IN THE COURT OF APPEAL

AT NYERI

(Coram: Shah, O'Kubasu & Keiwua JJ A)

CRIMINAL APPEAL NO 61 OF 2001

NGERA KAMAU WAHOME……...….APPELLANT

VERSUS

REPUBLIC…..…….....……RESPONDENT

(Appeal from an order of the High Court at Nyeri (Juma, J)

dated 23rd May, 2000 in H C C Cr A No 86 of 2000)

JUDGMENT

Although the appellant Ngera Kamau Wahome has listed eight grounds for consideration in this appeal, in reality the issue simply is whether or not the learned judge of the superior court (Mitey J) was right in summarily rejecting the appeal lodged by the appellant. Such summary rejection was pursuant to provision in section 352(2) of the Criminal Procedure Code.

The appellant was convicted of the offence of incest contrary to section 166(1) of the Penal Code. He allegedly had carnal knowledge of his 5 year old daughter. The complainant was too young to appreciate the nature of a statement on oath and her evidence was taken in the form of a statement only. Such evidence needs to be corroborated. The appellant's main complaint, in his petition of appeal in the superior court, was that the evidence of the complainant was manipulated in the sense that she told the court what her mother told her to tell the court.

It is a requirement in law that the evidence of a child of tender years ought to be corroborated by other material evidence in support thereof implicating the accused person. If it is not so corroborated the accused shall not be liable to be convicted on such evidence. See section 124 of the Evidence Act, cap 80 Laws of Kenya.

The appellant also complained to the effect that he had earlier been "released after winning". That we presume is a plea of *Autrefois Aquit*.

How he has brought this issue in his appeal to the High Court is not quite clear but the point is a matter of law. The point could well be a red herring but it needed to be gone into on the first appeal.

Section 352(2) of the Criminal Procedure Code provides:

"(2) 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 setting 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."

It is quite clear in the instant case that the issue of corroboration, that is whether or not there was cogent corroboration of the complainant's evidence is a matter of mixed law and fact. Similarly the belatedly taken up issue of *Autrefois Acquit* is a matter of law. Apart from these issues there could well be an argument that sentence could be reduced. We do not say that that argument would necessarily succeed; however the learned judge ought to have heard the appellant on the 14 year sentence.

We need not at this hearing go into the other conviction under section 44(1) of the Public Health Act, Cap 242, Laws of Kenya.

We have said it before and we say it again that the jurisdiction to summarily reject an appeal ought to be invoked in the clearest of cases where the conviction is against the weight of evidence, or that the sentence is excessive.

Accordingly, the appeal is allowed, the summary rejection of the appeal is quashed and a direction given that the appellant's appeal to the High Court should be returned for a judge to admit it to hearing and we so order.

Dated and delivered at Nyeri this 16th day of May, 2003

A.B. SHAH

…….

JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

M.M.O KEIWUA

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR