

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.4 OF 2013

(An Appeal arising out of the conviction and sentence of A.A. OTIENO - PM delivered on 7th December 2012 in Makadara PM. CR. Case No.3135 of 2010)

S M W.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, S M W was charged with the offence of **incest** contrary to **Section 20(1)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 1st May 2006 to November 2009 at his house in *[particulars withheld]* within Kariobangi North in Nairobi area Province, the Appellant, unlawfully and intentionally caused his penis to penetrate the vagina of C W, a girl aged 16 years, who was to his knowledge a step sister. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same dates and in the same place, the Appellant unlawfully and intentionally caused his body to come in contact with the genital organs, breast and buttocks of C W, a girl aged 16 years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted of the main charge of **incest**. He was sentenced to serve thirty (30) years imprisonment.

Although the Appellant was aggrieved by his conviction and sentence, during the hearing of the appeal, he abandoned his appeal on conviction. He instead pleaded with the court for a reduction of sentence. He told the court that during the period of his incarceration, he had learnt his lesson. He told the court that he was drunk at the time and regretted his actions. He pleaded with the court to exercise leniency on him and reduce the sentence that was imposed on him as he was a first offender. Ms. Ngetich for the State opposed the plea for reduction of sentence. She submitted that the offence carries a life sentence. She was of the view that given the circumstances of the case and given that the offence committed by the Appellant was heinous, the sentence meted by the trial magistrate was reasonable. She urged the court to confirm the sentence.

The Appellant is not challenging his conviction. He is appealing against sentence. Under **Section 20(2)** of the **Sexual Offences Act**, any male person who attempts to commit incest shall upon conviction be sentenced to a term of imprisonment of not less than ten (10) years. When the trial court sentenced the Appellant to serve the custodial sentence, it was exercising judicial discretion. As an appellate court, this court will only interfere with such exercise of judicial discretion if it is established that the sentence was manifestly harsh and excessive or was so lenient as to amount to miscarriage of justice. This court will interfere with the sentence if it is established that the sentence was unlawful. In the present appeal, the Appellant urged the court to interfere with the custodial sentence that was imposed on him by the trial court. He pleaded with the court to exercise leniency on him. He told the court that he had learnt his lesson. On the other hand, the State urged the court to confirm the sentence that was imposed by the trial court because it was reasonable.

The Appellant submitted that he was remorseful and that he had learnt his lesson, and taking into account the circumstances of the offence that the Appellant committed, this court is of the considered view that the sentence that was imposed on the Appellant was excessive in the circumstances. The Appellant was a first offender. For other offenders who are convicted of committing similar offence under **Section 8(4)** of the **Sexual Offences Act**, they are sentenced to serve a term of not less than 15 years imprisonment.

In the premises therefore, this court sees no reason why the Appellant should serve a harsher sentence. The Appellant's appeal on sentence is in the circumstances allowed to the extent that the sentence of thirty (30) years imprisonment that was imposed on him is set aside and substituted by a sentence of this court sentencing the Appellant to serve twenty (20) years imprisonment. That sentence shall take effect from 27th December 2012 when the Appellant was sentenced by the trial court. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF SEPTEMBER 2015

L. KIMARU

JUDGE