



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CRIMINAL APPEAL NO. 89 OF 2007**

**L.A. A..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being Appeal against Judgment of Eldoret Chief Magistrate's Court Criminal Case No. 6772 of 2007 delivered on 17<sup>th</sup> October 2007 by Hon. A.B. Mongare – Resident Magistrate)*

**J U D G M E N T**

**L.A.A** (herein, the appellant), appeared before the Resident Magistrate at Eldoret charged with incest by male person contrary to section 20(1) of the **Sexual Offences Act No. 3 of 2006**, in that on diverse dated between 26<sup>th</sup> March and 20<sup>th</sup> May 2007 in L District, Western Province, being a male person had penetration of N. J, a child aged eight (8) years who was to his knowledge his daughter.

There was an alternative count of indecent assault contrary to section 11(1) of the Sexual Offences Act, in that on diverse dates between 26<sup>th</sup> March and 20<sup>th</sup> May 2006, unlawfully and indecently assaulted N.J a child aged years by touching her private parts on the breasts and thighs. On pleading not guilty to both counts, the appellant was tried and convicted on the main count. He was then sentenced to serve thirty (30) years imprisonment with hard labour.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal based on the grounds contained in the petition of appeal filed herein on 26<sup>th</sup> October 2007. At the hearing of the appeal, the appellant represented himself and relied on his written arguments (submission) encompassing supplementary grounds of appeal filed without the leave of the court. However, the grounds for consideration are those specified in the original petition of appeal.

The learned State Counsel, **Mr. Kabaka**, opposed the appeal on behalf of the respondent. The gist of the appellant's argument is that the case against him was not proved beyond reasonable doubt as the evidence by the complainant (PW6) was an afterthought since she had not previously complained to the police or relatives about what had happened to her. Also, the evidence adduced against the appellant was inconsistent and unreliable in that the allegations made by PW1 were false and incompatible with what was stated by the rest of the witness. PW1 referred to a note written by PW3 but this fact was not corroborated by any witness. Further, the P3 form and the evidence by PW7 did not tally and could not therefore establish that the offence was committed. The evidence by PW3 and PW7 was at variance. The

appellant argued and contended that his defence was dismissed by the learned trial magistrate without meritable grounds. He urged this court to review and reverse the decision of the learned trial magistrate.

In his opposition to the appeal, the learned state counsel submitted that the act of incest was established by the evidence of the two doctors. This was confirmed by the complainant who stated that she was defiled by her father who normally slept with her. The learned state counsel further submitted that the appellant's defence was considered by the learned trial magistrate and rejected, therefore, the appellant's conviction was proper and should be upheld by this court. On sentence, the learned State Counsel submitted that the same was not proper as the appellant was liable to imprisonment for life instead of thirty (30) years imprisonment having committed the offence against the complainant who was below the age of eighteen (18) years at the time. The learned State Counsel contended that the sentence imposed by the learned trial magistrate was illegal and should be enhanced and substituted for life imprisonment.

All the arguments by both the appellant and the respondent have been given due consideration by this court whose duty is to reconsider the evidence adduced at the trial and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. In that regard, the prosecution case was that the complainant **N.A (PW6)** was at the material time aged eight (8) years. She lived with her father (the appellant) and they normally slept in one room and bed. Occasionally she would find her clothes removed even though she normally slept with them. The appellant had warned her not to tell people what went on between him and her. Her aunt, G.A.A, took her to hospital where she was examined by a doctor. The said **G. A. A (PW1)** was a teacher at L Primary School and was on 22<sup>nd</sup> June 2007, summoned to the office of the local District Officer (D.O) where she was informed that the appellant's first daughter called M.M had given birth to the appellant's child. The said M confirmed as much when she was called to the D.O's Office. It was then that the complainant (PW6) alleged that the appellant slept with her and had threatened to kill her if she talked about it. G (PW1) said that the complainant had confirmed to other children about what happened to her and that one of those children had written a note to a village elder confirming the fact.

**E.A (PW2)** is the husband of G. He confirmed that the complainant was called to the D.O's office where she alleged that the appellant slept with her every night. He (PW2) was also at the D.O's office at the time. **Dr. Kigen Barnaba (PW3)** of Lumakanda District Hospital examined the complainant who gave a history of having been repeatedly defiled by her father and upon examination, he (PW3) confirmed the fact of defilement. **Cpl. Charles Ocharo (PW4)** of Lumakanda police station arrested the appellant on instruction from the D.O. L and **P.C. Christine Atovi (PW5)** of Lumakanda police station took the complainant to hospital for examination and investigated the case. Later, she (PW5) charged the appellant with the present offence. **Dr. Joseph Embenzi (PW7)** of the Moi Teaching and Referral Hospital re-examined the complainant on the 5<sup>th</sup> September 2007 in compliance with a court order and confirmed that she had been sexually molested.

