



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MUSINGA & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 92 OF 2011

BETWEEN

ABDIRIZAK MOHAMMED DEROW APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from sentence of the High Court at Nairobi (Ochieng, J.) dated 2nd March, 2011

in

HC. CR.A. No. 327 of 2010)

JUDGMENT OF THE COURT

The appellant was convicted by the Senior Principal Magistrate's Court at Garissa on his own plea of guilty to a charge of defilement contrary to **Section 8 (1) (3)** of the **Sexual Offences Act** and sentenced to 20 years' imprisonment.

His first appeal to the High Court against the sentence was dismissed on 2nd March, 2011. The appellant then filed a notice of appeal to this Court but did not file any memorandum of appeal. Instead he filed a document entitled "**MITIGATION**". The appellant, who was unrepresented, told the Court that he was neither challenging the conviction nor legality of the sentence that was passed by the trial court and confirmed by the High Court but was merely seeking reduction of the sentence, which in his view was very harsh. He further lamented that he is HIV positive and was not getting proper medication in prison.

Ms Murungi, Senior Assistant Director of Public Prosecutions for the respondent, opposed the purported appeal saying that under **Section 361** of the **Criminal Procedure Code** no appeal lies to this Court from judgment of the High Court in respect of severity of sentence only.

We agree with Ms Murungi. **Section 361(1)** of the **Criminal Procedure Code** states 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.”*

See also **DESAI v REPUBLIC** [1971] E.A. 416.

Although there is no memorandum of appeal on record, even if we deem the appellant’s documents headed “MITIGATION” as a memorandum of appeal, we are satisfied that under **Section 361** of the **Criminal Procedure Code** cited hereinabove, no appeal can lie to this Court against a legal sentence that was passed by the trial court and confirmed by the High Court. Consequently, this purported appeal is dismissed with the consequence that the appellant shall serve the full sentence as passed by the trial court.

Dated and Delivered at Nairobi this 27th day of June, 2014.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

REGISTRAR

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