IN THE COURT OF APPEAL

AT NAIROBI

(CORAM : KIHARA KARIUKI,(PCA), MARAGA,& J.MOHHAMED,JJ.A

CRIMINAL APPEAL NO.152 OF 2013

BETWEEN

MOSES KAMAU GATHUNGA ……………….……...……………… APPELLANT AND

REPUBLIC …………………………….....…....……………...……. RESPONDENT

(An appeal from a Ruling of the High Court of Kenya at Nairobi (Mbogholi Msagha, J) dated 6th June, 2013

in

H. C. Cr. A. No. 4 of 2011)

JUDGMENT OF THE COURT

(1) Moses Kamau Gathunga, hereinafter referred to as the appellant, was charged with, and convicted, of the offence of defilement contrary to ***section 8 (1) (3)*** of the Sexual Offences Act. The particulars of the charge were that on the 26th March 2010, at Kiganjo estate, Thika District, within Central Province, he committed an act which caused penetration with B. N. M, a girl aged 14 years old. He was convicted and sentenced to fifteen (15) years imprisonment.

(2) He was aggrieved with this conviction and sentence and preferred an appeal to the High Court of Kenya at Nairobi. In his first appeal, he alleged that the trial court convicted him on a defective charge; that the evidence adduced was not credible; that vital witnesses were not called by the prosecution; and that his defence was rejected yet it was an illustration of the grudge prevailing between him and the complainant's mother. For these reasons, the appellant asserted that his conviction was unsafe and asked the High Court to allow his appeal.

(3) That appeal was heard and determined by Mbogholi Msagha, J. who dismissed it. The appellant has now preferred this second appeal in which he relies on his memorandum of appeal that was lodged in this Court on the 17th July, 2013. He also relies on his written submissions which are dated the 14th July, 2014. The gist of these submissions is that the appellant is remorseful and will never commit any offence again; that he has undergone various training programmes while in prison and is now a reformed man; and that if given an opportunity, he will use his new found skills in the education and mentorship of the youth in society.

(4) The appeal was opposed by Mrs. G. W. Murungi, Senior Assistant Director of Public Prosecutions. Mrs. Murungi submitted that the conviction and sentence was proper, and that under ***section 361*** of the Criminal Procedure Code, we have no jurisdiction to interfere with the

sentence passed by the trial court since severity of sentence is a matter of fact. She therefore asked us to dismiss the appeal.

(5) This is a second appeal, and we remind ourselves of our duty of loyalty to the concurrent findings on matters of fact of the two courts below us. In ***Christopher Nyoike Kangethe vs 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."***

(6) Having read the entire record of appeal and considered the appellant's submissions, we are satisfied that the conviction of the appellant was proper. The concurrent findings of the trial court and the first appellate court were that at about 10.00 pm on the material night, the complainant, B. N. M. was going to the communal toilet in the plot where she lived when she met the appellant who was well known to her as 'Baba Gatunye'. The appellant then grabbed her, covered her mouth, dragged her to a dark area behind the fence of the plot and defiled her. B. N. M. then went back home and slept. She did not report the matter to her mother because her mother was drunk. The next day she went and reported the matter to her aunt, C K, who then took her to the Thika District Hospital. B. N. M. was examined by Dr. Juliet Kinyua who found that she had been defiled.

(7) We find no reason to interfere with these findings. Consequently, we dismiss the appeal against conviction.

(8) We have considered the appellant's written submissions and we note that his main prayer is on the severity of the sentence which he is serving. He states that he is now reformed, and that he is remorseful, and asks this Court to reduce his sentence to a lesser term, or grant him a non-custodial sentence.

(9) ***Section 361*** of the Criminal Procedure Code provides for the powers of this Court in a second appeal. In particular, ***section 361 (1) (a)*** provides in part that:

> ***"…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."***

(10) We reiterate what was stated by this Court in ***David Mbau Njoroge v Republic***

[2009] eKLR (Criminal Appeal No. 350 of 2007):

> ***"… it is not open for this Court to consider the severity of sentence even if it had been raised, unless the legality of it was in issue. Severity of sentence is a question of fact. Section 361(1) (a) of the Criminal Procedure Code is clear on that."***

(11) We are therefore constrained by law from interfering with the sentence, unless we find the same to be illegal.

(12) Under the Sexual Offences Act (the Act), the minimum sentences for the offence of defilement are provided. These sentences vary with the ages of the victims. *Section 8 (1) (3)* of the Act provides for a sentence of not less than twenty years imprisonment for a person found guilty of defilement of a child between the ages of twelve and fifteen years. It reads:

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

(13) In the present appeal, B. N. M. was at the time of the offence aged 14 years.

Accordingly, and pursuant to ***section 8 (1) (3)*** of the Act, the appellant ought

upon conviction, to have been sentenced to the minimum term of twenty years as is stipulated by law. This was not the case, as the trial court imposed the term of fifteen years. The issue is whether we have jurisdiction to interfere with that sentence.

(14) Similar circumstances obtained in ***Joseph Kiplimo v Republic [2011] eKLR (Criminal Appeal No. 416 of 2010)*** where this Court was faced with an appeal where the trial court, having found the appellant guilty of an offence contrary to ***section 8 (2)*** of the Sexual Offences Act, imposed a sentence of fifty years imprisonment, instead of the term of life imprisonment prescribed by law. The court considered whether or not it had jurisdiction to interfere with an unlawful sentence and rendered itself thus:

> ***"The issue of sentence in this case is a matter of law as it is the issue as to whether the sentence meted out to the appellant is lawful or not. It is not a question of severity of sentence. It is whether a lawful sentence was awarded. We have jurisdiction to interfere."***

(15) In the appeal before us, we do therefore have jurisdiction to interfere with the sentence imposed by the trial court and affirmed by the first appellate court which was unlawful.

(16) Accordingly, and for the reasons which we have stated, the appeal must fail and it is hereby dismissed. We further order that the sentence of fifteen years imprisonment be and is hereby set aside and substituted with a sentence of twenty years. It is so ordered.

Dated and delivered at Nairobi this 3rd day of October, 2014.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

J. MOHAMMED

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JUDGE OF APPEAL