The culmination of the prosecution case resulted in the appellant being placed on his defence. He elected to make an unsworn statement in which he said that he was a radio and television repairer in, Lugari and that on the 22<sup>nd</sup> May 2007 he took the complainant to school and thereafter proceeded to the D.O's office to follow up a land matter. He did not see his brother (PW2) and his wife (PW1) at the said office, he was told by a police officer that PW2 had gone to that office and alleged that he (appellant) had defiled the complainant. He (appellant) demanded evidence to prove the allegation. Instead, he was arrested and later taken to Lumakanda police station where he was informed that he had touched the complainant's private parts. He denied the allegation and contended that he was fighting with his brother over land boundary and not a sexual offence. He further contended that he did not commit the offence and that his brother and wife wanted him behind bars so that they could take his land.

At the end of the trial, the learned trial magistrate considered the evidence in its totality and concluded that not only was the complainant defiled but also that she was defiled by the appellant. In so concluding, the learned trial magistrate stated that:-

***“The minor herself confirmed that she sleeps on the same bed with the father. The father undress***

***her occasionally and defiles her. He threatens her with killing if she told anybody. This very history was clear from Doctor Embenzi. Even assuming PW1 and PW2 are against the accused person herein, the other independent evidence is overwhelmingly strong. The same irresistibly point at the accused person as the only person who committed the offence. His allegation that he is being implicated by PW1 and PW2 so that they take his land is neither here nor there. I find accused person's defence a mere story cooked to get him off the hook. He is guilty as charged."***

On its part and on the basis evidence led by Dr. Barnaba (PW3) and Dr. Embenzi (PW7), this court is not in doubt that indeed the complainant (PW6) was sexually assaulted over a period of time. From what was stated by the complainant, it was apparent that the assault was committed secretly and being secretive the expectation that there would be an independent witness to the fact was remote. The identity of the assailant was revealed by the complainant when she was summoned at the D.O's office. It was there that she **"let the cat out of the bag"** in the presence of among other people, her aunt G (PW1) and her uncle E (PW2). The complainant revealed that she slept in the same room and on the same bed with her father (appellant) and that occasionally she would find her clothes removed during the night. She further revealed that her father had warned her not to tell anybody about what goes on between them. Apparently, even before the cat was let out of the bag, suspicion had already been cast upon the appellant as it had previously been alleged that he impregnated his elder daughter called M who gave birth to his child.

In fact, G (PW1) and E (PW2) indicated that they were summoned to the D.O's office to discuss issues pertaining to the appellant's children. It was then that the appellant's conduct towards the complainant came into the limelight. E (PW2) who is the appellant's brother said that the appellant had also raised an issue pertaining to his (appellant's) land saying that he wanted his (appellant's) child with his elder daughter (M) to inherit his (appellant) land. Unfortunately, the D.O. was not called to testify and shed light on the complaints made to him and discussed at his office. However, it strongly appeared that the primary purpose for the meeting and discussion at the D.O's office was in relation to the appellant and his children. This explained the reason why the complainant (PW6) had to be called to that office. It was there that the appellant was arrested after being implicated by the complainant.

In his defence, the appellant made no attempt to explain or state the reason why his own eight year daughter (PW6) would suddenly decide to implicate him if at all he was not responsible for sexually molesting her. His allegation that he was implicated by G (PW1) and E (PW2) so that they may take his land was unbelievable in the face of the evidence against him by the complainant whom the learned trial magistrate believed. Indeed, the learned trial magistrate was in a better position than this court to determine the credibility of the witnesses who appeared and testified before him.

Basically, there having been no substantial dispute that the complainant was sexually assaulted, the identification of the assailant became the only issue for determination. In that regard and having considered the credible evidence adduced by the complainant (PW6) in the light of the defence raised by the appellant, this court is compelled to agree with the learned trial magistrate that the appellant was the person responsible for sexually molesting the complainant, his own daughter. His conviction on the main count of incest was sound and proper and is hereby upheld. With regard to the sentence imposed by the learned trial magistrate (i.e thirty (30) years imprisonment with hard labour), the applicable provision was the proviso to section 20(1) of the Sexual Offences Act No. 3 of 2006 which states that;-

***"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 shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration on the indecent act was obtained with the consent of the female person."***

Herein, the complainant (PW6) was at the material time aged eight (8) years. The foregoing proviso to section 20(1) of the Sexual Offences Act is framed in mandatory terms yet the appellant was handed a sentence of 30 years imprisonment with hard labour. The proviso provides for imprisonment for life without the inclusion of hard labour. The question that springs to mind is whether the sentence imposed by the learned trial magistrate was lawful.

In its submissions, the respondent contends that the sentence is illegal and should be set aside and substituted for life imprisonment as provided by the law. In considering sentences meted out in substitution for life sentence, the Court of Appeal in the case of **Bernard Omari Kigwaro vs. Republic – Criminal Appeal No. 320 of 2007 at Kisumu**, took into account its holdings in an earlier decision i.e. **Fred Michael Bwayo vs. Republic – Criminal Appeal No. 130 of 2007** and stated as follows;

*“Nevertheless what is exceedingly rare, as we are unable to find any, a sentence of twenty years or more in substitution for life imprisonment even in sexual offences as the law stood before July 2006. If the end of justice were served by imposing lesser sentences at the time, it would be unjust to the appellant in this case to depart so fundamentally from the principles of sentencing which obtained when the offence was committed. That view in no way diminishes the gravity of such offences but pays homage to certainty and consistency in the law. We think the learned trial magistrate and the Judge of the Superior Court were unduly influenced by the new Act and applied sentencing standards which did not apply to the case before them. This reflects on the lawful nature of the sentence and this entitles this court to intervene.”*

In the Bernard Omari case above, a sentence of thirty (30) years imprisonment was set aside and substituted for a sentence of eighteen (18) years imprisonment. The appellant therein had been charged with defilement under the repealed section 145(1) of the penal code which provided that a person was liable to imprisonment for life with hard labour. The Court of Appeal noted that;-

*“It should be noted, however that punishment provided for the offence is mandatory and there is clear discretion for the court to consider the appropriate sentence depending on the circumstances and antecedents of each case and accused person. The appellant in this case was thus liable to imprisonment with hard labour for life.”*

To this court’s understanding, the aforementioned remarks by the Court of Appeal indicate that although section 145(1) of the penal code provided for a mandatory punishment of life imprisonment, it was still open to a trial case to impose any other appropriate sentence depending on the circumstances of the case and the antecedent of the accused. In effect, the Court of Appeal was saying that the mandatory sentence provided for was not absolute. The question is, would the same Principles apply herein considering that the charge herein was under the new Sexual Offences Act No. 3 of 2006 and Section 20(1) thereof contains the words **“shall be liable to imprisonment for life.”** Do these words connote that the court has no choice but to impose a sentence of life imprisonment?

This court does not think that the words completely shuts out a trial court from exercising discretion on sentence because whereas in law, the word “shall” imposes a mandatory duty on the court and the same word is used in Section 20(1) of the Sexual Offences Act, the word “liable” connotes a likelihood to incur a penalty (see, **the 8<sup>th</sup> Edition of Black’s Law Dictionary**) and is also used in Section 20(1) of the said Sexual Offences Act. Therefore, in the opinion of this court, the usage of the word “liable” gives a trial court leverage to impose any other sentence than the one prescribed. This would of course depend on the circumstances of each particular case.

Indeed, in **Opoya Vs. Uganda (1967)EA 752**, the then East African Court of Appeal held that the words **“shall be liable on conviction to suffer death”** provide a maximum sentence only and the courts have a discretion to impose sentence of death or of imprisonment. (See also, **Daniel Kyalo Muema Vs. Republic (2009)e KLR (CA)**). It would therefore follow that the sentence of thirty (30) years imprisonment imposed herein against the appellant was lawful and deserving but rather excessive considering that the appellant was treated as a first offender, he was the sole bread winner for his children and was indeed remorseful for his unlawful and most distasteful conduct towards his very daughter, the complainant.

In the case of **Ambani Vs. Republic (1990) KLR 161**, the High Court held that sentences imposed on accused person must be commensurate to the moral blame worthiness of the offender. The appellant by his conduct, would definitely be ostracized from his family and society. He has left a permanent trauma on the complainant but he will also have to live with his guilt and mental torture for the rest of his

life. Consequently, this court deems it fit and just to reduce the thirty (30) years imprisonment by half. In that regard the appellant will now serve fifteen (15) years imprisonment. Otherwise, the appeal is dismissed.

**J.R. KARANJA  
JUDGE**

**(Delivered and signed this 22<sup>nd</sup> day of March 2011)**