



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 22 OF 2016

J M M APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No.299 of 2016 of the Senior Resident Magistrate's Court at Githongo by C.A Mayamba– Senior Resident Magistrate)

JUDGMENT

The appellant, **J M M**, was charged and convicted for the offence of incest contrary to section 20 (1) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on divers dates between the year 2013 and 2016 at **particulars withheld**, in Imenti Central District of Meru County caused his penis to penetrate the vagina of **E.W.M** who to his knowledge was his daughter.

The appellant was sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant raised three grounds of appeal as follows:

- 1.That the learned trial magistrate erred in law and fact by failing to appreciate that some vital information was not disclosed at the trial.
2. That the learned trial magistrate erred in law and fact by convicting the appellant while relying on contradictory evidence.
- 3.That the learned trial magistrate erred both in law and fact by formulating own theory to convict the appellant.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case were briefly as follows:

The appellant's wife used to be away from home in pursuit of business engagements. The appellant used this opportunity to lure the complainant to sexual liaison since the year 2013 when the complainant was in class seven. The same was uncovered when the complainant became pregnant. She revealed that the appellant was responsible.

On his part the appellant contended that he was falsely implicated.

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**.

Other than the contention of the appellant that vital information was kept away from the court, my careful perusal does not disclose any such information. He ought to have pointed out the information so as to assist the court establish whether the information was vital or not. His first ground therefore lacks merit.

E.W.M narrated how she first encountered the appellant sexually. She said this was in the year 2013 when she was in class seven. Her father volunteered to teach her how to clean her genitalia well. After the lessons, he penetrated her anal orifice with his penis. He warned her not to tell anybody. He continued to have anal intercourse with her until November 2015 when he had sex with her per vagina. Her evidence was that the appellant took advantage of her mother's absence to have sex with her.

When she reported to her mother, the appellant threatened her mother with an axe.

T M N (PW2) testified that after she was called at her daughter's school and informed that she was pregnant, the complainant implicated the appellant. This is when she disclosed to her what the appellant used to do while she was away. When she confronted the appellant, he threatened that they were all going to die. He went and picked an axe.

The medical evidence by **Dr. Samuel Mutegi (PW3)** was that the complainant was sexually active and that she was pregnant.

I have not only perused the evidence on record but also rehashed the salient areas of the same. I have found no contradictions.

The learned trial magistrate considered the appellant's defence before dismissing it and rightly so. Though he claimed that his wife was having an affair with **on Mworio**, during cross examination he said he has had good relationship with her until 2016. This therefore informed the trial magistrate in dismissing his defence.

The learned trial magistrate was informed by the evidence on record to rely on the proviso to section 124 of the evidence Act to believe the complainant. It states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

I have no reasons on record to make me doubt the complainant's evidence. The decision of the learned trial magistrate was not based on a theory but on sound evidence that was adduced by the prosecution.

Section 20 (1) of the Sexual Offences Act provides as follows:

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.

Considering that our law has not limited life imprisonment to a specific period I am persuaded to temper the sentence with mercy though undeserved. I will reduce the sentence from life imprisonment to 30 years imprisonment. To that extent only the appeal succeeds.

DATED at Meru 19th day of December 2016

KIARIE WAWERU KIARIE

JUDGE