



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. E016 OF 2020

SM.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **SMK**, the Applicant, was convicted for the offence of **incest by male** contrary to **Section 20(1) of the Sexual Offences Act**, and sentenced to ten (10) years imprisonment. The complainant was his daughter, aged eight (8) years old.
2. By way of Notice of Motion filed herein on the 8th September 2020, the Applicant seeks orders that would in actual sense amount to a review of his sentence, to a non-custodial one. He avers that he has suffered during the period that he has been in custody and is remorseful. That he has undergone rehabilitation and has been spiritually nourished during the 9(Nine) months that he has been incarcerated; and, that he underwent an operation at Kenyatta National Hospital that has caused him psychological and mental stress.
3. Further, he stated that during trial which lasted for five (5) years he was out on bond but did not abscond and that his family needs him for sustenance.
4. The State through learned State Counsel, Ms Akunja opposed the application. She urged that a non- custodial sentence, considering circumstances of the case will not serve ends of justice.
5. A decision to impose a custodial sentence or not depends on gravity of the offence and other relevant factors that would have a negative effect on the suitability of the sentence.
6. **Section 20(1)** of the Sexual Offences Act provides as follows: -

“(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person..”

7. In the case of **Wanjema VS Republic(1971) E.A. 493**

Trevelyan J. said.

“An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

8. In the case of **Shadrack Kipkoech Kogo vs Republic, Eldoret Crim. Appeal No.253 of 2003**, the Court of Appeal stated that: -

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing

the sentence, the sentencing court took into account an irrelevant factor or factors, that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.”

9. In passing the sentence meted out the trial court took into consideration injuries sustained by the victim and the fact of the act having been committed repeatedly. The stated circumstances proved that incarceration would be more effective as opposed to a non-custodial sentence. The Applicant was out on bond during trial therefore the sentence imposed was proper.

10. In the premises, I find the application lacking merit. Accordingly, it is dismissed in its entirety.

11. It is so ordered.

Ruling signed and delivered virtually at Nairobi this 28th Day of January 2021.

.....

L. N. MUTENDE

JUDGE