



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIVASHA**

**CRIMINAL APPEAL NO 2 OF 2019**

**JMM.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Principal*

*Magistrate's Court at Engineer Sexual Offence Case No.637 of 2015 delivered*

*by Hon. E.K. Nyutu (PM) on 20<sup>th</sup> December 2018).*

**JUDGMENT**

**Background**

1. The appeal is from a judgment of Engineer Principal Magistrate Hon. E.K. Nyutu delivered on 14<sup>th</sup> May, 2019 in Criminal Case No.637 of 2015. The Appellant was the Accused whereas the Respondent was the Prosecution in the said suit.
2. **JMM**, the Appellant herein was charged in count 1 with the offence of incest contrary to **Section 20 (1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the 8<sup>th</sup> day of July, 2015 at [Particulars Withheld] sub-location, Kipipiri District within Nyandarua County, being a male person caused his penis to penetrate the vagina of RNW a child aged (8) years whom to his knowledge was his niece.
3. In the alternative, the Appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006** in that on the 8<sup>th</sup> day of July, 2015 at [Particulars Withheld] sub-location, Kipipiri District within Nyandarua County, being a male person caused his penis to come into contact with the vagina of R NW a child aged 8 years.
4. The Appellant pleaded not guilty to both charges. Upon trial, he was convicted of incest. He was sentenced to life imprisonment. Aggrieved by both his conviction and sentence, he preferred the instant appeal.
5. He filed a Petition of Appeal and subsequently Amended Grounds of Appeal received into court on 17<sup>th</sup> May, 2021 raising three (3) grounds of appeal which I duplicate as follows:

*a. THAT the trial magistrate erred in law and fact by awarding a sentence without evidence of the star witness, Rachel Nyambura but failed to comply with Section 31 and 32 of the Sexual Offence Act 2006.*

*b. THAT the learned trial magistrate erred in law by awarding a sentence applying the wrong principles in law under Section 20(1) of the Sexual Offences Act No3 of 2006.*

*c. THAT the learned trial magistrate erred in law and fact by holding that PENETRATION was not proved yet the evidence of PW3 could not be corroborated by any other evidence, it was an error to convict on such flimsy evidence.*

**Summary of Evidence**

6. The prosecution's case can be summarized as follows: **PW1, RNW**, a minor had a *voire dire* conducted and it was established that she could not proceed beyond a certain point. The court then directed that an intermediary be sought to assist the court.

7. A **HM**, an intermediary for the complainant took the stand on 10/5/2018 and testified as **PW1**. The Intermediary met RNW on 9/5/2018 and interviewed her. She established from RNW of her family background. As to the happenings of the instant alleged offence, the intermediary gleaned from RNW that the Appellant pulled her into a bush, touched her breasts and inserted his finger into her vagina having earlier removed his penis which she saw. On cross examination, the intermediary stated that the Appellant was alone in the house with RNW and could neither recall the date nor the actual distance where it happened.

8. **PW2, GWM** stated that she is RNW's grandmother. She stated that prior to 8/7/2015 she had observed for a while that RNW limped and was having difficulty sitting down. She asked RNW, what had happened who was not willing to speak, to which she resorted to asking her school teacher. On advise, PW2 went to the police with RNW, who established that RNW had been defiled by the Appellant. RNW was then taken to hospital where it was established that she had been defiled. RNW told PW2 that the Appellant got hold of her while she (PW2) was away. PW2 stated that RNW parents died and produced her birth certificate which indicated she was born on 14/2/2007. In cross examination, PW2 stated that RNW had complained that Appellant was in the habit of defiling her. Cross examination revealed that RNW had been examined by PW2 who then went to RNW's teacher.

9. **PW3, a Peter Nginyu** a Clinical Officer at Njabini Health Centre Hospital examined RNW on 08/07/2015. He stated that RNW presented fecal matter in under wear, bruises and tenderness on medial aspect of the thighs, freshly perforated hymen, sphincter muscle of anus was loose with fecal incontinence. He surmised that penetration had been visited on RNW's anus and vagina. In cross examination, PW3 stated that he examined RNW on the alleged date of offence 08/07/2015 and did not fill a PRC form as they were not readily available and also noted that RNW had visited a dispensary prior to his examination.

