



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 83 OF 2018**

**DO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal in Mitigation and sentence against the judgment of the learned Hon. D. Mochache SPM in Criminal Case No. 84 of 2016 dated 23<sup>rd</sup> February 2016 at Shanzu Court)

**J U D G M E N T**

1. The Appellant DO filed this appeal against the judgment of Hon. D. Mochache (SPM) delivered on 23<sup>rd</sup> day of February 2018 in Shanzu SPM's Court Sexual Offence Case No. 84 of 2016 where he was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. The appellant was convicted and sentenced to serve ten years imprisonment.

2. The grounds of appeal in the amended grounds of appeal filed on 30<sup>th</sup> November 2020 are as follows:-

i) That the learned trial Magistrate fell into error when she says that she had no discretion when it comes to Sexual Offence Sentences.

ii) That the learned trial Magistrate fell into error in applying a wrong principle in passing the 10 years sentence which was so harsh and excessive.

iii) That the learned trial court Magistrate fell into error by failing to consider appellant's mitigation which considered could have reduced the 10years meted upon the appellant.

iv) That the learned trial court Magistrate fell into error in law by failing to consider the period spent in remand custody prior to conviction and sentence.

3. In the affidavit in support of the appellant's application to amend the grounds of appeal at paragraph 5 he averred that he had decided to appeal on Mitigation and Sentence alone.

4. The particulars to the offence for which the appellant was charged are that on diverse dates between 1<sup>st</sup> December 2015 and 31<sup>st</sup> July 2016 at Mtwapa Township within Kilifi County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of ZD a child aged 10 years who was to his knowledge his sister.

5. The appeal was canvassed by way of written submissions. The Appellant in his submissions argued that it was erroneous the trial court to say that sentences under Section 20(1) of the Sexual Offences Act No. 3 of 2006 are fixed. He relied in the holding in **Kichajele S/O Ndamungu vs Republic (1949) E.A.C.A. 64** that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular in which these words occur is merely a maximum and that the court may impose a lesser sentence below the limit indicated.

6. He also relied in the holding of **Sir Clement Delestang V.P. Opoya vs Uganda** where he stated:

***"It seems to us beyond argument that the words 'shall be liable to' do not in the ordinary meaning require the imposition of the stated penalty but merely expresses the stated penalty which may be imposed at the discretion of the court. In other words they***

*are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it”.*

7. The appellant argued that the use of the words liable to gives room for the exercise of discretion. The Appellant further relied in the Supreme Court of Kenya holding in petition nos. 15 & 16 of 2015:-

**Francis Muruatetu & Another vs Republic** to urge the court to reduce the 10 years sentence.

8. He also cited the case of **Shadrack Kipchonge Kogo vs Republic in Eldoret CR. Appeal No. 253 of 2003** where the court held:-

*“That sentence is essentially an exercise of the trial court and this court to interfere, it must be shown that in passing the sentence the court took into account an irrelevant fact or that a wrong principle was applied or short of those. The sentence was so harsh and excessive that an error in principle must be inferred”.*

9. In regard to Mitigation the Appellant argued that he had been in custody since he was 36 years and he was now 40 years. He claimed that he had reformed while in prison and was remorseful to the incident and regrets a lot. He promised not to commit any crime if released/given another chance to be re-united back into society. He said that his health may not enable him to complete the 10 years sentence and that would be against the spirit of the sentencing Guidelines 2016.

10. The Appellant urged the court to consider the period he spent in remand custody.

11. The Respondent in submissions argued on both the original and amended grounds of appeal. This court will however confine itself to the submissions in relation to amended grounds of appeal which grounds are in respect to sentence and mitigation only.

12. The Respondent while relying in the holdings in **PMM vs Republic (2018) eKLR** and **MK vs Republic (2015) eKLR** argued that the phrase “not less than” has not been used in the proviso to Section 20(1) of the Sexual Offences Act and the inference is that the proviso does not create a minimum sentence but that the accused shall be liable to imprisonment for life.

