



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO 91 OF 2019

MK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's

Court Criminal Case No. 91 of 2019, A. Lorot, SPM on 17th January, 2017)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

MK.....ACCUSED

JUDGEMENT

1. The appellant, **MK**, was charged in the Chief Magistrate's Court at Machakos in Criminal (SOA) Case No 16 of 2014 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 the 9th day of May, 2014 at [Particulars Withheld] Village, Ndalani Location in Yatta District within the Machakos County, intentionally touched the vagina of **ENM** with his penis who was to his knowledge his daughter. Based on the same facts he faced an alternative charge of Indecent Act.

2. In support of its case the prosecution called 7 witnesses. After *voir dire* examination, the Court found that though the complainant had sufficient intelligence to understand nature of the trial, she was too young and timid to understand the meaning of an oath hence would give unsworn statement but would still be cross-examined by Appellant.

3. According to the Complainant, who testified as PW1, on 27th July, 2015, she was sleeping when the appellant picked her and took her to a bed. The Appellant then removed her underpants, slept on her and did a bad thing to her. It was her evidence that she did not know of the relationship between her and the Appellant and that at the time of the incident her father was in police custody while her mother was at her father's place. The Complainant only came to know of her assailant in the morning since it was dark when she was carried.

4. The Complainant testified that the incident occurred at the Appellant's place where she had been taken by her mother together with her younger sister with whom they were sleeping on the floor. During the time of the incident, she felt a lot of pain in the area of her buttocks.

5. After the incident, the Complainant disclosed the same to her teacher who told her to go bath in her place. When she left school, she went to her grandfather's place and disclosed the incident to her Aunt and it was then that she was taken to the hospital by PW3 and members of the public from where they reported the matter to *Nyumba Kumi* and proceeded to Kisikini, where her mother was at the time having left the Appellant's place. After that she never returned to the Appellant's place.

6. According to PW4, **Rael Mbithe Munyoki**, on 22nd July, 2015, she was from Mutituni Market at around 6.30 p.m. when she came across the Complainant on the road at a place Inyaani. The Complainant who had a school bag informed her that she was from [Particulars Withheld] School and was going to her grandparents' place at Kisekinye. Asked if she would reach there, the child stated that she would but

upon observing that the Complainant, PW4 noticed that she was walking with a, odd gait and she decided to take her in. Upon asking the Complainant what had happened to her, she child disclosed that she had been defiled by her father, who had also beaten her. The Complainant disclosed that her father was **M** while mother was **N**.

7. Based on that information particularly where the Complainant said she was hailing from, PW4 called PW3 who was from the area and relayed the said information. They then agreed that PW4 would stay with the Complainant overnight and take her to PW3 at AIC Kyuuni Church at Mutituni the following day and on that day, PW4 handed over the Complainant to PW3 who took the child to hospital.

8. According to PW3, **Cynthia Nthenya**, on 22nd July, 2015, at 8.00 p.m. she was at home when she was called by PW4 relayed the aforesaid information to her. PW3 then called her sister's place at Kisikine to inquire if the child was known there but no one knew her. The sister told PW3 to inquire from the Complainant the school which she was attending and PW3 was informed that the Complainant was attending [Particulars Withheld] Primary School. The two ladies agreed that PW4 would stay with the Complainant for the night and to take her to the church place as PW3 was far away. PW3 then called the child's relative, PW2 and informed her about the child and PW2 agreed to pick the Complainant the following day which she did. However, upon raising the child's dress she saw that she had whip marks around her waist area up to the back. When they further inquired from the child if anything else had happened to her, the Complainant was reluctant to do so but upon further prodding, she disclosed that during the absence of her mother, her father twice lifted her from the floor where she was sleeping onto the bed and did bad things to her. PW3 then suggested to PW2 to take the child to her grandmother and on 23rd, they took the Complainant to Mutituni Dispensary where she was examined before they were referred to Machakos Level 5 where she was treated after which they went to report the matter at Machakos Police Station where they were issued with a P3 Form.

