



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, SICHALE & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO.25 OF 2015

BETWEEN

SAMUEL MURUNGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Achode, J.), dated 4th October, 2012

in

HC.CR.A. No.448 of 2010)

JUDGMENT OF THE COURT

Samuel Murunga, was charged with the offence of *defilement contrary to section 8(2) of the Sexual Offences Act*. It was alleged that on 9th March, 2009 at Ruaka Village, he intentionally and unlawfully committed an act which caused penetration with his male member into the female organ of **R.B.K.**, a girl of 14 years. He also faced an alternative charge under *section 11(1)* of the same Act.

The Chief Magistrate's Court at Kiambu found him guilty and sentenced him to ten years in prison. He appealed to the High Court (**Acholde, J.**), which found him guilty on the alternative charge of committing an indecent act but retained the prison term.

Being aggrieved by that decision, **Samuel Murunga** filed in this Court what was headed "MEMORANDUM OF MITIGATION." In it he pleaded that he was remorseful and had reformed much while in prison. There, he had undertaken various courses, been assigned useful roles and had changed by undergoing theological and vocational training and was now "saved", never to return to the old ways.

When the matter was called out for hearing, **Samuel Murunga**, said that he was ready to be heard, save that he had told the prison staff who assisted him to draw up his grounds before us that what he wanted to address us on was mitigation only. He had accepted the decision of the two courts below but having become a reformed person who had served over one third of his prison term, he asked us to see how we could assist him. He told us that the Committee for the Prerogative of Mercy had visited the prison and advised him to place his plea before us now that he had served a third of his prison term.

At this juncture, we informed **Samuel Murunga** that according to **section 361 of the Criminal Procedure Code**, this being a “second appeal” we could only hear him on points of law and not fact. He was informed that the issue of sentence as put before us with a plea that we set him at liberty, was a point of fact and therefore not within our statutory mandate as a second appellate court.

Mr. O. J. Omondi, the learned Senior Assistant Director of Public Prosecutions submitted that since the law only permitted us to entertain points of law at this stage, yet **Mr. Murunga** had laid before us grounds in mitigation of sentence, we lacked jurisdiction and the “appeal” was incompetent. It should be dismissed.

This matter was listed as an appeal before us. In that sense, **section 361 of the Criminal Procedure Code** fell to be considered. **Mr. Murunga** having accepted the decisions of the two courts below, then the relevant parts of section 361 of Criminal Procedure Code applicable are these:

“361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against the 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.”*

Section 7 stipulates which sentences each level of subordinate courts may pass. In the present case, the sentence upon which **Mr. Murunga** wishes to be heard in mitigation, was not enhanced by the High Court and the Senior Resident Magistrate who heard the case in the subordinate court, had power to pass the subject sentence. So, all in all, we advert to the decision of this Court in the case of **Simon Karanja Kiarie vs Republic Cr.A. 142 of 2013**, where the appellant had filed “mitigation on appeal” and wished to be heard on the same. The Court, after reproducing **section 361(1) of the Criminal Procedure Code**, as we have done, delivered itself thus:

“The appellant herein is not challenging legality of the sentence that was meted out. He is merely arguing that the same was severe and urges this Court to reduce it to the period already served. This Court has severally held that in such an instance, it lacks jurisdiction to interfere with a lawful sentence. ...Jurisdiction is the bedrock of any court decision and without it a court has no power to do anything, other than to dismiss the matter before it, as we hereby do in respect of this appeal.”

In the same vein, we dismiss this “appeal” on account of being incompetent. It does not lie in law.

Dated and delivered at Nairobi this 3rd day of July, 2015

J. W. MWERA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR