REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 78 OF 2015

NICHOLAS NJERU MANJANO.....APPELLANT

VERSUS

REPUBLIC…… …….....……..RESPONDENT

(Being an appeal from the original conviction and sentence in CR 1911/14 at Siakago Principal Magistrate's Court by Hon. A.N. Makau Ag SRM on 11th November, 2014)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 10 years imprisonment in respect of committing an indecent act contrary to section 179 of the Criminal Procedure Code (Cap 75) Laws of Kenya, which was imposed upon him by the court of Acting Senior Resident Magistrate on 11th November 2014, following his acquittal on the main charge of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006. The conviction and sentence on a charge of incest was entered on the basis of the offence of indecent act, being a minor and cognate offence to the major offence charged namely incest in terms of section 179 of the Criminal Procedure Code.

2. The circumstances of this case were that the appellant is the father of the complainant (PW 1). He went to the bedroom of the complainant and removed her clothes and proceeded to have sexual intercourse with her. It is the evidence of the complainant that the appellant covered her mouth. And for that reason she was unable to scream. In the following morning, she reported this to her mother, who then reported the incident together with the complainant to the police.

3. The appellant has raised 5 grounds of appeal in his petition to this court challenging both the conviction and his sentence. When the appeal came for hearing on 22nd September 2016, the appellant abandoned his appeal against his conviction. He proceeded to argue his appeal against the sentence only. In this regard, the trial court found that the appellant was not remorseful and that he did not deserve leniency. She then proceeded to sentence the appellant to 10 years imprisonment, which is the mandatory minimum sentence prescribed by statute for this offence.

4. In his 5 grounds of appeal, the appellant challenged the conviction and urged the court to set aside the sentence. In his submissions to this court the appellant urged this court to reduce the sentence. It was his further submission that he had been in prison for two years since he was convicted and sentenced in 2014. Furthermore, he submitted that he suffers from TB in regard to which he was treated at Embu level 5 hospital. It was also his submission that when he contracted TB his eye sight was equally affected to the extent that he is now unable to read. According to him, he has not been treated for the eye problem. He has also urged the court to release him so that he can undergo treatment in respect of his eyes. As regards the TB, he has submitted that he is being treated.

5. Finally, he submitted that he has received reports that four of his children are out of school and that the court should have mercy on him.

6. Ms Mbae for the state opposed the reduction of his sentence. According to her, the 10 years imprisonment is the minimum prescribed sentence for indecent assault. She further submitted that the appellant was not remorseful. And for that reason, she urged the court to confirm the sentence.

7. In terms of ***section 28 of the Penal Code (Cap 63) Laws of Kenya,*** sentencing is a matter for the discretion of the court. An appeal court is only entitled to interfere, where there has been a misdirection either on a point of law or fact. According to ***Wanjema v. R (1971) EA 493*** an appeal court is entitled to interfere with the sentence imposed by the trial court where the trial court has overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. I bear in mind that the 10 years imprisonment imposed upon the appellant was the minimum prescribed by the statute. According to the Court of Appeal in ***Kibirgen v R (1975) EA 250,*** it is incorrect to treat the minimum sentence as the starting point. That court went further to rule that even where the statute prescribes the minimum sentence, the court is required to assess the sentence in the ordinary way. If the sentence arrived at by the court is below the minimum that is prescribed by statute, the court is required to impose the minimum sentence. The trial Court should have followed this procedure as opposed to finding as it did that: "*The prosecution did not prove the age of the girl/victim and I sentence accused to 10 years imprisonment. The sentence is mandatory*." Finally, it is a requirement of the law according to ***Kantilal Jivraj v. R (1961) EA 6*** that a trial court should not have acquitted the appellant on a charge of incest in view of the conviction entered in the alternative charge of indecent act, which was done on the basis of it being a minor and cognate offence to incest. In other words it should not have made any finding in respect of the charge of incest. However, I find that these misdirections did not occasion a failure of justice in terms of section 382 of the Criminal Procedure Code.

8. In view of the above circumstances set out in paragraph 2 and bearing in mind that the appellant was not remorseful and that this was his daughter, the appellant deserved the sentence imposed upon him by the trial court.

9. In the light of the foregoing, the appellant's appeal is dismissed in its entirety.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **4th** day **OCTOBER, 2016**

In the presence of both the appellant and Ms Mbae for the respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

04.10.16