



IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 415 of 2007

BETWEEN

ZACHARIA WAITHAKA MWAURA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome, J.) dated 8th February, 2007

in

H. C. CR. A. No. 21 of 2004

JUDGMENT OF THE COURT

The appellant, **Zacharia Waithaka Mwaura**, was convicted by the Chief Magistrate's Court at Nakuru (S. Muketi) of the offence of defilement of a girl under 14 years contrary to **section 145 (1)** of the Penal Code and sentenced to serve 14 years in prison.

Upon his conviction and sentence, the appellant appealed to the superior court against sentence only. After hearing the appeal on sentence, the learned Judge of the superior court (Koome, J) dismissed the same, and expressed herself, in part, as follows:

“The appellant has appealed against the sentence imposed by the trial court and in his grounds of appeal, he has pleaded for leniency for reasons he is suffering from acute pneumonia and it is not possible to receive appropriate treatment while in prison. He also states that he is remorseful and regrets the beastly act that lead (sic) to his conviction and sentence.

During the presentation of the appeal, the appellant further argued that he was 17 years of age when the offence took place although the court noted that he was 19 years, he ought to have been tried as a child. He contended that the imprisonment to a term of fourteen years is harsh to a child like him and it is not to (sic) the best interest as (sic)

a child like him. He urged this court to set him free as he as (sic) trained in carpentry grade 3 while in prison so that he can contribute to national development.”

The appellant now comes before this Court on a second and final appeal and he drew up the memorandum of appeal in person. He cited six grounds which challenged both conviction and sentence. However, at the hearing before us, the appellant conceded that his appeal was on sentence only and not conviction, as indeed he had not appealed against conviction in the superior court. Clearly, as the record shows, the appellant’s appeal before the superior court was based on sentence only, and he cannot now raise grounds to challenge conviction. And in so far as his appeal against sentence is concerned, as correctly submitted by the learned State Counsel, Mr. Vincent Nyakundi, the appeal does not lie to this Court in view of the provisions of **section 361** of the *Criminal Procedure Code*, which provides in clear terms that a second appeal may only be based on matters of law and not facts. It states in relevant part:

“361: (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”.(Emphasis added).

We must therefore find and hold, as we now do, that this Court has no jurisdiction to determine the appeal and we order that it be and is hereby dismissed. The sentence imposed by the superior court being lawful sentence shall remain.

Dated and delivered at Nakuru this 28th day of May, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR