REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 136 OF 2015

NOO.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

*(Appeal against Judgement, conviction and sentence in CMC Criminal Case Number **294** of 2014 Nakuru, Republic vs Nicholas Ochieng Olang, delivered by Hon. Amwayi, RM on 19.5.2015).*

JUDGMENT

1. The appellant was charged, tried and convicted of the offence of incest contrary to section **20(1)** of the Sexual Offences Act[1] in Nakuru CMCC No. **294** of 2014. On **19th** May 2015 he was sentenced to serve life imprisonment.

2. He appealed to this court against both the conviction and sentence. However, on **22nd** January 2019, when this appeal up for hearing, he abandoned his appeal against conviction and opted to pursue his appeal against the sentence. He pleaded with the court to reduce the sentence.

3. Counsel for the DPP **M/s Kibiro** opposed the plea to reduce the sentence on grounds that section 20(1) of the Sexual Offences Act[2] provides for a sentence of life imprisonment, hence the sentence is lawful. She urged the court to uphold the sentence.

4. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. The appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.[3] In *Shadrack Kipchoge Kogo vs Republic*,[4] the court of appeal stated:-

> *"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"*

5. In his mitigation, the appellant pleaded for leniency. While passing the sentence, the learned Magistrate stated that *"I have considered the mitigation of the accused person and I have in mind the nature of the offence committed herein."* Then he proceeded to impose a sentence of life imprisonment.

6. I find it necessary to reproduce *Section **20 (1)** of* the **Sexual Offences Act**[5] below:-

> ***20 (1)** Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.*
>
> ***Provided** that, if it is alleged in the information or charge and proved that the female is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.*

7. The phrase *"shall be liable to"* has been used in the above provision. The question whether the above section prescribes a mandatory sentence of life imprisonment has been the subject of judicial construction by our superior courts. The Court of Appeal in *M K v Republic**[6]*** discussed the this section in detail. I find it apposite to quote extensively from the said decision.

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

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

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

17. In the instant case, the appellant was charged with an offence under ***Section 20 (1)*** *of the* ***Sexual Offences Act****. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to* ***Section 20(1)*** *stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?*

18. The first observation to note is that the phrase "not less than" has not been used in the proviso to ***Section 20 (1)*** *of the* ***Sexual Offences Act****. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.*

19. What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of ***Opoya -v- Uganda*** ***(1967) EA 752*** *had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in* ***James -v- Young*** ***27 Ch. D. at p.655*** *where North J. said:*

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

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

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

21. Guided by the decision in ***Opoya -v- Uganda*** ***(1967) EA 752*** *and the persuasive dicta of North J. in* ***James -v- Young*** ***27 Ch. D. at p.655;*** *we are satisfied that the sentence stipulated in the proviso to* ***Section 20 (1)*** *of the* ***Sexual Offences Act*** *is* ***not a minimum mandatory sentence of life imprisonment****.* ***The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment.*** *Read in conjunction with the general provision in* ***Section 20 (1)*** *we hereby state that the correct interpretation of the proviso in* ***Section 20 (1)*** *is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.*

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

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

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

8. It seems to me beyond argument the words "shall be liable to" does not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it. From the comments made by the Magistrate cited above, the learned Magistrate did not address himself to the question whether or not the said provision conferred discretion

to him. Differently stated, his discretion in the matter before him remained un exercised. As a consequence, he imposed the maximum sentence. Alternatively, he misconstrued the said provision to be mandatory and imposed a life sentence, hence, the exercise of his discretion in pronouncing the sentence was unfairly influenced by the said misdirection of the law or failure to exercise his discretion properly or both.

9. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances.[7]The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.[8] Also, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[9]

Final Orders

10. In view of my analysis and the proper construction of the proviso to section **20(1)** of the Sexual Offences Act,[10] and considering the age of the complainant at the time of committing the offence, and the relationship between the complainant and the appellant, and, bearing in mind the gravity of the offence, and the principles of sentencing stated above, I substitute the sentence of life imprisonment to a jail term of **30** years.

11. The upshot is that the sentence of life imprisonment is substituted with a prison term of thirty **(30)** years. In computing the jail term of thirty **(30)** years, the period already served shall be included.

Right of appeal **14** days

Signed and Dated at **Nakuru** this **24th** day of **January** 2019

John M. Mativo

Judge

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[1] Act No. 3 of 2006.

[2] Ibid.

[3]See Makhandia J (as he then was in *Simon Ndungu Muragevs Republic*, Criminal appeal no. 275 of 2007, Nyeri.

[4]Criminal Appeal No. 253 of 2003(Eldoret), Omolo, O'kubasu&Onyango JJA)

[5] Act No. 3 of 2006.

[6] {2015} eKLR.

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

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

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

[10] Act No. 3 of 2006.