



**MOO v Republic (Criminal Appeal E011 of 2024)
[2024] KEHC 5930 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E011 OF 2024**

**KW KIARIE, J
MAY 23, 2024**

BETWEEN

MOO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O.A case No. E044 of 2023 of the Chief Magistrate’s Court at Homa Bay by Hon. C.A.S. Mutai–Senior Principal Magistrate)

JUDGMENT

1. MOO, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence were that on diverse dates between February 2022 and the 28th day of February 2023 at [particulars withheld] village of [particulars withheld] sub-county in Homa Bay County being a male person caused his penis to penetrate the vagina of EAO, a female child aged fourteen years, who was to his knowledge his daughter.
3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence. The appellant was in person. He raised the following grounds of appeal:
 - a. That the trial court erred in both law and facts by failing to verify the variation in dates the allegations occurred.
 - b. The trial court erred in both law and fact by failing to appreciate the gravity of the offence charged, a misstep that could significantly affect the severity of the charges.
 - c. That the trial court erred in both law and fact by failing to table whether there wasn’t a vendetta between the two parties.



- d. The trial court erred in law and fact by failing to verify the complainant's age.
 - e. The trial court erred in law and fact by failing to ascertain the charges against the appellant.
 - f. That mandatory life sentence denied the appellant a fair trial.
4. The state opposed the appeal. It was contended that the prosecution proved its case to the required standards and that the appeal lacked merit.
 5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of *Okeno v Republic* [1972] EA 32 to guide my decision-making process.
 6. Section 20 (1) of the *Sexual Offences Act* provides:

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.

7. From the provisions of this section, the ingredients for incest are as follows:
 - a. The accused must be a male;
 - b. The victim must be a female;
 - c. She must be his daughter, granddaughter, sister, mother, niece, aunt or grandmother;
 - d. He must know the relationship; and
 - e. There must be penetration.
8. The prosecution evidence is that the appellant was the complainant's stepfather, which the appellant conceded. Is a stepfather, for section 20 (1) of the *Sexual Offences Act*, a father? The Court of Appeal resolved this issue in the case of *LOA v Republic* [2020] eKLR as follows:

The appellant submits that, being a stepdaughter, she was not his daughter. That a stepdaughter is not one of the persons with whom a male person is guilty of incest if found to have had sexual intercourse with. On the other hand, the respondent takes a contrary view; that a step-daughter is just as good as a daughter as she is among the persons whom a parent is prohibited from having sex with. Section 22 of the *Sexual Offences Act*, sets out the persons with whom having sex with will amount to incest. These are brother, sister, half-brother, half-sister, adoptive brother and sister, father, half-father, uncle of first degree, mother and mother and an aunt of the first degree. No doubt the appellant was PW1's half-father and or stepfather. Therefore, the two having sex was incestuous.

9. There is no doubt that the relationship between the appellant and the complainant was between the father and daughter.



10. A certificate of the complainant's Birth was produced as a prosecution exhibit. It indicates that she was born on October 20, 2008. As of February 2022, she was thirteen years and four months old.
11. It was established that the complainant was under the age of eighteen years.
12. The complainant testified that the appellant defiled her severally between February 2022 and February 2023, and she became pregnant. She gave birth to a baby who unfortunately died.
13. After the baby died, some samples were taken from her, the complainant and the appellant. The sample revealed that the appellant was the father of the complainant's baby. This proved penetration beyond a shadow of a doubt.
14. The appellant claimed he was innocent and falsely accused due to a boundary dispute and issues with his wife. However, the DNA results proved that he was indeed the father of the complainant's baby, making his defence invalid. As a result, the trial court's decision to convict him cannot be challenged.
15. The appellant contended that the sentence meted out was very harsh. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] EA 599, as follows:

The principles upon which an appellate court will exercise its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. (*R v Shersbewsity* (1912) CCA 28 TLR 364).

16. The proviso to section 20 of the [Sexual Offences Act](#) states:

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.

17. The complainant in count one was fourteen years old at the time of the offence. The law views incest as a more severe offence than defilement, not only because it is repugnant to morality but also because trust is betrayed. However, I am persuaded to interfere with the sentence to mete out a determinate sentence. The sentence by the learned trial magistrate is set aside and substitute it with a sentence of thirty years imprisonment. The sentence will run from the 18th day of September 2023, for he remained in custody during the trial.
18. The appeal only succeeds to that extent.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF MAY 2024

KIARIE WAWERU KIARIE

JUDGE

