**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO. 12 OF 2019**

**NRO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in S.O.A case No.4 of 2018 of the Principal Magistrate's Court at Oyugis by Hon. J. Wesonga– Senior Resident Magistrate)*

**JUDGMENT**

1. NRO, 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 25th day of January 2017 and September, 2017 at [Particulars Withheld] sub-location, Rachuonyo North Sub-County within Homa Bay County being a male person caused his penis to penetrate the vagina of MA, a female person who to his knowledge was his niece.

3. The appellant was sentenced to serve life imprisonment. The appellant was represented by James Aggrey Mwamu, advocate. He has appealed against both conviction and sentence.

4. He raised seven grounds of appeal which can be summarised as follows:

a) That the learned trial magistrate erred in law and in fact by failing to consider that the prosecution did not allow defence witnesses to testify.

b) That the learned trial magistrate erred in law and in fact convicting the appellant on a charge that was not proved.

c) That the learned trial magistrate erred in law and in fact by sentencing the appellant to life imprisonment.

5. The appeal was opposed by the state through Mr. Ochengo, learned counsel.

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. Though the appellant contended that he was not allowed to call his witnesses, this is not supported by the evidence on record. When this matter came for defence hearing on 16th April, 2019 his advocate Mr. Bana informed the court that the appellant would give sworn evidence and had no witness to call. Again on 30th April, 2019 the same advocate stated that he had perused the proceedings and that the evidence adduced in defence would suffice. This ground of appeal is therefore baseless.

8. 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:**

9. Flowing from provision of this section, the ingredients for incest under the section 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.

10. The evidence of MA (PW1) pointed the appellant as the person who defiled her. She testified that he was her father's brother. She was therefore his niece. Her evidence was that the first time he defiled her was at her grandmother's home. When Dievon Harun Ajwang (PW5) examined her, he found her to be seven months pregnant. This is a girl aged 15 years. The prosecution therefore proved that there was penetration into her genitalia.

11. The appellant is a male while the victim was a female.

12. It is not in doubt that the victim was a niece of the appellant. The appellant was aware of this fact and he while testifying he referred to her as such.

13. Other than the victim's evidence that the appellant defiled her, the DNA report after the baby was born indicated that the appellant was 99.99% the father of the child. The penetration was therefore proved.

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. SHERSHEWSITY (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 15 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 19TH DAY OF OCTOBER, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**