



**COO v Republic (Criminal Appeal E005 of 2022)  
[2022] KEHC 14329 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14329 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
CRIMINAL APPEAL E005 OF 2022  
KW KIARIE, J  
OCTOBER 27, 2022**

**BETWEEN**

**COO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O.A case No.12 of 2019 of the Senior Principal Magistrate's Court at Oyugis by Hon.C.A Okore–Principal Magistrate)*

**JUDGMENT**

1. COO, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of the offence were that on diverse dates between the month of November and 23rd day of December 2018 in Rachuonyo North Sub-County within Homa Bay County being a male person caused his penis to penetrate the vagina of DAO, a female person who to his knowledge was his daughter.
3. The appellant was sentenced to serve life imprisonment. The appellant was in person. He has appealed against both conviction and sentence.
4. He raised grounds of appeal as follows:
  - a. That the trial magistrate erred in law and facts when she convicted the appellant and failed to find that the provisions of section 48 of the [Evidence Act](#) Cap 80 laws of Kenya were violated.
  - b. That the pundit trial magistrate erred in law and fact when she convicted the appellant failed to find that the investigation carried out in the instant case were shoddy.



- c. That the learned trial magistrate erred in law and fact when she the appellant and failed to find that the evidence adduced was meagre and flimsy and would not support a safe conviction.
  - d. That the learned magistrate erred in law and fact that when she rejected the appellant's defence.
5. The appeal was opposed by the state through Mr. Ochengo, learned counsel on grounds that:
    - a. The conviction was based on the evidence on record.
    - b. The sentence was proper.
  6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.
  7. Section 20 (1) of the *Sexual Offences Act* 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:
  8. Flowing from the provisions of this section, the ingredients of incest are as follows:
    - a. The accused must be a male;
    - b. The victim must be a female;
    - c. She must be his daughter, granddaughter, sister, mother, niece, aunt or grandmother;
    - d. He must have knowledge of the relationship; and
    - e. There must be penetration.
  9. According to the evidence of DAO (PW1), her stepfather asked her to accompany him to their main house where he went and defiled her. At the time, the appellant had sent his other daughter to the shop and his wife was away in a meeting. The appellant defiled her. When her mother returned to the house, she found the duo where the defilement had taken place. Her evidence was that the appellant had previously defiled her.
  10. EA (PW2) testified that the appellant inherited her after her husband had died. On 23<sup>rd</sup> day of December 2018 she went for a meeting and upon her return, she found the complainant's shoes at the door. She knocked at the door while calling out the complainant. The appellant opened the door as he struggled to wear his pair of trousers. The complainant was still on the ground while half naked.
  11. The complainant was examined by Ayden Omwoyo (PW4) a clinical officer. He found her with a healed broken hymen. He therefore concluded that she had been severally defiled.
  12. I therefore make a finding that the prosecution proved to the required standards that the appellant defiled the complainant herein.
  13. The appellant is a male while the victim was a female who is a step daughter of the appellant. The appellant was aware of this fact and he while testifying he referred to her as such.
  14. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of *Nillson vs. Republic* [1970] E.A. 599, as follows:



The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter 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 will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James Vs. Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R Vs. Shersbewsity* (1912) C.CA 28 T.LR 364.

15. The proviso to section 20 (1) of the *Sexual Offences Act* states:

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.

16. In the instant case, the victim was aged 17 years at the time of the offence. The sentence in the proviso is not mandatory. The learned trial magistrate therefore erred to approach the sentence as if it was mandatory. I therefore set aside the life sentence and substitute it with a sentence of 20 years imprisonment. The sentence will run from when he was sentenced by the learned trial magistrate. To that extent the appeal succeeds.

**DELIVERED AND SIGNED AT HOMA BAY THIS 27<sup>TH</sup> DAY OF OCTOBER, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**

