**JKM v Republic (Criminal Appeal E045 of 2020)**
**[2024] KEHC 3023 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3023 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NANYUKI**

**CRIMINAL APPEAL E045 OF 2020**

**AK NDUNG'U, J**

**MARCH 12, 2024**

**BETWEEN**

**JKM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. The Appellant in this appeal, John Kariuki Mainawas convicted on his own plea of guilty of incest contrary to section 20(1) of the *Sexual Offences Act* No.3 of 2006. On 15/10/2019, he was sentenced to seventeen (17) years imprisonment.

2. The particulars were that on the 10/10/2019 at Chuma area in Laikipia Central Sub-County of Laikipia County being a male person caused his penis to penetrate the vagina and anus of Leah Wairimu Maina a female person who was to his knowledge his sister aged 22 years old.

3. The Appellant has appealed against the sentence only. He filed a document titled 'appeal in mitigation and written submission praying a reduction of the sentence' and raised the following grounds of mitigation;

    i. That he was young when he committed the offence and therefore pleads leniency.

    ii. He was a first offender.

    iii. That he is remorseful.

    iv. That he is a law abiding citizen.

    v. That he has done a biblical course as part of rehabilitation.

4. In his written submissions, he argued that the complainant was his sister and therefore the court should adopt a reconciliatory approach. That Article 50(2) (p) of *the Constitution* provides that an accused

person has a right to benefit from the least severe prescribed punishment for the offence and therefore, lesser sentence ought to be considered. That the offence he was charged with provides for a sentence of not less than 10 years and since he was a first offender, he has reformed and has studied theology, a lesser sentence should be considered. Further, he is remorseful and regret the actions, he is sorry for the shame he brought upon himself and his family. That he has no discipline case in the prison and has done several courses with assistance of prison staff and will use the acquired skills by impacting positively to the youths to live in a purpose driven life. Further, there were no aggravating circumstances as there was no loss of life, maiming or injury which was inflicted. He therefore urged the court to consider that the period of five years behind bar has been enough.

5. In opposing the appeal, the Respondent submitted that the plea of guilty was unequivocal as the procedure for taking plea complied with the provision of Section 207 of the Criminal Procedure Code and thereby no appeal can lie on conviction as per section 348 of the Criminal Procedure Code which bars appeal against conviction where an Accused person has pleaded guilty except to the legality of the sentence. As to the sentence, the sentence was legal and that sentencing is at the discretion of the trial court and a higher court should not interfere of the exercise of the discretion by the lower court unless it is shown that the lower court exercised its jurisdiction injudiciously, that the sentencing court took into account an irrelevant factor or the wrong principle was applied and the sentence was excessive and therefore an error of principle (Mokela vs The State (135/11) (2011) ZASCA 166).

6. That the Appellant has not urged any circumstances to show that the trial court took into consideration a wrong factor or principle. He was given an opportunity to mitigate but failed to do so but the court considered the fact that he was a first offender and had saved court time by pleading guilty. The trial court also considered the aggravating factors. Further, even though the Appellant claimed that he has reformed, the trauma that was instilled to the complainant, which the Appellant affirmed in his mitigation is a lifetime trauma that the complainant will continue to suffer. Therefore, the sentence imposed was justifiable considering the aggravating circumstances.

7. This being an appeal against the sentence only, my duty was to evaluate the record only. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court. The Appellant has not challenged his conviction and the manner the plea was taken. He pleaded guilty and the trial court gave him time to reconsider his plea after warning him on the gravity of the offence and the possible sentence and after he was brought to court a second time, he proceeded to plead guilty. Facts were read to him which he admitted and the trial court proceeded to convict him.

8. As to the sentence, The Appellant was accused of contravening the provisions of Section 20(1) of the *Sexual Offences Act* which provides thus;

> "
>
> "(1) 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."

9. The particulars of the charge stated that the complainant was the Appellant's sister aged 22 years old. The Appellant in his submissions admitted that the complainant was his biological sister. The above provision states that one is liable to imprisonment for a term of not less that ten years which means that this is the minimum sentence for the offence of incest.

10. As seen earlier the Appellant was sentenced to seventeen (17) years imprisonment which is way above the prescribed sentence of 10 years. In enhancing the sentence, the trial court duly took into account the fact that the Appellant did not mitigate before the trial court despite being given a chance to do so but the trial court considered the fact that he was a first offender and saved the court time by pleading guilty in the first instance as his mitigation.

11. The trial court further considered the aggravating circumstances in that, the trial court stated that the Appellant did not express remorse, the offence was committed at night when the complainant could not get help, the Appellant strangled the complainant to prevent her from screaming, that the Appellant not only penetrated the complainant through her vagina but also through her anus, that the Appellant slapped the complainant continuously to silence her and also beat her mercilessly. The court also considered the psychological torture the offence caused the complainant.

12. As submitted by the Respondent's counsel, sentencing is at the discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (Ogolla S/o Owuor v R {1954} EACA 270).

13. Apart from the mitigating factors, the Appellant did not allege any of the above principles.

14. He further pleaded that he is entitled to the least severe sentence as provided under Article 50(2)(p) of *the Constitution*. The said Article provides that;

> "(2) Every accused person has the right to a fair trial, which includes the right-
>
> (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."

15. A reading into the said Article relates to a right an accused person is entitled to in a case where the prescribed punishment has been changed between the time the offence was committed and the time of sentencing. There has not been any change in the said *Sexual Offences Act* with regard to the punishment for the offence which the Appellant was charged with. As such, the provisions of Article 50 (2) (p) of *the Constitution* do not, and cannot apply to this case.

16. On the whole, the Appellant has not demonstrated that in sentencing, the trial court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. In the premises the appeal fails and is dismissed.

**DATED SIGNED AND DELIVERED AT NANYUKI THIS 12TH DAY OF MARCH 2024.**

**A.K. NDUNG'U**

**JUDGE**