



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 123 OF 2018**

**HAM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the original conviction and sentence by Hon. D. Nyambu,*

*Chief Magistrate, in Kwale Chief Magistrate's Court Sexual Offence No. 27 of 2017).*

**JUDGMENT**

1. On 30<sup>th</sup> August, 2018 the appellant was convicted on his own plea of guilty for the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on diverse dates between January and February, 2017 at [Particulars Withheld] village Tiwi location in Kwale County within Coast region, he intentionally caused his penis to penetrate the vagina of MR [name withheld] a person who was to his knowledge his granddaughter. He was sentenced to life imprisonment.

2. On 17<sup>th</sup> October, 2018 the appellant filed his petition and grounds of appeal. With leave of the court, he filed his amended grounds of appeal on 10<sup>th</sup> December, 2019. In the said grounds of appeal the appellant raised issues that the sentence imposed on him was harsh and excessive, that the new born child needs his father's care and that he never wasted the court's time as he was remorseful and pleaded guilty to the charge.

3. In his submissions, the appellant stated that the minimum sentence for the charge of incest is 10 years imprisonment but he was sentenced to life imprisonment. In his view the sentence is harsh and excessive as that is the maximum sentence for the offence of incest. He stated that his mitigation was not considered. He relied on the case of **Hamisi Bakari and Another v Republic** [1987] eKLR, where the court stated that where a heavy minimum sentence is involved, lower courts should be particular to see that each ingredient in the charge as reflected in the particulars of the offence is properly proved and that 7 years was a long time to serve in a case where the issues were not clear.

4. The appellant submitted that although the complainant was disabled, she gave birth to a child who is in need of his father's care. He cited the case of **Hamisi Masudi Gambere v Republic** [2019] eKLR, where a child was born out of an offence of defilement and the Judge reduced the sentence from 15 years to 11 years imprisonment to enable his father to return to society and take care of his child.

5. The appellant stated that the complainant was 26 years old and it was unfair for the sentence of life imprisonment to be imposed on him. He also pointed out that as a sign of remorse, he never wasted the court's time by going through a full trial, when he realized that the child was his. He prayed for his appeal to be allowed.

6. On 12<sup>th</sup> February, 2020 Ms Mwangeka, Prosecution Counsel filed written submissions to oppose the appeal. She seems to have lost sight of the fact that after PW3 who was a Government Analyst produced DNA results which established that the appellant had sired the child PW1 had given birth to, he changed his plea and pleaded guilty to the offence of incest. The Prosecution Counsel went ahead to analyze the evidence which had been adduced by witnesses before the appellant had a change of heart and opted to plead guilty.

7. This court has perused the manner in which the plea was taken and it is satisfied that the Trial Magistrate followed the guidelines for plea taking as laid out in the case of **Adan v Republic** (1973) EA 443. The plea was therefore clear and unequivocal.

8. The only issue for determination is whether the sentence imposed on the appellant can be said to be either harsh or excessive. The victim of the incest MRM [name withheld] was epileptic. A copy of her card issued by the National Council for Persons With Disabilities which identified her as a person living with disability was produced in evidence. The nature of her disability touches on her mental capacity.

9. The appellant as per the facts read out in court was a grandfather to the victim. When he was given an opportunity to mitigate he asked to be given the infant born out of the sexual liaison with the victim, so that he could take care of her. This court however notes that the appellant only admitted his culpability after the Government Analyst produced the DNA report incriminating him in the commission of the offence. DNA analysis revealed that there was a 99.9% probability that the appellant was the father of the child borne by the victim.

10. This court notes that there were aggravating circumstances in this case as the victim was suffering from mental disability. The appellant therefore took advantage of a person who might never have spoken about the incest if she had not become pregnant. The proceedings of 4<sup>th</sup> September, 2017 indicate that her mother was appointed an intermediary by the court so as to give evidence on the victim's behalf. The victim was therefore vulnerable.

11. Noting that the appellant eventually pleaded guilty to the charge of incest, which was an admission of his wrongdoing, this court is of the view that the sentence of life imprisonment imposed on the appellant was harsh. In line with the decision in **Jared Koita Injiri v Republic** [2019] eKLR, I substitute the sentence of life imprisonment with a determinate sentence of 30 years imprisonment. In line with the provisions of Section 333(2) of the Criminal Procedure Code, the sentence will be effective from 23<sup>rd</sup> July, 2017 when the appellant was first arraigned in court. The appeal succeeds only to the above extent.

**DELIVERED, DATED and SIGNED at MOMBASA on this 17<sup>th</sup> day of July, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Appellant present in person

Mr. Muthomi, Prosecution Counsel - for the DPP

Ms Peris Maina - Court Assistant.