



**MM v Republic (Criminal Appeal E117 of 2019)
[2023] KEHC 381 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E117 OF 2019
EM MURIITHI, J
JANUARY 26, 2023**

BETWEEN

MM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. E.Mbicha
SRM in Meru Criminal Case SO No.1 of 2017 delivered on 5/2/2019)*

JUDGMENT

1. MM, the appellant herein was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 30/8/2010 at around 1100 am in [Particulars Withheld] village in Meru Central District in Eastern Province, he intentionally touched the vagina of DG with his penis who was to his knowledge his niece. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the material date and place, he intentionally touched the vagina of DG a child aged 4 years with his penis.
2. He denied the charges but upon full trial, he was convicted on the main count of incest and sentenced to 25 years imprisonment.

The Appeal

3. The appellant expresses his satisfaction with his conviction but he takes issue with his 25 years sentence, particularly on the failure by the trial court to order the same run from 2/9/2010, the date of his arrest, in line with the provisions of section 333 (2) of the *Criminal Procedure Code*.



Submissions

4. The appellant submitted that the trial court's failure to order his 25 years sentence to start running from the date of his arrest was contrary to section 333 (2) of the *Criminal Procedure Code*, the Kenya Judiciary Sentencing Guidelines, 2016, *Abamad Abolfathi Mohammed & anor v Republic* (2018) eKLR and *Bethwel Wilson Kibor v Republic* (2009) eKLR. He urged the court to exercise its powers under article 23 of the *Constitution* and order his sentence to run from the date of his arrest.
5. The respondent submitted that the sentence imposed by the trial court was reasonable and warranted in view of the offence committed, taking into consideration the maximum sentence is life imprisonment. It prayed for the dismissal of the appeal in its entirety as the trial court took into consideration the time the appellant spent in prison.

Analysis and Determination

6. The sole issue for determination is whether the trial court took into account the provisions of Section 333 (2) of the Criminal Procedure Code.
7. This being an appeal only against sentence, it is important to set out the principles guiding interference with sentencing by the appellate court. Those principles were restated by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

8. The offence of incest is defined in section 20 (1) of the *Sexual Offences Act*, as relevant, in the following terms:-

“(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, provided that if it is alleged in the information or charge 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.”

9. Then record is clear that the appellant was in custody from 2/9/2010 when he was arrested upto 5/2/2019 when he was sentenced.



10. Section 333 (2) of the *Criminal Procedure Code* provides that:

“Subject to the provisions of section 38 of the Penal Code (cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

11. The importance of taking the pre-trial period into consideration during sentencing cannot be gainsaid. The Court of Appeal in *Abamad Abolfathi Mohammed & Anor v Republic* (*supra*) held as follows:

“...With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody.”

12. It is clear that the trial court contravened section 333(2) of the *Criminal procedure Code* when it passed the imprisonment for 25 years without factoring in the pre-detention period.

ORDERS

13. Accordingly, for the reasons set out above, the appellant’s appeal on the sentence succeeds. The appellant’s sentence of imprisonment for 25 years shall commence from 2/9/2010 when he was arrested.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JANUARY 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Mr. Masila, Principal Prosecution Counsel for DPP.

