REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 53 OF 2019

EKK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being An Appeal From The Conviction And Sentence Of Hon. N. Wairimu, Pm, Delivered On 25 March 2019 In Eldoret Chief Magistrate's S.o. Criminal Case No. 23 Of 2018)

JUDGMENT

[1] This appeal arises from the decision of the Principal Magistrate, **Hon. N. Wairimu**, in **Eldoret Chief Magistrate's Sexual Offences Criminal Case No. 23 of 2018: Republic vs. EKK.** The appellant was therein charged with the offence of incest contrary to **Section 20(1)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged that on the **25 January 2018** at [Particulars withheld] Village in Eldoret West District within Uasin Gishu County, being a male person, he caused his penis to penetrate the vagina of **MJ**, a juvenile aged 14 years, who was to his knowledge his sister.

[2] In the alternative, the appellant was charged with committing an indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars were that on the **25 January 2018** at [Particulars withheld] Village in Eldoret West District within Uasin Gishu County, he unlawfully and indecently caused his male genital organ (penis) to come into contact with the female genital organ (vagina) of **MJ**, a girl aged 14 years.

[3] The appellant denied the charges when they were read over to him on **31 January 2018**. Consequently, a plea of "not guilty" was entered and the case fixed for hearing. Thereafter, after the evidence of the complainant and three other witnesses had been taken, the appellant opted, of his own volition, to change his plea. Thus, on the **6 February 2019,** he requested that the charge be read over to him again. His response thereto was an admission of the charge; whereupon a plea of "guilty" was entered. The matter was then stood over to the **7 February 2019** for the facts to be given; and, when the facts were read over to him, the appellant admitted those facts to be correct. He was accordingly convicted on his own plea of guilty and sentenced to life imprisonment in respect of the substantive charge.

[4] Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **5 April 2019** on the following grounds:

[a] That he did not understand the language which was used during the trial;

[b] That his fair trial rights and freedoms under **Article 50(1), (2)(a), (b), (c), (d), (e), (f), (g), (h), (l), and (m)** were greatly violated;

[c] That he was not informed of the charge or the penalty it entailed;

[d] That the life sentence imposed on him is a violation of his rights and fundamental freedoms under **Article 53(d) and (f)** of the **Constitution;**

[e] that his rights under **Articles 19, 27, 26(1), 28 and 29** were likewise violated;

[f] That the case against him was nothing but a sham; and,

[g] That there was no evidence connecting him with the offence.

[5] Accordingly, the appellant prayed that his appeal be allowed, the conviction quashed and the sentence set aside. The appeal was urged on his behalf by **Mr. Chepkilot** by way of the written submissions dated **7 September 2020.** Counsel thereby proposed the following issues for determination:

[a] Whether the appellant required legal representation;

[b] Whether the appellant was a minor;

[d] Whether the life sentence is justified.

[6] Regarding the question whether the appellant was a minor, counsel made reference to page 24 of the Record of Appeal which shows that the trial court caused the appellant's age to be assessed; and that he was found to be 17 years old. He submitted therefore that it was erroneous for the learned trial magistrate to ignore that fact in handling the trial; and particularly before rejecting the Pre-Sentence Report. Counsel relied on **Francis Omuroni vs. Uganda**, Criminal Appeal No. 29 of 2000 as to the primacy of medical evidence, not just in the case of a minor complainant but also a minor subject who finds himself/herself in conflict with the law.

[7] Counsel further submitted that, having ascertained that the appellant was a minor, the lower court ought to have complied with the provisions of **Sections 77 and 186** of the **Children Act**; and accorded him legal representation at state expense. He consequently faulted the trial court for proceeding with the matter against the appellant without such representation. In his submission, the ensuing sentence was, for that reason, a nullity taking into consideration **Section 190** of the **Children Act**; which prohibits the imprisonment of children. He further faulted the sentence of life imprisonment from the point of view of the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic** [2017] eKLR and urged the Court to set aside the sentence imposed on him by the lower court.

[8] On behalf of the State, **Ms. Kegehi** relied on her written submissions dated **9 March 2021**. On the basis of the proceedings held before the lower court, she urged the Court to find that the appellant's plea was unequivocal; and that the learned trial magistrate fully complied with the plea-taking process set out in **Adan vs. Republic** [1973] EA 445. With regard to the sentence, counsel pointed out that the lower court considered the appellant's mitigation as well as the social inquiry report; by which it was ascertained that the appellant was an adult as at the time of the offence, having been born on **3 November 1994**. Counsel urged the Court to consider the circumstances of this case, including the fact that the complainant and her siblings had been left under the care of the appellant after their parents died. She therefore submitted that the sentence of life imprisonment was proper and should serve as a deterrence; not only to the appellant, but also to others of his ilk. Accordingly, **Ms. Kegehi** urged for the dismissal of this appeal.

