IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, WARSAME & G.B.M. KARIUKI

CRIMINAL APPEAL NO 40 OF 2013

BETWEEN

MBITHI MUSANGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(being an appeal from the judgment of the High Court of Kenya at Machakos (Makhandia, J)

in

H.C.Cr.A 48 of 2010)

****

JUDGMENT OF THE COURT

Mbithi Musangi, hereinafter referred to as the appellant, was charged and convicted of the offence of attempted defilement contrary to section 9 (2) of the Sexual Offences Act. The particulars of that offence were that on the 21st February 2009, he unlawfully and intentionally attempted to have carnal knowledge of **M.M.M.,** a child of 11 years. Upon his conviction, the trial court sentenced him to serve twelve years imprisonment.

The appellant was aggrieved with the conviction and the sentence imposed on him by the trial court, so he presented a first appeal to the High Court. In that appeal, he faulted the charge sheet for being defective, he alleged that vital witnesses were not called and that the trial court failed to consider his defence. The High Court re-evaluated the evidence afresh, and upheld the conviction and sentence.

The appellant now brings this second appeal in which he challenges the severity of the sentence imposed upon him. He contends that the sentence is harsh and excessive.

The only issue for our determination is whether we have jurisdiction to entertain a second appeal based purely on the severity and harshness of the sentence imposed by the trial court and upheld by the High Court.

First and foremost, it is clear that this is a second appeal; therefore we ask ourselves whether we are entitled to interfere with the concurrent findings of the lower courts. The reasons for making such an

interference are well established. In ***Christopher Nyoike Kangethe v Republic*** ***[2010] eKLR*****(Criminal Appeal No 306 of 2005)** the Court considered the jurisdiction of this Court in a second appeal and rendered itself thus:

> ***"an invitation to this Court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so. And the only compelling reason(s) would be that no reasonable tribunal could on the evidence adduced have arrived at such findings, or in other words, the findings were perverse and therefore bad in law."***

This was reiterated in ***J.A.O v Republic*** ***[2011] eKLR (Criminal Appeal No. 176 of 2010)***where the Court stated that:

> ***"… [A] second appeal ought to be on matters of law as the Court will be slow to interfere with concurrent findings of fact unless they were based on no evidence at all or on a perverted appreciation of the facts."***

In the appeal now before us, the concurrent findings of fact were as follows:An11 year old child **M.M.M**. (PW1) was on her way home from the river on the 21st February 2009 when she met the appellant, who was well known to her. The appellant engaged her in a brief conversation, and then tripped her. When she fell down, the appellant lay on her and attempted to defile her. She screamed attracting the attention of her two aunts, **J M C** (PW2) and **M M** (PW3) who ran towards her. PW2 arrived first and found PW1 on the ground with the appellant lying on top of her in a state of undress. Upon seeing PW2, the appellant ran off, and PW2 ran after him, where she, together with other neighbours arrested the appellant.

We have anxiously considered the record of the lower courts. It appears to us that these findings were reached upon a correct appreciation of the facts and evidence. We find that there is nothing to warrant our interference with these concurrent findings, on factual and legal analysis. We think that there was no misdirection committed by the lower courts that would make us fault them.

The only issue that was raised by the appellant in the present appeal was that his sentence was harsh and excessive. We must therefore make a finding on whether we have the jurisdiction to hear an appeal on severity of sentence.

The appellant was sentenced to serve twelve years imprisonment under section 9(2) of the Sexual Offences Act which provides as follows:

> ***"(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years***."(emphasis added)

The sentence of twelve years is therefore legal under the law. On a second appeal, such as the one before us now, are we entitled to interfere? Section 361 of the Criminal Procedure Code provides that:

> ***(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.***

Going by this provision of law, we are not therefore entitled to interfere with the sentence meted out on the appellant by the trial court and upheld by the High Court. Section 361 of the Criminal Procedure Code is very clear and categorical that an appeal cannot lie on severity of sentence, whether the appellant thinks it was harsh or otherwise. It is trite law that the meting out of a sentence, such as was done in the present

case, is a discretionary power reserved for the trial court. There is no basis for us to substitute our discretion with that of the trial court, as we are of the view that the said discretion was exercised judicially and in accordance with the law. We decline the invitation by the appellant.

We reiterate what was stated by this Court in ***David Mbau Njoroge V Republic*** ***[2009] eKLR (Criminal Appeal 350 of 2007)***:

> ***"… it is not open for this Court to consider even if it had been raised, unless the legality of it was in issue. Severity of sentence is a question of fact. Section 361(i)(a) of the Criminal Procedure Code is clear on that."***

The upshot of what we have stated is that this appeal has no merit and it is hereby dismissed.

Dated and delivered at Nairobi this 30th day of May 2014

E. M. GITHINJI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR