



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL 228 OF 2014

B M K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(An Appeal arising out of the sentence of Hon. H. Nyakweba PM in Criminal [Case No. 118 of 2012](#),
delivered on 18th November 2013 in the Principal Magistrate's Court at Kilungu)**

JUDGMENT

The Appellant was charged with offence of attempted incest by a male person contrary to Section 20(1) of the Sexual Offences Act. The particulars of the offence were that on the 26th July 2012 at [particulars withheld] village, Kilungu District, in Makueni county, the Appellant attempted to commit an act which causes penetration with I M M alias P, a child aged 9 years knowing that she was his daughter.

The Appellant was arraigned in court on 27th September 2012 when he pleaded not guilty to the charges. He was tried, convicted of the offence and sentenced to fifteen (15) years imprisonment.

The Appellant is aggrieved by the judgment of the trial magistrate and preferred this appeal on the sentence only. The grounds as stated in his Amended Grounds of Appeal availed to the Court are that he was a first time offender and was seeking leniency; that he was reformed and remorseful over his action; he was the sole breadwinner of his family; he has been in custody for a long period before the sentence was meted out; and he had a terminal disease.

Mr. Shijenje, the learned prosecution counsel, opposed the appeal in oral submissions he made in court on 8th June 2016. It was stated that the Appellant was sentenced under a section that provided for a minimum sentence of 10 years imprisonment, and the sentence of 15 years imprisonment was within the law.

I have considered the Appellant's mitigation and the arguments by the Prosecution, and find that the issues for determination by the court are whether the sentence meted out on the Appellant is illegal or unlawful, harsh or excessive as provided for under the Sexual Offences Act or in any other statute, and whether the said sentence is amenable to reduction and /or variation.

Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-

“ In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence”.

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

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 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 (see also Sayeka -vs- R. (1989 KLR 306)"

In the instant appeal, the Appellant was charged with, and convicted of the offence of attempted incest contrary to Section 20(2) of the Sexual Offences Act, which needs to be read together with sub-section (1) and 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.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years."

The said section provides for a minimum sentence of ten years imprisonment, therefore the sentence of fifteen years imprisonment was lawful. I note that the Appellant was found to be a first offender by the trial Court and was not remorseful. He now states that he is remorseful and regrets his actions. However, I also note that the offence was committed against a child of tender years of 9 years, who was the Appellant's biological daughter, and the offence therefore calls for a deterrent sentence.

I accordingly uphold the conviction of, and sentence of 15 years imprisonment imposed upon the Appellant by the trial Court for the offence of attempted incest contrary to Section 20(2) of the Sexual Offences Act.

Orders accordingly.

DATED AT MACHAKOS THIS 27TH JULY 2016.

P. NYAMWEYA

JUDGE