



REPUBLIC OF KENYA



KENYA LAW
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**SHR alias K v Republic (Criminal Appeal E023 of 2023)
[2024] KEHC 1452 (KLR) (15 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1452 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E023 OF 2023
JN ONYIEGO, J
JANUARY 15, 2024**

BETWEEN

SHR ALIAS K APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against sentence by Hon. J.J. Masiga in the Principal
Magistrate's Court at Dadaab in MSCO No. 8 of 2022 delivered on 10.06.2023)*

JUDGMENT

1. The appellant herein filed an undated petition of appeal filed on 22.08.2023 in which he has challenged the sentence by the trial court in Principal Magistrate's Court at Dadaab in MSCO No. 8 of 2022.
2. The appellant had been charged with the following counts to wit:
3. Count I: Incest contrary to section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on 15.05.2022 at around 0500hrs in Garissa County, he intentionally caused his penis to penetrate the vagina of DSH, a child aged 16 years who was to his knowledge his daughter.
4. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on 15.05.2022 at around 0500hrs in Garissa County, he intentionally and unlawfully touched the buttocks of DSH, a child aged 16 years.
5. Count II: Rape in the view of a family member contrary to section 7 of the [Sexual Offences Act](#) No. 3 of 2006. Particulars were that on 15.05.2022 at around 0500hrs in Garissa County, he intentionally caused his penis to penetrate the vagina of LHA, in the view of DSH a child aged 16 years.
6. The trial court convicted the appellant of the offence of incest contrary to section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced him to serve life imprisonment and in Count II, a 10-year imprisonment. The same were to run concurrently.



7. It was that sentence that necessitated the instant appeal wherein he has listed three (3) grounds of appeal. However, from the reading of the submissions filed in support of the said grounds and which submissions he entirely relied on, the appellant is only challenging the sentence as being harsh and excessive. He faulted the trial court for having failed to take into account his dignity in meting out the sentence.
8. At the hearing of the appeal parties elected to rely on their written submissions to argue the same.
9. In the said submissions, the appellant submitted that the sentence was harsh and excessive taking into account the circumstances under which the offence was committed. He reiterated that the Honourable court do consider the purpose of sentencing and the principles of sentencing being amongst others, to promote rehabilitation of the offender.
10. The appeal is opposed by Mr. Kihara, the learned prosecution Counsel who submitted that the prosecution proved its case beyond any reasonable doubt. That from the evidence adduced, the appellant used force against PW2 to have sex and further with PW1 who was his biological daughter. The prosecution urged this court to find that the appellant was culpable of the offences charged.
11. On sentence, counsel urged that the sentence invoked by the trial magistrate was not only legal but also appropriate noting the circumstances of the case and therefore, the same should be upheld. Generally, the respondent urged this court to dismiss the appeal herein for the same was devoid of merit.
12. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in *Okeno v Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination and thereby weigh conflicting evidence and thereafter the court draws its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See *Gunga Baya & another v Republic* [2015] eKLR).
13. Having considered and analyzed the evidence before this court, the issue for determination is whether the appellant has made a case for this court to interfere with the sentence imposed by the trial court.
14. In the case before the trial court, the appellant was charged with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No.3 of 2006 and that of rape contrary in the view of a family member contrary to section 7 of the *Sexual Offences Act* No. 3 of 2006.
15. Section 20(1) of the *Sexual Offences Act* provides that: -
 - a. “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.”
16. Section 7 of the *Sexual Offences Act* No. 3 of 2006 stipulates that:

A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.



17. The court noted that before sentencing, the appellant was offered an opportunity to mitigate but instead, chose to remain silent thus left his fate unto the hands of the court. The trial court did consider the mitigation and other factors before meting out the said sentence and so, it cannot therefore be faulted since it had the opportunity to exercise its discretion. The sentence meted out was lawful and legitimate as per the provisions of the law. (See *Christopher Ochieng v R* [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011, *B W v Republic* KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR and *Jared Koita Injiri v Republic*, KSM CA Criminal Appeal No. 93 of 2014).
18. The above notwithstanding, the Court of Appeal in the case of *Evans Nyamari Ayako v Republic* Criminal Appeal No. 22 of 2018 at Kisumu set aside the life imprisonment upheld by the High Court with a sentence of 30 years. The appellant had been charged with the offence of defilement contrary to section 8(2) of the *Sexual Offences Act*. The court of appeal held that life imprisonment should be pegged at the maximum of 30years. Given the cruel circumstances under which the offence was committed, I am inclined to uphold the sentence of 30 years being the maximum sentence for life imprisonment.
19. In view of the above holding, the following orders shall apply.
- i. The sentence in respect of Count I is reviewed from the indefinite life imprisonment to 30 years' imprisonment.
 - ii. The sentence in respect to Count II is hereby upheld.
 - iii. The said sentences to run concurrently.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 15TH JANUARY, 2024

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J.N.ONYIEGO

JUDGE

