REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 26 OF 2018

CMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable C. A. Ocharo-

PM dated 15th December, 2017 in Machakos CM's Court Criminal Case No. 314 of 2015)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

CMM.....ACCUSED

JUDGEMENT

1. The appellant, **CMM**, was charged in Machakos CM's Court Criminal Case No. 314 of 2015 with the offence of incest contrary to section 20(1) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant, on diverse dates between January, 2015 and 19th February, 2015 at Ngelani Location in Machakos District within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of **PWM**, a child aged 7 years who was to his knowledge his daughter.

2. Alternatively, the Appellant was charged with committing an indecent act with a child contrary to section 11(1) of the same Act, particulars being that the appellant, on diverse dates between January, 2015 and 19th February, 2015 at [particulars withheld] Location in Machakos District within Machakos County, intentionally and unlawfully touched the vagina of **PWM**, a child aged 7 years with his penis.

3. In support of its case the prosecution called 7 witnesses. During *voir dire* examination, the complainant stated that she did not know what it means to take oath. However, the Court found that she was intelligent enough to appreciate the essence of telling the truth and was affirmed.

4. According to the complainant who testified as PW1, she was studying at [particulars withheld] Primary school but staying in a rescue centre where she was taken by the Investigating Officer. Prior to being taken there she was living at home with S her younger brother, N a young boy. She was also living with her mum and dad, the Appellant. According to her, the Appellant slept on her and told her to remove her panty. It was her evidence that the Appellant hurt me on the stomach and that he had done it before. The Complainant however did not inform her mother about the same since he forgot.

5. The Complainant stated that the Appellant inserted his finger in her vagina. He however did not use anything else. After that the complainant went to hospital and was examined. She identified her treatment notes form Machakos level five. On the day of the incident, she could not remember where her mother was though the incident occurred during the day.

6. PW2, **Jackline Kasalu**, testified that on the morning of 20th May, 2015 at around 6.00 a.m., when she woke up she found the complainant who is her neighbour's child under the water tank covering herself with a sweater and carrying a bag. PW2 then called her sister in law,

Redempta, and they took the child to their house. Upon opening her bag, they found clothes and the complainant informed them that she had slept behind the tank. The Complainant informed them that her father had told her to go back to where she had slept.

7. According to PW2, the complainant looked unkempt, was hungry and feeling very cold and informed them that the previous night she had slept at the house of a woman called **Bertha Lote** and that she had left her mother in the house. The Complainant informed them that her father wanted to beat her up but she ran away. According to the Complainant, her father used to call her then raped her. The Complainant disclosed to them that the first time it happened, she informed her mother but she just took the bloody clothes and washed them and that after Bertha told the child's mother to take the child to hospital she only bought her soda and cake and told her never to talk about the incident.

8. PW2 decided to tell the head of their women group and the incident was relayed to the chief and assistant chief who after hearing the Complainant's narration of how the father used to rape her, took the child away. PW2 identified the complainant's father as the Appellant whom she had known for long since they went to school together. As for the Complainant's mother, she had known her for three years since she got married.

9. PW3, **Jacinta Motete**, the women representative at the CDF Committee, testified that she was a business woman in Machakos and on 20th February, 2015 she went to Machakos as usual. At about 10.00 a.m., one **Anne** called her from home. The said **Anne** was with **Rebecca** and they asked to see her and requested her to go to the home of **David Kavoo Nthenge**. They told her there was a child who was being mistreated. When she arrived she saw a child seated by the tank and was informed that the child, the Complainant, had gone to their home the previous night and had told them she had been chased away from home by her parents and that her father usually defiled her by removing her panty, removing his penis and inserting it into her. This occurrence started while in Mwea and that the first time the father did that to her she told her mother but she just cleaned her and told her never to tell anyone.

10. It was PW3's evidence that she had known the Appellant for long because that is also her home. According to PW3, the child looked confused. She called the chief who came and after he spoke to the child, he called the assistant Chief. Leaving the Complainant with PW3, the chief then went to the Complainant's home but the Appellant and his wife were not there. As we waited, PW3 saw the parents going into their home so she called the chief who arrested the parents and PW3 accompanied the child to the Chiefs' camp. It was her evidence that she had no grudge against the Appellant and that they had never disagreed.

11. In cross-examination, she denied that they couched the Complainant on what to say.

12. **Anastacia Mbatha, PW4,** a neighbour to the Complainant was at home on 18th February, 2015 at about 5.00 p.m. when she saw the Complainant going to her home. During that time, her children were in school. When she asked her to go back home because she was leaving for the market, she told PW4 she could not go back home because her father was using her and PW4 understood this to mean being raped. PW4 told her to wait for her in my home as she went in search of her mother, RM, but she was unable to find the mother either at home or in the market.

