



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MACHAKOS**

**CRIMINAL APPEAL 124 OF 2010**

**A N N.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal arising out of the sentence of F.M. Nyakundi PM in Criminal [Case](#) No. 554 of 2009**

**delivered on 6<sup>th</sup> April 2010 in the Principal Magistrate's Court at Makueni)**

**JUDGMENT**

The Appellant was charged the offence of incest by male contrary to Section 20(1) of the Sexual Offences Act. The particulars of the offence were that on the 1<sup>st</sup> day of December 2009, at Athi location, Kalawa division in Mbooni East District within Eastern Province, being a male person, he intentionally and unlawfully had carnal knowledge of M N a female person who was to his knowledge his daughter aged 10 years.

In the alternative the Appellant was charged with the offence of committing an indecent Act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that 1<sup>st</sup> day of December 2009, at Athi location, Kalawa division in Mbooni East District within Eastern Province, he unlawfully and indecently assaulted M N a girl aged 10 years by touching her private parts.

The Appellant was first arraigned in the trial court on 21<sup>st</sup> December 2009 and he pleaded not guilty to the charge against him. The hearing commenced on 6<sup>th</sup> April 2010, and three prosecution witnesses gave evidence. The Appellant then indicated that he wanted to plead guilty. The charge was then read out again to the Appellant and he pleaded guilty. He admitted the facts as read out by the prosecutor and he was convicted of the offence of incest on his plea of guilty and sentenced to forty (40) years imprisonment.

The Appellant being aggrieved by the judgment of the trial magistrate has appealed his sentence. The Appellant in his initial Petition of Appeal filed in court on 30<sup>th</sup> April 2010 appealed against both his conviction and sentence. However, at the hearing of the appeal on 4<sup>th</sup> December 2015, he indicated to the Court that he wanted to appeal on the sentence only, and he relied on mitigation grounds and submissions he availed to the Court dated 24<sup>th</sup> November 2015.

The Appellant's grounds of mitigation were that the trial magistrate contravened section 124; the sentence

was manifestly harsh and excessive as the Appellant was not the biological father of the complainant; his mitigating factors were not considered during sentencing; the exhibits was not availed even after his change of plea; and that the High Court has unlimited jurisdiction and discretion powers on the issue of sentencing

The learned Prosecution counsel, Mr. Shijenje made oral submissions during the hearing of the appeal and stated that the sentence the law provides for the offence the Appellant was convicted of is life sentence, and there is no reason the Appellant's sentence of 40 years imprisonment should be interfered with.

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 to 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.

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, (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 the case of **Shadrack Kipkoech Kogo -v- R, Eldoret Criminal Appeal No.253 of 2003** where 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 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)"***

Likewise, in the case of **Kenneth Kimani Kamunyu -vs- R. (2006) eKLR** it was stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

In the instant appeal, the Appellant was charged with, and convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act, which 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."***

The complainant herein was aged 10 years, and the maximum sentence for the offence of incest by a male in the circumstances is life imprisonment. The sentence imposed upon the Appellant of forty years imprisonment was therefore lawful to that extent.

It is however my view that the sentence of forty years imprisonment was quite lenient, and reasonable grounds exist for the enhancement of the Appellant's sentence to a life sentence. This is for the reasons that the evidence adduced in the trial Court showed that this was not the first time the Appellant was

defiling the complainant, the Appellant in his grounds seems to be of the view that the fact that the complainant was not his biological child excuses him from a severe sentence, and in any event under section 8(2) of the Sexual Offences Act the defilement of a child under the age of eleven years attracts a minimum sentence of imprisonment for life.

However, as no notice or warning was given to the Appellant of the intention to enhance his sentence, to do so at this stage would prejudice him and may be contrary to *Section 364 (2)* of the **Criminal Procedure Code** and *Article 50* of the Constitution, since the Appellant was not given the opportunity to be heard and address the court on an enhanced sentence. Reference is also made to the decisions in **Charles Muriuki Mwangi -v- R, (2015) eKLR** and **Christopher Mwangangi Katumo -v- R (2007) eKLR**.

I accordingly uphold the conviction of, and sentence of forty years imprisonment imposed upon the Appellant for the offence of incest contrary to section 20(1) of the Sexual Offences Act for the above reasons. The said sentence shall have effect from the date of conviction in the original trial Court

Orders accordingly.

**DATED AT MACHAKOS THIS 3<sup>RD</sup> DAY OF FEBRUARY 2016.**

**P. NYAMWEYA**

**JUDGE**