



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 190 OF 2016**  
**JOW.....APPELLANT**  
**VERSUS**  
**REPUBLIC ....RESPONDENT**

(An appeal against conviction and sentence from a judgment delivered on 2<sup>nd</sup> December 2016 from the original Criminal file No.537/2015 at Nakuru judgment by Hon. Gicheha (SPM) for the offence of Incest Contrary to Section 20(1) of the Sexual Offences Act.

**JUDGMENT**

1. The appellant was charged, convicted and sentenced to serve twenty five (25) years imprisonment for the **offence of Incest Contrary to Section 20 (1) of the Sexual Offences Act NO. 3 of 2001.**

The particulars of the offence are that on diverse dates between the year 2012 and 2015 within Nakuru County, intentionally and unlawfully caused his male genital organ namely penis to penetrate the female genital organ namely vagina of GO a female child who to his knowledge was his daughter which caused penetration.

2. This appeal is against both the conviction and sentence on grounds stated in the Petition of Appeal that the trial magistrate

- 1. Erred in law and fact by failing to find that the prosecution evidence was contradictory and inconsistent.**
- 2. Erred in law and fact by failing to consider Section 124 of the Evidence Act by convicting the appellant on uncollaborated evidence.**
- 3. Failed by admitting a DNA report.**

**The Conviction.**

3. The offence of incest is defined under **Section 20 (1) of the Sexual Offences Act**, thus

**20(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 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”.**

4. To prove the offence of Incest, the prosecutor must establish the following

- 1. That the relationship between the victim and the perpetrator must fall within the category stated under Section 20(1) of the Sexual Offences Act.**

**2. Proof of penetration or an indecent act.**

**3. Age of the complainant.**

**4. Identity of the perpetrator.**

5. I have perused and considered the totality of evidence adduced before the trial court and the judgment thereof.

The offence is alleged to have been committed over a period of four years, between 2012 and 2015.

The appellant was arraigned in court on the 26<sup>th</sup> June 2015.

He denied the offence and the prosecution case commenced, with three witnesses adducing their evidence. The appellant defended himself.

6. The victim testified on the 11<sup>th</sup> March, 2016. Her testimony was that at the time, she was 20 years old, meaning, in the year 2012, she was sixteen years old placing her in the bracket of a minor, but an adult in 2014, when offence is alleged to have continued upto 2015 March, when the appellant was arrested and arraigned in court.

7. The relationship between the appellant and the victim is not under challenge at all. The victim claimed to have been defiled three times from which she conceived but procured an abortion, funded by the appellant, but on subsequent occasion in 2013 she conceived from which a child born out of the incest. The victim and appellant were subjected to a DNA test at the Nairobi Women's Hospital - Nakuru by order of the court to determine paternity of the child. It was done at the Nairobi Women's Hospital. It was produced in court as Exhibit 3 (b) – dated 12/10/16. The report confirmed that the appellant was the biological father of the child. The report was produced without any objection from the appellant.

By the above, the relationship between the victim and the appellant was established as being that of the father of the victim's child, who is the step daughter of the appellant.

8. Penetration is defined under **Section 2 of the act** as

**“the partial or complete insertion of the genital organs of a person into the genital organs of the other person”.**

**PW2** was the doctor who examined the victim and produced the P3Form. The victim was found to have been pregnant. Without a doubt, that resulted to the pregnancy. The appellant had no question over the report, or to the doctor.

9. Age was not a contested matter before the trial court. The victim was aged between 12 years and 20 years.

**10. Identification of perpetrator.**

The players in the crime were family members, each known to each other. Further, the DNA report confirmed the paternity of the victim's child as the appellant. That on its own, even if other ingredients failed the test, was sufficient prove that the appellant was the perpetrator of the heinous crime – **Dennis Osoro Obiero Vs. Republic (2014) e KLR.**

The ingredients of Incest were thus proved to the required standard – **AKK Vs. Republic (2018) e KLR.**

**11. Section 124 Evidence Act, Cap 80 Laws of Kenya, states that** if the court is satisfied of sufficient evidence under the Sexual Offences Act, it may convict upon the evidence of the victim alone, if it believes the victim, and records the reasons for such belief, as stated in the Proviso.