13. In the evening at about 7.00 pm when she returned home, she told the mother that the Complainant was at her place and that she needed to go for her but she did not. As a result, the Complainant spent the night there and at about 7.30 am her mother went to her home but when the Complainant saw her she started crying saying she was afraid of her father who was defiling her and beating her. The child said the father would defile her when the mother is out in the shamba or market. PW4 ten told the mother to take the child to hospital as she went to church and in the evening the Complainant's mother went and informed PW4 that the Complainant had disappeared. The next day PW4 received a call from her neighbour, Rose, that the Complainant had been found in her home. They decided to call their chairlady, PW3, who called the area chief. After speaking to the child, they arrested the child's father, the Appellant whom the Complainant had informed her had defiled her. The Appellant, according to PW4, had been her neighbour for long.

14. In cross-examination, PW4 explained that the Complainant told her of the defilement on 18th so she decided to look for the child's mother. According to her, she did not know the Complainant before she went to her home but she used to see her playing with other children. She however had never spoken to her before.

15. **Dr. John Mutunga, PW 5** had with him a P3 form for the Complainant who was aged 7 years and an age assessment document. He also had treatment notes for the child and PRC form. According to him, the child was alleged to have been defiled by someone well known to her on diverse dates between January 1st and 19th February, 2015. On examination, the child was withdrawn, hymen broken and external genitalia was tender. They did a high vagina swab but there were no spermatozoa seen and pus cells. HIV test was however negative and the child's age was assessed at eight years. He filled in the P3 form on 26th February, 2015 and signed it. The witness produced the same, treatment notes, laboratory results, PRC form and age assessment certificate as exhibits.

16. In cross-examination he clarified that he did not treat the complainant who was attended to by **Dr. Njau**.

17. On 20th February, 2015 at about 12.00 pm, **PW6, Martin Muburu Vika,** the Chief Gilani location, was in the office when he received a phone call from women of Mitunia village informing him there was a child who was sleeping in an empty water tank in someone's home. He called the Assistant chief and together they proceeded to David Ntheni's home where they found the child. When they summoned the parents and asked them where the child was, they did not know.

18. PW6 learnt that the child had been running away from home and when interviewed, the child, who was in standard two, disclosed that the father had been inserting his fingers into her vagina and sometimes beats her. PW6 arrested the appellant who is the child's father and whom he knew by appearance since there was a time the appellant was arrested by his *askaris* for cultivating cannabis in his home. After arresting the Appellant, he was taken to Machakos police station.

19. **PW7, Noel Mwingi Kilonzo,** the Assistant chief Ngelani testified that on 20th February 2015 while in the office, he received a phone call

from the area chief Ngelani (PW 6) who directed him to proceed to **David Ndenge's** home. Upon going there, he found the chief who told him he had found a child who appeared to have been beaten and chased away from their home. Although PW7 did not know the child, the neighbours knew her and disclosed that her father's name is CM. According to him, one **Jacinta Mutete**, PW3, who was present told them that the child had told them that her father had tried to sleep with her and threatened to kill her.

20. They proceeded to the Appellant's home and found him, his wife and two children and the Appellant was arrested because he had failed to make a report of the child's disappearance for two days. The witness was however not aware of the offence with which the Appellant was charged though he knew him very well and there was no problem between them.

21. In cross-examination, PW7 said that the teacher told them the child did not go to school the previous day. According to him, the child disappeared at night yet the Appellant did not make a report.

22. **PW8, CPL Rose Wawira,** the investigating officer testified that on 20th February, 2015 a case involving the Complainant was reported after she was taken to the station by the area chief and assistant chief in the company of the Appellant and the child's mother. They reported that the child's father had been defiling her. She entered the report in the OB and placed the appellant in the cells. After recording the child's statement, she took her to Katoloni Rescue Centre and recorded other witness statements from the neighbours, assistant chief and chief.

23. It was her evidence that the child ran away from their home and was staying at one of the witness' homes. One of these witnesses reported of the incident. She escorted the child to Machakos Level 5 Hospital where she was examined by a doctor who found the child's hymen had been broken and was withdrawn at the time of examination. According to her, the child had been defiled by her father who was identified by the Chief as well as the child. The child's P3 form was also filled on 26th February, 2015 and February, 2015 the child's age was assessed on 4th June, 2015 at 8 years (eight). According to him, he did not know the Appellant before this case.

