



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: MUSINGA, GATEMBU, & MURGOR, JJA.)

CRIMINAL APPEAL NO. 291 OF 2011

SAMSON MUIRURI MBUGUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of

Kenya at Nakuru (Wendoh, J.) Dated 17th June, 2011 in HC.CR. A. No. 185 of 2010)

JUDGMENT OF THE COURT

1. The appellant was tried and convicted of the offence of defilement of an imbecile contrary to **section 146** of the **Penal Code** as read with **section 48(3)** of the first schedule to the **Sexual Offences Act**. He was sentenced to 14 years’ imprisonment. His first appeal to the High Court against sentence was unsuccessful. The appellant then preferred a second appeal to this Court.

2. When the appeal came up for hearing, the appellant, who is unrepresented, told the Court that he had been in prison custody since 21st May, 2010 when he was convicted and sentenced by the trial court; that he has only three (3) months to go before he completes the sentence; that he is now fully rehabilitated and prayed that we reduce the sentence to the period already served and set him at liberty.

3. **Miss Nyakira Kibera**, learned Prosecution counsel for the respondent opposed the appeal. She submitted that this being a second appeal against sentence only, that is a matter of fact and this Court has no jurisdiction to hear such an appeal.

4. We agree with Miss Kibera. **Section 361(1) (a)** of the **Criminal Procedure Code** states as follows:

“A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

(a) On a matter of fact and severity of sentence is a matter of fact...”

5. This Court has restated the above position in a number of decisions, see for example, **JOSEPH ONYANGO OTIENO & ANOTHER V. REPUBLIC [2000] eKLR**. We reiterate that we have no jurisdiction to hear a second appeal against severity of sentence as that is a matter of fact. Consequently, we dismiss this appeal.

Dated and delivered at Nakuru this 11TH Day of June, 2019.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR