IN THE COURT OF APPEAL

AT ELDORET

(CORAM: TUNOI, O'KUBASU & DEVERELL, JJ.A.)

CRIMINAL APPEAL NO. 186 OF 2005

BETWEEN

PETER EDUKON …….…… APPELLANT

AND

REPUBLIC …….RESPONDENT

(Appeal from an order of the High Court of Kenya at Kitale (Lady Justice Karanja) dated 25th May, 2005

in

H.C.CR.A. NO. 17 OF 2005)

****

JUDGMENT OF THE COURT

Peter Edukon, the appellant herein, was charged with the offence of defilement of a girl under the age of fourteen years contrary to ***Section 145 (1)*** of the Penal Code. The particulars of the offence were that:

> **"Peter Edukon**
>
> ***On the 31st day of December, 2004 at [Particulars Withheld] in Turkana District of the Rift Valley Province, unlawfully had carnal knowledge of M A a girl under the age of sixteen years".***

The appellant was arraigned before the Senior Resident Magistrate's Court at Lodwar on 4th January, 2005 when he pleaded *"Not Guilty"* to the charge. The appellant's trial commenced on the 31st January, 2005 when three prosecution witnesses (PW1, PW2 and PW3) testified against him. The trial was adjourned to 14th February, 2005 when the fourth prosecution witness (PW4) testified. The trial was then adjourned to 23rd February, 2005 when the appellant changed his plea of *"Not Guilty"* to *"Guilty"*.

Upon that change of plea by the appellant, the Court Prosecutor, one Inspector Khaemba, narrated the facts of the case to the court. The appellant admitted the facts of the case upon which the trial court convicted him on his own plea of guilty.

Before the appellant was sentenced, the prosecutor asked the trial court to treat him as a first offender. In mitigation, the appellant told the trial court that he was 19 years old, single and a farmer along Turkwell river. He completed his mitigation by stating that he was remorseful and that the incident was accidental.

The learned trial magistrate considered all that had been urged before him and sentenced the appellant to twenty (20) years imprisonment with hard labour.

Being aggrieved by the foregoing the appellant filed an appeal in the superior court setting out the following grounds of appeal:

> ***"1. Your Lordship, I pleaded not guilty at trial.***
>
> ***2. That the trial magistrate erred in law and facts by failing to note that the complainant's evidence was not consistent.***
>
> ***3. That the trial magistrate failed to note that this case was not investigated as the law requires.***
>
> ***4. That the trial magistrate rejected my defence and shifting burden of proof upon me for the harsh sentence of this kind.***
>
> ***5. That I humbly request to be furnished with copies of the trial proceedings".***

The appellant's appeal was summarily rejected by the superior court (Karanja J) on the 25th May, 2005 under ***Section 352 (2)*** of the Criminal Procedure Code which provides:

"Where an appeal is brought on the ground that the conviction is against the weight of the 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".

Upon that summary rejection of his appeal by the superior court, the appellant now comes to this Court by way of second appeal.

The power of summary rejection of an appeal under ***Section 352 (2)*** of the Criminal Procedure Code must be strictly limited to the clearest of cases and must be brought only on the ground that the conviction is against the weight of evidence or that the sentence is excessive. This is a point that has been considered by this Court in its various decisions. In ***Okello v. R*** [2003] KLR 205 at page 207 this Court stated:

"The power of summary rejection of an appeal under section 352 (2) of the Criminal Procedure Code is strictly limited to cases where the appeal is brought only on the ground that the conviction is against the weight of evidence or that the sentence is excessive. See John Nderitu Mwangi & John Gichohi Wachira v Republic (1982 – 88) 1 KAR 276. These principles were earlier inunciated (sic) in cases like Obiri v Republic [1981] KLR 489 and Kariuki v Republic [1981] KLR 14".

Having considered the grounds set out by the appellant in his first appeal to the superior court, we are of the view that those grounds do show that the issues raised were not confined to weight of evidence

only. We think the appellant was entitled to the benefit of a full hearing by the superior court.

For the foregoing reasons, this appeal is allowed and the summary rejection of the appellant's appeal in the superior court is set aside and a direction is given that the appellant's appeal to that court should be returned for a judge to admit it to hearing and we so order. Those shall be our orders.

Dated and delivered at Eldoret this 22nd day of September, 2006.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

……

JUDGE OF APPEAL

W. S. DEVERELL

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR