**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 42 OF 2016**

**ET.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[Being an appeal against both the conviction and the sentence of Hon. Rita Amwayi [RM] delivered on 8th March, 2016 in Molo Chief Magistrate's Court Criminal Case No. 162 of 2015.]*

**JUDGMENT**

1. The Appellant, ET, was arraigned before the Chief Magistrate's Court, Nakuru charged with the principal count of incest contrary to section 20(1) of the Sexual Offences Act. The facts alleged in the charge sheet were that on on the 18/01/2015 at [particulars withheld] village in Kuresoi District within Nakuru County, being a male person, caused his penis to penetrate the vagina of KC, a female aged 15 years who was, to his knowledge his daughter.

2. The Appellant faced an alternative charge of committing an indecent act with the same KC by touching her vagina with his penis on the same date and at the same place.

3. The Appellant pleaded not guilty and the case went on to full trial. The Prosecution called five witnesses. When put on his defence, the Appellant gave a sworn statement and called one witness. The Learned Trial Magistrate was persuaded that a case had been made beyond reasonable doubt and convicted on the principal count. She then imposed a sentence of life imprisonment.

4. The Appellant is aggrieved and has appealed to this Court raising the following grounds of appeal enumerated in his amended Grounds of Appeal:

> ***1.*** *That the Learned Magistrate erred in law and fact in failing to find that the age of the Complainant was not conclusively established.*
>
> ***2.*** *That the Learned Magistrate erred in law and fact in failing to find that the penetration is a crucial ingredient of the offence of defilement [and that it] was not proved beyond reasonable doubt.*
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> ***3.*** *That the Learned Magistrate erred in attaching credence to the testimony of PW1 and PW without warning himself that he did not record their evidence;*
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> ***4.*** *That the Learned Magistrate erred in awarding (sic) a mandatory sentence under section 20(1) of the Sexual Offences Act.*

5. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. *See* ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** **(1957) EA 336**, ***Ruwala vs. R*** **(1957) EA 570**.

6. The Appellant filed written submissions and during the hearing of the appeal, informed the Court that he did not wish to add anything orally.

7. Mr. Chigiti, Prosecution Counsel, argued the appeal on behalf of the State. He submitted that there was sufficient evidence to convict in the case. He submitted that the relationship between the Appellant and the Complainant was not disputed. Second, Mr. Chigiti submitted that

penetration was proved through the oral testimony of the Complainant and the medical documents produced as exhibits. Third, Mr. Chigiti submitted that the age of the victim was proved through the oral testimony of the victim.

8. To establish the charged offence, the Prosecution needed to prove beyond reasonable doubt the three ingredients:

i. That there was blood relationship between the Appellant and the Complainant – in this case father-daughter relationship;

ii. That there was penetration; and

iii. That the penetration was caused by the Appellant.

9. Additionally, for sentencing purposes, the Prosecution needed to establish that the Complainant was less than eighteen years old. The age of the Complainant also has implications for the third element of the offence: whether penetration was caused by the Appellant. Where the Complainant is less than eighteen years old - which is the age of consent - and the person charged with the offence of incest is an adult, and penetration is established, there is an irrebuttable presumption that penetration was caused by the adult since the minor is incapable of consenting to the act. In the present case, the claim was one of forcible penetration anyway.

10. The Complainant, KC, testified first in the case. The Court noted that the Complainant was fifteen years old and would, therefore, be sworn. The Complainant testified that on 18/01/2015 while at home where she lived with her father, the Appellant, mother, step-mother and siblings, the Appellant instructed her to take some firewood to a certain room in the compound. That room was where her step-mother, the Appellant's second wife, lived. The step-mother was away at the time. KC testified that she obliged and took the firewood to that room. As soon as she entered the room, the Appellant entered the room and locked it from the inside.

11. KC said that the Appellant told her that he would not allow her to leave the room. The Appellant then proceeded to remove his trousers and then forcefully removed KC's underpants. KC testified that the Appellant, then, pushed her to the floor and proceeded to defile her. She said that she was scared and she screamed as she felt a lot of pain in her private parts as the Appellant penetrated her.

12. KC testified that it appears that some neighbours heard her screams because she heard someone knock on the door. The neighbours had come to her rescue. They ordered the Appellant to open the door; and when he did, KC fled out.

13. The neighbours, then, took both KC and the Appellant to Mwahe AP Police Post where a report was made and the Appellant arrested. Later on, KC went to the hospital where she was examined and a P3 Form filled out.

14. One of the neighbours who went to KC's rescue was Johnston Leting. He testified as PW2. He told the Court that on that day – 18/01/2015 – he had just come from church and was heading to a nearby canteen when a neighbour by the name Mama Chela informed him that she had heard some screams coming from the Appellant's household. He rushed to the home of the Appellant.

15. Mr. Leting testified that when he got to the homestead, he found that the screams were coming from a two-roomed house. He went to the window and peeped inside. He saw the Appellant holding KC tightly against the wall. Mr. Leting said that he kicked the door while shouting forcing the Complainant to open the door. KC rushed out. Mr. Leting said that he went inside the room and demanded to know what the Appellant was doing. He got no response from the Appellant but KC told him and the other neighbours that the Appellant had defiled her. They decided to go report the matter to the Police and took KC and the Appellant with them to Mwahe AP Police Post.

16. At Mwahe Police AP Police Post, the group found APC Robert Rono. He minuted the occurrence, re-arrested the Appellant and advised KC and her mother (who had joined the group) to go to the Police Station to report and have the child examined. APC Rono also escorted the Appellant to Keringet Police Station and handed him there. He testified as PW3.

17. At Keringet Police Station, it was Corporal Emily Chebet to took over the matter as the Investigating Officer. She recorded the statement of KC, issued her with a P3 Form and re-arrested the Appellant. Later on, she recommended that the Appellant be charged with the offence of incest.

18. KC was taken to Keringet Health Centre the following day – on 19/01/2015. She was seen by Komen Miningwa, a Clinical Officer. Mr. Miningwa testified as the final Prosecution witness. He confirmed examining KC. He noted that she had an injury on her knee. Her genitalia had no injuries and had no discharge but the hymen was missing. When the health centre did tests on her vaginal swab, it confirmed that there was spermatozoa in the swab. Mr. Miningwa concluded that there was evidence of penetration. He produced the P3 Form as an exhibit in the case.

19. In his defence, the Appellant denied that he defiled his child. He said that the neighbours simply framed him because of a land dispute. He admitted that KC was his daughter and that they were home together on 18/01/2015. However, he said that KC brought some utensils to the house and he started beating her with a cane. He insisted that he did not defile her but that a neighbour, a man whose name he does not know wanted his land hence instigated the case.

20. The Appellant called one witness, his mother, Pauline Soi. She testified that on 18/01/2015, the Appellant came from work and the Complainant brought firewood; and that she witnessed nothing. However, on cross-examination, Ms. Soi conceded that on 18/01/2015, she was at Kaplong and not at Mwahe.

21. The Learned Trial Magistrate had no difficulty in concluding that all the elements of the offence of incest had been established; and disbelieved the Appellant's version.

22. The first salvo which the Appellant throws against the verdict is a procedural one: he says that it was an error for the Learned Trial Magistrate to convict him yet she did not warn herself that she did not record the evidence of the first two Prosecution witnesses.

23. It is true that the evidence of the first two Prosecution witnesses was taken before the Honourable A. Towett before she was transferred out of the station. When the Honourable R. Amwayi took over, the Trial Court record shows that she complied with the provisions of section 200(3) of the Criminal Procedure Code on

29/11/2015. She informed the Appellant of his rights under that section and the Appellant knowingly elected that the case should proceed from where it had reached. Having made that election, it is un-availing for the Appellant to raise that to attack the validity of the judgment in the case. There is no requirement in law that a Trial Magistrate specifically record in the judgment that she did not record the evidence of some witnesses once the provisions of section 200(3) are adhered to. It might be a good practice to do so – but this is not a reversible error.

24. Next, the Appellant complains that the age of the Complainant was not proved to the required standard. He is demonstrably wrong in this. The Complainant gave straightforward testimony that she was 15. The P3 Form said as much. The Appellant, who is the father to the Complainant, did not contest both pieces of evidence. The Learned Trial Magistrate believed them; and I have no reason to impugn that finding.

25. The trial Court record also contains plain evidence of penetration contrary to the claims by the Appellant. The Complainant, whom the Trial Court found to be a credible witness, gave straightforward testimony about how the Appellant forcefully penetrated her. That evidence was corroborated by the medical evidence in the case. The P3 Form and the testimony of Mr. Miningwa established that the Complainant had spermatozoa in her vaginal swab the day after the alleged incident. The combination of these two pieces of evidence establish penetration beyond reasonable doubt.

26. The last point taken up by the Appellant has more salience. He complains that it was an error for the Learned Trial Magistrate to sentence him to life imprisonment. He says that the Learned Trial Magistrate only did so because she wrongly believed that section 20(1) of the Sexual Offences Act imposes mandatory life imprisonment where the victim of incest is less than eighteen years old. The Appellant argues that that interpretation is wrong both on account of binding decisions of higher Courts on that section as well as under the doctrine of ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015.***

27. The relevant part of ***Section 20 (1)*** of the **Sexual Offences Act** provides as follows:

> *Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter…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….*

28. Does this provide for a mandatory sentence of life imprisonment? The Court of Appeal had occasion to deal with this question in ***MK v Republic (Nairobi Crim. App. No. 248 of 2014) [2015] eKLR***. The Court of Appeal comprehensively held as follows:

> *Our reading of the Sexual Offences Act shows that whenever a minimum sentence is imposed, the phrase not less than is used.*
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> *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….…What does "shall be liable" mean in*
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> *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….. 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.*
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> *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.*

29. This decision is quite clear that section 20(1) does not impose a mandatory life imprisonment for the offence of incest where the victim is less than 18 years old.

30. Additionally, as our case law has departed from the position that the minimum sentences provided for in the Sexual Offences Act are categorical and immutable prescriptions from which a sentencing Court cannot depart regardless of the circumstances of the individual case before them. This was perhaps most clearly held in ***Dismas Wafula Kilwake v R [2018] eKLR***, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

*In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in **Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015**], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.*

*Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the*

*Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.*

*The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.*

31. This progressive decisional law now requires Courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

32. This means that the Appellant is right on his argument about the sentence for incest under the proviso in section 20(1) of the Sexual Offences Act.

33. In the present case, the Appellant mitigated by stating that he was the sole bread winner for his family. In her sentencing decision, the Trial Magistrate indicated that she was disposed to meting out a stiff sentence because the Appellant was a father who had become a security threat to his own children. She thought life imprisonment served deterrence purposes.

34. While it is not clear that she was moved to that position by the interpretation suggested by the Prosecution counsel that life imprisonment was mandatory, in the present case, it is possible to say that life imprisonment is excessive. It is excessive because the Appellant was a first offender. While the offence he committed is almost by definition inhuman and depraved especially considering that the victim was his own child, it is also true that he did not commit the offence in a particularly barbaric fashion.

35. Taking into consideration the age of the victim; the violent manner of the commission of the crime; the fact that the Appellant was a first offender; and comparison of other like cases (like the cited case of ***MK v Republic (supra)***), it is necessary to reverse the sentence imposed in this case. Instead, I will impose a sentence of twenty-five (25) years imprisonment.

***36.*** **The upshot is that:**

***a.*** **The appeal against conviction is wholly dismissed.**

***b.*** **The appeal against sentence succeeds to the extent that the sentence imposed is reviewed downwards to imprisonment of twenty five (25) years. The imprisonment period shall be computed to begin on 20/01/2015 when the Appellant was first arraigned in Court since he remained in custody throughout his trial.**

*37.* Orders accordingly.

**Dated and delivered at Nakuru this 25th day of June, 2020**

**.....**

**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Mr. Alex Chigiti, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.14