24. At the close of the prosecution's case, the appellant was placed on his defence and testified that on 19th I was not even at home and that the Complainant was in school. According to him, he left home at 8.00 a.m. and came back at 8.00 p.m. When he got home he found the lights on and there was no one in the house. After sometime, his wife came and told him she was out looking for their daughter but did not find her. When he asked her why the child had run away, she told him she had made a mistake and run away to a neighbour's house.

25. The next day on 20th he left for work and returned back home at 3.00 p.m., and found the chief and his assistant who, told him they were looking for him for chasing his child from home. He accompanied them to their office then was take to Machakos police station where he learnt of these charges. According to him, he did not commit the offence.

26. In cross-examination, the Appellant admitted that the Complainant was his daughter aged 7 years. He also had a son who was younger. He stated that they were leaving school at 4.00 p.m. Since he was a casual labourer, he had no fixed timings but at the times had a contract for two months. It was his testimony that they were constructing within the market and their reporting hours was 7.30 a.m. to 4 – 5.00 p.m. The earliest time they were allowed to leave was 5.00 p.m. and that for the two months there is no day he left before 5.00 p.m. According to him, his wife just worked at home.

27. He confirmed that on 15th he did not call anyone to report that the child had not come back home and the next day he left for work by which time the Complainant had not returned home. He also did not call the next day when he was at work and let her mother look for her.

28. In her judgement, the learned trial magistrate found that based on the age assessment report, the victim was 8 years old and therefore a child. She also found that there was no doubt that the victim was the Appellant's daughter. As regards the issue of penetration, she found that the evidence of the medical officer was that on examination, the complainant's hymen was broken and there was tenderness on her external genitalia. From the demeanour of the Complainant and the conduct of the Appellant after he learnt of the Complainant's disappearance, the learned trial magistrate found that the Appellant committed the offence by performing an indecent act with his own child and proceeded to find him guilty of the offence. She accordingly sentenced the Appellant to life imprisonment which sentence in her view was the mandatorily prescribed sentence.

29. In this appeal it was submitted that the charge sheet was defective because it was drafted in a manner indicating that penile penetration took place yet from the evidence that was not the case. It was further submitted that there were contradictions between the evidence of PW2 and the complainant regarding the mode of penetration. Based on the findings of the learned trial court, it was submitted that the court ought to find that PW2 was an untruthful witness hence the Appellant's conviction was unfounded. According to the Appellant since **Dr Wanjau**, the doctor who treated the Complainant never testified, PW5 ought not to have produced his evidence since he was not the author thereof. According to the Appellant the failure to call the Complainant's mother was fatal to the case. Regarding the sentence, it was submitted that since an indecent act is provided as an alternative in the charge, under section 11(1) of the ***Sexual Offences Act***, the Appellant ought to have been liable to a term not less than 10 years.

30. The Respondent, on the other hand submitted that since the Complainant t's testimony was that the Appellant inserted his finger into her vagina and did not use anything else, there was no evidence that the Appellant inserted his genital organ into her genital organ hence ruling out the offence under section 8(1) as read with 8(2) of the Act. This evidence was corroborated by that of PW5 who examined the Complainant and filled in the P3 form.

31. It was therefore submitted that the trial Court erred in convicting the Appellant of the main charge yet the evidence pointed to the alternative charge. The Court was therefore urged to find the Appellant guilty of the alternative charge, convict him and sentence him accordingly.

Determination

32. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.

33. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

34. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

35. It was therefore appreciated by the Court of Appeal in **Kiilu & Another vs. Republic [2005]1 KLR 174,** that:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

36. The appellant contended that the charge sheet was defective due to the fact that though it indicated that there was penile penetration, the evidence did not prove this. It is true that from the evidence adduced, there was no penile penetration since the evidence was to the effect that the Appellant inserted his fingers into the genital organ of the Complainant. However, it was held in **Paul Katana Njuguna vs. Republic [2016] eKLR**, that:

> **"In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code."**

37. In **Flugence Otieno Kessa vs. Republic Mombasa Criminal Appeal No. 80 of 2000**, it was held by the Court of Appeal that:

> **"Before we leave the mater there is one issue which was raised in the High Court and which we think we ought to touch on. That issue concerned the fact that the three charges of fraudulent false accounting were laid under Section 330(a) and not under Section 330(b) of the Penal Code. The particulars of the charges clearly show that they ought to have been laid under paragraph (b) of Section 330…We think the charges ought to have been laid under Section 330(b) of the Penal Code and we understand the learned Judge to be saying that the mistake in laying the charges under paragraph (a) did not really occasion any failure of justice to the appellant and was a curable irregularly under Section 382 of the Criminal Procedure Code. We agree with this proposition. The position would have been different if Section 330(b) did not exist at all."**

38. In my view the mere fact that the evidence adduced does not prove the offence with which the accused is charged is not necessarily fatal if the evidence disclosed a cognate offence which is what the Appellant alleges in this case.

39. Section 20 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.***
>
> ***(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.***
>
> ***3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as "section 114 orders" under the Children's Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.***

40. In explaining the distinction between the offence of defilement and incest, **Majanja, J** in **F O D vs. Republic [2014] eKLR** held that:

> **"While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest."**

41. It is therefore clear that in order to prove incest the evidence must prove that the appellant committed an indecent act or an act which causes penetration. In other words, once there is evidence of indecent act, penetration is not necessary. Section 2 of the ***Sexual Offences Act*** defines "penetration" as:

> ***the partial or complete insertion of the genital organs of a person into the genital organs of another person.***

42. "Indecent act" on the other hand 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 that causes penetration.***
>
> ***(b) exposure or display of any pornographic material to any person against his or her will.***

43. What it means is that even in the absence of penetration as legally defined under the ***Sexual Offences Act***, where there is evidence of contact between any part of the body of the accused with the genital organs, breasts or buttocks of the complainant, the other ingredients of the offence being satisfied, commission of sexual offence may still be proved. In this case the complainant's evidence was that the appellant took her to another bed, slept on her, told her to remove her panty and hurt her on the stomach. According to her, the Appellant only inserted his finger in her vagina but did not use anything else. In these circumstances, there was no evidence of penetration. However, with due respect to **Miss Mogoi**, learned prosecution counsel, the offence of incest could still be found to have been committed since incest may either be committed through penetration or by commission of an indecent act. The insertion of one's fingers into the genital organs of another is clearly an indecent act under section 2 of the said Act. To my mind the reason why in cases of incest no distinction is made between penetration and indecent act is because the law takes a seriously dim view of those who knowingly sexually assault their kindred.

44. The second ingredient of the offence of incest is that the accused ought to have the knowledge that the complainant is his daughter, granddaughter, sister, mother, niece, aunt or grandmother. In this case it was admitted by the Appellant himself that the Complainant was his daughter.

45. The last condition is that it must be proved that the indecent act or an act which causes penetration was caused by the accused. In this case there was evidence from the Complainant that the indecent act was committed by the Appellant. That the said act was committed was similarly proved from the medical evidence which revealed that the Complainant's hymen broken and the external genitalia was tender.

46. The Appellant however took issue with the fact that PW5 produced documents made by **Dr Njau**, when PW5 was not the maker thereof. In **Emmanuel Mwadime vs. Republic [2016] eKLR,** the Court (**Kamau, J**) expressed herself as hereunder:

> **"Against the backdrop of the aforesaid powers, this court nonetheless came to the firm conclusion that it could still not convict the Appellant on the charge of grievous harm. Appreciably, as was rightly pointed out by the Appellant, PW 5 had no power or authority to tender in evidence the P3 Form on behalf of Patterson Mwapula, who the Learned Trial Magistrate indicated to have been PW 5. 61. This was in contravention of Section 77 of the *Evidence Act* Cap 80 (Laws of Kenya) that provides as follows:-**
>
> > ***"In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."***

However, a P3 Form, being an expert report can only be tendered in evidence by a skilled expert as provided in Section 48 of the *Evidence Act*. The same provides as follows:-

> **"*When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.*"**

Evidently, PW 5 was not skilled in medical matters. It was irrespective that the Appellant did not object to him producing the P3 Form because he did not lead evidence to demonstrate that he knew the signature of Patterson Mwapulu, attest that the said Patterson Mwapulu was the one who signed the said P3 Form or that he was well versed in medical matters. The situation would have been different had the said P3 Form been produced by a medical person and the Appellant failed to object to the production of the same. In the case of *Julius Karisa Charo vs Republic* (Supra), Ouko J also expressed similar reservations about police officers tendering in evidence P 3 Forms because they should only restrain themselves to tendering documents that would fall in their docket. He stated as follows:-

> **"To my mind police officers role in the production of documentary evidence ought to be restricted police abstracts and other non-technical documents. For the reasons stated I find and direct that PC Sang cannot produce the post-mortem report on behalf of Dr. Olumbe who has relocated at Australia and the efforts made in trying to procure his attendance, from what I have stated above, there must be pathologists who are conversant with his writing and signature."**

There is no doubt in the mind of this court that PW 1 sustained injuries as was evident from the photographs that were adduced in evidence. However, the P3 Form was critical to corroborate the injuries that he sustained because it is normal for it to be inconsistent with oral evidence that is tendered by witnesses. Failure to call Patterson Mwapulu thus dealt a fatal blow to the Prosecution's case as this court not therefore consider as the possible charge of the Appellant having caused grievous harm to PW 1 herein. In the circumstances foregoing, Amended Grounds of Appeal Nos 2, 5, 6, 7, 8 and 9 had merit and the same are hereby allowed."

47. **Ouko, J** (as he then was) in **David Jefwa Kalu vs. R Cr. Appl No. 133/03** held that:

> **"Medical evidence if sought to be adduced ought to be so done with propriety and not in such slipshod manner."**

48. A very clear warning was issued by the Court of Appeal in **Sibo Makovo vs. R Criminal Appeal NKR No. 39/1996** in the following words:

> **"…it appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called."**

49. In this case it is true that some treatment documents were produced by PW5 who was not the maker thereof. However, unlike in **Emmanuel Mwadime vs. Republic** (supra) PW5 who produced the said documents was a medical expert. What is disturbing however is that the Appellant was never given an opportunity to object to the production of the treatment documents by PW5. In my view that was a misdirection and I find that the initial treatment documents ought not to have been admitted in the manner they were so admitted. However, nothing turns on that point since the P3 itself was filled in by PW5 himself.

50. In my view the Appellant's conviction was based on sound evidence and cannot be disturbed.

51. As regards the sentence, the learned trial magistrate seems to have been of the view that the penalty for the offence was mandatory life sentence. With due respect that is not the correct legal position. That section states "***shall be liable to imprisonment for life"***. **Sir Henry Webb C.J.** in **Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64** had this to say on the proper construction of the words "**liable to**":

> **"The wording used throughout the code is "*shall be liable to*" but a consideration of the various sections shows in our judgment, that the use of the words "*shall be liable to*" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."**

52. The predecessor of the court went further in **Opoya versus Uganda [1967] EA 752** at page 754 where **Sir Clement DeLestang V.P**. picked up the conversation *inter alia* thus:

> **"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 express 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."**

53. A similar position was adopted in **D W M vs. Republic** (supra) where the Court held that:

> **"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual**

Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

54. That the life sentence is not mandatory appears from the sentence meted in **Tito Kariuki Ngugi vs. Republic [2008] eKLR** where the Court held that:

> **"The appeal against sentence has also no merit. The Appellant defiled his own daughter and caused her trauma which she will have to live with for the rest of her life. The 20 years he was given against life imprisonment provided for by the section under which he was charged cannot in the circumstances of this case be said to be harsh."**

55. Therefore, bearing the totality of the above principles in mind, it is my view that the use of the words "***shall be liable to imprisonment for life***" in section 20(1) of the ***Sexual Offences Act*** gives room for the exercise of judicial discretion. The court below fell into error when it took the words "***liable to***" to mean that only the maximum sentence could be meted out against the appellant. In **Shadrack Kipchoge Kogo vs. Republic Eldoret Criminal Appeal No. 253 of 2003** the Court had this to say:-

> **"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor 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.**

56. In my view the law in applying the use of the word "liable" appreciates that since incest can either be committed by an act that constitutes legal penetration or indecent act, the effect of either of those acts on the victim may not necessarily be the same, hence depending on whether there was penetration or indecent act, the court is given the discretion to impose the appropriate sentence in the circumstances. Accordingly, the Learned Trial Magistrate applied a wrong principle in her decision on sentencing and hence imposed a sentence that was so harsh that an error of principle must be inferred.

57. In this case there was no penetration. However, this Court cannot lose sight of the fact that the culprit here was the complainant's father who ought to have been in the forefront in protecting the complainant. Instead of doing so, he took it upon himself to be the instrument through which the complainant would be traumatized. The Complainant was so traumatized that she kept away from her home. That the mother seemed to have been complacent in the whole episode and took no action to protect her own daughter even when the incident was reported to her but instead chose to protect the Appellant, reveals a very unfortunate and cruel attitude on the part of both parents.

58. While appreciating the appellant was a first offender, and the prosecution did not advance any other reasons to justify the maximum sentence, and that there was no penetration but commission of indecent act, and while I appreciate this was and a heinous act on the part of a father against his daughter, I set aside the life sentence imposed upon the Appellant and substitute therefor a sentence of sixteen years imprisonment from the date of his incarceration on 20th February, 2015. To this extent only does the appeal succeeds but is otherwise dismissed.

59. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 27th day of February, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

The Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey