



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. E022 OF 2021

DMN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against sentence by Hon. Ndeng'eri in Chief Magistrate's Court

at Embu in Sexual Offence Case No. 19 of 2019 delivered on 09.02.2021).

JUDGMENT

1. The appellant herein filed an undated petition of appeal in which he has challenged the sentence by the trial court in Chief Magistrate's Court at Embu in Sexual Offence Case No. 19 of 2019. The trial court convicted the appellant of the offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006 and sentenced him to serve Forty (40) years imprisonment. He faults the trial court for having failed to take into account his dignity and age in meting out the sentence.

2. It was that sentence that necessitated the instant appeal wherein he has listed Six (6) grounds of appeal. However, from the reading of the submissions filed in support of the said grounds and which submissions he entirely relied on, the appellant challenges the sentence as being harsh and excessive.

3. At the hearing of the appeal, the parties elected to rely on their written submissions to argue the appeal.

4. In the said submissions, the appellant submitted that the sentence was harsh and excessive taking into account the circumstances under which the offence was committed. He reiterated that the appeal is on sentence only, and as such, prayed that this Honourable court do consider the purpose of sentencing and the principles of sentencing being amongst others, to promote rehabilitation of the offender.

5. The appeal is opposed by Ms. Mati, the learned prosecution Counsel wherein she submitted that they are opposed to the review of the sentence in that the sentence is very lenient compared to the punishment as stipulated in the Act. It was submitted that the trial court exercised its discretion properly and this court ought not to interfere with the said discretion. She urged the court to dismiss the appeal and uphold the sentence. Reliance was made on the case of **Ogolla s/o Owuor v Republic [1954] eKLR**.

I have considered the appeal before me and the written submission by both parties. As already indicated, the appeal is mainly on sentence where the appellant becries a harsh and excessive sentence meted unto him.

6. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in **Okeno v Republic [1972] E.A. 32** and re-stated in **Kiilu and another v R (2005) 1 KLR 174** where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination and thereby weigh conflicting evidence and thereafter the court draws its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See **Gunga Baya & another v Republic [2015] eKLR**).

7. Having considered and analyzed the evidence before this court, the issue for determination is whether the appellant has made a case for this court to interfere with the sentence imposed by the trial court.

8. In the case before the trial court, the appellant was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No.3 of 2006 and the particulars of the offence being that on 08.06.2019, at [Particulars Withheld] Village in Embu Township within Embu

County unlawfully and intentionally caused his penis to penetrate into the vagina of PWM who was to his knowledge his daughter.

9. Section 20(1) of the Sexual Offences Act provides that: -

“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.”

10. The court notes that before sentencing, the appellant was offered an opportunity to mitigate and it is clear the trial court indeed noted to have considered the said mitigation before sentencing the appellant to 40 years imprisonment. The trial court did consider the mitigation and other factors before meting the said sentence and so, it cannot therefore be faulted since it had the opportunity to exercise its discretion. The sentence meted out was lawful and legitimate per the provisions of the law. (See Christopher Ochieng v R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011, B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR and Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014). **The appellant did not prove that the sentence was 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.**

11. *In my view, the trial court rightfully considered all material facts before it and further appreciated the objectives of sentencing and so reached a determination that is well founded in the law.* As such, it is my view that in the circumstances of the case, the sentence cannot be said to be excessive and/or harsh. The appellant did not satisfy and/or prove any of the grounds as were pronounced in Bernard Kimani Gacheru v Republic [2002] eKLR.

12. In the above premises, I find that the appeal is in want of merit and I hereby dismiss the same.

13. *It is so ordered.*

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent