IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA, MURGOR JJ, A)

CRIMINAL APPEAL NO. 38 OF 2013

BETWEEN

ZEMBETAYO AMBILINJI……. APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega (B. Thuranira laden, J) dated 31st July 2012 In **H.C.CR.A. NO. 59 OF 2011)**

JUDGMENT OF THE COURT

The appellant, **ZEMBETAYO AMBILINJI**, was tried by the Senior Resident Magistrate's Court at Butali on a charge of defilement of a girl contrary to ***Section 8 (1)*** as read with ***section 8(2) the Sexual Offences Act No.3 of 2006***. The particulars of the offence were that on 25th May 2010, at ***[particulars withheld]*** village, South Kabras location in Kakamega North District, within the Western Province the appellant unlawfully and willingly inserted his genital organ, namely a penis into the genital organ of a girl aged 16 years namely**, *SQM (PW 1), the complainant***.

The brief facts of the case are that on 25th May 2010 at about 8 am SQM, a standard 8 pupil at ***[particulars withheld]*** Primary School, was on her way to sports in her school, when she met the appellant on the road near her school. The appellant got hold of her and threatened to beat her if she screamed. The appellant took SQM, locked her in his house, and ordered her to undress, following which, he defiled her five times.

When the appellant learnt that her father ***P (PW 2)*** had reported SQM's disappearance to the police, he took her to his relative's house, where he abandoned her. She was found walking on the road by her father who took her to Malava Police Station where he made a report of the crime.

PC Caroline Kibrot (PW 3) conducted the investigations into the defilement of SQM, and charged the appellant with the above stated offence.

Kizito Sifuna (PW 4), a clinical officer examined SQM and his assessment showed that she had been defiled.

The appellant was charged with the offence, and in his defence he denied that he knew or had met SQM.

He testified that the first time he had seen her was at the police station when he was charged, and thereafter when she testified in court. The trial Court however, dismissed that defence, convicted him and sentenced him to 15 years imprisonment.

Being dissatisfied with the sentence ordered by the trial court, the appellant appealed to the High Court against the sentence. In her judgment, *Thuranira Jaden J*, dismissed the appeal, and upheld the conviction and sentence.

Being further aggrieved by the decision of the High Court, the appellant filed a second appeal for the reduction of sentence which is before us.

In his appeal for reduction of the sentence, the appellant stated that he would rely on the written submissions presented to the Court on 18th May 2015, wherein he contended that the sentence of 15 years was arbitrary, excessive and disproportionate and a breach of his constitutional rights as enshrined in the Constitution. The appellant further complained that during mitigation, despite the fact that he was aged 19 years, that his parents had died and that he was living alone, the trial magistrate had not taken these facts into account but, had gone ahead to sentence him to 15 years' imprisonment.

Mr. Sirtuy, learned Principal Provincial Counsel, opposed the appeal against the sentence. Counsel submitted that the High Court had found that the sentence of 15 years was the minimum stipulated for the offence in question, and that an appeal could not lie to this Court unless on a matter of law.

Section 8 (1) as read with ***section 8(4) the Sexual Offences Act No.3 of2006*** stipulates a minimum sentence for defilement of a child within the age bracket of between 12 and 15 years. From the record, the complainant was aged 16 years. When the High Court considered the complainant's age, it found the sentence under ***section 8 (4)*** of the ***Sexual Offences Act*** to be lawful, and having found no valid grounds in law to challenge the conviction and sentence upheld the decision of the trial court.

Having regard to the circumstances of the case, we are satisfied that the sentence as handed by the trial court, and upheld by the High Court was lawful and in accordance with the law.

On the severity of the sentence, ***Section 361 (1) (a)*** of the ***Criminal Procedure Code*** provides,

> **"A party to an appeal from a subordinate court my 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 a sentence, except where a sentence has been enhanced by the High Court....."**

In the case of ***Paul Tanui vs Republic (2010) eKLR***, this Court stated thus,

> ***"Second appeals to this court are on a point of law only and the severity of sentence is expressly a matter of fact (see Section 361 (1) (a) of the Criminal Procedure Code). It is clear that an appeal against the severity of the sentence as opposed to the legality of the sentence is not maintainable."***

The appeal herein is with respect to the severity of the sentence. This is a matter of fact and not an issue of law. Pursuant to ***section 361 (1) (a),*** we find that we have no jurisdiction to interfere with the lawful sentence of the courts below.

As a consequence, this appeal must fail, and it is therefore dismissed.

It is so ordered.

DATED and DELIVERED at KISUMU this 3rd day of JULY 2015.

D.K. MARAGA

JUDGE OF APPEAL

D. MUSINGA

JUDGE OF APPEAL

A.K. MURGOR

JUDGE OF APPEAL

I certify that this is true copy of the original

DEPUTY REGISTRAR