9. PW2, **JMM**, confirmed that on 21st July, 2016 she got a call from PW3, a fellow church member, who informed her that that she had received information about a child who was found on the road who was said to hail from her place. They agreed that she would pick the child the following day and on that day the child was taken to church when she realised that the child was a daughter her sister in law aged 8 years. Upon picking the child she realised that the child had difficulty in walking and the child informed them that she had been beaten by her father. Upon further prodding the child disclosed that she had been defiled by her father. They then proceeded to the child's grandfather's place and informed him what had taken place and the said grandfather told PW2 to take her to the Hospital. They then took the child to Mutituni Dispensary where they were advised to report the matter at Machakos. Before proceeding thereto, they reported the matter at the Chief's place and then went to Machakos police station where they were given a P3 form which was filled and they recorded a statement.

10. In cross-examination PW2 reiterated that the child had been defiled and had been beaten up when she found her at the time when the child's father was not around. The child informed her that she had explained to her class teacher who gave her Kshs. 40 to go to her grandmother and she had boarded a vehicle with the same and alighted at Mutituni at 7.00 p.m. when she was spotted by PW4 who rescued her at 7 p.m. PW2 denied that they were implicating the Appellant but denied knowledge that the Appellant was implicated by the Complainant's mother.

11. PW5, **Dr. Julia Mutunga**, from Machakos Level 5 Hospital, produced the P3 form that was filled in for the Complainant. According to her, it was reported that the Complainant, aged 8 years was allegedly defiled from 20th July, 2015 to 22nd July, 2015. It was her evidence that the Complainant sustained bruises on thighs and injuries in her private parts and that her hymen was torn. However, the tests for Syphilis and HIV turned out negative though she had pus cells. In her opinion, the Complainant the degree of injury was grievous harm. She signed the P3 on 7th August, 2015 and produced the same as an exhibit.

12. She also produced the Post Rape Care Form (PRC Form) which revealed injuries in her private parts and though the complainant was calm during the examination she had pain in her legs. According to P6, it showed that she was defiled by her step father. She exhibited the said Post Rape Care Form, the laboratory request form, the age assessment form for the complainant which confirmed that she was aged 8 years as well as her treatment card from Muthetheni which was relied upon in filling in the P3 form.

13. PW7, **Corporal Patrick Kilonzo** on 24th July, 2015, arrested the Appellant based on the information received from the members of the public and took him to Machakos Police Station after informing him of the reason why he was being arrested.

14. The Investigating officer, PW6, **PC Nancy Akumu**, was directed by the OCS, Machakos Police Station to undertake investigations of the incident. She issued the Complainant with a P3 form which was filled in. According to her, the Complainant identified the father to the AP's who arrested him. She exhibited the laboratory test results, P3 form, treatment notes, Post Care Rape Form, Age Assessment Report which showed that the Complainant was 9 years. At the conclusion of the investigations, she preferred charges against accused after the Complainant identified the Appellant, her father, as her assailant.

15. At the close of the prosecution's case, the appellant was placed on his defence and testified that on 27th July, 2015, he quarrelled with his wife who framed him with the charges before court. He was therefore shocked when on the same day, he was arrested by police officers. He denied having defiled his daughter.

16. In his judgement, the learned trial magistrate found that the appellant committed the offence with which he was charged in the main charger. It was his finding that the child's complainant was received in the police station on 24th July, 2015, 3 days prior to the accused's alleged quarrel with his wife. Besides, the mother to the child did not testify and was nowhere in the picture and the Appellant did not call her as a witness. The trial court found that the doctor's evidence showed the child was defiled and she had injuries on the thighs and bruises on both the labra majora and minora, and on the vulva. She also had pus cells in her system.

17. According to the court, the Appellant did not deny that the complainant, who bore his name, was his child who initially tried to cover up that she was beaten by the father. It was the Learned Trial magistrate's finding that the evidence was overwhelming against the Appellant hence the reason he offered so frail a challenge to the testimony of the prosecution's witnesses. He therefore proceeded to convict the Appellant on the main charge and sentenced him to life imprisonment.

18. In this appeal, it is submitted that penetration was not proved and that the evidence tendered did not conclusively lead to the conclusion that it was the appellant who committed the offence in question. According to the Appellant the use of the word “bad thing” did not necessarily connote defilement. The Court was urged to treat the Complainant’s evidence with caution as it fell short of describing what was done to her on the threshold that can point to the appellant as the perpetrator. It was further submitted that the prosecution witnesses contradicted themselves as regards the number of time the Complainant was defiled. According to the Appellant in his evidence he cogently explained the circumstances that led to his arrest yet the Learned Trial Magistrate did not consider the same. It was further submitted that the sentence imposed on him was manifestly excessive in the circumstances.

19. In opposing the appeal, it was submitted on behalf of the Respondent that the prosecution through PW6, the investigations officer produced age assessment report of the complainant according to which the age of the complainant was about 8 years. As regards penetration, the Respondent submitted that based on section 2 of the *Sexual Offences Act* it was submitted that from the Complainant’s evidence and that of PW5 the doctor who filled the P3 form and the PRC form it was found that upon examination, the minor had bruises on her thighs. She also had injuries on her private parts and her hymen was torn.

20. As to whether penetration was occasioned by the accused, it was submitted that PW1 testified that the appellant was a person known to her since her mother took her to the appellant’s home together with her younger sister. The appellant picked and took the minor to bed, defiled her during night and the minor identified him in the morning therefore there was no possibility of mistake in identification. In his defense, the Appellant also confirms that she had quarrelled with his wife and the minor was his daughter. Therefore, it is safe to conclude that the appellant was identified by recognition.

21. It was further submitted that the minor in her testimony stated that she was left by her mother under the care of the appellant, but she did not know the relationship between her mother and the appellant. In his defense the appellant did not dispute that he had blood relationship with the minor. As to whether there were inconsistencies in the evidence tendered, it was submitted that the discrepancy noted is on the days the complainant was defiled which was a minor discrepancy which does not negate the fact that the complainant was defiled and she identified the appellant as the perpetrator. It was therefore submitted that the minor inconsistencies by the prosecution witnesses are not fatal to the testimony of the complainant as they did not shake the evidence of the complainant and should be ignored and the court should consider the relevant evidence in support of the charge.

22. As for the defence, it was submitted that while the appellant’s defense was that the charge is a fabrication because of the quarrel he had with his wife on 27th July, 2017, the appellant did not dispute that he was in the same house with the minor on that day. Accordingly, it was submitted that the prosecution proved all the ingredients of the offence beyond any reasonable doubt. Further, the defense of the accused person was hopeless denial and could not dispel the overwhelming evidence tendered by the prosecution.

23. Regarding the sentence, it was submitted that the same is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. While exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation. Mitigating and aggravating factors should also be considered. In this case considering that the law provides for a mandatory life sentence, in meeting the sentence the court took note of the seriousness of the offence, the age of the victim, the blood relations between the appellant and the victim and the principles of sentencing. Therefore, there is no reason for this court to interfere with the sentence imposed by the trial court.

24. According to the Respondent, the conviction was safe and that this appeal does not raise any basis to disturb the conviction. The Court was urged to uphold both the conviction and sentence.

Determination

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

26. 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.”

27. 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.”

28. 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.

29. However as held by **Mativo, J** in **Sylvester Wanjau Kariuki vs. Republic [2016] eKLR**, a decision in which he cited the decision of the Supreme Court of India in **K. Anbazhagan vs. State of Karnataka and Others Criminal Appeal No. 637 of 2015:-**

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”

30. 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.

31. In this case there is no doubt as regards the age of the Complainant. It is clear that the Complainant was aged below 18 years and this was confirmed by the age assessment report.

32. 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.”

33. It is therefore clear that in order to prove incest the evidence must prove that the accused 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.

34. “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 phornographic material to any person against his or her will.

35. 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 picked her placed her on the bed and did "bad manners" to her. The Appellant has submitted that there was no evidence of penetration. However, it is clear from the evidence that even if there was no penetration, the actions described by the Complainant constituted indecent act. This was proved not only by the evidence of the Complainant but also the evidence of the doctor, PW5 who produced the age assessment report.

36. In her evidence the Complainant testified that she was left in the custody of the Appellant and though she testified that she was unaware of the relationship between her and the Appellant, Section 22(1) of the *Sexual Offences Act* provides as follows:-

22(1) In cases of the offences 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 ..."

22(3) A 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.

37. The appellant in his evidence did not dispute the relationship between himself and the Complainant and as was held by **Mativo, J** in ***Sylvester Wanjau Kariuki vs. Republic*** (supra):

"My own understanding is that 'half father' is a term which means exactly the same as 'step-father' – it means one who is not a biological father of the child but has married the child's mother as in the present case or has adopted the child. Therefore by dint of Section 22(1) of the Act the appellant being a step-father of the complainant and one who stood in 'locus parentis' can legally be charged and indeed convicted of the crime of incest with the step-daughters. 'locus parentis' is a legal term describing a relationship similar to that of a parent to a child. It refers to an individual who assumes parental status and responsibilities for another individual, usually a young person, without formally adopting that person. Thus, the doctrine 'locus parentis' can provide a non-biological parent to be given the legal rights and responsibilities of a biological parent if he/she has held himself out as a parenti."

38. In her evidence, the Complainant narrated the events that took place on the night in question. These events were not denied by the Appellant whose evidence was that the charges against him were fabricated. He however did not deal with the occurrences of the night in question. In ***D W M vs. Republic [2016] eKLR***, the Court of Appeal expressed itself as hereunder:

"The learned Judge concurred with the learned trial magistrate's rejection of the appellant's assertions on fabrication of charges because there was no suggestion in his cross-examination of his wife that the two had any prior differences. In his defence, the appellant only mentioned that he quarrelled with his wife on 23rd September, 2010 when she left but there was nothing to suggest that R s' evidence was motivated by malice as R only repeated in her testimony what the complainant had narrated to her. On that account the learned judge affirmed the trial magistrate's finding that there was nothing on the record that would suggest that the complainant and her mother R acted in concert to make up a case against the appellant."

39. Dealing with similar circumstances the Court in ***Tito Kariuki Ngugi vs. Republic [2008] eKLR*** expressed itself as follows:

"I am satisfied and I agree with Mr. Mugambi that the allegation of a frame up is an afterthought. The Appellant's own daughter especially did not have any reason to frame up her father."

40. In this case, the Complainant's mother did not even feature in the prosecution's case. From the evidence it was clear that the Complainant herself was not even willing to disclose that she was defiled by the Appellant and it was not until some prodding that she did so. In those circumstances, appellant's case that the charges were fabricated by the mother is unsupported.

41. As regards the contradictions in the prosecution's case, I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of ***David Ojeabuo vs. Federal Republic of Nigeria {2014} LPELR-22555(CA)***, where the court (**Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA**) stated as follows:-

"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."

42. Whereas I appreciate that there were minor discrepancies in the evidence of the witnesses it is my respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence (10th Ed) Vol. 1 at 46.***

43. As was stated in ***John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:***

"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard

uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory.”

44. This was the position in Willis Ochieng Odera vs. Republic [2006] eKLR, where the Court of Appeal held:

“As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of section 382 of the *Criminal Procedure Code*.”

45. In the case of Njuki vs. Rep 2002 1 KLR 77, the court said the following in respect of discrepancies in the evidence of witnesses:

“In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused... however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”

46. In Philip Nzaka Watu vs. Republic [2016] eKLR, the Court of Appeal held that:

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

47. In Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

48. In Erick Onyango Ondeng’ vs. Republic [2014] eKLR, the Court of Appeal held that:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured device for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See OKENO VS REPUBLIC (1972) EA 32). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

49. As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

“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.”

50. In Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”

51. Each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness’s evidence or any part of his testimony. (*Nyakisia v. R. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal*).

52. I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision. Having considered the evidence adduced I find no reason to interfere with the conviction.

53. As regards the sentence, the learned trial magistrate imposed the maximum sentence. According to him, there were no mitigations and the offence was serious. With due respect the Learned Trial Magistrate did not consider the fact that the Appellant prayed for leniency.

54. Section 20(1) of the *Sexual Offences Act. No. 3 of 2006* employs the phrase **“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.”

55. 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.”

56. 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.”

57. That the life sentence is not mandatory appears from the sentence meted in *Tito Kariuki Ngugi vs. Republic* (supra) 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.”

58. 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* gave room for the exercise of judicial discretion and in exercising the discretion the Court ought to consider the remorsefulness of the accused as well as whether the accused is a first offender. The court below fell into error when it failed to consider both factors. 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.”

59. However, the offence facing him was a serious offence and this Court cannot lose sight of the fact that the alleged culprit here was the complainant’s father who ought to have been in the forefront in protecting the complainant. Instead of doing so, it is alleged that he took it upon himself to be the instrument through which the complainant would be traumatized. In the premises while I confirm the Appellant’s conviction, I hereby quash the life sentence imposed on him and substitute therefore as sentence of 15 years imprisonment to run from 24th July, 2015.

60. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 16th day of December, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

The Appellant online

Mr Ngetich for the Respondent

CA Geoffrey