IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), MUSINGA & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 204 OF 2016

BETWEEN

M K M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Ruling/Judgment of the High Court of Kenya at Machakos (J.P. Jaden, J.) dated 28th October, 2015

in

HC.CR.A. NO. 156 OF 2013)

****

JUDGMENT OF THE COURT

The appellant, **M K M**, was arraigned, tried and committed by the Senior Resident Magistrate's Court in Yatta on a charge of incest by a male person contrary to ***section 20(1)*** of the **Sexual Offences Act**, No. 3 of 2006, whereupon he was sentenced to life imprisonment. The particulars of the offence, which the trial court found to have been proved, were that on the 20th day of March 2008 at [particulars withheld] Sub-location Kyasioni Location in Yatta District within the Eastern Province, being a male person, the appellant had carnal knowledge of M.K. a female juvenile who was to his knowledge his daughter. She was two years old.

Upon conviction and sentence the appellant preferred an appeal against both before the High Court. It was heard and dismissed on 28th October 2015 by B.P. Jaden, J. provoking this appeal.

Now the appellant has filed before this Court a document titled merely '*Grounds of Mitigation*' in which he sets out points of mitigation that he regrets committing the offence against his two year old daughter; has since adopted the religious way of life and sought forgiveness and reconciliation with his family; has undergone carpentry training sufficient to be self-reliant and feed his family; his children's future is bleak without him. He prays therefore for a lesser jail term.

At the hearing the appellant did not address us beyond stating that the complainant had agreed to drop charges against him some time subsequent to his conviction and sentence.

For the Republic, **Mrs. Murungi**, the learned Senior Assistant Director of Public Prosecutions, simply stated that the Court is bereft of jurisdiction to interfere with the sentence by dint of ***section 361(1) (C)*** of the **Criminal Procedure Code** which limits its jurisdiction to handling matters of law only and not matters of fact, severity of sentence being expressly stated to be a matter of fact.

The Senior Assistant Director of Public Prosecutions urged that the sentence imposed being a lawful one by a court of competent jurisdiction, we cannot interfere.

The question before us is a simple one, namely; whether we have jurisdiction as a second appellate court, to entertain a mitigation against severity of sentence presented in the guise of an appeal.

The short answer to the question, indeed the only answer is that we cannot entertain such mitigation or challenge to severity of sentence by whatever name called. That much is clear from ***section 361(1)*** of the **Criminal Procedure Code** which provides thus;

> ***"361. (1) 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; or***
>
> ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."***

(Our emphasis)

To entertain this appeal would be to assume a jurisdiction expressly denied this Court and constitute a deliberate violation of statute and hence a nullity. This Court cannot engage in such patent nullities and illegalities, the appellant's avowed change of ways notwithstanding.

Indeed, we need to state quite categorically that the practice now seeming to gain traction and notoriety, of second appeals against severity of sentence only being presented as 'mitigation statements' or the like, has no foundation in law, is contrary to statute and should stop. It is also worth recalling, that when all a person presents on a second appeal is a mitigation, there really is no appeal because an appeal under our Rules is based on a memorandum of appeal. It must, by dint of ***Rule 64(2)*** take the following form;

> ***"64. (1) …***
>
> ***(2) the memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of first appeal, the points of law or fact and, in the case of any other appeal, the points of law, which are alleged to have been wrongly decided."***

We have said enough to show that the purported appeal herein is incompetent and without merit. It is accordingly dismissed in entirety.

Dated and delivered at Nairobi this 26th day of January, 2018.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR