



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, J.J.A)**

**CRIMINAL APPEAL NO. 97 OF 2013**

**BETWEEN**

**BMN.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Embu (Ongundi, J.) dated 11<sup>th</sup> October, 2013*

**in**

**H.C.CR.A No. 46 of 2011)**

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**JUDGMENT OF THE COURT**

1. BMN, the appellant, was charged with three counts of incest by a male person contrary to **Section 20 (1)** of the **Sexual Offences Act No. 3 of 2006** before the Principal Magistrate Court at Siakago. He also faced three alternative counts of indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act**.
2. The particulars of the first count of incest were that on 30<sup>th</sup> April 2007, in Mbeere District within the then Eastern Province, the appellant committed an indecent act or an act namely incest which act caused penetration with a female person namely JMN who to his knowledge the said female person was his niece. The particulars of the second count of incest were that on 1<sup>st</sup> May, 2007 at the aforementioned place, the appellant committed an indecent act or an act namely incest which caused penetration with a female person JMN who to his knowledge the said female person was his niece. On the third count of incest the particulars were that on 6<sup>th</sup> May, 2007 at the aforementioned place, the appellant committed an indecent act or an act namely incest which caused penetration with a female person JMN who to his knowledge the said female person was his niece.
3. In the first alternative count, the particulars were that on 30<sup>th</sup> April, 2007 at the

aforementioned place, the appellant committed an indecent act with JMN a child aged 12 years by touching her private parts. On the second alternative count, the particulars were that on 1<sup>st</sup> May, 2007 at the aforementioned place, the appellant committed an indecent act with JMN a child aged 12 years by touching her private parts. The particulars of the third alternative count were that on 6<sup>th</sup> May, 2007 at the aforementioned place, the appellant committed an indecent act with JMN a child aged 12 years by touching her private parts.

4. The prosecution case rested on the testimony of PW1, JMN who testified as follows:

***“I go to [Particulars Withheld] Primary School. I am in Standard 8, I am 13 years old. In 2007 I was 12 years old. On 30<sup>th</sup> April, 2007 my mother called me to take cows and goats to a grazing field. While taking care of the stock, the accused came to where I was. The cows were running all over. The accused laughed when he saw some mating. The accused got into the bush and called me. He later came to where I was and pulled me. I fell down and he laid on me and did remove my pantie. He unzipped his trouser and inserted his penis into my vagina. I struggled with him. I cried upon leaving. I saw blood in my private part. My skirt got blood stained. My pantie got torn during the incident. Thereafter I went about looking after the cows and I went home at 6:00 p.m. I did not mention this incident to anyone. The accused had threatened to beat me in the event I mentioned the incident to anyone. On 1<sup>st</sup> May 2007, the accused found me grazing. He repeated what he had done earlier. He had sexual intercourse with me. He held me tightly that I could not run away. Once he was through he threatened me not to mention this incident to anyone. I was putting on a different pantie. I later got home and took a bath, however, I did not wash my pantie. On 6<sup>th</sup> May 2007, the accused came where I was taking care of the cows and goats. He took me to the point where he had previously defiled me and did defile me. Once he was through he asked me if I had told anyone, I told him that I had not disclosed it to anyone. He threatened me. On 10<sup>th</sup> May 2007, my mother came and took me from school given that she had seen blood on my clothes. She took me to Gacaari dispensary whereat I was examined and a P3 Form issued. The accused before court is my uncle. I disposed off my panties. I took my petticoat to the police.”***

5. PW2, HNW, testified that she is the mother to PW1 and wife to the brother of the appellant. That on 10<sup>th</sup> May, 2007 at 9.00 a.m. she had gathered clothes for washing and saw that some of the clothes belonging to PW1 had blood stains; she decided to go to school to find out what was the position. PW1 informed her she had had sex with the appellant while taking care of stock; that the appellant had threatened her. She took the complainant to the police to record her statement and later went to Mbeere District Hospital where PW1 was examined and a P3 Form filled.

6. Upon hearing the prosecution case and the defence testimony, the trial court convicted the appellant on all the three counts and acquitted him of the alternative counts. The trial court sentenced the appellant to 10 years imprisonment for count 1, 10 years for Count 2 and 10 years for Count 3. The trial court ordered the sentences to run consecutively.

7. The appellant's first appeal to the High Court was dismissed. The learned Judge observed that PW1 was the only eye witness to this incident; that she explained all that had transpired on oath and was cross examined by the appellant. The High Court observed that PW1 had testified that all the incidents occurred while she was grazing her parents' cattle; she gave graphic details of what occurred and the threats the appellant issued to her. The learned Judge held that the trial magistrate had properly analyzed the evidence and arrived at the correct decision; both the conviction and sentences were confirmed.

8. Aggrieved by the judgment of the High Court, the appellant has lodged a second appeal before this Court. At the hearing of this appeal, the appellant was in person while the State was represented by the Assistant Director of Public Prosecution, Mr. J. Kaigai.

9. The appellant has raised one ground of appeal; he has not appealed against his conviction but on the sentence meted out to him. It is his case that the two courts below erred in ordering the sentences to run consecutively and not concurrently. In his submission, the 10 year sentences meted on counts 1, 2 and 3 should run concurrently.

10. The State in opposing the appeal submitted that the trial court and the High Court were right in law in ordering a consecutive term of imprisonment for counts 1, 2 and 3; as the three offences were committed separately the consecutive sentences are legal.

11. This being a second appeal, it is confined to points of law (See ***Chemagong vs. Republic (1984) KLR 213*** and ***Reuben Karari s/o Karanja vs. Republic 17 EACA146***). The thrust of this appeal is whether the sentences meted on the appellant ought to run concurrently and not consecutively.

12. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of ***Ogolla s/o Owuor, (1954) EACA 270*** wherein the predecessor of this Court stated:

***"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 In Omuse - v- R (Supra) while in the case of Shadrack Kipkoach Kogo –v- R., Eldoret Criminal Appeal No.253 of 2003 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)"***

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

13. In the instant case, it is not in dispute that the appellant was charged with three separate counts under **Section 20** of the **Sexual Offences Act**. Upon conviction, the trial court sentenced the appellant to 10 years imprisonment in each count and directed the sentences to run consecutively. The issue for our determination is 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. For us to make a determination of this issue, we hereby explore the relevant statutory provisions and case law on the subject. **Section 12** of the **Criminal Procedure Code**, stipulates that:-

***"Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass."***

**Section 14** of the **Criminal Procedure Code** provides for circumstances in which a court can direct sentences to run concurrently or consecutively. **Section 14** provides in part as follows:

***"(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently."***

**(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.**

**(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences –**

**(a) of imprisonment which amount in the aggregate to more than fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or**

**(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.”**

**Section 7 (1) of the Criminal Procedure Code stipulates that “**

**(a) a subordinate court of the first class held by a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.**

**(b) a resident magistrate may pass any sentence authorized..... or under the Sexual Offences Act.**

See also the High Court decision in *Ali Abdi Shabura –v- Republic- H.C.CR.A No. 90 of 2007*.

14. In *Ondiek – v- R 1981 KLR 430*, the learned Justices Simpson and Kneller then of the High Court stated that the practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances, the sentences imposed ought to run concurrently. In *Nganga – v- R, 1981 KLR 530*, learned Justices Trevelyan and Sachdeva then of the High Court held that concurrent sentences should be awarded for offences committed in one criminal transaction. In the case of *Sawedi Mukasa s/o Abdulla Aligwaisa (1946) 13 EACA 97*, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences.

15. As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

16. In the instant case, the offences were not committed at the same time and in the same transaction; they occurred on diverse dates. Thus we find that the trial court and the High Court did not err in directing or ordering a consecutive term of imprisonment for the conviction in counts 1, 2 and 3.

17. It is our considered view that the exception in *Section 14 (3)* of the *Criminal Procedure Code* is inapplicable to this case in light of the provisions of *Section 7 (1)* of the *Criminal Procedure Code*. We further observe that *Section 14* of the *Criminal Procedure Code* stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. Applying this provision to the facts of this case, it follows that the consecutive sentences of 30 years imposed on the appellant is to be deemed as a single sentence. With this in mind, the 30 year sentence becomes a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal.

18. We are cognizant of the decision of this Court in **Griffin -vs- R., - Criminal Appeal No. 185 of 1998 (UR)** wherein it was stated that:-

***“The Court of Appeal cannot interfere with the sentence solely on the ground that it was heavy, unless it was also manifestly excessive.”***

See also the case of **Kenneth Kimani Kamunyu -vs- R. (2006) eKLR** where it is stated that this Court can only interfere with the sentence if it is illegal or unlawful:

***“The Court would not act on a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial Judge unless it was evident that the Judge acted upon some wrong principles or overlooked some material factors. Secondly that the sentence imposed on an accused person must be commensurate to the moral blame worthiness of the offender and it was thus not proper exercise of discretion in sentencing for the court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence”***

19. On our part, the appellant did not make any submission to the effect that the consecutive sentences imposed were harsh, excessive, unlawful or illegal. We note that the appellant was charged with an offence under **Section 20** of the **Sexual Offences Act**. As indicated above, **Section 20 (1)** of the Act stipulates that the term of imprisonment for an offence under the Section is a term of imprisonment not less than 10 years. However, there is a provisos that when the female person is under the age of 18 years, the accused person shall be liable to imprisonment for life. In the instant case, the complainant PW1 was a female person under the age of 18 years at the time of the offence and it was not illegal for the trial court to impose a 10 year term of imprisonment for each count. The sentence meted upon the appellant was legal and not unlawful. The points of law that can make an appellate court interfere with the sentence meted on an appellant in the instant case were neither canvassed nor proved in this appeal. In totality, we find that this appeal has no merit and is hereby dismissed.

***Dated and delivered at Nyeri this 16<sup>th</sup> day of December, 2014.***

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**