REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

REVIEW APPLICATION NO.38 OF 2020

RMM.....APPLICANT

VERSUS

STATE.....RESPONDENT

(Being a Review of Sentence of N.N.Njagi SPM in Criminal Case No.9 of 2018 at Wundanyi)

RULING

1. The Applicant was charged before Senior Principal Magistrate Court Wundanyi (N.N. Njagi SPM) with Two Counts of **Incest contrary to Section 20(1)** of the **Sexual Offences Act No.3 of 2006**.

2. In **Count 1,** the particulars are that **RMM,** on the **18th January, 2018** at around 2:00 pm at **[Particulars Withheld]** village in Ronge Location of Mwatate Sub-county within Taita Taveta County, intentionally and unlawfully caused your penis to penetrate the vagina of **PW** a girl age **12 years** who is to your knowledge is your grand-daughter.

3. In the **Alternative Charge** to **Count 1,** the Applicant was charged with **Indecent Act with a Child contrary to Section 2(1) as read with Section 11(1)** of the **Sexual Offences Act No.3 of 2006.**

The facts are that **RMM**, on **18th January, 2018** at around 2:00pm at **[Particulars Withheld]** village in Ronge Location of Mwatate Sub-county, within Taita Taveta County, intentionally and unlawfully touched the vagina of **PW** a girl aged **12 years** using your penis.

4. In **Count 2,** the Applicant was charged with **Incest contrary to Section 20(1)** of the **Sexual Offences Act No. 3 of 2006**.

The facts read that **RMM** on diverse dates in **November 2017** at around 11:00am at **[Particulars Withheld]** village in Ronge Location of Mwatate sub county within Taita County, intentionally and unlawfully caused your penis to penetrate the vagina of **JSW** a girl aged **11 years** who is to your knowledge your grand-daughter.

5. In the **alternative charge,** the Applicant was charged with **committing an Indecent Act with a Child contrary to Section 2(1) as read with Section 11(1) of the Sexual Offences Act No.3 of 2006**.

The facts to the alternative charge were that on the diverse date in **November 2017** at around 11:00am at **[Particulars Withheld]** Village in Ronge Location of Mwatate Sub- county within Taita County, intentionally and unlawfully touched the vagina of **JSW** a girl of **11 years** old using your penis.

6. The Applicant pleaded guilty to the offence of **committing Incest contrary Section 20(1) of the Sexual Offences Act** with regard to the 1st Complainant in Count 1 and denied the alternative charge thereof. The Applicant further pleaded not guilty to the offence of committing **Incest contrary Section 20(1) of the Sexual Offences Act** with regard to the 2nd Complainant in Count 2 but pleaded guilty to the Alternative Charge thereof as provided for under **Section 2(1) as read with section 11 (1) of the Sexual Offences Act**.

7. After plea taking, the trial court convicted the Applicant on his own plea of guilt and sentenced him to serve 10 years imprisonment in Count 1 but was discharged for the alternative charge to Count 1. The Applicant having also pleaded not guilty to the main Count 1, but pleaded guilty to the alternative charge to the said Count, was convicted on his own plea of guilt and sentenced to 10 years imprisonment. The trial court further ordered that the sentences do run consecutively.

8. The sentences as issued by the trial court have resulted into the instant review wherein the Applicant filed a **Petition** together with a

Chamber Summons Application on the **2nd September, 2020**. In the pleadings before the court, the Applicant prays that the sentences set to run consecutively by the trial court be overturned and this court order the sentences to run concurrently.

9. The main issue that arises before this Court is when can a High Court interfere with a sentence as imposed by a subordinate trial court?

10. The Applicant pleaded guilty as stated and was convicted on his own plea of guilt. Being a review, this Court has the primary duty of examining the record of proceedings before the trial court in order to satisfy itself as to the correctness of those proceedings, the legality or propriety of the findings, sentence or any order made or passed by the said court and make appropriate orders depending on its findings.

11. The Court of Appeal in the case of **Ahmad Abolfathi Mohammed & Another -vs- Republic Criminal Appeal No.135 of 2016** sets the conditions under which a sentence may be interfered with as follows:

> **"As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle, ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.**

12. Similarly, the Court of Appeal in the case of **Ogolla s/o Owuor -vs- Republic [1954]EACA 270**, pronounced itself on this issue as follows:-

> **"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."**

13. In the case of **Mokela -vs- The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

> **"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."**

14. The Applicant herein is only interested in the sentence that was meted against him and prays that the same be reviewed by court. The Applicant avers that the sentence is manifestly excessive and thus prays that this court orders that he serves a term of 10 years concurrently instead of 10 years consecutively for the Counts he was convicted for, contrary to what was ordered by the trial court that sentences to both counts as charged run consecutively.

15. The Court of Appeal, on its part, in the case of **Bernard Kimani Gacheru –vs- Republic [2002] eKLR** restated that:

> **"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."**

16. This Court has gone through the proceedings of the trial court and has observed that the trial court complied with the law and was neither wrong in principle nor overlooked material facts in the Applicant's case.

17. In this case, the Applicant was charged with two Counts under **Section 20(1)** of the **Sexual Offences Act** in which both Counts had an alternative charge under **Section 11(1)** of the **Sexual Offences Act**.

18. **Section 11(1)** of the **Sexual Offences Act** provides:

> **(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.**

19. **Section 20** of the **Sexual Offences Act** provides:

> **(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.**

20. Both **Sections 11(1)** and **20(1)** of the **Sexual Offences Act** provide for *prima facie* mandatory minimum sentences. The Court of Appeal in the case of **Jared Koita Injiri –vs- Republic [2019]eKLR** held:

> ***"…In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act,* and if the reasoning in the Supreme Court case was applied to this provision, it too should be**

considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy…"

21. Similarly, the Applicant herein committed offences against minors, which is heinous. In the case of **Yasmin –vs- Mohamed [1973]EA 370**, Madan J, (as he was then) held:

"…The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved…"

22. From the proceedings of the instant case, the Applicant committed an atrocious crime against two minors who are his grandchildren and were under his care. Similarly, this Court agrees with the finding in the **Jared Koita Injiri (supra) that the Applicant cannot be trusted around children, even if they are his own relatives. It will also be noted that the Applicant, upon being convicted, did not show any leniency and or remorse. He has still not done so even as he pleads for a review of the sentence against him.**

23. Further, it is noteworthy that the Applicant was charged with two different counts, which involved two different complainants. The accused should be made aware that these are two different crimes with two different victims and particulars, and hence attract different sentences as per the Sexual Offences Act.

24. More importantly, the Applicant has not shown any compelling reasons why this court should interfere with the sentence as meted by the trial court.

25. Having considered the circumstances under which the offences were committed as well as the Applicant's defence together with the application dated **2nd September, 2020**, I find no reason to interfere with the sentences which were meted against the Applicant by the trial court.

26. In the premises, the Application and Petition for review fail and the same are hereby dismissed accordingly.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 11TH DAY OF FEBRUARY, 2021.

D. O. CHEPKWONY

JUDGE