[9] I have perused and considered the appeal, the record of the lower court as well as the submissions made herein. Although, the Prosecution called 4 witnesses whose respective testimonies were taken between **6 August 2018** and **12 November 2018**, the matter was thereafter dealt with summarily after the appellant opted to change his plea on **6 February 2019** from "Not Guilty" to "Guilty". I note though that, at page 37 of the Record of Appeal, it is reflected that a plea of not guilty was entered. This is obviously a typographical error, granted that the handwritten version of the proceedings does confirm, on the reverse

page of page 22, that indeed a plea of "Guilty" was entered, abbreviated as P.O.G.E in the original record. The record of the lower court further confirms that the facts were then called for and were given on **7 February 2019;** and that the appellant again admitted those facts to be correct. Consequently, he was convicted on his own plea of guilty and accordingly sentenced.

[10] In the premises, although the appeal is expressed to have been brought against both conviction and sentence, the appellant could only validly appeal against the sentence. This is because **Section 348** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** is explicit that:

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence."**

[11] Accordingly, any ground of appeal or submission made herein by the appellant that seem to impugn the soundness of his conviction is clearly untenable. In this respect, I agree fully with the position taken by a multiple bench of the Court in **Olel vs. Republic** [1989] KLR 444, that:

> **"Having considered the submissions by both learned counsel on the interpretation of section 348 ... we have come to the conclusion that where the plea is clearly an unequivocal plea of guilty, an appeal against conviction cannot lie. The section itself is quite clear on that and permits of no confusion or difficulty in its interpretation. It does not merely limit the right of appeal but bars it completely in cases of an unequivocal plea of guilt. That is the fact of what the marginal note also states..."**

[12] In the premises, Grounds 7 and 8 of the appellant's Grounds of Appeal, which seem to attack the appellant's conviction for lack of sufficient evidence, are clearly misconceived in the circumstances. Thus, the only valid question to pose, in connection with the appellant's conviction, is whether his plea was unequivocal as tested against the procedure for plea-taking set out in **Section 207** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya.** That provision states that:

> **(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**
>
> **(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**
>
> **Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**
>
> **(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.**
>
> **(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.**

[13] Similarly, in ***Adan vs. Republic*** *(supra)* **Spry, V.P**. set out the elaborate procedure for taking pleas thus:

> ***"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and***

then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."

[14] With the foregoing in mind, I have scrutinized the record of the lower court. It shows that when the appellant was arraigned for plea on **31 January 2018**, the first thing the court did was to inquire from him the language of his choice; whereupon he opted for Kiswahili. The charge and its elements were then read over and explained to him in Kiswahili language; and he responded thereto by pleading not guilty. Consequently, a plea of not guilty was entered and he was then admitted to bail pending hearing. It is further evident from the lower court record that, throughout the proceedings, the appellant was an active participant; a clear indication that he was able to effectively communicate with the lower court. For instance, on **14 February 2018**, when his case came up for hearing, the appellant informed the court that he was not ready to proceed because he was yet to be supplied with the witness statements. His request was granted and another date fixed for his trial.

[15] The appellant's active participation in the proceedings before the lower court is further evident in the proceedings of **3 May 2018, 31 May 2018, 4 July 2018**, **19 September 2018** and **10 January 2019**; not to mention his meaningful cross-examination of the 4 Prosecution witnesses on **6 August 2018** and **12 November 2018**. More importantly, when he opted to change his plea on **6 February 2019**, the record shows that the change was at his instance; and that he initiated the process by asking the court to read the charge to him again. And, the court record shows that, not only did the learned trial magistrate thereafter read the charge to the appellant in Kiswahili language, but also recorded verbatim his response thereto; which was in Kiswahili language.

[16] In line with **Adan vs. Republic** (supra), the facts of the case were stated by the prosecuting counsel to the trial court in the appellant's presence; and once more, he admitted those facts and his response, in Kiswahili, was recorded in his own exact words before his conviction was recorded. The record further confirms that the appellant was thereafter given an opportunity to express himself in mitigation; which he did in a meticulous manner. The learned trial magistrate then called for a Pre-Sentence Report and granted time till **25 March 2019** for that purpose. It is manifest therefore that the appellant's plea was entirely unequivocal and therefore that he has absolutely no reason to complain about the plea- taking process. Indeed, in the 1st ground of appeal, the appellant explicitly conceded that he pleaded guilty to the charge.

