



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL APPEAL NO 41 OF 2019**

**MKK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against Judgement, conviction and sentence in CMC Criminal Case Number 121 of 2014-Kilifi, Republic vs Mohamed Kalama Kiringi, delivered by R.Ondieki, SPM delivered on 31.7.2017).*

**JUDGMENT**

**Introduction**

1. **MKK** (hereinafter referred to as the appellant) was sentenced to 10 years imprisonment in criminal case number 121 of 2014 at Kilifi Senior Resident Magistrates' Court for the offence of incest contrary to Section 20 (1) of the Sexual Offences Act. [1] There was no finding on the alternative count of committing an indecent act with a child. [2] In exercise of his right of appeal, he now seeks to quash the conviction and sentence.

**Approach to appeal**

2. In determining this appeal, this court has a legal duty to re-analyse, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify. [3]

3. This court must determine, as regards the conviction in the first place, what the evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its judgment.

4. In other words, this court must consider whether the Magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the conviction and sentence. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence.

5. Stated differently, in order to determine whether there is any merit in any of the submissions made by the respective parties, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the judgment.

6. This means that if an appellate court is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. The appeal court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal.

7. To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty.

8. I find it useful to cite the High Court of Bloemfontein, South Africa in *S vs Singh* [4] where the court stated:- "*The best indication that a Court has applied its mind in the proper manner ...is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.*"

9. When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. As Nugent J stated “*what must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.*” [5]

### **The Trial in the lower court.**

10. The complainant, FM’s, evidence was that she was 12 years old, and that the appellant is her father. She stated that sometimes in September 2012 her mother left her with her siblings, namely H and S and attended a funeral. She said that that her father called her into the house and slept with her. She also said he gave her traditional medicine. She said she was slightly injured in her private part but she did not bleed. She stated that she never told anyone.

11. She also testified that on another occasion he told her that they go and fetch firewood in the bush but on arrival she did not see the firewood. She also stated that on another occasion he had sex with her at home, and, that, he took a cloth and wiped her private parts after sleeping with her and also he gave her medicine and told her not to tell anyone.

12. In addition, she said in yet another incidence, he told her to go and give the goats water, which she did, but she saw him in the bush, then he called her and spread his shirt on the ground and told her to lie on it, but, she refused and ran home. She stated that on another occasion her mother had gone to keep vigil at a funeral and her father called her at night and asked her to sit on his laps, and, that, he put her on his thighs, but she struggled with him and kicked him in the abdomen. She said he grabbed her but she fled to another room where he followed her, but she refused to give in. She said he gave her medicine. She said he hurt her hand and her mother realized it and asked her what happened and she told her what has been happening. She testified that her mother asked him and he said the devil had deceived him.

13. She stated that her father was subsequently arrested and she was also taken to the hospital where she was examined. She identified her P3 form, Post Rape care form and her Age Assessment Report in court.

14. NNM, the complainant’s mother testified that on 8<sup>th</sup> March 2014 at 7.30 am she returned from a funeral and found the complainant standing outside. She stated that she noticed the complainant was not walking properly and she asked her the problem but the complainant said nothing. She testified that she later asked her and she opened up and told her what has been happening. She stated that she called his brother, his mother and the complainant repeated the story. She said his brother wanted the issue to be resolved quietly, but the story had spread and the chief summoned them. She stated the complainant was aged 13 years.

15. Mary Katana, a Volunteer Children’s Officer testified that on 12<sup>th</sup> March 2014 the appellant went to her crying and said his wife and daughter were making false claims against him. She said that he told her they had a family meeting where he admitted the claims that he had sex with their daughter. She said he told her he admitted to avoid being killed. She stated that he was told to compensate the family. She stated that she reported to the Chief, and that she took the complainant to the Police Station where she was issued with a P3 form and a Post Rape Care Form.

16. Sebastian Karisa, the area Chief testified that on 14<sup>th</sup> March 2014 he received a report on incest and that he asked the Children’s Volunteer Officer to investigate and that he also summoned the girl and the mother both of whom confirmed the incident. He said he reported the matter to the District Officer and the police and the appellant was arrested.

17. Dr. Hassan Bachen, a Medical Doctor produced the P3 form completed by Dr. Kalu whose hand writing he was familiar with. He also produced the Post Rape Care report. He stated that the complainant had a history of having been defiled three times. He stated that the finding were that her hymen was broken and no discharge was noted.

18. Cpl Clara Bingo who took over the file from PC Koitaba who was transferred produced the Age Assessment Report.

19. At the close of the prosecution case, the trial Magistrate was satisfied that a *prima facie* case had been established. He ruled that the appellant had a case to answer and complied with the provisions of section 211 of the Criminal Procedure Code.[6] The appellant elected to give unsworn defence. He called two witnesses.

20. In his defence, he stated that he is a mason and a stone cutter, and, that, on 7<sup>th</sup> March 2014, he was planning to go to Chasimba for a project together with his children Hamisi and Fatuma, and, that they carried poles. He said that it was said that the complainant had done something bad, and she was beaten by his son. He denied defiling her and stated that his daughter bribed the police.

21. The appellant called Joshua Kalama Kingi as his witness. He testified that on 7<sup>th</sup> March 2014 the appellant’s wife went to him to report the incident and asked for a sitting with the elders. He said that the complaint’s wife reported that Saidi, the appellant’s son had reported that the appellant had slept with his daughter. He said that upon asking the complainant she said that she dreamed sleeping with her father in the spirit world, like witchcraft. He also said Said stated he never saw the appellant in the act.

22. The appellant also called Jumaa Kalama, then a village elder as his witness. He testified that he instructed the area chief to arrest the appellant, and, under the Chiefs instructions, he took the appellant for medical examination and thereafter he was charged with the offence.

### **The verdict**

23. The learned Magistrate in his judgement analysed the evidence, the law and jurisprudence on standard of prove and he was satisfied that the prosecution had established its case to the required standard. He convicted the appellant and sentenced him to 10 years imprisonment.

## The appeal

24. The appellant cites the following grounds:-

- a. **That** the learned trial Magistrate erred in law and fact by finding a conviction and sentence without considering that the prosecution did not prove their case beyond doubt.
- b. **That** the learned trial Magistrate erred in both law and fact by convicting and sentencing the appellant without considering that it was a made up case based with hypothetical explanation which was unsafe for conviction.
- c. **That** the learned trial Magistrate erred in law and facts by finding my conviction and sentence defence evidence (sic).

## Submissions

25. The applicant submitted that the prosecution case was full of material contradictions. He relied on *Philip Nzau Watu v Republic*<sup>[7]</sup> and argued that the Doctor did not specify the age of the injuries. He also relied on *Ben Maina Mwangi v Republic*<sup>[8]</sup> in which the High Court allowed an appeal on similar grounds holding that the doctor's findings did not connect the accused with the offence. He argued that the prosecution did not prove its case as required.

26. He argued that the prosecution case was a made up case. He recalled the evidence of his witness who testified that the complainant stated that she dreamed sleeping with her father, and, that, the complainant never reported the incident from September 2012 until March 2014. Citing section 109 of the Evidence Act,<sup>[9]</sup> he argued that there was no cogent evidence implicating him.

27. The appellant also argued that there existed a grudge between himself and his wife. He cited *Okeno v Republic*<sup>[10]</sup> and argued that this court has a duty to subject the entire evidence to scrutiny and arrive at its own conclusions.

28. Lastly, the appellant argued that he raised a strong defence which created a reasonable doubt on the prosecution case. He cited *Solomon Mrukaria v Republic*<sup>[11]</sup> and submitted that the court ought to have granted him the benefit of doubt.

29. The Respondent's counsel relied on *AKK v Republic*<sup>[12]</sup> which restated the ingredients of the offence of incest, which are the relationship between the victim and the accused, proof of penetration, age of the complainant and identity of the perpetrator. She referred to the evidence on record and submitted that the above ingredients were proved.

## Determination

30. The court's duty is to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions are so material that the trial Magistrate ought to have rejected the evidence. The Uganda Court of Appeal in *Twehangane Alfred vs Uganda*,<sup>[13]</sup> stated that not every contradiction warrants rejection of evidence. It subtly stated:-

*"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."*

31. It is settled law that inconsistencies unless satisfactorily explained would usually **but not** necessarily result in the evidence of a witness being rejected.<sup>[14]</sup> The question to be addressed is whether the contradictions mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. I cannot think of a better definition of the word contradiction than the words of the Court of Appeal of Nigeria in *David Ojeabuo vs Federal Republic of Nigeria*<sup>[15]</sup> thus:-

*"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."*

32. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.<sup>[16]</sup> It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.

33. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.<sup>[17]</sup>

34. Applying the tests discussed above I find that what the appellant is referring to as contradictions and inconsistencies are not substantial nor do they relate to the substance of the case to the extent they can affect the conviction. They are not fundamental to the main issues and

therefore cannot create a reasonable doubt in the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it can say it feels an abiding conviction to a moral certainty of the truth of the charge.<sup>[18]</sup> Further, the evidence in question is to be considered together with the rest of the evidence, which point to the occurrence of the incident and the identification of the assailant. Corroboration of the evidence is also a relevant factor. Accordingly, the argument that the evidence was tainted by inconsistencies and contradictions fails.

35. On the alleged existence of a grudge between the appellant and his wife, a distinction should be drawn between situations where an accused is proved by the totality of the evidence to have established ill motive. In such a case, the conviction cannot be allowed to stand. However, where the court finds the surrounding circumstances and probabilities as in this case excluded any reasonable possibility that someone other than the accused perpetuated the offence – the court will be right in rejecting allegations of ill motive. The evidence before the learned Magistrate viewed in totality did not point towards the existence of a grudge. In my view, the appellant's defence on this issue is a mere suggestion totally unsupported by evidence. The family had sittings prior to his arrest and there is nothing to show the alleged grudge ever dominated the discussions. On the contrary, what emerged from the meeting was a desire to resolve the issue at family level but the story had reached the Chiefs office. The suggestion of ill motive is not supported by evidence. This being so, the trial court was entitled not to draw an adverse inference against the prosecution evidence to suggest ill motive.

36. The magistrate correctly placed reliance on the available evidence in rejecting the appellant's defence. Furthermore, in summing up his findings that led to the conclusion that the state succeeded in proving its case beyond reasonable doubt, the Magistrate listed reasons for so finding. In my mind, this shows the level of importance that the Magistrate attached to his findings. I find that the Learned Magistrate did not misdirect himself on this issue.

37. On the submission that his defence was not considered, it is correct that the legal burden of proof in criminal cases never leaves the prosecution's backyard. Viscount Sankey L.C. in the celebrated case of *Woolmington vs. DPP*<sup>[19]</sup> in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that:-

*‘Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’*

38. The defence must be weighed against the evidence offered by the prosecution. A trial court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused. This is the basic calling of every court without exception.<sup>[20]</sup>

39. Whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. The Supreme Court of Nigeria in *Ozaki and another vs The State*<sup>[21]</sup> stated that for a defence to be rejected it must be incredible and that the defence must be weighed against the evidence offered by the prosecution. In *Uganda vs. Sebyala & Others*,<sup>[22]</sup> the learned Judge citing relevant precedents had this to say:-

*“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts”*

40. The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi.<sup>[23]</sup> Once an accused person discharges the evidential burden of adducing evidence of alibi, it is the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the evidence adduced by the prosecution and if there is doubt in the mind of the court, the same is resolved in favour of the accused.

41. A trial Court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyse the prosecution evidence and leave out that of the accused is a fatal mistake. It's a duty bestowed in every Court to weigh one set of evidence (prosecution) against another (defence) before arriving at a conclusion. This is the basic calling of every Court without exception.<sup>[24]</sup>

42. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating the accused is true. The correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses. It is acceptable in totality in evaluating the evidence to consider the inherent probabilities and improbabilities.

43. The proper approach is to weigh up all the elements, which point towards the guilt of the accused against all those, which are indicative of his innocence. The court is required to take proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.

44. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.<sup>[25]</sup> Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider all the evidence with great care, especially when it is the only evidence because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the charged crime have been proven, that the evidence irresistibly points to the accused, and that the evidence is both truthful and accurate.

45. In determining whether the appellant's defence was considered, this court has a legal duty to re-analyse, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify.<sup>[26]</sup> An appellate court will not interfere with or temper with the trial court's judgment or decision regarding either conviction or sentence unless it finds that the trial court misdirected itself as regards its findings of facts or the law.<sup>[27]</sup>

46. However, if the trial court misdirected itself either on the facts or the law, an appellate court will interfere and deal with the matter as it deems fit, including substituting its own order or decision for that of the trial court, which may include an order setting aside the conviction or altering the sentence.

47. The ambit for the interference by a first appellate court on a finding of fact and credibility is restricted to few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong.<sup>[28]</sup> Factual errors may be errors where the reasons, which the trial Magistrate provides, are unsatisfactory or where he/she overlooks facts or improbabilities. In addition, where the finding on fact is not dependent on the personal impression made by a witness' demeanour, but predominantly upon inferences and other facts, and upon probabilities. The appeal court is also in an equal position to the trial court.<sup>[29]</sup>

48. When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.<sup>[30]</sup>

49. The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.<sup>[31]</sup>

50. This court must determine, what the evidence of the state witnesses was, as understood within the totality of the evidence, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decisions / findings or judgment.<sup>[32]</sup>

51. Turning to the facts of this case, this appeal will stand or fall on whether the ingredients of the offence were proved. Section 20 (1) of the Sexual Offences Act:-<sup>[33]</sup>

*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 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.*

52. To establish a case under the above section, the prosecution must prove the elements of the offence. For instance, there must be an **indecent act** or **an act, which causes penetration**. Further, the victim must be a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother.

53. It is therefore imperative that the prosecution must prove the existence of a father/daughter relationship between the appellant and the complainant. From the evidence, there is no dispute that the appellant was the complainant's father. It is also clear that the complainant is a female person within the meaning of Section 20 (1) of the Act and that the appellant is her father and that he knew her to be his daughter. These basic truths, which are essential ingredients of the offence of incest, were not contested at all.

54. Section 22 of the act provides the test of relationship as follows:-

*1) In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.*

*(2) In this Act—*

*(a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;*

*(b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;*

*(c) "half-brother" means a brother who shares only one parent with another;*

*(d) "half-sister" means a sister who shares only one parent with another; and*

(e) “adoptive brother” means a brother who is related to another through adoption and “adoptive sister” has a corresponding meaning.

(3) An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

55. The above presumption was not rebutted.

56. An indecent act is defined in Section 2 of the Act as follows:-

‘indecent act’ means an unlawful intentional act which causes:-

(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act of penetration.

(b) ...

‘Act which causes penetration’ means an act contemplated under this Act.’

57. It is also necessary to bear in mind the definition of *penetration* which is defined in the act as ‘*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*’ The prosecution bears the onus of proving that an “**indecent act**” or “**act which causes penetration**” has been committed in addition to proving the relationship between the accused/appellant and the complainant as well as the age of the complainant.

58. In support of “**indecent act**” and “**act which causes penetration**” is the evidence of the complainant who narrated how her father defiled her, the doctor’s evidence which confirmed the hymen was broken, the P3 form and the PRCR. It is my finding that the above facts disclosed the offence of incest, and, that, the evidence established the offence to the required standard.

59. On sentence, I note that the appellant was sentenced to 10 years imprisonment, even though the complainant was aged below 18 years. The phrase “*shall be liable to*” has been used in the above provision. The question whether the above section prescribes a mandatory sentence of life imprisonment has been the subject of judicial construction by our superior courts. The Court of Appeal in *M K v Republic*<sup>[34]</sup> discussed the section in detail. I find it apposite to quote extensively from the said decision.

14. *There are two critical issues for us to consider and determine in this appeal. First is whether there is a minimum mandatory sentence of a term of life imprisonment in the proviso to Section 20 (1) of the Sexual Offences Act. Second whether the twenty (20) year term of imprisonment imposed by the trial court was illegal. We have considered the authorities cited by the appellant and it is our considered view that the authorities are not relevant to the determination of the two pertinent issues in this appeal. The appellant was charged with an offence under the Sexual Offences Act which prescribes the sentences to be meted out to persons convicted thereunder.*

15. *Readings of the diverse provisions of the Sexual Offences Act reveal that in most sections, a minimum sentence is provided for. For example, under Section 3 (3), a person guilty of the offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years...; Section 4 of the Act stipulates that a person convicted of attempted rape is liable upon conviction for imprisonment for a term which shall not be less than five years... Section 5 (2) of the Act provides that a person convicted of sexual assault shall be liable to imprisonment for a term of not less than ten years... Section 8 (3) of the Act provides that a person convicted of defilement when the child is between the ages of twelve and fifteen years shall be liable to imprisonment for a term of not less than twenty years.*

16. *Our reading of the Sexual Offences Act shows that whenever a minimum sentence is imposed, the phrase not less than is used.*

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 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.

22. Based on the foregoing interpretation, we are of the considered view that in the instant case, the learned judge erred in law in holding that the twenty (20) years term of imprisonment meted to the appellant by the trial court was an illegal sentence. We find that the twenty (20) years term of imprisonment was not an illegal sentence and was lawful in the context of the decision in **Opoya -v-Uganda (1967) EA 752**. It follows that the learned judge erred in correcting and or enhancing the sentence from 20 years to life imprisonment. We reiterate the principles in the case of **Ogolla s/o Owuor, (1954) EACA 270** wherein the predecessor of this court stated:

*“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”*

23. We are of the considered view that the High Court misinterpreted the proviso to **Section 20 (1)** of the **Sexual Offences Act** and acted on wrong principles and overlooked the decision in **Opoya -v- Uganda (1967) EA 752**.

