



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R MWONGO, J)

CRIMINAL APPEAL NO. 9 OF 2017

FNG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in SO No 3 of 2016

in the Chief Magistrate's Court, Naivasha, (P. Gesora – CM)

JUDGMENT

Background

1. The appellant has appealed against conviction and sentence imposed on him by the trial court. He was found guilty of committing incest with his daughter aged seventeen years contrary to **Section 20(1)** of the **Sexual Offences Act, No 3 of 2006**. The trial court sentenced him to fifteen (15) years' imprisonment on 3rd March 2017.

2. In his original petition of appeal he states that: he pleaded not guilty at the trial; that he suffers from chronic diabetes and deteriorating health; that he was the sole bread winner for a family of seven school going children; that he has learned his lesson and will abide with all rules if given another chance; and that he seeks his sentence to be reduced.

3. His amended grounds of appeal –also based entirely on mitigation – are stated to be premised on **section 350(v)** of the **Criminal Procedure Code**. That provision however only deals with the situation where an appellant may file amended grounds of appeal. His amended appeal contains the following grounds:

“a. THAT, the sentence is harsh considering that I was a first offender.

b. THAT, I am remorseful and very sorry in what transpired and promise that I will never engage in any criminal activities if the court gives me another chance.

c. THAT, I am a family man and my family entirely depends on me.

d. THAT, I am a sick man suffering from hyperzostors which have really proved to be harmful to my health. The disease is life threatening and has made me to be a full member who repeatedly visits the hospital nearly on daily basis.

e. THAT, may the court consider my mitigation, reduce my serving years or remit my sentence to a non-custodial sentence probably a probation.”

4. The prosecution in its submissions merely pointed out that the appellant was properly convicted for incest; and that the sentence was reasonable.

5. I note that the amended grounds of appeal merely plead for leniency, and there are no substantive legal grounds raised by the appellant challenging the conviction; he merely seeks that the court be merciful and reconsider his circumstances.

6. Notwithstanding the fact that there were no sufficient grounds of appeal and that that the appeal could have been summarily rejected under **section 352(1) and (2)** of the **Criminal Procedure Code**, I have nevertheless carefully perused the lower court proceedings and judgment.

7. I note that the appellant was convicted on the strength of the evidence of his daughter, who was then seventeen years old. She stated that she was forced to have sex by her father in order to pay for school fees in January 2014. In September 2014 she gave birth to the appellant's baby. She reported to the chief after the birth of her baby because she wanted to go back to school. However, her father insisted that she must have sex with him again before he could pay fees.

8. Thereafter the chief reported to the mother and advised that the victim be taken to hospital. DNA samples were eventually taken from the appellant, the victim and the victim's mother who was the appellant's wife. The DNA report was availed in court and concluded as follows:

“Based on the above findings, there are 99.99 + % chances that FNG is the biological father to JW who is also JW's biological child”

9. The victim's birth certificate was also availed in court, and it shows that her father is the appellant and her mother is JW.

10. The accused's evidence was merely that he refused to take his daughter to school and she framed him.

11. I find on the strength of the evidence that the trial magistrate properly convicted the appellant. The sentence meted was also appropriate and in accordance with the law.

12. With regard to appropriateness of sentence, the proviso to **Section 20(1) sexual Offences Act** provides that if it is proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. At the hearing the Birth certificate of the victim was produced showing that she was seventeen years old at the time the offence was committed.

13. Accordingly, the sentence imposed was quite lenient in the circumstances, and was meted out after the trial magistrate took into account the appellant's mitigation. I therefore find no reason to interfere with the same.

Disposition

14. As shown in the foregoing, and having considered all the appellant's grounds of appeal, and also having carefully reviewed all the evidence on record, I find that on the basis of the available evidence, the learned magistrate correctly convicted and appropriately sentenced the appellant.

15. Accordingly, the appeal is hereby dismissed.

16. Orders accordingly.

Dated and Delivered at Naivasha this 13th Day of May, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Francis Ngugi Gathige - Appellant present in person
2. Mr. Koima for the State
3. Court Clerk - Quinter Ogutu.