[17] In the premises, the appellant's 2nd ground of appeal, namely, that he did not understand the language which was used during the trial, is untenable. Untenable because, he was given an opportunity to elect the language of communication and he opted for Kiswahili; which is the language that was used when he changed his plea on **6 February 2019**. Thus, the contention by the appellant that his constitutional rights under **Article 49(1)(a)(b) and (d)** were violated is baseless. In the same vein, the complaint, in the 4th ground of appeal, that the appellant was not informed of the charge is utterly indefensible.

[18] It is likewise plain that the facts, as presented by the prosecuting counsel, **Ms. Karanja**, fully disclosed all the elements of the offence as laid in the substantive count; namely that the complainant was then a minor; that the appellant is her step-brother; and that he defiled her on the night of **25 January 2018.** Moreover, **Ms. Karanja** produced a P3 Form in proof of the allegations of penetration as well as a Certificate of Birth for the complainant, which proved the date of birth of the complainant to be **5 June 2004**. The complainant was therefore less than 18 years old and hence a child for the purposes of **Section 20(1)** of the **Sexual Offences Act;** which provides that:

"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 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."

[19] It is noteworthy however that the learned trial magistrate failed to state that the conviction was in respect of the main charge; thereby disregarding the provisions of **Section 169** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya;** which require that:

"In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."

[20] In the light of the foregoing, the question to pose is whether the omission is so grave as to vitiate the proceedings of the lower court; and my answer to that question is in the negative. This is because, from the proceedings of **7 February 2019**, there is no doubt that the charge contemplated was the substantive charge of defilement. The facts given were in respect of that substantive charge; and therefore no prejudice or failure of justice was occasioned by the omission. Indeed, **Section 382 of the Criminal Procedure Code** provides that:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

[21] Hence, having found that the appellant's conviction was unequivocal I now turn to the gist of the appeal, namely, the legality and propriety of the sentence of life imprisonment imposed on the appellant by the lower court. That sentence was impugned from the following angles:

[a] That the appellant was a minor at the time; and therefore that he ought to have been treated as such for purposes of **Article 53(1)(d)** and **Sections 77, 186 and 190** of the **Children Act;**

[b] That the right of the appellant to legal representation was violated; and therefore the sentencing hearing is null and void;

[c] That the sentence is illegal, excessive and therefore unwarranted.

[a] <u>On whether the appellant was a child:</u>

[22] The first angle to the appellant's appeal against the sentence imposed on him was that he was a child as at the time the offence was committed; and therefore that he was entitled, by dint of **Article 153(1)(d)** and **Sections 77, 186 and 190** of the **Children Act** to be treated as such. **Article 53(1)(d) and (f)** of the **Constitution** safeguards the rights of children in the following terms:

"Every child has the right—

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence,

inhuman treatment and punishment, and hazardous or exploitative labour:

…

(f) not to be detained, except as a measure of last resort, and when detained, to be held-

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age.

[23] Sections 77 and 186 of the **Children Act**, on the other hand, safeguard a child's right to legal representation, if need be, at state expense. These safeguards are unlocked by the mere fact that an offender is a person under the age of 18 years (see **Section 2** of the **Children Act).** In this instance, the appellant contends that he was 17 years old at the time of arrest; an assertion that appears to be supported by the proceedings of the lower court; particularly the proceedings of **6 December 2018.** The record shows that the lower court, acting *suo motu*, made an order for the appellant to be taken to **Moi Teaching and Referral Hospital** for age assessment. The outcome of the age assessment was that the appellant's age was estimated to be 17 years. A report to that effect, dated **13 December 2018** was filed before the Court on **19 December 2018**.

[24] On the basis of the age assessment report the trial court took appropriate measures and caused the appellant to be transferred to the Juvenile Remand Home, pending the hearing and determination of his case. There is however no indication that the issue of legal representation was addressed, either before or after the age assessment. Upon conviction, however, it came to light that the appellant was already an adult as at the time the offence of defilement occurred; and that he had already been issued with an identity card No. 34481182, and was therefore above 18 years old at the time. This was made manifest vide the social inquiry conducted by the Probation Officer, Eldoret, for purposes of sentencing hearing. Thus, the Probation Officer attached to her report dated **13 March 2019** copies of the appellant's Certificate of Birth No. 075176, Kenya National Examinations Council Result Slip, and School Leaving Certificate. The Certificate of Birth, in particular, indicates that the appellant was born on **3 November 1994.** The same date of birth is reflected on the appellants' Kenya Secondary School Leaving Certificate.

[25] It is evident from the Pre-Sentence Report and the documents annexed thereto, that that the appellant was 23 years old and therefore an adult as at the time of commission of the offence. That being the case, the learned trial magistrate cannot be faulted for having treated the appellant as an adult for the purpose of sentencing. Likewise, the appellant has no justification for complaining that his rights were violated for purposes of **Article 53(1)(d)** of the **Constitution**; and his attempts to rely on the provisions **Sections 77 and 186** of the **Children Act** are to no avail in so far as they are premised on a false foundation.

[b] <u>On the right to legal representation</u>:

[26] The foregoing notwithstanding, there is no gainsaying that the right to legal representation is also enshrined under **Article 50(2)(g) and (h)** of the Constitution thus:

"Every accused person has the right to a fair trial, which includes the right:-

...

(g) to choose and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

[27] In **<u>Republic vs. Karisa Chengo & 2 Others</u>** [2017] eKLR; the Supreme Court had occasion to

discuss the above constitutional provision and had the following to say at paragraph [87] of its Judgment:

> **"[87] Article 50(2)(h) of the Constitution provides that "[e]very accused person has the right to a fair trial, which includes the right…to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly." It does not define what "substantial injustice" means. However, in David Macharia Njoroge v. Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result…." While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa v. Republic; C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment."**

[28] Accordingly, there can be no doubt that, notwithstanding his unfounded claim to be a child, the appellant had the right, not only to be represented by an advocate before the lower court, but to also be informed promptly of that right; granted the severity of the sentence contemplated by the proviso to **Section 20(1)** of the **Sexual Offences Act.** Again, the record of the lower court is silent as to whether this right was explained to the accused person as required by **Article 50(1)(h).** What is plain however is that the appellant conducted his own defence; notwithstanding that **Article 50(1)(h)** is explicit that an accused person has the right to have an advocate assigned to him at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

[29] Of course, it is not in every case that legal representation is granted at state expense. Hence, in **Republic vs. Karisa Chengo & 2 Others** (supra), the Supreme Court laid down the following prerequisites:

> **"…it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:**
>
> **(i) the seriousness of the offence;**
>
> **(ii) the severity of the sentence;**
>
> **(iii) the ability of the accused person to pay for his own legal representation;**
>
> **(iv) whether the accused is a minor;**
>
> **(v) the literacy of the accused;**
>
> **(vi) the complexity of the charge against the accused;**

[30] In addition to the foregoing, there is an elaborate legal framework to operationalize **Article 50(2)(h)** in the form of the **Legal Aid Act, 2016**. **Section 40** of the Act provides that:

(1) A person who wishes to receive legal aid, shall apply to the Service in writing.

(2) Where a person wishes to apply for legal aid the person shall apply before the final determination of the matter by a court.

(3) An application under subsection (1) shall be assessed, with respect to the applicant's eligibility for legal aid services in accordance with this Act."

[31] Section 42 of the Act further recognizes that, for persons in lawful custody, the application for legal aid need not be made to the trial court. It states that:

The officer-in-charge of a prison, police station, remand home for children or other place of lawful custody shall—

(a) ensure that every person held in custody, is informed in language that the person understands, of the availability of legal aid on being admitted to custody and is asked whether he or she desires to seek legal aid;

(b) maintain a register in which shall be entered the name of every person held there and the response of each such person when asked if he or she desires to seek legal aid; and

(c) ensure that a legal aid application form is made by a person in their custody wishing to apply for legal aid and shall inform the Service of the application within twenty-four hours of the making of the application.

[32] There is no indication that these alternative avenues were pursued by the appellant. That notwithstanding, the fact remains that he was eligible for legal representation at state expense but was not afforded the opportunity to make an application for it by the lower court and the affiliate duty-bearers. That said, the question is whether that failure occasioned a failure of justice. It bears repeating that the appellant initially pleaded not guilty; and that he opted to change plea out of his own volition and after much reflection; granted that the Prosecution had by then called four key witnesses. He actively participated in the proceedings after pleading not guilty; and undertook robust cross-examination of witnesses before making a conscious decision to admit the main charge. Moreover, the appellant was able to put forward a strong presentation by way of mitigation; which was taken into consideration by the lower court.

[33] I consequently take the view that no substantial injustice occurred in the circumstances. In this connection, I am of the same mind as **Hon. Nyakundi, J**. who, in **Polycarp Simon Mchore vs. Republic** [2018] eKLR, held that:

"In this case the court has to ascertain whether broadly speaking there was a failure of justice in absence of counsel at the trial of the appellant. Reliance was placed on right to counsel ... This court holds that in so far as the rights expressed in Article 50 2(b), (c), (d), (e), (f), (i), (j) (k) (h) of the constitution. The trial magistrate acted within the requirements of the law.

