



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, MUSINGA & M'INOTI, JJ.A.)**

**CRIMINAL APPEAL NO. 36 OF 2015**

**BETWEEN**

**ABDULLAHI SHEIKH HUSSEIN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya*

*at Nairobi (Ochieng, J.) dated 26<sup>th</sup> April, 2012*

**in**

**H.C. CR. A. NO. 330 OF 2010)**

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**JUDGMENT OF THE COURT**

1. The appellant was convicted by the Principal Magistrate's Court at Garissa on his own plea of guilty to a charge of defilement of a boy aged under 10 years contrary to **section 8(1)** of the **Sexual Offences Act**. He was sentenced to life imprisonment as by law required. It is important to note that immediately after he pleaded guilty to the said charge, the trial magistrate warned the appellant of the consequences of such a plea and thereafter read the charge again, to which the appellant still pleaded guilty.

2. The facts of the case were read to the appellant and he affirmed that they were true. The trial court gave the appellant opportunity to mitigate before it passed sentence, as required under the law. The appellant stated:

***“I committed the offence because of problems. I have prayed court to forgive me. I will never repeat it.”***

3. In passing sentence, the learned magistrate had no discretion to exercise, in view of the provisions of **section 8(2)** of the **Sexual Offences Act** which prescribe sentence to life imprisonment for a person convicted of defilement with a child aged eleven years or less. He therefore sentenced the appellant accordingly.

4. The appellant preferred an appeal against sentence to the High Court, saying it was harsh and excessive.

5. The High Court dismissed the appeal, holding that it was a lawful sentence. The appellant thereafter moved to this Court on a second appeal. When the appeal came up for hearing, **Mr. Wakabi Mathenge**, learned counsel for the appellant, argued that the High Court did not consider that the plea of guilty was not unequivocal; that the charge did not disclose the penal provision; and that the age of the child had not been proved.

6. **Mr. Wanyonyi, Senior Assistant Director of Public Prosecutions**, submitted that the plea was unequivocal; that the appeal to the High Court was against sentence only; and that this Court had no jurisdiction to entertain the appeal in view of the provisions of **section 361(1)** of the **Criminal Procedure Code**. He urged the Court to dismiss the appeal.

7. We agree with Mr. Wanyonyi that under the aforesaid section of the law, on a second appeal this Court has no jurisdiction to entertain an appeal as against severity of a lawful sentence. The section provides as follows:

*“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.”*

8. In the circumstances, we have to dismiss this appeal as the Court has no jurisdiction to entertain it. It is so ordered.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of July, 2017.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**