



REPUBLIC OF KENYA



KENYA LAW
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**EMN v Republic (Criminal Appeal 47 of 2020)
[2022] KEHC 13077 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13077 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL 47 OF 2020
HPG WAWERU, J
SEPTEMBER 22, 2022**

BETWEEN

EMN APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from original Sentence in Nanyuki CM
Sexual Offence Case No 48 of 2018 – N Thuku, PM)*

JUDGMENT

1. The Appellant herein, EMN, was convicted after trial of incest by a male person contrary to section 20(1) of the *Sexual Offences Act*, No 3 of 2006 (the Act). It was alleged in the charge that on 07/06/2018 at about 9.00 a.m. at [Particulars withheld] Village in Kieni-East Sub-County within Nyeri County, he intentionally caused his penis to penetrate the vagina of one PWN aged 11 years, a female person who was to his knowledge his sister.
2. On 08/05/2020 the Appellant was sentenced to 20 years imprisonment. He appealed against both conviction and sentence; however, on 14/06/2022 he informed this court that he wished to pursue only the appeal against sentence, stating that he was satisfied with the conviction. He repeated this assertion on 12/07/2022 when the appeal first came up for hearing.
3. At the hearing of the appeal the Appellant stated that he was now 29 years old and the first-born in the family; that he was very drunk when he committed the offence; and that the complainant had now forgiven him. He submitted that in these circumstances the sentence imposed upon him was manifestly harsh and excessive. He pleaded for reduction of the sentence to enable him return home and put his life back together.
4. On his part learned counsel for the Respondent opposed the appeal and submitted that the sentence ought to be enhanced to life imprisonment as the complainant was 11 years old. Counsel submitted



further that the sentence provided for under section 20(1) of the Act was mandatory imprisonment for life.

5. Section 20(1) aforesaid provides –

“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.”

Contrary to assertions by learned counsel for the Respondent, the only mandatory sentence provided for in section 20(1) aforesaid is the minimum ten (10) years imprisonment. There is no mandatory life imprisonment provided for. The use of the term “shall be liable to imprisonment for life” simply means that the trial court could, in its discretion, impose life imprisonment if the female person concerned in the offence was alleged in the charge or information to be under eighteen (18) years old, and that age duly proved by evidence. The trial court was thus entitled to impose any sentence between ten years and life imprisonment. It imposed twenty years imprisonment.

6. The Appellant has argued that 20 years imprisonment was manifestly harsh and excessive in the circumstances. What were these circumstances? The Appellant was about 25 years old at the time of commission of the offence. The trial court sought and obtained a victim-impact report from Probation Services. That report stated that the complainant had forgiven the Appellant for the defilement. It was rather surprising that the trial court did not see it fit also to obtain a probation or pre-sentence report on the accused.

7. There was no history of the Appellant previously molesting the complainant or any other child in the family. He was a young man who apparently committed the offence on impulse.

8. Every person deserves a second chance. I am satisfied that the sentence imposed of 20 years imprisonment was manifestly harsh and excessive in the circumstances of this case. The minimum 10 years imprisonment provided by law would have met the ends of justice.

9. I will therefore set aside the sentence of 20 years imprisonment imposed and substitute therefor ten (10) years imprisonment, the same to run from 08/05/2020 when the Appellant was sentenced. To that limited extent only does the appeal against sentence succeed. The appeal against conviction, which was abandoned, is hereby dismissed. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 20TH DAY OF SEPTEMBER 2022

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 22ND DAY OF SEPTEMBER 2022

