



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 109 OF 2011**

**J M M .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Yatta Senior Resident Magistrate's Court,  
Criminal Case No. 27/2010 by Hon. A.W.Mwangi on 30/11/2010)*

**JUDGMENT**

1. **JMM**, the appellant was charged with the offence of incest by male person contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. In the alternative, committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, No. 3 of 2006.
2. In count 2, the charge is deliberate transmission of HIV contrary to section 26(1) (a) of the Sexual Offences Act, No. 3 of 2006. He was convicted on his own plea of guilty on the charge of incest and deliberate transmission of HIV.
3. He now mitigates on sentence. The appeal was based on grounds that having pleaded guilty he saved courts time; he committed the offence under the influence of alcohol; he is now reformed; the sentence imposed is too harsh and excessive; and he is the sole breadwinner of his family which will suffer.
4. At the hearing he emphasized the fact that the sentence is harsh.
5. The learned State Counsel, **Mr. Mwangi** stated that the complainant was the accused's daughter aged nine (9) years whom he had carnal knowledge of and deliberately infected her with HIV. He asked the court to confirm the sentences meted out which were within the law.
6. The appeal being against sentence, I will not delve into details of facts of the case perpetrated that were admitted by the appellant leading to conviction. This would however call on me to consider what was relevant to the sentence meted out.
7. In arriving at the sentences, the trial court took into consideration the nature of the offences committed and deemed the minimum prescribed sentence for each offence suitable. What the trial court failed to appreciate was the fact that the appellant abused the trust the child had in him as a parent. She was infected with a deadly disease which is as good as being handed a death sentence. In the circumstances, though the sentence was permitted by statute, it was disproportionate.
8. Section 354 (3) (b) of the Criminal Procedure Code empowers me to enhance sentence where I find appropriate. This is a case that calls for increase of sentences imposed. I therefore dismiss the appeal on sentence, set aside sentences imposed and order as follows:-

**Count 1** – the appellant shall now serve **15 years** imprisonment.

**Count 2** -the appellant shall serve **25 years** imprisonment. Sentences to run concurrently.

9. It is so ordered

**DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of OCTOBER, 2013.**

**L.N. MUTENDE**

**JUDGE**