IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & MURGOR JJ.A)

CRIMINAL APPEAL NO. 102 OF 2014

BETWEEN

P M M..................................APPELLANT

AND

REPUBLIC.......................RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nairobi

(L. Mutende, J.) dated 30th October, 2013

in

HCCRA No. 168 of 2011)

****

JUDGMENT OF THE COURT

In this second appeal, ***P M M***, ***the appellant***, was charged with the offence of incest contrary to ***section 20 (1)*** of the ***Sexual Offences Act, 2006***. The particulars of the offence are that on the 6th September 2011 at 1.00 p.m at Lower Yatta District within Kitui, being a male person, he caused his penis to penetrate the vagina of CMN a female person aged 14 years who was to his knowledge his granddaughter.

In the alternative, he was charged with committing an indecent act with a child contrary to ***section 11 (1)*** of the ***Sexual Offences Act*** No 3 of 2006. The particulars were that on 6th September 2011 at 1.00 p.m within Kitui County, he willfully and unlawfully had an act of indecency with CMN a girl aged 14 years by touching her private parts namely her vagina.

The appellant pleaded guilty to the main count as read and was convicted and sentenced by the trial court to serve twenty (20) years imprisonment. Aggrieved by that decision, the appellant appealed to the High Court which upheld the conviction and sentence of the trial court.

The appellant now filed what he calls "Mitigation" to this Court pleading that due to his old age of 56 years, the sentence of 20 years be substituted with a lenient sentence as the decision of the trial court was harsh and excessive; that he has suffered ill health which continues to deteriorate, and he requires access to proper medication; that his dependants are suffering and are out of school as they are unable to sustain themselves; he prayed for a non-custodial sentence so as to enable him take care of them; that he had undergone several reforms and had since been rehabilitated and was as a consequence ready to abide by the rule of law if allowed to return back to society.

In his submissions, the appellant sought to have the balance of his sentence dispensed with.

In response, ***Mr. P. Mailanyi*** learned Senior Assistant Director of Public Prosecution submitted that the appellant had pleaded guilty to the charge of incest; that the plea was unequivocal; that ***section 361 (a)*** of the ***Criminal Procedure Code*** provides that the issue of severity of sentence is a matter of fact which this Court does not have jurisdiction to entertain. Counsel urged us to dismiss the appeal.

On the severity of sentence, ***section 361 (1) (a)*** of the ***Criminal Procedure Code*** provides;

> ***"A party to an appeal from a subordinate court my 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 a sentence, except where a sentence has been enhanced by the High Court..."*** *[Emphasis added]*

In the case of Paul ***Tanui vs Republic (2010) eKLR,*** this Court stated thus,

> ***"Second appeals to this court are on a point of law only and the severity of sentence is expressly a matter of fact (see Section 361 (1) (a) of the Criminal Procedure Code). It is clear that an appeal against the severity of the sentence as opposed to the legality of the sentence is not maintainable."***

The appeal herein concerns the severity of the sentence. This is a matter of fact and not an issue of law. Pursuant to ***section 361 (1) (a),*** we find that we have no jurisdiction to interfere with the lawful sentence of the courts below.

As a consequence, this appeal must fail, and is therefore dismissed.

It is so ordered.

Dated and Delivered at Nairobi this 9th day of February, 2018.

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR