



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, KIAGE & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 89 OF 2014

BETWEEN

TARCISIO CHEGE KIHIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nairobi by

(Justice Gitumbi) dated 15th November, 2013 in

HC. CR. A. 453 OF 2010

JUDGMENT OF THE COURT

What the appellant, who is unrepresented by counsel, has lodged in this Court as foundational to his appeal to this Court is a document titled ‘MITIGATION’.

In that document, the appellant sets out satiatim an account of how he was convicted of the offence of indecently assaulting a child contrary to **Section II (1)** of the **Sexual Offences Act** and sentenced to serve ten years imprisonment. He goes on to state that he was a first offender who has since embraced the virtue of respect for the rule of law, has reformed and is deeply remorseful. Moreover, he has while in prison gained technical skills in the area of motor mechanics and electricals attaining in them Grade 4 and 2 qualifications respectively.

The appellant prays for a non-custodial sentence and craves a second chance to ease the sufferings of his family by helping them meet their needs and pleads to be rescued from the torment of prison. He categorically concludes with the prayer that his “**mitigation against the sentence only**” succeeds in its entirety.

Prior to coming to this Court, the appellant had preferred a first appeal before the High Court at Nairobi. That appeal was against conviction and sentence. It was heard by Mary M. Gitumbi J. who, by a judgment delivered on 15th November 2013 found it to be devoid of merit and dismissed it.

Assuming that what is before this Court is an appeal, for this Court exists for purposes only of hearing appeals and matters connected thereto, it would be a second appeal. The law on second appeals

to this Court in criminal matters is governed by **Section**

361 of the Criminal Procedure Code:

“361 (1) A party to an appeal from a subordinate court may, subject to sub-section (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; ...”

That provision of the law is a jurisdictional one. It is constrictive and limiting of the Court’s jurisdiction in second appeals, limiting it to matters of law only.

The appeal before us is simply and exclusively an appeal against sentence, and severity of sentence at that. We are bereft of jurisdiction to entertain it and to interfere with the sentence imposed by the trial court and confirmed by the High Court on first appeal.

Had the appeal been against conviction or had there been any challenge to the legality of the sentence, thereby making it a matter of law, we might have been able to intervene. See, **JOSEPH KIPLIMO - Vs- R [2011]eKLR (CRIMINAL APPEAL NO. 416 OF**

2010). We are without jurisdiction, and without jurisdiction, we cannot come to the aid of the appellant, virtuous though his ways may have become.

Being of that mind, we do what we must, and accordingly dismiss this appeal.

Dated and delivered at Nairobi this 10th day of October 2014.

P. KIHARA KARIUKI (P.C.A)

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR