



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL APPEAL NO. 21 OF 2018**

**HENRY SHAMALA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgment, conviction and sentence of Hon. M. I. Moranga– SRM*

*delivered on 26<sup>th</sup> June, 2011 in the Chief Magistrate’s Court at Kakamega*

*in Criminal Case No. 2119 of 2009, Republic vs Henry Shamalla)*

**JUDGMENT**

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of incest contrary to section 20 (1) Sexual Offences Act No. 3 of 2006.
2. The state has supported both the conviction and sentence.
3. In this court the appellant has raised 2 grounds of appeal in his petition.
4. In ground one (1) he has faulted the trial court in failing to find that there was along existing family grudge between the family of the appellant and that of the complainant. In this regard, the sworn evidence of the appellant was that he had no grudge against the parents of the complainant (PW1). The mother of the complainant namely CN (the initials of her name) testified that on 4<sup>th</sup> January, 2009 at around 2.00 p.m. she was at her home. While there RM (PW2) who was her sister in law, went to the house of PW3. RM (PW2) handed to her a sugar cane which the victim had given to her. It was also the evidence of PW3 that her daughter (PW1) was born on 17<sup>th</sup> December, 1999, a matter in respect of which she produced a baptismal card as exhibit 7. The complainant was taken for medical examination. She was examined by Kennedy Njaya (PW5). Upon examination he found laceration in the minor labia and majora labia. He also found spermatozoa in the complainant’s vagina. Finally he found her hymen to be partially perforated.
5. Furthermore, PW3 testified that she did not have any differences with the appellant. She also testified that the appellant is her brother in law.
6. The issue of existence of a grudge was only brought up by Monicah Shamalla (DW2), who is the wife of the appellant. It was the evidence of DW2 that the complainant was mentally disturbed (mad) a matter in respect of which she was treated traditionally and in the hospital. DW3, Aggrey Lulykha Noahali testified that there was a land dispute between their family and that of complainant.
7. It’s clear from the defence evidence that the evidence of the appellant materially contradicted that of his wife and brother in respect of the grudge between their family and that of the complainant.
8. The trial court heard and saw the prosecution and defence witnesses testify. After observing their demeanor it believed the evidence of prosecution witnesses. It found the defence evidence to be incredible.
9. This is a first appeal. As a first appeal court, I have independently re-assessed the entire evidence. As a result, I find that the conviction of the appellant was based on sound evidence. I therefore dismiss his appeal against conviction.
10. As regard sentence, the trial court wrongly found it has no discretion other than to impose a life imprisonment. In view of the Supreme

Court decision in **Francis Muruatetu & Another (2017) eKLR** the court had a discretion to impose any other suitable sentence. I am therefore entitled to interfere with the discretion of the trial court in that regard.

11. After considering the aggravating and mitigating factors, I find that the proper sentence is one of twenty (20) years imprisonment, which the appellant now has to serve.

Judgment signed, dated and delivered in open court at Kakamega this 5<sup>th</sup> day of September, 2019.

In the presence of the appellant and Ms. Rotich for the State.

**J.M. BWONWONG'A**

**JUDGE**