13. The definition of the meaning “shall be liable” was also drawn from the Court of Appeal for East Africa in the case of **Opoya vs Uganda [1967] E.A. 752** where it was held that 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.

14. In the same breath the Respondent relied in the dicta in **James vs Young 27 Ch.D. at p655** where North J said:-

*“But when the words are not ‘shall be forfeited’ but shall be liable to be forfeited’ it seems that what was intended was not that there should be absolute forfeiture, but a liability to forfeiture, which might or might not be enforced”.*

15. The Respondent argued that the sentence under Section 20(1) of Act No. 3 of 2006 is mandatory life imprisonment. It was contended that the proviso to section 20(1) of Act No. 3 is to effect that a person convicted of incest when the female victim is under the age of 18 years is liable to a terms of imprisonment between 10 years and life imprisonment. It was argued that the sentence meted out was proper and should not be interfered with and the appeal should be dismissed.

16. Having considered the grounds of appeal, the submissions by the Appellant and the Respondent respectively and having relooked at the proceedings in the trial’s Magistrate court particularly mitigation by the appellant and the sentence by the trial Magistrate the issues for this court to consider are:

- a) Whether the sentence of 10years imprisonment was excessive in the circumstances.
- b) Whether the trial Magistrate failed to consider the Appellants mitigation before sentencing.
- c) Whether the trial Magistrate ought to have considered the period the Appellant was in remand custody while passing sentence.

17. Section 20(1) of the Sexual Offences Act, creates an offence of incest where the accused found guilty is liable to imprisonment for a term not-less-than 10 years. The proviso to that section provides that if the female person is under the age of 18 years the accused person shall be liable to imprisonment for life. The complainant in this matter, according to the charge sheet was 10 years old at the time the offence was committed. The P3 form and PRC form produced during the trial confirms that the complainant was 10 years old at the time the offence was committed having been born on 7<sup>th</sup> February 2006. It therefore follows that the punishment applicable is the one in the proviso to Section 21 of the Sexual Offences Act i.e **the accused person shall be liable to imprisonment for life.**

18. Being that the complainant was 10 years at the time of the offence was committed, the trial Magistrate was within her discretion to pass a sentence against the appellant upto life imprisonment. This court therefore finds that the sentence of 10 years meted out against the appellant for sexually assaulting his little sister continually over a period 2 years was very lenient in the circumstances.

19. The appellant in mitigation told the court to be lenient with him as he had a child in Std. 8. The court in passing sentence said it did not have any discretion when it comes to Sexual Offences as the sentences are fixed but went ahead to pass a sentence of 10 years imprisonment in respective of the fact that the female victim of the offence was a child aged 10 years and looked up to the appellant for protection. Although the appellants mitigation was not considered this court finds that the sentence was very lenient as the applicable sentence is upto life imprisonment in the proviso to Section 20(1) of the Sexual Offences Act. The trial Magistrate without saying exercised her discretion to pass a sentence of 10 years instead of life imprisonment.

20. On whether the court ought to have considered the remand period it is true that the Appellant was not released on bond as indicated in the proceedings of 8/03/2017 the court declined to release the accused in bond as it likely to be a danger to his sister. The appellant was therefore in custody from 19/10/2016 upto 27/02/2018 when he was sentenced. In consideration of the proviso to Section 333(2) of Criminal Procedure Code this court hereby orders that the sentence of 10 years meted out against the appellant should run from 19/10/2016.

21. The upshot of the above analysis is that the appeal succeeds only to the extent of the 4<sup>th</sup> ground of the amended grounds of appeal. The sentence is upheld and the appellant to serve the sentence from 19/10/2016.

**Dated, signed and delivered at Mombasa this 25<sup>th</sup> day of February, 2021 by Microsoft Teams/Open Court.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**