



REPUBLIC OF KENYA



KENYA LAW
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**JTL v Republic (Criminal Appeal E007 of 2021)
[2022] KEHC 10987 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 10987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E007 OF 2021
GWN MACHARIA, J
JULY 25, 2022**

BETWEEN

JTL APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Naivasha Cr. Case No. 1449 of 2013 delivered by Hon. E. Boke (PM) on 2nd July 2013)

JUDGMENT

1. The Appellant, JTL, was convicted on his own plea of guilty for the charge of incest by male contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the night of 26th June 2013 in Gilgil District within Nakuru County, being a male person, he caused his penis to penetrate the vagina of MAJ, a girl aged seven (7) years who was to his knowledge was his daughter. He was sentenced to serve life imprisonment.
2. Being aggrieved by the sentence, he preferred a late appeal on the ground that the sentence was excessive as the life imprisonment prescribed for the offence under Section 20(1) of the *Sexual Offences Act* is not mandatory.
3. In his written submissions filed herein on 2nd February, 2022, he contended that the life imprisonment prescribed for the offence is not a minimum mandatory sentence given that Section 20(2) of the *Sexual Offences Act* also provides for imprisonment of ten (10) years. He relied on the case of *Opoya v Uganda* (1967) EA 752 where the court explained that the words “shall be liable” means the maximum sentence allowable and courts have discretion to impose a lesser sentence. He submitted that he has undergone rehabilitation while in prison as he undertook some training and acquired skills which can help him lead a positive life if given a chance to re-integrate with the society.



4. On the other hand, learned state counsel, Mr. Michuki opposed the appeal on the ground that the Appellant’s mitigation was duly considered by the trial court prior to sentencing. Counsel submitted that the Appellant is not deserving of any leniency in light of the circumstances of the case and in this regard, he urged the court to take note of the fact that the offence was committed in response to gender based violence. According to counsel therefore, the life imprisonment is sufficient and should not be set aside.

5. The Appellant was charged under Section 20(1) of the [Sexual Offences Act](#) which states as follows:-

“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 added)

6. In the case of *M K v Republic* [2015] eKLR, the Court of Appeal had the opportunity to interpret Section 20(1) above as follows:-

“17. In the instant case, the appellant was charged with an offence under Section 20(1) of the [Sexual Offences Act](#). This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned Judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?

18. The first observation to note is that the phrase “not less than” has not been used in the proviso to Section 20(1) of the [Sexual Offences Act](#). The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.

19. What does “shall be liable” mean in law”. The court of Appeal for East Africa in the case of *Opoya - V - Uganda* (1967) EA 752 had an opportunity to clarify and explain the words “shall be liable on conviction to suffer death”. The court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or imprisonment.

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21. Guided by the decision in *Opoya -v- Uganda* (1967) EA 752 and the persuasive dicta of North J. in *James -v- Young* 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the [Sexual Offences](#)



Act is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.”

7. In view of the above interpretation, the learned trial magistrate in this case was not obligated to impose a “a mandatory” life imprisonment without justification. Instead, the legal sentence the Appellant was liable to be handed was between ten years and life imprisonment which was to be dictated by the circumstances of the case as well as the mitigation the Appellant tendered.
8. I have considered the circumstances under which the offence was committed. The Appellant went to his house drunk on the material day and created chaos which caused his wife to flee leaving him with his three daughters. He beat up his two other daughters who also fled and left him with the minor and that is when he defiled her. I have also taken into account the fact that the minor suffered a third degree perineal tear as a result of the defilement and underwent an operation for repair. Further, I have noted that the Appellant opted not to offer any mitigation. This may have informed the court’s decision to impose a life sentence as the record does not show that the learned magistrate considered that a mandatory life sentence was the only sentence available for the offence.
9. Be that as it may however, the prosecution informed the court that the Appellant was a first offender and thus it is my considered view that the sentence meted out on the Appellant was harsh and excessive in the circumstances. Further, I have taken note of the Appellant’s submissions that he has reformed. He however abused the trust that his child place on him and turned into a beast. Consequently, I hereby allow the appeal against sentence. The life imprisonment is set aside and substituted with twenty five (25) years imprisonment to run from the date of arrest which is 30th June, 2013. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 25TH DAY OF JULY, 2022.

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G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

Appellant in person.

Ms. Maingi for the Respondent.

