



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 13 OF 2016

PGW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Sentence imposed in Criminal Case S.O Number 26 of 2015 in the Chief Magistrate's Court at Nyeri on 3.2.16 by Hon. C.Mburu (RM))

JUDGMENT

The Trial

The Appellant herein **PGW** has filed this appeal against sentence on a charge of incest by male contrary to section 20(1) of the Sexual Offences Act. The particulars of the offence were that:-

On the 24th day of May 2015 in Nyeri County caused his penis to penetrate the vagina of G.N.K a female person who to his knowledge was his niece

In the alternative count; the appellant was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the charge are that

On the 24th day of May 2015 in Nyeri County intentionally and unlawfully touched the vagina of G.N.K a child aged 12 years old with his penis

The prosecution called a total of four (4) witnesses in support of their case. The complainant recalled that on 24.3.15; the appellant who is her uncle found her outside her grandfather's house, grabbed her hand and took her to the shamba where he defiled her. That the appellant threatened to kill her if she reported the matter to anyone. That on a Tuesday whose date she could not recall; she told her mother that she was not feeling well and was taken to hospital. That she was later taken to the police station and she reported that the appellant had defiled her.

PW2 RW, the complainant's mother recalled that on Monday 25.5.15 at about 9.00 pm, the complainant reported that she had pain in her private parts and that her uncle G had defiled her when she had visited her grandfather the previous Sunday. That she escorted her to Kiganjo Dispensary and later reported the matter To Iganjo Police Station where a P3 form was issued and which was later filled.

PW3 Dr. Julia Kituku produced the complainant's P3 filled by Dr. Muriu who was not available. She told court that complainant who was 12 years was o examination found to have infection and a perforated hymen. She produced the Post Rape Care form and P3 form as PEXH. 1 and 2 respectively.

PW4 CPL Betty Chepkoech, the investigating officer recalled that after complainant's case was allocated to her to investigate; she interrogated the complainant and received from complainant's mother, duly filled Post Rape Care form and P3 form as PEXH. 1 and 2 respectively. That the appellant was later arrested and charged.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. On 3.2.16, the learned trial magistrate delivered a judgment in which she convicted the appellant and sentenced him to serve 10 years imprisonment.

The Appeal

Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 11th February 2016, the appellant set out 4 grounds of appeal to wit:-

- 1. That the 10 years sentence imposed against him is harsh and excessive**
- 2. That the court be pleased to reduce the sentence as it deems fit**
- 3. That his incarceration has made his family to be desperate since the land they occupy has a succession case in court**
- 4. That the education of his children has failed since he was the sole breadwinner after his wife became disabled after an accident**

During the hearing of the appeal, the appellant relied wholly on his grounds of appeal. Mr. Nyamache, Counsel for the state, in response thereto submitted that the appellant was sentenced to the minimum sentence for incest and urged this court not to interfere with it.

The appellant is only appealing on the extent of the sentence. 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:

The trial magistrate imposed a sentence of 10 years which is the minimum sentence for incest.

Issues for Determination

The question for determination is whether the appellant was sentenced to a harsh and excessive sentence.

Determination

Generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty. (See **Daniel Kyalo Muema vs Republic, Court of Appeal Criminal Appeal No. 479 of 2007 (Nairobi)**). This principle is contained in section 66 (1) of the Interpretation and General Provisions Act Cap 2, Laws of Kenya which provides:-

“Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punished by a penalty not exceeding the penalty prescribed”

The principle of law in Section 66 aforesaid is entrenched in Section 26 of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any

written law and further authorizes the court to pass a sentence or a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment. In particular, Section 26 (2) and (3) of the Penal Code provides:-

(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment.

The proviso to Section 20 of the Sexual Offences Act provides:-

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.

The trial court had the discretion to impose any term between the minimum of 10 years and maximum of life sentence had it considered that the complainant was under the age of eighteen years.

In **Shadrack Kipchoge Kogo vs Republic Criminal Appeal No. 253 of 2003**, the court of appeal stated:-

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

There is no evidence that the learned trial magistrate’s exercise of discretion in sentencing the appellant to the minimum term of 10 years for incest was not judicious.

Decision

Although this court has discretion under Section 354 (3) (b) of the Criminal Procedure Code to increase or reduce the sentence or alter the nature of the sentence, this is one case where the court’s discretion cannot be exercised in favor of the appellant since he was sentenced to the minimum term. The upshot of this is that the appeal is dismissed and the sentence imposed on the appellant is upheld.

DATED AND DELIVERED THIS 8th DAY OF June 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - **Kinoti**

Appellant - **Present in person**

For the State - **Mr. Nyamache**