



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**  
**Criminal Appeal 399 of 2006**

**SHADRACK OMONDI MALO .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An appeal from an order of the High Court of Kenya*

*Kisumu (Mwera, J.) dated 15<sup>th</sup> August, 2006*

**in**

**H.C.C.R.A. NO. 220 OF 2005)**

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**JUDGMENT OF THE COURT**

This is a second appeal. The appellant was convicted for the offences of attempted defilement of a girl under the age of 16 years contrary to *section 145* of the Penal Code and creating disturbance contrary to *section 95(1)* of the Penal Code and was thereafter sentenced to 10 years imprisonment with hard labour in the first count and 6 months imprisonment in the second count. The imprisonment terms were ordered to run concurrently. In his first appeal to the superior court, his main complaint in his home made grounds was that his conviction was based on insufficient and conflicting evidence. Subsequently he engaged counsel, one Ong'ele who filed a supplementary petition of appeal in which he raised, among other issues, that the charges were defective, and that the defence case not considered.

The appellant's file was placed before Mwera, J. who after perusing the file summarily dismissed the appellant's appeal pursuant to the provisions of *section 352 (2)* of the Criminal Procedure Code and thus provoked this appeal. Among the grounds raised in the appellant's memorandum of appeal is that his appeal was improperly summarily dismissed, because he was represented by legal counsel who had filed a supplementary petition of appeal. Learned Senior Principal State Counsel, Mr. Musau concedes the appeal, quite properly so in our view because it is not usual to summarily dismiss an appeal under *section 352 (2)* CPC, where counsel appears for an appellant. Besides, an important legal point was raised with regard to the propriety of the charges as laid on which the appellant should have been heard.

In the circumstances we allow the appeal, set aside the order of summary dismissal made on 15<sup>th</sup> August, 2006, and direct that the appellant's appeal to the High Court be admitted for hearing before a single Judge other than Mwera, J. Order accordingly.

*Dated and delivered at Kisumu this 20<sup>th</sup> day of November, 2007.*

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**