60. It seems to me beyond argument the words “shall be liable to” does not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words it is not mandatory but it provides a maximum sentence only and while the liability existed the court might not see fit to impose it. The trial Magistrate appears to have been aware that the sentence is not mandatory.

61. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.<sup>[35]</sup> The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.<sup>[36]</sup> Also, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.<sup>[37]</sup>

62. Where no minimum or maximum sentences are provided, sentencing is an exercise of courts discretion. The guiding principles are listed in the above paragraph. For me to interfere with the sentence, it must be excessive and unjustified and not proportionate to the offence. I have no doubt that the offence is serious and a deterrent sentence is necessary. I think the Magistrate imposed a lenient sentence for an offence that required a stiffer penalty. The sentence is not proportionate to the gravity of the offence. I will however not interfere with the learned Magistrate’s discretion. I will instead allow the sentence to stand.

63. In conclusion, I find and hold that this appeal has no merits. Accordingly, the appellant’s appeal on both conviction and sentence is dismissed.

Right of appeal **14** days.

64. Signed and Dated at **Nairobi** this day of 2020

**John M. Mativo**

**Judge**

Signed, Delivered and Dated at **Malindi** this **23<sup>rd</sup>** day of **January** 2020

**Reuben Nyakundi**

**Judge.**

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[1] Act No. 3 of 2006.

[2] Contrary to section 11 of the Sexual Offences Act, Act No. 3 of 2006.

[3] See *Okeno vs Republic* {1972} E.A, 32at page 36, *Pandya vs Republic* {1957} EA 336, *Shantilal M. Ruwala vs Republic* {1957} EA 570 & *Peter vs Sunday Post* {1958}EA 424.

[4] {1975} (1) SA 227 (N) at 228.

[5] *S vs Van der Meyden* {1999} (1) SACR 447 (W) stated at 450.

[6] Cap 75, Laws of Kenya.

[7] Cr App No 29 of 2015.

[8]{2006} e KLR.

[9] Cap 80, Laws of Kenya.

[10]{1972} EA 32.

[11]{2014} e KLR.

[12]{2018} e KLR.

[13] *Crim. App. No 139 of 2001*, [2003] UGCA, 6.

[14] See *Uganda vs Rutaro* {1976} HCB; *Uganda vs George W. Yiga* {1979} HCB 217

[15]{2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.

[16] See *Osetola vs State* {2012} 17 NWLR (Pt1329) 251.

[17] See *Theophilus vs State* {1996} 1 NWLR (Pt.423) 139.

[18]Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary.

[19] {1935} A.C 462 at page 481.

[20] *John Matiko & Another vs Republic*, Criminal Appeal No. 218 of 2012.

[21] Case No. 130 of 1988.

[22]{1969} EA 204.

[23] See *OrteseYanor& Others vs The State* {1965} N.M.L.R. 337.

[24] *John Matiko & Another vs Republic*, Criminal Appeal No. 218 of 2012.

[25]Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary.

[26] See *Okeno vs Republic* {1972} E.A, 32at page 36, *Pandya vs Republic* {1957} EA 336, *Shantilal M. Ruwala vs Republic* {1957} EA 570 & *Peter vs Sunday Post* {1958}EA 424.

[27] See *R vs Dhlumayo & Another* 1948 (2) SA 677 (A). The principle was also restated in *S v Mlumbi* 1991 (1) SACR 235(SCA) at 247g.

[28] See *S vs Hadebe and Others* 1997 (2) SACR 641 (SCA) t 645e- f.

[29] Ibid.

[30] As Nugent J (as he then was) in *S v Van der Meyden* [1999 \(1\) SACR 447](#) (W) stated at 450.

[31] As was stated in *S vs Singh* [1975 \(1\) SA 227](#) (N) at 228.

[32] *Ibid.*

[33] Act no. 3 of 2006.

[34] {2015} eKLR.

[35] See *Alister Anthony Pareira vs State of Maharashtra* {2012}2 S.C.C 648 Para 69.

[36] See the Supreme Court of India in *State of M.P. vs Bablu Natt* {2009}2S.C.C 272 Para 13.

[37] See *Somanvs Kerala* {2013} 11 SC.C 382 Para 13, Supreme Court of India