10. **PW4, PC Josephine Kemunto**, the investigating officer stated that on 08/07/2015 RNW was accompanied by PW2 who informed her that on 08/7/2015 when on her way from school, the Appellant accosted her and took her to a nearby bush, laid her on her stomach and defiled her in her anus and after he finished he threatened her direly if she disclosed what had happened. PW2 then informed PW4 that later on she noticed RNW walking with difficulty and informed her of what the Appellant had done. PW4 then took them to a dispensary and issued them with a P3 Form and referred them to Ol-Kalou District Hospital.

11. PW4 stated that the Appellant was arrested that same day. In cross examination, she stated that the complainant came to the station on 08/07/2015. She further stated that she interviewed RNW who identified the Appellant as her aggressor. She produced P. exhibit 1 being the birth certificate of RNW

12. After the close of the prosecution case, the trial court ruled that a *prima facie* had been established and accordingly put the Appellant on his defence. He gave an unsworn statement in evidence and called no witnesses. He stated that on 9/7/2015 he went to PW2's house and found three children with the youngest being attended to by RNW and who could not pacify the crying infant. At this point he left, searching for PW2 to help the baby. He found PW2 in the company of other women and a teacher. He then learnt that PW2 was at the AP Post where he went to ask for the house keys. He was met by an officer who ordered him to go back for the child that could not be pacified. When the Appellant returned with the children in tow, RNW was examined to which she alleged that she had been defiled by him. The Appellant was examined and thereafter remanded. The Appellant stated that there was no medical evidence to show that RNW was defiled.

13. At the conclusion of the trial, the trial court took into account the submissions of the parties and in its determination relied on the testimony of the intermediary (PW1), PW2, and PW4. The trial court further relied on the medical evidence from the PRC and P3 Forms as produced by PW3 in arriving at the conclusion that PW1 was indeed defiled.

14. The trial court considered the submission by the Appellant in defence and noted his version of events of 09/07/2015 and surmised that he only gave an account of how he was arrested. The trial court considered **Section 20(1)** and **Section 22** of the **Sexual Offences Act** and distilled the parameters to prove incest, namely the Sex of the perpetrator being a male and the victim a female, the relationship between the two, penetration and the age of the victim for the purposes of sentencing. From the four parameters the trial court convicted the Appellant having established that he was related to RNW, RNW being 8 years of age, penetration being established from the P3 form and sentenced him to life imprisonment.

#### Appellant' submissions

16. The Appellant filed his written submissions alongside the Amended Grounds of Appeal on 17<sup>th</sup> May, 2021. On ground one, he submitted that due to the fact that the star witness was not called, the sentence was a nullity. The Appellant further submitted that by virtue of **Sections 31 and 32** of the **Sexual Offences Act**, the complainant was a vulnerable witness with mental disabilities since in *voire dire* examination, she went mute when asked questions. It was his view that the entire **Section 31** was not complied with as far as the appointment of an intermediary was concerned.

17. On ground two of his appeal, the Appellant submitted that the life sentence meted to him was not mandatory and ought to have been sentenced to the least severe sentence of 10 years which he opines would have been fair. Reliance was put on **M.K. vs Republic [2015] eKLR** with the crux of his mooted point being that the term 'not less than' having been used in the sentencing provision and in the aforementioned case gives discretion to the Court in sentencing. He similarly relied on the case **Opoya vs Uganda [1967] EA 752** where the court resented the Appellant to 15 years down from a life-imprisonment and **Meru H.C. Criminal Appeal 73 of 2010- GM vs Rep (2017) eKLR** where the Appellant, convicted under **Section 20(1)** of the **Sexual Offences Act** and the victim being 9 years old saw life sentence replaced with 15 years.

18. On ground three, the Appellant submitted that the penetration ingredient of defilement was not proven beyond a reasonable doubt. He contended that the complainant/ RNW did not testify and thus could not establish penetration. That PW3's evidence needed further corroboration of other material evidence which was lacking. He further contended that since the examination was done on the date of the incident, spermatozoa ought to have been present and therefore lack of spermatozoa rendered the medical evidence of no probative value. Further, that because RNW's hymen was broken, the court ought to have found that the breaking could not have solely been raptured by sexual intercourse but also by other activities such as tampons, masturbation or injury as was held in **Criminal Appeal 186 of 2010 PKW vs**

## **Republic [2012] e KLR.**

19. The Appellant submitted that PW2's testimony was hearsay as she was not an eyewitness. Furthermore, the evidence of PW4 and that of the intermediary were contradictory and offered no value to the case. He added that **Section 124** of the **Evidence Act** could not be applied to the instant case.

20. Lastly, reliance was put on **Criminal Appeal 50 of 2012 Elizabeth Waithengi Gatimu vs Republic (2015) eKLR** where it was held that an accused person ought to be given the benefit of doubt regardless of the plea taken and against the backdrop of circumstances.

### ***Respondent's Submissions***

21. Learned State Counsel, Ms. Maingi made oral submissions. On the first ground of Appeal, she drew the court's attention to the proceedings of 09/3/2015 when the matter first came up for hearing and the prosecution noted that the minor was indeed of tender years and was unresponsive at pre-trial. She pointed out that on 15/2/2016 the prosecution expressed concern that the minor could not express herself and prosecution invoked **Section 31** of the **Sexual Offences Act** and was granted leave by court to call an intermediary on behalf of the victim. The court, during a *voire-dire* examination on the complainant also noted that the minor was fearful and was unable to respond which prompted to the engagement of an intermediary. The intermediary testified that on 10/05/2018.

22. Learned counsel submitted that under **Section 31(2)** of the **Sexual Offences Act**, an intermediary on motion by the court or by the prosecution can be appointed after regard to the examination of the victim, the age of the complainant, nature of the relationship between parties and intimidation of the minor and other relevant factors.

23. In rebuttal to the allegation by the Appellant that the trial court erred in appointing an intermediary, counsel referred to the case of ***MM V. Republic CA NRB Crim. App. No. 41 of 2003 [2014] eKLR*** where the Court of Appeal stated that **"Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice."**

24. She submitted that **Section 33** of the **Sexual Offences Act** allows a trial court to rely on surrounding circumstances in fulfilment of **Section 31** thereof. She submitted that the prosecution demonstrated that the minor was unable to testify and the Children's Officer/intermediary asked her questions which she relayed to the court. The Appellant cross-examined her evidence to which she responded to with information from the minor. Further that the prosecution stated that the minor was able to identify the Appellant as her uncle. The trial court also relied on surrounding circumstances, that the Appellant was the child of PW2 and what the child told her and it was by PW2's initiative that the minor was able to reveal what happened. PW2 noticed that the minor had difficulty seating and standing, that at the time of the offence she was living with the child and the Appellant who is an uncle to the minor.

25. She submitted that other surrounding circumstance was the medical evidence of PW3 in the form of a P3 Form which indicated the injuries on the minor and whose determination was that she was defiled. Counsel further relied on the evidence of PW4 who was the investigating officer who testified as to what the minor revealed to her. In totality, counsel submitted that the intermediary was properly and legally appointed.

26. In addressing the second ground of appeal, Miss Maingi stated that the degree of consanguinity between the minor and the Appellant had been established as niece and uncle. Learned counsel further addressed the issue of penetration that was covered by the testimony of the intermediary and PW3. As to the age of the minor, counsel relied on P. Exhibit 1, a birth certificate.

27. On the assertion that that a PRC Form was not produced, counsel submitted that PW3 produced a P3 Form which was conclusive. The learned counsel in addressing the subsequent non-attendance of PW2 stated that she had been searched for and when not found a warrant of arrest was issued. Counsel further added that PW2 stated she had difficulties going to court because the Appellant was her son.

28. Learned counsel submitted that the conviction was proper and the life imprisonment was legal. She urged the court to dismiss the appeal in its entirety.

### **Analysis and determination**

29. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. These principles have been underscored in numerous decisions by the superior courts among them being in the case of ***Okeno vs Republic [1972] EA 32 in which the Court of Appeal said:***

***"It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."***

30. I have considered the evidence on record, the grounds of appeal and the respective rival submissions. I have deduced that the issues arising for determination are:

**a) Whether the procedure in appointing an intermediary were followed.**

**b) Whether the ingredients of incest were proved beyond a reasonable doubt, and**

c) *Whether the appeal is merited.*

**(a) Whether an intermediary was properly appointed.**

31. On the first issue, an intermediary is a medium through which the accused person or complainant communicates to the court as per **Article 50 (7) of the Constitution. Section 2 of the Sexual Offences Act** strictly defines an intermediary as:

**“A person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children’s officer or social worker.”**

32. **Section 31(2) of the Sexual Offences Act** gives discretion to the prosecution or the court *suo moto* to declare a child a vulnerable witness. In the instant case, after having conducted a *voire-dire* examination on the minor on 3/5/2018 the trial court of its own motion directed that an intermediary be appointed to assist the court as the minor presented herself as fearful beyond a certain point to be able to testify on her own.

33. It is important at this point to restate the entire **Section 31** of the **Sexual Offences Act** which provides for the appointment of an intermediary. The same reads:

**“(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—**

**(a) the alleged victim in the proceedings pending before the court;**

**(b) a child; or**

**(c) a person with mental disabilities.**

**(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court’s opinion he or she is likely to be vulnerable on account of—**

**(a) age;**

**(b) intellectual, psychological or physical impairment;**

**(c) trauma;**

**(d) cultural differences;**

**(e) the possibility of intimidation;**

**(f) race;**

**(g) religion;**

**(h) language;**

**(i) the relationship of the witness to any party to the proceedings;**

**(j) the nature of the subject matter of the evidence; or (k) any other factor the court considers relevant.**

**(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection(2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.**

**(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures-**

**(a) allowing such witness to give evidence under the protective cover of a witness protection box;**

**(b) directing that the witness shall give evidence through an intermediary; (c) directing that the proceedings may not take place in open court;**

**(d) prohibiting the publication of the identity of the complainant or of the complainant’s family, including the publication of information that may lead to the identification of the complainant or the complainant’s family; or**

(e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may—

(a) convey the general purport of any question to the relevant witness;

(b) inform the court at any time that the witness is fatigued or stressed; and

(c) request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including—

(a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;

(b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

(c) the need to protect the witness's dignity and safety and protect the witness from trauma; and

(d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

(11) Any person, including a juristic person, who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatsoever reveals the identity of a witness in contravention of a direction under this section, is guilty of an offence and liable on conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both if the person in respect of whom the publication or revelation of identity was done is under the age of eighteen years and in any other case to imprisonment for a term of not less than three years or to a fine of not less than two hundred thousand shillings or to both.

(12) Any juristic person convicted of any offence under this section shall be liable to a fine of one million shillings.

(13) An accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness.”

34. So then, what informed the appointment of the intermediary? The evidence attests that on 09/3/2015 when the matter first came up for hearing the prosecution noted that the minor was indeed of tender years and was unresponsive at the point a *voire dire* examination was conducted. On 15/2/2016 the prosecution expressed concern that the minor could not express herself and it invoked **Section 31** of the **Sexual Offences Act** and was granted leave by court to call an intermediary on behalf of the victim. The court, during a *voire-dire* examination on the complainant also noted that the minor was fearful and was unable to respond which prompted to the engagement an intermediary. The intermediary testified that on 10/05/2018.

35. The court further had regard to the relationship between the victim and the perpetrator being niece and uncle respectively which further exacerbated the fear in the victim to testify. The Children's Officer/intermediary asked the minor questions which she relayed to the court. The intermediary was able to answer the questions which the Appellant put to her in line with what the minor had told her had happened. That in any case other surrounding circumstances were a full proof that the intermediary would be minor's voice. For instance, she (minor) had been able to reveal to PW2 what had happened which prompted the arrest of the Appellant. Also the medical evidence corroborated the minor's evidence, what she had told PW1 and her disposition after PW2 noted that she was walking with difficulty.

36. The Appellant cross-examined PW1 to which she responded to with information from the minor. Further that the prosecution stated that the minor was able to identify the Appellant as her uncle. The trial court also relied on surrounding circumstances, that the Appellant is the child of PW2 and what the child told her. It was by her (PW2's) initiative that the minor was able to reveal what happened. PW2 noticed that

the minor had difficulty seating and standing, that at the time of the offence she was living with the child and the Appellant who is an uncle to the minor.

37. All these circumstances leads the court to conclude that the trial court followed the proper procedure in ordering that an intermediary be appointed. Further that the existing circumstances dictated that there was sufficiency of evidence which required to be told. PW1 was a case of a vulnerable witness who could not face the situation and the court had to intervene to ensure that her voice was heard. The intermediary just spoke on behalf of the minor as other material evidence corroborated the charge on behalf of PW1.

38. I disagree with the Appellant's submission that the intermediary was appointed to fix him merely because PW2 was unwilling to testify. It is on record the PW2 feared to testify against her son. This prompted the prosecution to apply for a warrant of arrest against her. Nevertheless, when she took the stand, she spoke nothing but the truth.

39. A Hope Muriithi who was a Children's Officer with a degree in Sociology was appointed as intermediary. Her testimony was that she met up with the complainant on 9<sup>th</sup> May, 2018 who relayed to her that her uncle whom she lived with, pulled her into a bush, undressed her, touched her breasts and inserted his finger into her vagina. The intermediary stated that the minor told her that the Appellant removed his penis but did not insert it into her vagina.

