



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Criminal Appeal 219 of 2008

PETER NJERU WANJIRU..... APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the sentence of the High Court of Kenya at Nairobi

(H. A. Omondi, J.) dated 18th June, 2008

in

H.C. Cr. A. NO. 210 OF 2007)

JUDGMENT OF THE COURT

The appellant was charged with defilement of a girl under the age of 14 years contrary to **section 145(1)** of the Penal Code. The offence was committed on 17th September, 2005 before the aforesaid section of the Penal Code was repealed. He was tried and convicted of the said offence in Criminal Case No. 6000 of 2005 in the Principal Magistrate's Court at Makadara. He was sentenced to 17 years' imprisonment with hard labour.

Being dissatisfied with the trial court's judgment, the appellant preferred an appeal to the High Court against both conviction and sentence. The High Court, (**Omondi, J.**) after a careful consideration of all the evidence that was adduced before the trial court, came to the conclusion that the conviction was proper in law and dismissed the appeal against the conviction. The High Court also rejected the appeal against sentence and confirmed the sentence.

The appellant then moved to this Court on a second appeal. The petition of appeal consists of three grounds, all relating to the conviction, mainly stating that the conviction was not well founded in law. There was no specific ground challenging legality of the same.

When the appeal came up for hearing, the appellant, who was unrepresented, withdrew his appeal against conviction but urged this Court to reduce the sentence, saying that he had served most of it and was remaining with only five years.

Mr. Monda, Senior Prosecution Counsel, did not oppose the appellant's withdrawal of the appeal against conviction. As regards sentence, Mr. Monda chose to leave the matter to the Court.

This is a second appeal and the applicable law in such appeals is **section 361** of the **Criminal Procedure Code**. Although none of the grounds of appeal specifically challenges the sentence that was handed down by the trial court and confirmed by the High Court, this Court has no jurisdiction to interfere with the sentence; as was urged to do by the appellant. **Section 361 (1)** of the Criminal Procedure Code states as follows:

“(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.”

Even if the appellant had argued that the sentence of seventeen years' imprisonment was severe, severity of sentence is a matter of fact and a second appeal to this Court can only lie on matters of law. In **DESAI V REPUBLIC [1971] E.A. 416**, it was held that on a second appeal, it was not open for the Court of Appeal to consider whether the sentence was unduly harsh or lenient. The court can only interfere if it is demonstrated that the trial court misdirected itself in law in passing the sentence, which is not the case in this appeal.

In view of what we have stated herein above, this appeal must be dismissed, which we hereby do.

Dated and delivered at Nairobi this 19th day of April, 2013.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR