



(From original conviction and sentence in criminal case No. 192 of 2011 of the Principal Magistrate's Court at Nyahururu - A. B. Mongare, SRM)

P N W.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was convicted and sentenced to twenty years imprisonment on his own plea of guilty to the offence of incest contrary to Section 20(1) of the Sexual Offences Act, 2006 (*No. 3 of 2006*).

Aggrieved with his sentence, the appellant has appealed to this court on grounds of sentence.

Section 348 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*) expressly forbids the court from entertaining any appeal (*where an appellant has been convicted on his own plea of guilty*) except on the legality and extent of sentence.

Section 20(1) of the Sexual Offences Act creates both the offence and punishment for the offence of incest by male persons. Where the victim of the incest is under the age of eighteen years, the punishment is imprisonment for life, but is otherwise ten years imprisonment.

In his Memorandum of Appeal, the appellant states that he is very remorseful and repentant, that he was misled by alcohol, and he has mended his ways, and would not repeat such acts again. He also says that he is the sole breadwinner, and that he has school going children who depend on him for fees and other expenses. He therefore prayed for a non-custodial sentence, or at the very least a reduction of his sentence.

At the hearing the appellant nearly recounted the above factors, and instead stated he was handed over to the Police under a citizen's arrest and had been beaten by the angry mob on discovering the appellant had been molesting his own daughter, a girl aged 14 years of age.

Mr. Omari, learned State Counsel opposed the appeal. He supported both the conviction and sentence. His grounds were **firstly**, that the appellant had pleaded guilty. **Secondly** the appellant confirmed the facts when read by the prosecution to him, "**as true**". **Thirdly** in mitigation the appellant had told the court that when he sleeps with his wife, she experiences pain and that the doctors say "**his male organ is too big.**"

In his address to the court, the appellant said that he had been subjected to mob-justice and had been beaten and did not know what was happening in court, and that the court should therefore have a look at the evidence before the lower court.

There was of course no evidence before the lower court. The Appellant had pleaded guilty. The proviso to Section 207(2) of the Criminal Procedure Code requires the prosecution to outline to the court the facts upon which the charge is founded, and if the accused does not admit the truth of the charge, the court is

required to enter a plea of "**not guilty**" and to proceed to trial in the usual or prescribed way through the calling of evidence for and against the charge.

In this case, the appellant pleaded guilty, and the court complied with the requirements of the proviso to Section 207(2) of the Criminal Procedure Code as stated above. The appellant when asked, stated that the facts as outlined by the prosecution were true. The Appellant in mitigation blamed the size of his "**manhood**" for the offence.

Taking the appellant's submissions, and submissions of State Counsel, there is no cause for interference with the sentence upon the appellant. I would say, the sentence of ten years was lenient upon him. His daughter was fourteen years of age, and in my view, intelligent enough to fight against her father's advances. To her credit on the second occasion she struggled and raised alarm which attracted her mother, who alerted the neighbours and had the appellant disciplined as best mobs know, a few slaps and kicks here and there, but not enough to make the appellant not follow proceedings on 21st January 2011, some 5 days after the event of 16th December 2010.

It is standard procedure for an accused to be taken to hospital before being arraigned or on orders of court. There was no evidence that the accused had suffered any injury which would have made him unable to follow the proceedings or take the plea. In any event he was given opportunity to explain himself. He blamed his act to alcohol, the attack on his daughter was not a cure to the size of his manhood. Here is a depraved soul. Sometime in prison may rehabilitate him.

The appellant treated his daughter badly. When the child went to ask for a match box in her father's bedroom, he invited his daughter to sit on his bed, and bewildered, the appellant pounced and grabbed, tore her underpants, covered her mouth with his hand and defiled her. The victim managed to scream and attracted the attention of her mother who called members of the public who arrested, and took him to Ngarua Police Station. The Police then took the victim to the local Health Centre, where it was confirmed that the child had been defiled. The appellant confirmed all this.

A father is a custodian of his children, particularly his daughters. He gives them a fish not a snake when they ask or beg him. It is a wicked father who turns to his girl child for sexual satisfaction. It is a cursed and damned son who turns to his mother for such satisfaction. The appellant blamed alcoholic intoxication for his act. Alcohol is drunk, like tea or coffee - do not drink if it causes heart burn or sickly palpitations. The desire comes from within, not without. In this case, it was not the first act, the child had clearly got unhappy and resisted, and screamed when able.

The sentence of twenty years was proper. I will not interfere with it.

I find no merit in this appeal and dismiss the same.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20TH day of JULY 2012

M. J. ANYARA EMUKULE
JUDGE