**IN THE COURT OF APPEAL AT NAIROBI**

**CORAM;P.KIHARA KARIUKI( PCA),KIAGE, MURGOR JJ.A**

**CRIMINAL APPEAL NO. 90 OF 2014**

**BETWEEN**

**A M A……..APPELLANT**

**AND**

**REPUBLIC…….RESPONDENT**

(Appeal from the judgment of the High Court of Kenya at

Nairobi (Mbogholi Msagha, J) dated 21st March, 2013

in

**H.C.CR.A. NO. 308 OF 2010)**

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**JUDGMENT OF THE COURT**

The appellant, **ALFRED MBISELU AVUTSWA**, was tried by the Chief Magistrate's Court in Count I on a charge of the offence of incest by a male person contrary to section 20 (1) of the Sexual Offences Act No. 3, and on an alternative count of the offence of an indecent act with a child contrary to section 11 (1) of the same Act. In count II, he was charged with the offence of assault causing actual bodily harm contrary to section 251 0f the Penal Code.

The particulars of the offence were that on the 8th February 2009 at 7pm, at Mathare Village in Ngong sub- division, Rift Valley Province, the appellant committed an indecent act by placing hismale genital organ and his fingers on the exterior of the female genital organ of **PAM, the complainant,** a child aged four years who was his step daughter. The particulars of Count II are that on the same day the appellant, unlawfully assaulted the complainant thereby occasioning her actual bodily harm.

Briefly, the facts of the case are that on 8th February 2009 at 7pm, PAM and her brother Bob were left at home with the appellant, who had sent their mother, E A to buy maize flour from Ngong town. Upon her return Everlyne found that PAM had a swollen face, red eyes and was crying. When she checked the child's private parts she saw blood on her legs, and upon asking the child what had happened, she was told that the appellant had beaten her, put her on the bed, removed her panties, and put his finger into her vagina. Everlyne went to her neighbor P O, who examined the child, and concluded that she had been defiled. She advised Everlyne to take PAM to the hospital. Evelyne reported the incident to Ngong Police Station, and thereafter took the

complainant to Ngong Hospital, where she was referred to Nairobi Women's Hospital. There, the child was examined by Dr. Ketra Muhombe, who found that the complainant had a subconjectival hemorrhage on her right eye, and that though PAM's

genitals were normal, there were small wounds on the vulva and the introitus, which is the interior vaginal opening. He produced the form P3.

The appellant was arrested and charged with the offences, and subsequently convicted and sentenced by the Chief Magistrate's Court.

Being dissatisfied with the conviction and sentence, the appellant filed an appeal in the High Court at Nairobi, where upon re-evaluation of the evidence the appeal was dismissed by Mbogholi Msagha J, in a judgment dated 21st March 2013.

In his appeal before us, the appellant specified 4 grounds of appeal namely that,

> 1. That the sentence of 15 years and 4 years conferred for indecent act and unlawful assault be reduced;
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> 2. That the court consider reducing the sentence having regard to the total period of confinement so far;
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> 3. That the Court consider the mitigation that the appellant has young children;
>
> 4. That the remaining part of the sentence be converted to community service.

In his written submissions dated 23rd July 2014, and filed in Court at the hearing of this appeal, the appellant who appeared in person, stated that he was remorseful and prayed that the Court would consider reducing his sentence to enable him return home to take care of his family, as he has since his conviction acquired a diploma in theology, and woodwork skills which would be of great assistance to himself and his family if he were to be released.

Mr. Orinda the learned Assistant Director Public Prosecutor for the State opposed the appeal and submitted that a proper basis for the conviction by the trial court had been laid. He urged that section 11(1) of the Sexual Offences Act specifies that the minimum sentence was 10 years and that the trial court was correct in handing down the sentence of 15 years for indecent assault, and 4 years for unlawful assault. Counsel submitted that the appeal on the sentence had no merit, as the High Court had considered the mitigations advanced by the appellant, and found the sentence to be legal. Counsel urged us to dismiss the appeal.

When we consider the appellant's grounds of appeal, it is evident that they are centered in the main on the sentence and its severity, as handed down by the trial court and upheld by the High Court.

Bearing this in mind, under **section 361** of the **Criminal Procedure Code**, this Court is mandated to hear only issues of law on second appeals in criminal matters.

**Section 361 (1)** provides,

> **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 section ----**
>
> a) **On a matter of fact, and severity of sentence is a matter of fact….."**

Undoubtedly, the provision is concerned with the jurisdiction of this Court, and, it is clearly specified that only questions of law can be considered by this Court on second appeals. See **Joseph**

**Njoroge vs Republic [1982] KLR 388**

The appeal before us is in the main grounded on the severity of the sentence, which cannot be entertained by this Court, due to a lack of jurisdiction. Had the appeal been against conviction or there had been any challenge to the legality of the sentence which are matters of law, we may have been able to intervene. See **Joseph Kiplimo vs Republic [2011] eKLR (Criminal Appeal No 416 of**

**2010.**

Having said that, the appellant's complaint is that, notwithstanding the period of sentence, the trial magistrate failed to take into account the period that the appellant was in custody prior to the date of the sentence.

According to the proviso to **section 333 (2)** of the **Criminal Procedure Code** where a person who is sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody.

From the record the appellant was arrested on 13th February

2009, and convicted on 20th April 2010 which would mean that he had been in custody for about one year prior to his conviction and sentence. Section 11(1) of the Sexual Offences Act specifies a minimum sentence of imprisonment of ten (10) years, while section

251 of the Penal Code specifies a sentence of imprisonment of five

(5) years.

The appellant was convicted to serve fifteen (15) years imprisonment in Count I under section 11(1) of the Sexual Offences

Act and four (4) years under Count II under section 251 of the Penal Code. Clearly, by reducing the term specified under section 251 from five (5) years to (4) years, we find that the trial magistrate took into consideration the period of one year when the appellant was held in custody prior to his conviction and sentence.

In the circumstances, we agree with the High Court that the sentence was legal, and find that there is no basis upon which to interfere, we accordingly order that the appeal be and is hereby dismissed.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 10th day of**

**OCTOBER, 2014.**

**P. KIHARA KARIUKI (PCA)**

**……..……**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**….....**

**JUDGE OF APPEAL**

**A.K. MURGOR**

**….....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**