



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 70 of 2012

D M N APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal against both conviction and sentence of the Senior Resident

Magistrate's court at Butere in Criminal Case No. 730 of 2010

[E. S. OLWANDE, SRM] dated 23rd November 2010)

JUDGMENT

The appellant **D M N** was charged in the subordinate court with incest contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that in the month of April 2010 at [PARTICULARS WITHHELD] within Western Province, being a male person used his penis to penetrate the vagina of ZK a female person who was to his knowledge his daughter aged 16 years.

He was recorded as having pleaded guilty to the charge. He was convicted and sentenced to serve 25 years imprisonment. He has now appealed to this court. His grounds of appeal are as follows:-

1. That he is both remorseful and apologetic as regards the commission of the offence and the sentence pronounced against him is extremely excessive in the circumstances considering that he has become a born again (saved) Christian and is praying for a non-custodial sentence.
2. That the sentence be set aside and a non-custodial sentence be preferred.
3. That he be pardoned and acquitted altogether.

The appeal therefore is against both conviction and sentence.

At the hearing of the appeal, the appellant submitted that the trial was his first time in court. That he was persuaded by the police officer who was with him to agree that he had committed the offence. He also submitted that he wanted to be released.

The learned State Counsel Ms Ngovi submitted that the record was clear that the appellant unequivocally pleaded guilty to the charge before the magistrate and then asked for pardon. Counsel emphasized that the appellant said before the trial court he was tempted by satan. Therefore he knew what he did and that it was wrong. Counsel lastly submitted that the appellant was lucky not to have been imprisoned for life.

This is an appeal from a conviction on a recorded plea of guilty. The appellant is not claiming that he did not plead guilty to the charge, but that a police officer persuaded him to plead guilty to the charge. He did so because he was not familiar with court process, as it was his first time to come to court.

I have perused the record. In my view the appellant understood what he was charged with. The language used was Kiswahili which he understood. The charge was read to him first on 16/11/2010 when he stated "It is true." The facts were then not ready and they were given on 23/11/2010 and he accepted them and was convicted. In mitigation, he stated that he was tempted by satan and sought pardon. In my view, what the appellant is trying to do now on appeal is to attempt to change his plea after a proper conviction. That in law is not permissible – see **Okello -VS Republic** [1969] EA 378. I will dismiss the appeal on conviction.

With regard to sentence, the maximum sentence for the offence charged is life imprisonment. The appellant was a first offender and was sentenced to serve 25 years imprisonment. Sentencing is a discretion of a trial court. The sentence, though severe, is neither harsh nor excessive nor illegal. Account must be taken, of the fact that the appellant as the father was the keeper and protector of his daughter, the complainant. This is certainly not a case for a non-custodial sentence, as it is apparent that the appellant even got a child with the complainant (his daughter) arising from the said incestuous relationship. A custodial sentence is called for, and on that I agree with the learned magistrate.

In the result I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence.

Dated and delivered at Kakamega this 14th day of March, 2013

George Dulu
J U D G E