



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**CRIMINAL APPEAL NO. 8 OF 2014**

**SIMON KIMANI GITAU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal on mitigation from the judgment dated 06/09/2011 in Naivasha CM's Criminal Case No 2986 of 2010 by Hon. P. M. Mulwa- PM)*

**JUDGMENT**

1. The appellant was charged and convicted for the offence of Defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the Sexual Offences Act and sentenced to twenty (20) years imprisonment.

2. The appellant filed a substantive petition of appeal against conviction and sentence on 6<sup>th</sup> September, 2011. The file went missing until 2<sup>nd</sup> April, 2019. At the hearing the appellant filed "Mitigation grounds" and said he only wanted to be heard on the grounds against the sentence of twenty years as shown below:

1. *That the imposed sentence was excessive given that I was a first offender.*
2. *That I am remorseful, repentant, reformed and rehabilitated.*
3. *That I have acquired skills in vocational training.*
4. *That I have no other criminal records even under prison rules.*
5. *That despite this issue, I had a harmonious relationship with my neighbours and no time had acted in manner to pose danger to the community.*
6. *That may the honourable court exercise its merciful discretion and humbly reduce my sentence preferably to one of a community service order.*
7. *That my health and condition is poor suffering in custody irreparably.*

The appellant prayed that his mitigation appeal be allowed, and the sentence be substituted with a non-custodial sentence or probation.

3. The appellant also filed submissions. At the hearing, the appellant essentially stated that what he seeks for a probation sentence. The prosecution opposed the appeal, and pointed out that Judgment gave a 20 years sentence imprisonment under **Section 8 (3)** of the **Sexual Offence Act** which gives a minimum sentence of 20 years for under 15 years child.

4. I have considered with a measure of anxiety whether what is before me is an appeal at all, given that the grounds are essentially on mitigation. The **Criminal Procedure Code** requires an appeal to be filed by way of a petition of appeal which must contain particulars of matters of law or fact which are appealed from. This is contained in **Section 350(2) CPA** which provides that:

***"A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which***

**notices or documents connected with the appeal may be served.....and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground other than those set out in the petition of appeal**

5. Thus a so-called “mitigation appeal” does not properly fall to be called an appeal under **section 350** of the **CPC**. To that end, **Section 352(1)** of the **CPC** allows for summary rejection of an appeal by the Court, if it considers that: “*there is no sufficient ground for interfering*” with the lower court’s decision.

6. However, there is a proviso to sub-section (1) that disallows summary rejection in certain cases. Under that proviso, summary rejection may not be effected in a case falling under **Sub-section 2** which provides as follows:

***“Where the appeal is brought on the ground that the conviction is brought against the weight of the evidence, or that the sentence is excessive .....”***

7. The only aspect of an appeal which is present in the petition of appeal herein is the issue of excessive sentence set out in paragraph (6) of the petition as follows:

***“6. That may the honourable court exercise its merciful discretion and humbly reduce my sentence preferably to one of a community service order.”***

8. I have carefully perused the proceedings of the lower court, and am satisfied that the appellant was properly convicted for the offence in the charge. The trial magistrate also considered the mitigation of the appellant after convicting the appellant, and the same is duly recorded in the proceedings. To that extent the mitigation now proffered by the appellant is superfluous.

9. The sentence that could be meted by the trial magistrate for the offence of Defilement contrary in **Section 8 (3)** of the Sexual Offences Act, is as follows:-

***“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”***

10. The trial magistrate meted the sentence of twenty years’ imprisonment which is the minimum in line with the statute. There is no assertion that the trial magistrate did not exercise her discretion in sentencing judiciously, or that there was any impropriety on the sentencing.

11. I therefore see no reason to interfere with the trial court’s judgment. Accordingly, the appellant’s plea and appeal is hereby dismissed.

12. The appellant’s only recourse is to plead for mercy under **Article 133** of the Constitution through the Power of Mercy Advisory Committee in terms of **section 19** of the **Power of Mercy Act, No 21 of 2011** or to await remission or parole under the Prisons Act

13. Orders accordingly.

**Dated at Naivasha this 18<sup>th</sup> Day of July, 2019.**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mr. Koima for the State
2. Simon Kimani Gitau - Appellant in person
3. Court Clerk - Quinter Ogotu