IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & AZANGALALA, JJ.A)

CRIMINAL APPEAL NO. 51 OF 2015

BETWEEN

M K ……...……. APPELLANT

AND

REPUBLIC ……..……...…….. RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Embu (Majanja, J) dated 9th January, 2014

in

H. C. Cr. A. No. 171 of 2013

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JUDGMENT OF THE COURT

1.The appellant herein did not file a **"Memorandum of Appeal"** as required under the Rules of this Court, but instead, placed on record what he calls **"Mitigation Appeal"** and listed thereunder eight items which all amount to a plea for mercy. He states that he was remorseful and apologetic; regrets what happened to the complainant; suffers from ulcers; is 57 years old, married with children; has studied the Bible in prison and for those reasons he deserves a non custodial sentence in order to reconstruct his life. At the hearing of the appeal he explained that he was not challenging his conviction, but was pleading with the court to reduce the sentence meted out by the High Court which he considers excessive as it did not consider the period already served in detention since his arrest.

2. The appellant was charged, tried and convicted by Embu Principal Magistrate **(L. K. Mutai)** for the offence of incest contrary to ***Section 20 (1)*** of the ***Sexual Offences Act (SOA)***. It was proved in evidence as charged, that in the month of March 2009 at ***[particulars withheld]*** Estate in Embu, he had sexual intercourse with MM, a girl at the time aged 12 years, who was his step-daughter. As a result of the sexual assault, MM became pregnant and subsequently gave birth to a baby girl. DNA tests conducted on the appellant and the child confirmed that the appellant was the biological father. Upon convicting the appellant, the trial Court sentenced him to serve the maximum sentence of life imprisonment. The Court justified the sentence as follows:-

> ***"Accused mitigation put into consideration. He is a first offender. The offence committed is very serious and also present within this courts jurisdiction. The complainant as a result of the accused heinous actions have been rendered a mother at a very early age hence responsibilities***

which must be too heavy for her to shoulder unassisted. Her future is also at a blink *(sic).* ***The accused disregarded his relationship with complainant who looked up to him for love and protection but who instead turned into a predator of his own. His actions does*** *(sic)* ***not deserve any mercy of this court since he too did what he did on the complainant without a feel*** *(sic)* ***of any responsibility. A deterrent punishment is called for. Accused sentence to life imprisonment."***

3.On appeal to the High Court, **(Majanja J.),** the conviction was upheld but the sentence was reduced to 15 years. The Court gave the following reasons for interfering with the sentence:

"The appellant was a first offender and the fact that he had intercourse with someone who trusted him as a father calls for a stiff sentence. However, the prosecution did not lead evidence of aggravating circumstances that would call for the maximum sentence of life imprisonment to be imposed. In the circumstances the sentence was excessive entitling this court to intervene. I therefore substitute the sentence of life imprisonment with that of 15 years imprisonment."

4. As this is a second appeal and there is no challenge to the conviction, we have to decide *in limine* whether the Court has jurisdiction to revisit the sentence as pleaded by the appellant. Learned Senior Assistant Director of Public Prosecutions, **Mr. Kaigai**, submits that there is no jurisdiction and cites ***Section 361 (1) (a)*** of the ***Criminal Procedure Code (CPC)*** in support. The section states as follows:-

"(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).

Sub ***Section 8*** referred to in (1) above is not relevant in this matter.

5. In numerous decisions of this Court, emphasis has been laid on the limits of the Court's jurisdiction and we may take it from the case of ***Chemagong -vs- Republic (1984) KLR 213 at page 219:-***

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja -vs- Republic 17 EACA 146)."

6. As regards sentencing generally, the principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court are now old hat. The predecessor of this Court, in the case of ***Ogolla s/o Owuor vs Republic [1954] EACA 270***, pronounced itself on this issue as follows:-

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R -v- Shershowsky (1912) CCA 28TLR 263)."

In the case of ***Shadrack Kipkoech Kogo -vs- R Eldoret Criminal Appeal No. 253 of 2003 (UR)*** *the Court of Appeal stated thus:-*

"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is

so excessive and therefore an error of principle must be inferred. (See also Sayeko -vs- R 1989 KLR 306)"

In the more recent case of ***Kenneth Kimani Kamunyu -vs- R (2006) eKLR,*** this Court reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

7. We have carefully examined the record of appeal and the challenge made on the sentence in this matter and we find no illegality or unlawfulness to invite our jurisdiction to interfere. The only complaint is the severity of the sentence which is a matter of fact and therefore outside our jurisdiction by dint of ***Section 361 (1) (a)*** *(supra).* Furthermore, even if we had found we had the jurisdiction to consider the sentence, it is our finding that the High Court committed no error in principle by reducing the sentence. On the contrary, the reduced term imposed on the appellant more than ameliorated the period of his incarceration pending completion of the trial which he drew our attention to. He was arrested and detained on 31st August, 2009 until his trial ended on 16th November, 2010 - a period of about 14 months. We find no compelling reason to interfere.

8. In the result, the appeal is not only incompetent for want of jurisdiction, but also lacking in merit. It is dismissed.

Dated and delivered at Nyeri this 9th day of November, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR