REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 29 OF 2019

SMR.....APPELLANT

- VRS -

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. J. Macharia – PM Keroka dated and delivered on the 20th September, 2013 in the original Keroka Principal Magistrate's Court Criminal Case No. 1108 of 2012}

JUDGEMENT

On 20th June, 2013 the court below sentenced the appellant to life imprisonment for the offence of incest contrary to Section 20 (1) of the Sexual Offences Act.

The particulars of the charge were that on 21st August, 2012 in Masaba South District within Kisii county the appellant being a male person caused his penis to penetrate the vagina of SBM a female person who was to his knowledge his daughter.

The appellant being aggrieved by the conviction and sentence preferred this appeal. In summary it is his contention that the charge against him was not proved beyond reasonable doubt, that his defence was ignored and that the sentence meted by the trial court was manifestly harsh and oppressive.

At the hearing of the appeal the appellant relied on written submissions while counsel for the respondent submitted orally. While I have carefully considered their submissions the law places upon me an obligation to reconsider and evaluate the evidence before the trial court so as to arrive at my own independent conclusion. I do so bearing in mind that unlike the trial court I did not see or hear the witness (***See Okeno v Republic (1972) EA 32***.)

The complainant Sarah Bitutu gave evidence on 20th September 2012 as PWII, the first witness having been her mother AMM (PW1). PWI gave evidence that upon her returning home the complainant told her that the appellant took her to an incomplete house and undressed her and started to rape her; that he made her to lie on a sack, removed her inner wear and inserted his penis into her vagina and did bad things to her. She further testified that she examined the child's genitalia and saw some whitish fluid and that her son Richard told her that he found the appellant on top of the complainant. This evidence was however negated by the complainant who while confirming that the appellant had taken her to the incomplete house and removed her underpant as he usually did, stated that on this occasion, he did not do anything because her brother found them and the appellant felt bad. Her exact words were: -

> **"You wanted to lie on top of me. You did not do anything on me as my brothers came and met you before you had done anything. You wanted to have sex with me. Richard met you……"**

On his part Richard Mabera (PWIII) testified that when he went to look for the complainant he found her and their father in a dark room in a house that was incomplete but he did not see what they were doing. It was his evidence that it was the complainant who told him and their brother S that the appellant had done bad things to her with his penis. It is clear that whereas the appellant may have had carnal knowledge of the complainant previously he did not do so on this occasion. It is my finding however, that the evidence on record proves beyond reasonable doubt that he attempted to defile her. There is evidence that corroborates her evidence that he took her to an incomplete building and removed her clothes but stopped when his son Richard appeared. Although Richard did not see what the two of them were doing because the place was dark he confirmed finding the two of them in a dark room in the incomplete building. The appellant's act of undressing his own daughter could only mean that he intended to have sexual intercourse with her. Therefore, the offence proved was one of attempted incest contrary to Section 20 (2) of the Sexual Offences Act. Indeed, on the day the appellant was arrested by Thomas Michoma Mogute (PWIV) he admitted to have defiled the complainant before but maintained that he had not done it on the material day meaning that the complainant could not have fabricated the evidence against him. It is my finding therefore that his defence was a sham. Accordingly, his appeal succeeds only to the extent that the conviction for incest under Section 20 (1) is quashed and substituted with one for attempted incest Contrary to Section 20 (2) of the Sexual Offences Act.

As for the sentence, he was sentenced to serve life imprisonment which I would have upheld had it been proved that he had defiled his own daughter several times. The sentence is however manifestly harsh for attempted incest whose minimum is a sentence of not less than ten (10) years. Noting that mandatory minimum sentences have in any case been declared unconstitutional and noting that the appellant has been in prison for six (6) years, I set aside that sentence and substitute it with one for the period already served. It is so ordered.

Signed, dated and delivered in open court this 5th March 2020.

E. N. MAINA

JUDGE