REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 157 OF 2014

G J N……...……..……... APPELLANT

VERSUS

REPUBLIC……..…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 475 of 2012 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon M. Chesang (Ag SRM) on 26th September 2013)

JUDGMENT

INTRODUCTION

1. The Appellant, G J N, was tried and convicted by Hon M. Chesang, Ag Senior Resident Magistrate for the offence of incest by male contrary to Section 20(1) of the Sexual Offences Act No 3 of 2006 and indecent assault on female contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve twenty (20) years' imprisonment.

2. The particulars of the charges were as follows :-

> **"On diverse dates in the month of April 2010 at [particulars withheld] within Taita Taveta County did have carnal knowledge with J M J aged 18 years who was his daughter."**

ALTERNATIVE CHARGE

> **"On diverse dates in the month of April 2010 at [particulars withheld] within Taita Taveta County, unlawfully and indecently using his genital organ namely penis touched private parts namely vagina of J M J."**

3. Being dissatisfied with the said judgment, on 12th November 2013, the Appellant filed a Petition of Appeal which stated:-

> **1. THAT he was praying for a lesser sentence.**
>
> **2. THAT he was praying to be put on probation so that he could take care of his family.**
>
> **3. THAT he was the father of seven and his wife died while he was in custody.**
>
> **4. THAT he was of age** (sic) **and he would suffer more in prison.**

5. THAT he was a first offender and wished to be considered. (sic)

4. On 7th March 2016, the Appellant filed Mitigation Grounds of Appeal. The same were generally as follows:-

1. THAT he started the case afresh after a Re-trial and his sentence was increased to 20 years from 15 years.

2. THAT the complainant was put in custody for 14 days and forced to make a confession as per the wishes of the Prosecution.

3. THAT his sentence should start from 2010.

4. THAT he had engaged himself in a rehabilitation programme and that he was ready to serve under any arm of the law.

5. His Written Submissions were filed on 7th March 2016. The State's Written Submissions were dated and filed on 14th March 2016.

6. When the matter came up in court on 14th March 2016, both the Appellant and the State informed the court that they would rely entirely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

8. Notably, Henry Kiptoo Sang (hereinafter referred to as PW 5) who was a Government Analyst conducted a DNA Test and concluded that the probability of J M J (hereinafter referred to as "PW 1") and the Appellant herein being parents of one R W was ninety nine (99%) per cent.

9. In view of the above, it was evident that the Appellant was not contesting the facts of the case but rather he was seeking to have his sentence reduced from twenty (20) years to fifteen (15) years' imprisonment.

10. The State therefore addressed its mind to the question of the severity of the sentence but added that PW 1 was placed in custody before testifying as she had turned into a refractory witness and her evidence was critical in this case. The Appellant did not submit on this issue.

11. Save for noting the said submissions by the State, the court did not therefore deem it necessary to analyse the same as it was really not a Ground of Appeal or a Mitigation Ground of Appeal.

I. SEVERITY OF THE SENTENCE

12. J W M (hereinafter referred to as "PW 2") told the Trial Court that the Appellant was her husband but not the biological father of J M J (herein after referred to as PW 1) as she got married to him when PW 1 was two (2) years of age. There was therefore was an incestuous relationship between the Appellant and PW 1 by virtue of Section 22 of the Sexual Offences Act and was among relationships that fall within the

prohibited degrees of consanguinity stipulated in Section 22 of the Sexual Offences Act.

13. The said Section provides as follows:-

> **"In cases of the offence of incest, brother or sister includes half brother and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a mother and an aunt of the first degree whether <u>through lawful wedlock or not</u>."**

14. Proof of a complainant's age is critical as it has a bearing on the sentence that a person convicted of the offence of incest should be given under Section 20(1) of the Sexual Offences Act.

15. Section 20(1) of the Sexual Offences Act provides as provides as follows:-

> **"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."**

16. A perusal of the proceedings shows that PW 1 did not adduce her Birth Certificate to prove her age. The Learned Trial Magistrate relied on the P3 Form completed on 28th June 2010 which indicated that PW 1 was approximately eighteen (18) years. By the time PW 1 was testifying three (3) years later, she would have been about twenty one (21) years.

17. It was the view of this court that in the absence of an Age Assessment Report or Certificate of Birth as proof of birth, PW 1 could not with certainty have been said to have been eighteen (18) years of age. Indeed, a P3 Form is not conclusive evidence of age of a person. However, as PW 1's age was not an issue in contention, this court accepted the same.

18. Accordingly, having considered the evidence on record and the written submissions by both the Appellant and the State, the court came to the conclusion that the Appellant was rightly convicted by the Re-Trial Court for the offence of incest by male. The Trial Magistrate acted correctly when she exercised her discretion and sentenced the Appellant to twenty (20) years imprisonment. The Appellant's proposition to be placed on Probation would thus not be proportional to the offence or lawful at all and the same is hereby rejected.

19. However, as the Appellant had earlier been convicted on similar facts and was sentenced to fifteen (15) years' imprisonment, it would only be fair if the sentence was reduced from twenty (20) years.

20. Notably, whereas the Appellant had urged this court to reduce the sentence he was to serve to fifteen (15) years, this court was of the considered opinion that ten (10) years' imprisonment would be consistent with cases it had decided on similar facts. Indeed, a court must always be consistent when asked to decide a case with similar facts. Further, where the complainant is an adult, differentiation should be made from a case where the incest is not consensual and involves a minor.

21. In the case of **<u>Benson Mgima Salim vs Republic [2015] eKLR,</u>** this court reduced the sentence of the appellant therein to ten (10) years' imprisonment having found him guilty of having had an incestuous relationship with his step daughter that was proven by a report by the Government Analyst that showed that there were 99.99+% chances that the appellant therein was the biological father of the a child born with the complainant therein.

II. COMPUTATION OF THE SENTENCE

22. In its submission, the Appellant submitted that his sentence ought to commence from 2010 when he was first convicted for fifteen (15) years before the High Court of Kenya Mombasa ordered a Re-Trial after his appeal. He stated that he was jailed a second time on 13th December 2012. The State did not address itself to this submission.

23. There was no indication in the file that was placed before this court that the Appellant was released on bond between the first and second trials. However, any time the Appellant spent time in prison before the Re-Trial and the time spent after the second conviction ought to be taken into account.

DISPOSITION

24. The Appellant's Mitigation Grounds of Appeal were partly successful. Accordingly, this court hereby quashes and/or sets aside the sentence of twenty (20) years the Appellant had been sentenced to and hereby substitutes the same with ten (10) years' imprisonment.

25. For the avoidance of doubt, the computation of the Appellant's sentence will include the period he served his sentence for his first conviction before his Re-Trial, if at all he served any time but will exclude any period he may have been out on bond for his Re-Trial. The court is of the firm belief that the computation of these days is best be done by the prison authorities as they have the records of the same to avoid any confusion herein.

26. It is so ordered.

DATED and **DELIVERED** at **VOI** this **31st** day of **March** 2016

J. KAMAU

JUDGE

In the presence of:-

Granton Jangani……..…….. for Appellant

Sirima……..… for State

Simon Tsehlo– Court Clerk