IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, WARSAME & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 20 OF 2016

BETWEEN

KIEMA MUTIE.......................................APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya

at Machakos (Thuranira, J.), dated 31st October, 2013 in

H. C. CR.A. No. 10 of 2011)

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JUDGMENT OF THE COURT

Kiema Mutie, (the appellant), was convicted and sentenced by the Principal Magistrate's Court at Kitui, for the offence of defilement contrary to **section 8(1)(3)** of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. The particulars of the charge against the appellant were that on the 31st day of January, 2011 at around 2.00 p.m. at [particulars withheld] Village, Zombe Sub-Location, Zombe Location in Kitui District of the Eastern Province, (as it was then known, now Kitui County), the appellant intentionally and unlawfully had carnal knowledge of SK a girl aged 12 years.

During the hearing of the case, the appellant denied the charge and the prosecution called five witnesses in support of its case. The appellant gave unsworn evidence and did not call any witnesses. The trial court having considered the evidence found that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him to 22 years imprisonment.

Distressed by the decision of the trial court, the appellant lodged an appeal in the High Court. The learned judge of the High Court, (Thuranira, J.), having re-considered and re-evaluated the evidence that was tendered before the trial court as required of a first appellate court, concluded that the evidence was sufficient to prove the charge against the appellant. The learned judge therefore dismissed the appeal and upheld the appellant's conviction and the sentence imposed against him by the trial court.

The appellant has now filed a strange document entitled ***"appeal of mitigation"***. Under that document the appellant mitigates the sentence meted out on him by the trial court on the grounds that he is of poor health, that he was the sole breadwinner of his family and that he has since the commission of the offence reformed. He therefore, pleads with this court to reduce his sentence. The appellant also filed written submissions which expound his mitigation.

When the matter came up for hearing before us, Mr. Gitonga Muriuki (Senior Principal Prosecutions Counsel) appeared for the respondent and made a short oral argument opposing the appeal. Counsel submitted that this being a second appeal the appellant can only argue points of law to challenge the decision of the first appellate court. Counsel argued that the appeal before us is a mitigation of the sentence and thus cannot be entertained by this Court. Lastly counsel submitted that the offence committed by the appellant has a minimum sentence of twenty years and the appellant was sentenced to twenty two years which according to counsel was lenient.

Having considered the record of appeal, the respective submissions of the appellant as well as that of the respondent, we must say that we agree with the learned counsel for the respondent that the issue of mitigation of sentence as raised by the appellant is not a point of law but one of fact. **Section 361** of the Criminal Procedure Code enjoins this Court to consider matters of law only when hearing and determining a second appeal. It provides thus: -

"(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." (Emphasis added).

In ***David Munyao Mulela & Another vs Republic [2013]*** it was held that: -

"The complaint on severity of sentence is misplaced firstly because it was not an unlawful sentence imposed and secondly the issue of severity of sentence cannot be before us as it is a matter of fact."

We agree with the holding in that case and adopt it. At no point did we hear the appellant complain that the sentence was unlawful; rather the appellant only implored this court to be lenient on him and reduce the sentence. Under **section 361(1)(a)** of the Criminal Procedure Code this Court does not have jurisdiction to entertain an appeal contesting the severity of the sentence as this is a matter of fact. Further, the concept of mitigating a sentence on a second appeal is unknown in law and practice and we cannot consider the same. In the case of ***M K M vs Republic [2018] eKLR*** this Court faced with a similar "appeal" rendered itself thus: -

"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."

This appeal is therefore without merit and accordingly, we order that this appeal be and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 27th day of April, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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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