



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MAKHANDIA, SICHALE & KANTAI, J.J.A.)

CRIMINAL APPEAL NO. 19 OF 2016

BETWEEN

WILSON NDIRANGU KING'ORI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nyeri (Mshila, J.) dated 21st April, 2016

in

H.C.CR. A. No. 33 of 2015

JUDGMENT OF THE COURT

The appellant, **Wilson Ndirangu King'ori**, was charged before the Principal Magistrate's Court at Othaya with the offence of attempted defilement contrary to **Section 9 (1) (2)** of the **Sexual Offence Act No. 3 of 2006**, particulars being that on 8th day of September, 2014 in [particulars withheld] village in Nyeri Sub-County within Nyeri County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of LWM, a child aged 3 ½ years. In the alternative charge he was charged with indecent act with a child contrary to **Section 11 (1)** of the said **Act** the difference in particulars in the alternative charge from the main charge being that he intentionally and unlawfully touched the vagina of the said child. He pleaded not guilty and a trial took place before R. K. Langat, Resident Magistrate. At the close of the prosecution case, the learned magistrate found that the prosecution had failed to establish a *prima facie* case against the appellant on the main count. Consequently, the appellant was acquitted of the offence under **Section 210** of the **Criminal Procedure Code** of the offence of attempted defilement. The case thereafter proceeded against the appellant in respect of the alternative count. At the conclusion thereof the appellant was convicted of the offence and sentenced to 10 years imprisonment.

The appellant was dissatisfied with those findings and filed Nyeri High Court Criminal Appeal No. 33 of 2015. At the hearing of that appeal the appellant abandoned the appeal on conviction and only proceeded on the appeal against sentence arguing that the sentence was harsh and should be reduced.

A. Mshila, J. considered the appeal and in a judgment delivered on 21st day of April, 2016 found no merit in the appeal; as the sentence imposed by the trial court was legal and one prescribed by law, nor was it harsh or excessive. The appeal therefore failed and was dismissed.

The appellant has now come to this Court on a second appeal where he has raised same grounds in the homemade "Grounds of Appeal". The appeal came for hearing before us on 14th February, 2018 when the appellant pleaded with us to consider his written submissions where he, in essence, asks us to reduce the sentence which the trial court imposed and confirmed by the High Court which he thought was harsh and excessive.

Mr. J. Kaigai, Senior Assistant Director of Public Prosecutions in opposing the appeal raised the issue of jurisdiction and submitted that severity of sentence by a subordinate court is a matter of fact which is not available for our consideration in a second appeal.

Section 361 (1) (a) of the **Criminal Procedure Code** allows a party to on appeal from a subordinate court to appeal against a decision of the High Court in its appellate jurisdiction to this Court on a matter of law only. The said section specifically provides that an appeal to this court cannot be on factual matters and declares severity of sentence to be a matter of fact.

As we have already stated the only issue that was placed before the High Court on first appeal was a complaint by the appellant that the sentence imposed by trial court was harsh and excessive. The High Court did not agree with him and dismissed the appeal.

This being a second appeal and in view of the mandatory provisions of law stated, we have no jurisdiction to entertain this appeal where the only complaint raised is on what the appellant considers a severe sentence imposed by the trial court. Having so found, this appeal cannot lie and we hereby dismiss it.

Dated and delivered at Nyeri this 21st day of March, 2018.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR