



**SYM v Republic (Criminal Appeal 31 of 2017)
[2022] KECA 393 (KLR) (4 March 2022) (Judgment)**

Neutral citation: [2022] KECA 393 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 31 OF 2017
SG KAIRU, J MOHAMMED & S OLE KANTAI, JJA
MARCH 4, 2022**

BETWEEN

SYM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Malindi
(J. Kamau, J.) delivered on 13th December 2016 in H.C. CR. A. No. 7 of 2016)*

JUDGMENT

1. SYM (the appellant) was charged at the Senior Resident Magistrate’s Court in Taveta with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* that on diverse dates between 20th January, 2014 and 30th January, 2014 at unknown times at [Particulars Withheld] Estate within Taita-Taveta County he unlawfully and intentionally touched the vagina of SSH (name withheld) with his penis who was to his knowledge his daughter aged 16 years.
2. The prosecution called five (5) witnesses. The appellant was placed on his defence and gave unsworn evidence and called one (1) witness. On 18th November 2015, the trial court delivered a judgment, found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant. He was sentenced to 30 years’ imprisonment.
3. The appellant was dissatisfied with the judgment and appealed to the High Court. The 1st appeal was heard through written submissions and on 13th December 2016 (J. Kamau, J.) delivered a judgment wherein she dismissed the appeal and held that the conviction and sentence that was imposed upon the appellant by the lower court was safe.
4. Aggrieved by that decision, the appellant filed a notice of appeal against both the conviction and sentence. The memorandum of appeal contains the grounds inter alia that both the trial court and the first appellate court erred in law: by upholding his conviction and sentence without considering



that the original charge against him is not known, hence defective contrary to Section 137 of the Penal Code; by upholding his conviction and sentence while relying on the evidence by the complainant (PW1) and PMM (name withheld) (PW2) which was inconsistent, un-corroborated and un-reliable contrary to Section 163(1)(c) of the *Evidence Act*; by upholding his conviction and sentence while relying on the Deoxyribonucleic Acid (D.N.A) test evidence which was not proved beyond reasonable doubt contrary to Section 36 of the *Sexual Offences Act* and Section 109 of the *Evidence Act*; and in dismissing his plausible defence contrary to Section 212 of the *Criminal Procedure Code*.

Submissions

5. At the hearing, the appellant who was unrepresented informed the Court that he did not wish to proceed with his appeal against conviction and will appeal only against the sentence meted out.
6. Ms. Karanja, learned counsel for the State submitted that the High Court considered that the appellant was the father of the complainant and that he had impregnated her; that these were aggravating circumstances as the complainant was forced to drop out of school and had the burden of bringing up the child; and that the sentence meted out on the appellant by the trial court was therefore not harsh and excessive in the circumstances of the case. Counsel urged us not to interfere with the sentence meted out.
7. In a brief rejoinder, the appellant urged the Court to have mercy on him as he is old, sickly, a first offender and his parents are elderly.

Determination

8. This is a second appeal. This Court's role as the second appellate court was succinctly set out in *Karani -vs- R (2010) 1 KLR 73* wherein this court held as follows:

“By dint of the provisions of section 361 of the criminal procedure code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as “matters of law”.

See also *John Kariuku Gikonyo vs R. Mombasa Criminal Appeal No.14 of 2018 (2019) eKLR*.

9. We have considered the appellant's grounds of appeal, the submissions, the authorities cited and the law. From the record, the appellant's appeal is only against sentence. The appellant was sentenced to 30 years imprisonment. Section 20(1) of the *Sexual Offences Act* provides:

“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 not less than ten years.

Provided that, if it is alleged in the information or charged and proved that the female person 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 a female person.”

10. In the instant appeal, by reason of the proviso to Section 20(1) of the *Sexual Offences Act*, the complainant was aged 16 years and the appellant was therefore liable to imprisonment for life. The



trial court exercised its discretion and sentenced the appellant to thirty (30) years imprisonment. The 1st appellate court upheld the sentence of 30 years' imprisonment. As a second appellate Court, we find no justification to interfere.

11. This Court in *JMM V. Republic [2020] eKLR* stated as follows:

“...sexual relations between an adult and a child is perverted and wrong, no matter the circumstance. And if the child is a family member the psychological consequences are even more damaging. There are some lines that should never be crossed.”

12. In the instant appeal, the appellant abused his position of trust as the complainant's father. He had a duty to protect her but instead, he sexually violated her as a result of which she bore a child.

13. The upshot of the above is that we find no substance in this appeal against sentence. We dismiss the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

