REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 44 OF 2019[SO, INCEST]

SOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from Judgment, Conviction and sentence delivered on 20.06.2019 in SRM's Ukwala

Criminal (SO) Case No. 34 of 2019 by Hon. Gladys Adhiambo, Senior Resident Magistrate).

JUDGMENT

1. The appellant SOO was tried and convicted of incest contrary to section 20(1) of the Sexual Offences Act. He is alleged to have defiled his 13 year old daughter and impregnated her. She gave birth to a son. Now, both daughter and her son share the same father, according to the DNA report filed in court. The appellant had initially denied the offence leading to a full trial. Placed on his defence, he never denied committing the offence. He only asked the trial court to forgive him for what he did. A pre bail assessment report recorded the victim minor to have asked the court to jail her father for life for defiling her. The appellant is said to have taken advantage of the absence of his wife who was mentally incapacitated to prey on his first born daughter. The trial magistrate heeded the victim's plea and wishes and sentenced the appellant to life imprisonment, upon finding the appellant guilty of incest. This sentence is also found in the proviso to section 20(1) of the Sexual Offences Act.

2. Aggrieved by the conviction and sentence, the appellant filed this appeal on 24/6/2019 and at the hearing, he abandoned his challenge against conviction. He asked this court to consider his sentence only, claiming that the sentence of life imprisonment imposed on him was unconstitutional.

3. Therefore, although the Appellant's appeal as filed via Petition of Appeal on 24/6/2019 challenges both conviction and sentence, this judgment determines the Appellant's appeal against sentence only. This is because, when the appeal was admitted to hearing on 19/1/2021 and directions for filing of written submissions to dispose of the appeal were given on 3/2/2021, the appellant filed his submissions on 1/3/2021 and stated as follows:

> **"Having received and perused the trial record, I hereby erect (sic) the following grounds based solely on the mitigation factors in respect of the sentence of life by the trial court."**

4. This court will therefore proceed as I hereby do and find that the appellant's appeal against conviction to be and is hereby marked as wholly withdrawn.

APPEAL AGAINST SENTENCE

5. The Appellant herein SOO was charged, tried and convicted for the offence of incest contrary to Section 20(1) of the Sexual Offences Act. The particulars of the charge dated 31/8/2018 are that on unknown day of March 2018 at night at [particulars withheld] village in Ugenya sub-county within Siaya County, being a male person, caused his penis to penetrate the vagina of GA a child aged 13 years who to his knowledge was his daughter. The appellant pleaded not guilty and after the full trial, the trial magistrate Hon. G. Adhiambo found the appellant guilty, convicted him and sentenced him to life imprisonment, vide her judgment and sentence of 20/6/2019, which is impugned. The charge sheet reveals that the appellant was aged 48 years.

SUBMISSIONS

6. According to the appellant, he was proved to be remorseful and that even his defence was a mitigating factor. He relied on **Simon**

Kipkurui Kimoni V R (no citation) stating that Odunga J held that mitigations have a place in the trial proceedings and that it ought to be considered while meting out sentence. He submitted that he did not premeditate the offence and that he was influenced by some mental distortment that engaged a memory lapse at some point hence he should not have been overpunished.

7. In his view, punishment that is severe and excessive serves neither the interest of justice nor those of the society.

8. The Appellant submitted further that the life imprisonment imposed on him as provided for in Section 20(1) of the Sexual Offences Act was unconstitutional due to its mandatory nature. He relied on **Francis Karioko Muruatetu & Another V Republic [2017] eKLR** where the Supreme Court held that mandatory sentence deprives the trial court of their legitimate jurisdiction to exercise discretion to individualize an appropriate sentence to the relevant aspect of character and record of each accused person. He further relied on **Christopher Ochieng V R [2008] eKLR** where, according to the appellant, the Court of Appeal held that minimum mandatory sentence is unconstitutional. He submitted that since the trial magistrate stated that her hands were tied under the law, this court can interfere with the life sentence imposed.

9. The Appellant further submitted that since he was incarcerated from date of arrest on 22/8/2018 to the time of conviction and sentence as he was unable to raise bail pending trial, this court should consider the provisions of Section 333(2) of the Criminal Procedure Code and Order that the term sentence to be reimposed to take into account the period that the appellant was in remand custody. He also relied on the Judiciary Sentencing Guidelines on the objectives of sentencing.

10. The Respondents' counsel Mr. Kakoi Principal Prosecution Counsel filed written submissions on 22/2/2021 opposing the appeal against conviction and sentence and urging this court to uphold the judgment of the trial court and dismiss the appeal herein.

11. However, as earlier stated, following the appellant's withdrawal of his appeal against conviction, this court will only consider submissions regarding allegations of severity of and or unconstitutionality of life sentence imposed on the appellant.

12. Submitting in support of the life sentence imposed on the appellant, Mr. Kakoi submitted that under Section 20(1) of the Sexual Offences Act, if age of Minority is pleaded and proved, the accused is liable to imprisonment for life.

13. According to Mr. Kakoi, the complainant minor gave very graphic details on how she was defiled by the person whose primary duty is to protect her. Further, that the conduct of the appellant towards the complainant offers no mitigating factors to warrant interference with the sentence.

14. In the alternative, counsel urged that should this court decide to interfere with sentence imposed, the same should not be less than 20 years imprisonment. He nonetheless urged the court to find the appellants' appeal unmeritorious and dismiss it.

DETERMINATION

15. Having considered the appellant's grounds of appeal on sentence, submissions for and against sentence reduction and the evidence adduced on record against the appellant, in my humble view, the issue for determination is whether this court should interfere with the life sentence imposed on the appellant.

16. 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 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 cases penetration or the indecent act was obtained with the consent of a female persons."**

17. The Section above creates the offence and ingredients of incest and also prescribes punishment generally, in the event that it is proven that the complainant is a minor.

18. The Appellant challenges the sentence imposed on the basis that it is excessive in the circumstances, considering his mitigations and secondly, that it is unconstitutional as he was given the mandatory minimum provided for in the proviso to Section 20(1) of the Sexual Offences Act.

19. In **S. Vs Nchunu & Another (AR 24/11) [2012] ZAKZPHC6,** the Kwa Zulu Natal High Court stated:

> **"It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in S Vs Scott-Crossley 2008 (1) SACR 223 (SCA) at para 35:**
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> > **"Plainly, any sentence imposed must have deterrent and retributive force. But off course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones."**

20. The learned Judges continued:

> **"…….It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society."**

21. In the **Francis Murutatetu & Another V Republic (supra)** case, the Supreme court of Kenya citing many other decisions including the ones referred to above made it clear as follows:

> **"Courts have always frowned on mandatory sentences that place a limitation to judicial discretion. In S. Vs Foms 1990(2) SA at 806 (L) - 807(b), the South African Court of Appeal (Corbett, (J) held that:**
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> **"The infliction of punishment is a matter for the discretion of the trial court. Mandatory sentences reduce the court's normal sentencing function to the level of a rubber stamp. The imposition of mandatory sentences by the legislature has always been considered an undesirable intrusion upon the sentencing function of the court. A provision which reduces the court to a mere rubberstamp, is wholly repugnant."**

22. In **S Vs Mofokeng 1999(1) SACR 502(h) at 506 (d),** Stegmann J opined:

> **"For the legislature to have imposed minimum sentences severally curtailing the discretion of the courts, offends against the fundamental constitutional principle of separation of powers of the legislature and the Judiciary. It tends to undermine the independence of the courts and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases."**

23. Similarly in **S Vs Jansen 1999(2) SACR 368(c) at 373(g)-(h),** Davis J held:

> **"Mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignity of the accused."**

24. It is undisputable that he Supreme Court in the Francis Muruatetu decision held that mandatory sentences provided for in cases of Murder and by extension, robbery with violence upon conviction, were unconstitutional in so far as they deprived the trial court of judicial discretion to mete out appropriate sentence having regard to the mitigation and circumstances under which a particular offence was committed.

25. That decision has been adopted by all courts including the Court of Appeal in sexual offences cases among them **Jared Injiri Koita Vs R [2019]eKLR** where the appellant was convicted for a sexual offence where sentence was non optional. The Court of Appeal exercised discretion and reduced the mandatory life imprisonment to a term sentence.

26. This fact of fettering discretion of courts in sentencing was appreciated by the Kenya Judiciary Sentencing Policy Guidelines where it is stated:

> **"Whereas Mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders."**

27. In the **Jared Injiri Koita v R** (supra) case, the Court of Appeal held:

> **"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentenced stipulated by Section 8(1) (2) of the Sexual Offence Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.**
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> **The Appellant was provided an opportunity to mitigate in the trial court where it was stated that he was first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children like the complainant, could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."**

28. The approach to be adopted by courts in determining appropriate sentences where minimum sentence is prescribed was stated in **S Vs Malgas 2001 (2) SA 1222 SCA 1235 para 25** thus:

> **"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."**

29. Applying the above principles to this case, it is an undisputed fact that the appellant committed incest against his own daughter, the

Complainant GA0, whose age assessment report dated 29/11/2018 (Exhibit 4) shows that she was approximately 14 years old.

30. Not only did the appellant commit the offence of incest against his daughter. He impregnated her and the DNA results as per the Government Chemist Report dated 8/3/2019 show that the appellant is 99.99+% the biological father to the infant (J.O) delivered by the complainant and the complainant GAO The incest was discovered when the complainant was already expectant. All this happened when the appellant who had sole custody of the complainant child and her 2 other siblings was married to their mother who was said to be mentally deranged and roaming in market places meaning the children had no other person to turn to for care and protection, but the appellant. There was no contrary evidence.

31. Placed on his defence, the appellant gave unsworn statement of defence and gave his mitigations and not defence. He prayed for the court's assistance because he was an orphan, his brother left children under the care of the appellant, that he had never committed any other offence and that at times he became absent minded and took herbs for treatment. Upon being convicted, the appellant prayed for forgiveness, that he lived alone, his parents died, his children are alone and that he did not know how they were fairing on at home.

32. In her sentencing remarks, the trial magistrate considered the nature and gravity of the offence, the fact that the appellant was a first offender, age of the complainant and the abuse of trust by the accused who preyed on his child, the physical violence and emotional torture meted on the complainant, placing her in the family way at a very young age and the prevalence of the offence requiring deterrent sentence.

33. This court cannot and would not condone sexual offences and especially if it is committed against minors and more so, members of the family who have no alternative abode. In **Yasmin Vs Mohammed [1973] EA 370**, Madan J stated:

> **"The High Court is especially endowed with the jurisdiction to safeguard the interests of infants as the court is the parent of all infants. The Welfare of the infants is paramount and is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe and sect fall within the purview of the Guardianship of infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."**

34. The appellant used violence and threats to chop off his daughter's neck as he defiled her, in the event that she cried even as she was in serious pain such that she could not bear it and so she cried out her heart. The appellant then upon being arraigned took the court and the complainant through an unnecessary trial as he never gave any defence of denial. He instead mitigated asking for assistance of the court and forgiveness. He seems to blame some extraordinary forces that led him to commit such a heinous offence.

35. The question is, does such a person who is not in control of his actions and who has an insatiable violent appetite for his own blood and flesh (daughter) deserve leniency, since he is a danger to society? The children he claimed were alone are the same children that he preyed on. Can he be trusted with their custody and care even if he is their father? What appropriate sentence should the court mete out in such circumstances?

36. In **R Vs Scott (2005) NS WCCA 152**, Howie J. Grove and Barn JJ stated:

> **"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed…… one of the purposes of punishment is to ensure that an offender is adequately punished…. a further purpose of punishment is to denounce the conduct of the offender."**

37. In **R vs AEM (200) NZ** it was held that:

> **"One of the main purposes of punishment is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet punishment."**

38. In **R Vs Harison [1997] 93 Crim R 314** it was held:

> **"Except in well-defined circumstances such as youth or mental incapacity of the offender…..Public deterrence is generally regarded as the main purpose of punishment, and this objective consideration relating to particular prisoner (however persuasive) and necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful fact in preventing the commission of similar crimes by those who may otherwise would be tempted by the prospect that only light punishment will be imposed."**

39. In the **Francis Karioko Muruatetu** case, the Supreme Court set out guidelines with respect to rehearing sentencing for the conviction of a murder charge which, by extension, applies to all cases where minimum and or mandatory sentences apply.

a. Age of the offender;

b. Being a first offender;

c. Whether the offender pleaded guilty;

d. Character and record of the offender;

e. Commission of the offence in response to gender-based violence;

f. Remorsefulness of the offender;

g. The possibility of reform and social readaptabilility of the offender;

h. Any other factor that the court considers relevant.

40. The objectives of sentencing in Kenya are now in the public domain as guided by the Judiciary Guidelines on sentencing. These have been reiterated in several decisions. These objectives include: deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct of the offender on the harm done to the victim.

41. Taking into account all the above stated factors and guidelines, I note that the appellant offender herein was the biological father to the complainant minor and is now the grandfather to his own daughter's child, a son. The complainant was aged about 14 years when she was violated. As a child, she is carrying the burden of raising another child whose father is also her father and who is in jail for life for the heinous offence.

42. The offender was not a youth. He was aged 48 years old in 2018 meaning he is now 50 years or more. He was married to the complainant's mother. The complainant is his first born child. His wife who is the complainant's mother is said to have had some mental derangement. If that be the case, the appellant had the opportunity and choice of either marrying another wife to help him raise his children or raise them in the best way possible since the children's mother has a medical condition, not turning them into his wives or sex toys. The complainant is traumatized permanently.

43. The Appellant had no past record hence he could be treated as a first offender. He however never pleaded guilty to the offence and took the court on a long winding tour of hearing evidence from several witnesses only for him to, during his defence, merely ask for forgiveness.

44. Albeit his past character and record is not known, the manner in which the appellant violated the complainant child by placing a weapon on her and threatening to kill her if she cried or told it out to anyone and even repeatedly defiling her on that material night in the matrimonial bed and house where his other two children slept and could only hear him assault the complainant tells it all, that he is worse than a wild animal, who was tearing into the body part of his daughter, a minor without any mercy. Does he deserve the mercy of the court? I doubt, considering the circumstances under which the offence was committed and the age of the appellant and complainant.

45. The offence was no doubt a gender-based violence offence where the offender used his power to control the feeble innocent child.

46. Albeit the offender/appellant pleaded for forgiveness and says he is remorseful, that must be due to his incarceration now that he has no liberty to do what he was doing. There is however no guarantee that he will not repeat the same offence to his own children or to other children who are not related to him by blood, given a chance to get back into the society.

47. From the horrifying evidence on record, the Appellant is a dangerous person. He is worse than a murderer. He deserved long prison sentence to keep him away from the society where is a risk to many women and children.

48. This is not one of those cases where the court can close its eyes to the offence and tamper justice with mercy. The appellant deserved a deterrent sentence. I find no fault with the sentence imposed on the appellant by the learned trial magistrate. Even the Francis Muruatetu decision did not say that maximum sentence is unconstitutional, such sentence can be meted out having regard to the circumstances of each case and mitigation. The appellant was given an opportunity to mitigate before he was sentenced. The trial magistrate did not say that her hands were tied in her sentencing remarks. She considered the seriousness of the offence and the mitigations by the appellant before imposing the lawful sentence which is not unconstitutional as her discretion was not fettered or at all.

49. I am alive to the fact that the **Francis Muruatetu** decision has been applied in many other decisions of the Court of Appeal including **Jared Koita Injiri v R** (supra) and the fact that the appellant can no longer hide his guilt as demonstrated by his withdrawal of the appeal against conviction.

50. I am also alive to the fact that the sentence provided for under section 20(1) –proviso thereof, of the Sexual Offences Act is not mandatory sentence. It is only the maximum that a trial court can impose. The Court of Appeal in **M K v Republic [2015] eKLR stated**:

> **"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 <u>that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life.</u> 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?**
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> **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 <u>the accused shall be liable to imprisonment for life.</u>**
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> **19. <u>What does "shall be liable" mean in law</u>? The Court of Appeal for East Africa in the case of <u>Opoya -v- Uganda</u> (1967) EA 752 had an opportunity to clarify and explain the words <u>"shall be liable on conviction</u> 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 of imprisonment. The Court cited with approval the dicta in James -v- Young 27 Ch. D. at p.655 where North J. said:

"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".

We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death".

20. On our part, we contrast the wordings in Section 8 (2) of the Sexual Offences Act with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.

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.

17. Mwongo J in **P M M v Republic [2018] eKLR stated:**

"As stated in the Opoya Case (supra) cited in the above decision of MK (supra), the Court of Appeal for East Africa interpreted and clarified and gave legal meaning to the words "shall be liable"* to mean as follows: "shall be liable on conviction to suffer death"** ***means that the court has discretion "to provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment".

In conclusion therefore, the proviso to Section20 (1)* simply means 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)* the Court of Appeal stated 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.

51. The learned judge in the above decision remitted back the case to the trial magistrate to impose an appropriate sentence.

52. In the instant case, however, the trial magistrate is no longer in the court station at Ukwala as she was transferred. That being the case, resubmitting the file to the same court for reconsideration of sentence will be an exercise in futility considering the fact that the trial magistrate fully considered the mitigations and circumstances under which the offence was committed against the minor before passing the life sentence. When the minor was interviewed by the probation officer during pre-bail assessment for the appellant during trial, she was said to be traumatized and asked that her father be sentenced for life. That is a victim of the offence who feels more pained than the courts which are merely involved in passing lawful sentences. The sentence imposed is for protection of society against predators like the appellant. It is my finding and holding that the sentence imposed was lawful, appropriate and justified in the circumstances. I find no reason to interfere with the same. I dismiss the appeal herein and uphold the sentence of life imprisonment imposed on the appellant by the trial court.

53. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 24TH DAY OF MARCH, 2021

R.E. ABURILI

JUDGE

In the presence of:

Appellant virtually at Kisumu Maximum Prison

Mr. Ngetich Prosecution Counsel for the State

CA: Modestar and Mboya