In the present appeal, the victim's evidence was collaborated by Medical Evidence and the DNA report. The appellant did not object or even question either the medical report or the DNA results.

12. There is no credible complaint that can be sustained on appeal on the matter of the DNA report which the appellant subjected himself to, and agreed to its production in court.

In the circumstances, I find no reason whatsoever to interfere with the trial court's findings and the conviction, which I hereby uphold.

**13. The Sentence.**

The sentence upon conviction for the offence of Incest is well stated under **Section 20 (1) Sexual Offences Act**; if the victim is under the age of 18 years, an accused is liable to life imprisonment, if the victim is an adult, the accused is liable to imprisonment of not less than ten years.

The trial court sentenced the appellant to twenty five years imprisonment.

14. In doing so, the trial court was rightly guided by the law and opted to take the option that when the offence was committed, the victim was under eighteen years old but continued for four years when the victim was a minor upto attainment of majority age.

15. Sentencing is a discretionary exercise of the trial court, save where there exists mandatory minimum sentences.

**In Shadrack Kipchoge Kogo Vs. Republic(Criminal Appeal No. 253 of 2003) the Court of Appeal stated;**

**“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied, or short of those the sentence was so harsh and excessive that an error in principle must be inferred”**

16. The appellant pleads that the trial court failed to take into account his mitigating factors while sentencing him.

I have considered the record and the appellant’s mitigation. I am satisfied that the trial court did consider the mitigation by the appellant as is evident in the judgment.

**Section 20(1)** states that upon conviction, the offender is liable to imprisonment for a term of not less than ten years. In this case, the minimum is ten years and no maximum is stated.

The twenty five years imposed by the trial court is well with the above parameters. I find no fault with the trial courts exercise of discretion.

17. However, in the current justice dispensation, especially after the **Supreme Court decision in the “Muruatetu”** decision in 2017, and the principles on sentencing stated thereto, as well as the **Judiciary Sentencing Policy**, it is important that a court while passing sentence to consider the circumstances under which the offence was committed and peculiarity of each case as well as construction of the Statute, prescribing the sentence.

18. It is now trite that when the words

**“shall be liable to”** are used, the sentence prescribed is not mandatory but only provides a maximum sentence. The sentencing court has discretion to impose a lesser sentence upon considering the peculiar circumstances – **NOO Vs. Republic (2019) e KLR.**

19. I have considered the relationship between the appellant and the victim being of step father and step daughter.

A child was born out of the relationship. It is an offence that no one in their right senses ought to commit. It matters not that the appellant was not the biological father of the victim, but a step daughter.

The victim of the offence will forever live with the shame, not to mention the trauma that the child born out of the illegal relationship will be faced with, once the truth comes down on her at later years.

20. I have considered comparable decisions.

a. In **JMK Vs. Republic (2019) e KLR**, the victim was 15 years old. The trial court’s sentence was reduced to 10 years imprisonment on appeal.

b. In **ES Vs. Republic (2018) e KLR**, the victim, 10 years old was defiled by her uncle. The trial court sentenced him to life imprisonment. On appeal, the sentence was reduced to 10 years imprisonment.

c. In **GM Vs. Republic (2017) e KLR** a minor, 9 years old was defiled by her father. He was sentenced to life imprisonment. On appeal, the court substituted the sentence with 15 years imprisonment.

21. Not underrating the gravity of the offence committed by the appellant, and upon consideration of the objectives and purpose of sentencing, I find the trial court’s sentence to have been too harsh, and excessive and not comparable to decisions rendered in respect of comparable offences.

I am therefore persuaded to set aside the twenty five years imprisonment, and substitute it with ten **(10) years imprisonment commencing from the 2<sup>nd</sup> December, 2016, the trial court’s sentence date.**

**DELIVERED, SIGNED AND DATED ELECTRONICALLY AT KERUGOYA THIS 8<sup>TH</sup> DAY OF OCTOBER, 2020.**

**J.N. MULWA**

**HIGH COURT JUDGE**

**PARTIES:**

1. Appellant in person.

2. Ms. Odero, Prosecution Counsel, Nakuru.