



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CRIMINAL APPEAL NO. 69 OF 2013

BETWEEN

JOSEPH OGINGA ORAMO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

at Homa Bay (E. N. Maina, J.) dated 15th March, 2013

in

HCCA NO. 7 OF 2012)

JUDGMENT OF THE COURT

1. The appellant was convicted by the trial court on his own plea of guilty to two counts. The first one was attempted rape contrary to **section 4** of the **Sexual Offences Act**; and the second one was assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. He was sentenced to 25 years' imprisonment on the first count and 2 years' imprisonment on the second count. The sentences were to run concurrently.

2. Being aggrieved by the severity of the sentences, the appellant preferred an appeal to the High Court of Kenya at Kisii. In dismissing the appeal, the High Court noted that the trial magistrate had pointed out that the appellant was not a first offender; that he had previously been convicted of rape and sentenced to 7 years' imprisonment; and that he was not remorseful.

3. Undeterred, the appellant preferred a second appeal to this Court. In his memorandum of appeal, he urged the Court to exercise leniency and reduce the sentence, which he termed as harsh and excessive.

4. When the appeal came up for hearing, **Mr. Sirtuy**, learned Principal Prosecution Counsel, argued that the sentence imposed by the trial court and affirmed by the High Court was lawful and there was no legal basis for interfering with it.

5. **Section 361** of the **Criminal Procedure Code** state 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.”

6. On a second appeal, this Court has no jurisdiction to hear an appeal on a matter of fact, and as stated in the above quoted section, severity

of sentences is a matter of fact. There is a plethora of decisions by this Court to that effect, see for instance, **STEPHEN CHEBII CHEBOIWO V REPUBLIC [2017] eKLR; KAINGO v REPUBLIC [1982] KLR 213.**

7. In view of the foregoing, this Court cannot interfere with the sentence that was passed by the trial court. Consequently, the appeal is dismissed. It is so ordered.

Dated and Delivered at Kisumu this 20th day of July, 2017.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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