40. Thus, from the general purport of the surrounding circumstances, I am unable to fault the learned trial magistrate and I come to the conclusion that the appointment of the intermediary was legally sound and accorded with Section 31 of the Sexual Offences Act.

***Whether the offence of incest was proved beyond a reasonable doubt.***

41. **Section 20 (1)** of the **Sexual Offences Act** provides as follows:

***“(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 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 the female person.”***

42. Therefore, the ingredients for incest are: An Indecent act or an act by a male person whose degree of consanguinity falls within the prescribed parameters of **Section 20** of the **Sexual Offences Act**. Succinctly put the essential elements for the offence of incest are: an intentional indecent act or an act which causes penetration with a female, the identification of the male perpetrator, consanguinity between the victim and the perpetrator who must be a relative and the age of the victim.

43. In **Criminal Appeal No.80 of 2017 at Kisii GMB -vs- Republic (2018) e KLR**, the court held that in an offence of incest, penetration is not a necessary ingredient but an indecent act as defined under the Act must be proved. In this case however, the minor narrated that indeed the Appellant had sexual intercourse with her which was further established by the medical evidence of PW3, Clinical Officer who examined PW1 on 08/07/2015. He stated that R.N.W. presented fecal matter in under wear, bruises and tenderness on medial aspect of the thighs, freshly perforated hymen, sphincter muscle of anus was loose with fecal incontinence and surmised that penetration had been visited on RNW's anus and vagina.

44. It is notable that the intermediary stated that she was told that the Appellant inserted her finger into her anus and vagina as opposed to his penis. On the other hand, the minor also told the intermediary that she saw the Appellant's penis. It is also evident that PW1 told her grandmother that the Appellant defiled her using his penis. Having regard to the fact that PW1 was fearful and frightened to testify against his uncle, she could have opted to say that the Appellant inserted his penis. It was also PW1's evidence that PW2 had requested the minor to forgive her uncle, the Appellant to which she had agreed subject to her being separated from him. A departure from this scenario is that PW2 herself testified that the minor told her that she had been defiled, an account she restated to the teachers and the police. Coupled with the strong medical evidence, I conclude that there was penetration of the minor's genitalia by the Appellant's genitalia. The account of what transpired as narrated to PW1 was intended to shred the strong evidence that the Appellant sexually assaulted the minor.

45. I add that the absence of spermatozoa does not lessen the fact that penetration took place. A man could penetrate but not ejaculate. He may also not release the spermatozoa internally so that even a swab examination reveals lacks of the same.

46. The Appellant was properly identified by PW1 with whom she lived in the same house. She testified that he took advantage when her grandmother, PW2 was away to sexually assault her. The Appellant's identification was direct and I have no reason to doubt that he was the assailant.

47. On the issue of degree of consanguinity, the intermediary relayed to the court at the minor's behest that the Appellant was her uncle. That was corroborated by PW2 who testified that she was the mother to the Appellant and the grandmother to PW1. No more evidence was required to establish this element.

48. Further, the minor's age was also satisfactorily established. Her birth certificate which was produced in evidence by PW4, the investigating officer put the minor at eight (8) years old. It showed that she was born on 14/02/2007.

49. In view of the foregoing, I find that all the ingredients of the offence of incest were satisfactorily met. The Appellant's defence fell far short of dislodging the strong prosecution evidence against him. He only attempted to account how he was arrested which did not oust the

fact that he defiled the minor. I dismiss his defence as lacking credibility.

50. As regards the sentence, **Section 20 (1)** of the **Sexual Offences Act** provides that:

***“(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 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 the female person.” (emphasis mine).***

51. Whereas I would agree with the Appellant that the use of the word ‘liable’ connotes that the court can exercise discretion in sentencing, the provision uses the words ‘**shall**’ before the word ‘**liable**’ which implies that the sentence provided is couched in mandatory terms. Hence, the court cannot impose a sentence less than the mandatory life imprisonment. For this reason, the sentence handed to the Appellant was legal and I cannot vary it.

52. In the upshot, I find that the prosecution proved their case beyond a reasonable doubt. I find no reason to warrant me to disturb the judgment of the learned trial magistrate. The conviction and sentence were both merited. I dismiss the appeal in its entirety.

**DATED AND DELIVERED AT NAIVASHA THIS 27<sup>TH</sup> DAY OF JANUARY, 2022.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Appellant in person.*

2. *M/s Maingi for the Respondent.*