REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 60 OF 2013

CN…….....……APPELLANT

-VERSUS-

REPUBLIC……...…….……..RESPONDENT

(Being an appeal against original conviction and sentence in Kangema Senior Resident Magistrate's Court Criminal Case No. 161 of 2013 (Hon. D.Orimba) on 6th January, 2011)

JUDGMENT

C N, the appellant herein was charged and convicted of the offence of incest contrary to **section 20(1)** as read with **section 22(1)** of the **Sexual Offences Act, No. 3 of 2006**. It was stated in the particulars of the offence that on the diverse dates in the month of June, 2010 within Murang'a County, being a male person, the appellant had carnal knowledge of GWK a female juvenile aged 14 years who was to his knowledge his half-sister. He was accordingly sentenced to serve ten years in prison.

The appellant appealed against the conviction and sentence.

In the grounds of his appeal the appellant contested the learned magistrate's decision on, amongst other grounds, that the learned magistrate ignored the need for crucial evidence of a DNA test which could have established with any certainty whether indeed the appellant had impregnated the complainant. At the hearing of his appeal, the appellant did not appear to challenge the conviction; he did not outrightly challenge the sentence either. In his written submissions the appellant purported to "mitigate" and urged the court to reduce the sentence.

The learned counsel for the state opposed the commutation of the appellant's sentence and argued that the minimum sentence for the offence for which the appellant was convicted was ten years imprisonment which is the sentence that the learned magistrate imposed.

Section 20(1) of the Sexual Offences Act under which the appellant was charged provides:

"20.(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 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 for 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."

Section 22 (1) and **(2)** of the Act describe and define a person's relationship with another for purposes of liability under **Section 20(1)** of the **Sexual Offences Act**. This section provides as follows:

22.(1) In cases of the offence of incest, brother and sister includes half-brother, half-sister 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 half mother and an aunt of the first degree whether through lawful wedlock or not.

For purposes of this appeal, the relevant part of subsection (2) defines "half-sister" as "a sister who shares only one parent with another".

Coming back to evidence at the trial, it was established that somebody must have committed an act which caused penetration to the supposed complainant. The complainant testified that as at November, 2010 she was fifteen years old and in class seven. Sometimes in June 2010 she visited her uncle, J.N at his home in Kangema where she also met the appellant. It was while she was in that home that the appellant had sexual intercourse with her. Since the intercourse was consensual, the complainant did not tell anybody and indeed nobody would have known of the appellant's sexual episode with the complainant were it not for the pregnancy that ensued and soon became visible when she returned to school. The subsequent pregnancy test which the complainant was subjected to confirmed that indeed she had conceived and was pregnant.

When she was cross-examined, the complainant was open with the court that her sexual encounter with the appellant was not the first of its kind; she had had sex before with her boyfriend in the same year although she did not specify the month or date of this encounter. With this kind of evidence it would be difficult if not impossible, to conclude without a paternity or a DNA test that the appellant was the man behind the pregnancy. The fact of pregnancy in these circumstances, would not of itself, be sufficient proof that the appellant was the man behind the complainant's pregnancy and therefore incestuous.

Of particular relevance to the charges against the appellant, the complainant described him as her "cousin". The investigating officer also confirmed that the appellant and the complainant were cousins. Neither the complainant nor the investigating officer gave any details of this "cousin" relationship.

It is also noted that none of the parents of the complainant or the appellant testified; not even J.N whom the appellant and the complainant are said to have been staying with when the offence was committed testified. The record shows that the parents or guardians of both the complainant and the appellant wanted the matter settled amicably out of court but the school principal of the complainant's school insisted on reporting the matter to the police who eventually took it up and charged the appellant with the offence of which he was charged and convicted. Accordingly, apart from the evidence of the complainant and that of the appellant no other witness gave any information on the "cousin" relationship between these two parties.

Be that as it may, **section 20(1)** of the Act, stipulates a category of persons that one may not engage sexual relations with without risking liability for a sexual offence as defined under that provision. This category of persons does not include "cousin," the term used by the appellant and the complainant to describe each other. In any event, the description of the complainant in the charge sheet is that she was the appellant's "half-sister" and not his "cousin".

As noted the term "half-sister" as used in the Act is not left for conjecture; due to the weight it carries in an offence of incest, it has been expressly defined under **section 22 (2)** of the Act. The term means ***"a sister who shares only one parent with another".*** I suppose an illustration of this definition would be where two people share the same mother but have different fathers or share the same father but with different mothers. The best example of the latter scenario would be children in a polygamous relationship.

Looking at the trial court's record, there is no evidence that the appellant and the complainant shared any of their parents; if anything, it is more probable than not that they never shared any of their parents though either of their respective parents could be related. This relationship, if it existed did not, and the

prosecution never attempted to demonstrate that it did bring the appellant's and the respondent's relationship within the category of the forbidden sexual relationships expressed in **section 20(1)** of the Sexual Offences Act.

In the absence of any clear definition of the relationship between the appellant and the complainant and assuming that it was proved to the required standard that the appellant had sexual intercourse with the complainant the appropriate offence for which the appellant ought have been charged with was the offence of defilement under **section 8(1) (3) of the Sexual Offences Act** which provides as follows:

"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

(2) …

(3) A person who commits defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

My conclusion is that is that in the absence of clear evidence that the complainant was the appellant's half-sister as defined under **section 22(2)** of the **Sexual Offences Act**, it was unsafe to convict the appellant of the offence of incest under **section 20(1)** of that Act. It follows that it would be unsafe for me to uphold or sustain the conviction. In the premises I allow the appellant's appeal, quash the conviction and set aside the sentence. The appellant is set free unless he is lawfully held under a separate warrant.

Signed, dated and delivered in open court this 25th day of February, 2014.

Ngaah Jairus

JUDGE