in prison and whereas he admitted that these two Memoranda of Appeal were thumb printed by him, he nevertheless denied some of the contents of the same Memoranda of Appeal.

We have considered the appeal. It cannot be disputed that the appeal is on the severity of sentence only. The Grounds of Appeal before us which we have reproduced above are all on severity of sentence. The appellant never complained in his first appeal against the procedure in the subordinate court leading to his plea of guilty in that court. We have on our own perused the record and do not detect any fault in the manner the plea was taken. In our view, the learned magistrate complied strictly with the legal requirements in taking the plea. (See the case of *Adan vs. Republic* [1973] EA page 445). The appellant in his appeal to the superior court never raised any question against procedural errors in taking the plea as indeed there were no such errors. The learned Judge of the superior court never detected any flaw and hence the rejection of the appeal summarily as it was only against the sentence, which sentence was lawful and in her view (and rightly so) was not manifestly excessive in the circumstances of the case. The request by the appellant that the appeal be allowed and the case be ordered to start *de novo* in the subordinate court is neither in the grounds of appeal before us nor was it raised in the appeal before the superior court. It is an afterthought and as it is not a ground of appeal before us, and further as no reasons were given for the same request, we are unable to accede to it.

As we have stated above, the appeal before us is only on severity of sentence. The sentence awarded of 20 years imprisonment with hard labour was lawful and that is the reason why we hold that the appeal is only on severity of sentence. *Section 361 (1) (a) and (b)* of the Criminal Procedure Code Chapter 75 Laws of Kenya States as follows:

“361 (1) A Party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this Section -

(a) On a matter of fact; and severity of sentences is a matter of fact; or

(b) Against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence”.

The effect of the above is that the appeal before us, which is against severity of sentence only, is incompetent and cannot stand as we have no jurisdiction to entertain it. It is dismissed.

Dated and delivered at Eldoret this 21st day of September, 2007.

S.E.O BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR