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

Criminal Appeal 208 of 2009

JAMES OSIEMA ABONGO …….. APPELLANT

AND

REPUBLIC …… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Karanja, J) dated 23rd October, 2008

In

H.C. Cr. A. No. 111 of 2008)

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JUDGMENT OF THE COURT

The less said about the facts and circumstances relating to the appeal before us the better, since learned Principal State Counsel, Ms Oundo concedes, and we agree, that it ought to be remitted to the superior court for hearing.

On 1st August, 2008, James Osiema Abongo, the appellant was convicted by Kisumu Principal Magistrate, Mrs. Onginjo, for the offence of defilement contrary to *section 8 (2)* of the Sexual Offences Act, No. 3 of 2006. It had been alleged in the charge sheet that on the 18th day of October, 2007 in Kisumu District, the appellant caused penetration with his genital organ to the genital organ of a child namely M.A.A aged 10 years. Upon his conviction he was sentenced to serve a prison term of 20 years.

The appellant was aggrieved by both the conviction and sentence, and he intended to challenge it in the High Court. One week later on 8th August, 2008, he filed a petition of appeal putting forward the following grounds:-

"(1) That the Magistrate erred in law and facts when he convicted me yet PW1 who is the complainant in this case told the court that she did not go to hospital or taken for treatment anywhere.

(2) That the Magistrate erred when he failed to detect the contradictions with (sic) the prosecution's witnesses about the date and time of the alleged crime.

(3) That I pray to be supplied with a certified copy of the court proceedings to enable me raise more grounds for my appeal.

(4) That I wish to be present at the hearing of this appeal"

The petition of appeal was drawn in person at G.K. Prison Kisumu as the appellant was unrepresented by counsel throughout. It is clear from ground number 3 in that petition that the appellant was seeking copies of proceedings and judgment with a view to amending the petition and raising more grounds. But that never happened. Instead, on 23rd October, 2008, the High Court issued a certificate signed by Karanja, J under *section 352* of the Criminal Procedure Code (the Code) stating as follows:-

"I certify that I have perused the record and I am satisfied that the appeal has been lodged without sufficient ground for complaint. Appeal Summarily Rejected. S. 352 (2)."

In the first place, an appeal filed before the High Court is ordinarily for hearing under *section 359* of the Code. But under *section 352* of the Code, subject to express safeguards or thresholds, the court may reject the appeal summarily after hearing the appellant or his advocate (subsection 1) or without hearing any of them if it fits into the well defined parameters of *subsection 2*. We may reproduce the entire section for full appreciation of its provisions:-

"352 (1) When the High Court has received the petition and copy under section 350, a judge shall peruse them, and if he considers that there is no sufficient ground for interfering, may, notwithstanding the provisions of section 359, reject the appeal summarily:

Provided that no appeal shall be rejected summarily unless the appellant or his advocate has had the opportunity of being heard in support of the appeal, except –

(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 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.

(3) Whenever an appeal is summarily rejected notice of rejection shall forthwith be given to the Attorney-General and to the appellant or his advocate."

In our view, the Jurisdiction on summary rejection of an appeal does not arise unless three thresholds obtain:-

(i) there is a petition and copy of judgment filed under section 350,

(ii) the Judge has perused them,

(iii) he considers that there is no sufficient ground for interfering.

The Judge will then hear the appellant or his counsel or choose not to hear them if the only grounds are:-

"(i) *that the conviction is against the weight of the evidence, or*

(ii) that the sentence is excessive

(iii) the evidence is sufficient to support the conviction

(iv) there is no material which could raise a reasonable doubt whether the conviction was right, or

(v) there is no material which could lead to the reduction of the sentence

In the case before us, the petition filed and presumably perused by the Judge was filed on interim basis in terms of *Section 350 (2) (i)* of the Code. As stated earlier, the appellant , who was acting in person and was committed to prison, had applied for

copies of the proceedings and judgment and therefore had the right under the proviso to section 350 (2) (i) to amend his petition without leave of the court. There was no inquiry directed at the provisions of that section before the learned Judge purported to peruse the petition and record and we think the omission to do so was in breach of the appellant's right to a fair trial. Secondly, this Court has stated, times without number, that the jurisdiction under *section 352 (2)* is strictly limited to cases where the appeal is brought on the ground that the conviction is against the weight of evidence or the sentence is excessive – see for example: Aggrey v. Republic [1983] KLR 650. Both the nature of the petition and the Judge's careful scrutiny of the record are paramount considerations. The petition need not specifically state that the appeal is against the weight of evidence, so long as the substance of the grounds clearly so indicate. The two grounds of appeal put forward in the petition of appeal before the superior court did not merely complain about the weight of the evidence but the veracity of it in proving the crucial elements of the offence charged. Various other grounds were raised before us and we think the appellant ought to be given an opportunity to urge them. We were also informed by the Principal State Counsel that the legality not merely sufficiency, of the sentence is in issue.

In all the circumstances this appeal is for allowing. We order that the order and certificate issued by the superior court and dated 23rd October, 2008 be and is hereby set aside. We direct that the appellant be served with the full record of the proceedings and judgment of the superior court and be given the opportunity to amend his petition of appeal dated 8th August and filed on 11th August, 2008 before the appeal is heard. We further direct that the appeal be admitted for hearing and be heard by a Judge of the High Court in Kisumu, except Karanja, J. Orders accordingly.

Dated and delivered at Kisumu this 18th day of June, 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.BOSIRE