



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)**

**CRIMINAL APPEAL NO. 249 OF 2012**

**BETWEEN**

**ISAYA NASUMBA JUMA..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Kenya at Kakamega (Chitembwe, J.) dated 19<sup>th</sup> July 2012**

**in**

**H.C.CR.A. NO. 209 OF 2010)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. **Isaya Nasumba Juma** (the appellant) was, upon trial for the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act No.3 of 2006** and also on an alternative charge of committing an indecent act with a girl contrary to **Section 11(1)** of the said Act, convicted on the main count and sentenced to twenty years imprisonment.
2. His appeal to the High Court succeeded only in reducing the sentence to fifteen years imprisonment. Being dissatisfied with the High Court decision, the appellant has come to this Court on a second appeal.
3. The substratum of the appellant's seven grounds of appeal is a plea of mitigation and prayer for the reduction of the same or better still the substitution of the fifteen years imprisonment with a non custodial sentence. That in a nutshell is an appeal against severity of sentence.
4. On a second appeal, this Court can only entertain an appeal against the legality of sentence. It has no jurisdiction to entertain an appeal on the severity of sentence. **Section 361(1)** of the **Criminal Procedure Code** makes this very clear. It 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 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."*

5. There are a host of authorities from decisions of this Court including **Otieno Dida v. Republic [2011] eKLR**, confirming that this Court has indeed no jurisdiction to entertain an appeal on the severity of sentence. In the circumstances, much as we note with pleasure that, while in prison, the appellant has reformed and would perhaps have deserved a further reduction of sentence, our hands are tied and there is nothing we can do. Consequently, we have no option but to dismiss this appeal.

**DATED and Delivered at Kisumu this 20<sup>th</sup> day of November 2014.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**

