IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 144 OF 2013

BETWEEN

JOSPHAT MBURU KARIUKI …… APPELLANT

AND

REPUBLIC ……..RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Achode, J) dated 21st February, 2013

in

H.CCRA. NO. 320 OF 2011*)*

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JUDGMENT OF THE COURT

1. The appellant, Josephat Mburu Kariuki, was on 18th October 2011 convicted for the offence of attempted murder and sentenced to a prison term of ten years. According to an account by an eye witness that formed part of the evidence on the basis of which the appellant was convicted, on 29th September 2009 at Kenol Trading Centre in Muranga County, the appellant removed a window pane of a dwelling house in which Leah Wairimu Muthoni and her husband were sleeping, poured a highly inflammable liquid into the house and set it a blaze. As a result the said Leah Wairimu Muthoni sustained 18-20 degree burns and was hospitalized for over one year at the Thika District Hospital. Her house was also gutted down. The appellant's defence before the trial court was that he did not know anything about the charges that he faced.

2. Upon conviction, the appellant appealed against the conviction and sentence to the High Court. When his appeal came up for hearing before the High Court, he withdrew his appeal against the conviction and pursued his appeal against the sentence urging that the sentence was harsh and excessive and that his mitigation was not duly considered.

3. In her judgment, the learned judge of the High Court observed that according to the medical evidence tendered at the trial, the complainant sustained over 18% degree burns and also lost most of her property in the fire set by the appellant; that "*the appellant is not remorseful at all for the suffering he caused to the complainant's family. The only reason he has come before this court is because his comfort is compromised in prison*." The judge did not in those circumstances consider the sentence to be harsh or excessive and rejected the appeal.

4. In his document titled "mitigation" presented to this Court on 12th March 2013, and his written submissions titled "mitigation grounds of appeal" presented during the hearing of the 'appeal' before us, the appellant urged that he is now a reformed person and has undergone various correctional programs; and that he has acquired skills in prison which he can use on rejoining society as a responsible person. He accordingly urged the Court to reduce the sentence.

5. Opposing the appellant's prayers, Mr. O. J. Omondi, learned Senior Assistant Director of Public Prosecutions submitted that the question of severity of sentence cannot, under section 361 of the Criminal Procedure Code, be canvassed on a second appeal and that the sentence imposed by the trial court and confirmed by the High Court is lawful.

6. We agree with learned counsel for the state. Under Section 361(1)(a) of the Criminal Procedure Code, we cannot, on a second appeal, entertain an appeal on severity of sentence, which under that provision is declared to be a matter of fact. **(See Musyeki Lemoya vs R [2014] eKLR).** There is no suggestion by the appellant that the sentence imposed is illegal. Indeed the sentence is lawful. Accordingly, the appellant's mitigation is improperly before us and the same is hereby dismissed.

Dated and Delivered at Nairobi this 18th day of December, 2014.

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this a

true copy of the original.

DEPUTY REGISTRAR