There is always a presumption that court processes and procedures are complex and difficult to interpret and apply. It was in light of this the drafters of the constitution introduced right to counsel. Article 50(g) and (h). I think what trial courts have not done is to effectively carry out an inquiry to establish whether the individual before court has the ability to conduct his or her own defence… This court takes judicial notice that there are instances where self-represented litigants in both criminal and civil proceedings are able to sieve relevant evidence, challenge the adverse party case with such vigour … that at the end of it all no incalculable injustice or prejudice is occasioned. To me what trial courts fail to do is to enforce Article 50(g) and (h) on right to counsel by determining the following: The personal circumstances of the accused, his level of aptitude or ineptitude to navigate the trial by

himself or herself, the extent to which he or she can cross-examine witnesses, peruse and appreciate both documentary and other exhibits and their materiality to the charge likewise whether he understands the rights governing right to silence and right against self-incriminating evidence. The other appropriate inquiry is whether by virtue of being served with witness statements and detailed information on what the case entails he or she possesses sufficient knowledge and understanding of the various legal aspects of the process of criminal justice…

In the instant case based on the severity of sentence the capacity of the accused to defend himself has not been impugned. Due to the determinative weight to this element evidence on his inadequacy to appreciate the rules of evidence, role of cross-examination and even more importantly the elements of the charge preferred against him by the state.

As to the merits of this ground I am satisfied that the irregularity in the court proceedings did not result in a failure of justice to render the trial unfair as canvassed by the applicant counsel.

[c] <u>On the legality and propriety of life imprisonment</u>:

[34] Needless to say that life imprisonment is in itself a lawful sentence. It is provided for in **Section 20(1)** of the **Sexual Offences Act**, pursuant to which the appellant was charged. It is also a truism that sentence is a matter within the discretion of the trial court; and that an appellate court ought not to interfere simply because it would have meted a lesser or stiffer sentence. In **<u>Bernard Kimani Gacheru vs. Republic</u>** [2002] eKLR, the Court of Appeal expressed itself on this matter and restated that:

> ***It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.***

[35] In the 5th ground of appeal, the appellant complained that in convicting him to life imprisonment, the lower court violated his fundamental rights and freedoms under **Articles 19, 26(1), 27, 28, 29** and **53(d) and (f)** of the **Constitution**. Whereas **Article 19** is essentially a general provision declaring, *inter alia*, that the Bill of Rights is an integral part of Kenya's democratic state and that the fundamental rights and freedoms in the Bill of Rights belong to each individual and are not granted by the State, **Article 26(1)** speaks to the right to life. **Articles 27 and 28** of the **Constitution** entrench the right to human dignity, equality and freedom from discrimination. **Article 29,** on the other hand, provides for freedom and security of the person.

[36] It is also instructive that, other than the non-derogable rights, such as the right to fair trial under **Article 50**, **Article 24(1)** of the **Constitution** recognizes that any of the rights or fundamental freedoms in the Bill of Rights is limitable by law if this is **"…reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors…"** Accordingly, the right to life is qualified in **Sub-Articles (3) and (4)** of **Article 26** of the **Constitution**. The right to equality and freedom from discrimination can be curtailed, if need be, to give fuller effect to the realization of the rights in the Bill of Rights by the majority; such as by affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or target groups due to past discrimination.

[37] In the light of the foregoing, it cannot be argued that life imprisonment *per se* amounts to a violation of the appellant's constitutional rights as was urged by him; for, it is provided for in **Section 20(1)** of the

Sexual Offences Act and therefore can be imposed, if the circumstances of a particular case calls for it. This point was aptly made by the Court of Appeal in ***Dismas Wafula Kilwake vs. Republic*** *[2018] eKLR* as follows, albeit within the context of **Section 8** of the **Sexual Offences Act**:

> ***"…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…"***

[38] I note however that, in imposing the sentence of life imprisonment, the learned trial magistrate was of the posturing that the sentence was mandatory. That was clearly a misdirection for the proviso to **Section 20(1)** of the **Sexual Offences Act**, uses the phrase **"…shall be liable to…"** as opposed to the phrase **"…shall upon conviction be sentenced to imprisonment for life…"** which is what is provided for in **Section 8(2)** of the **Sexual Offences Act**.

[39] The Court of Appeal underscored this important distinction in **Daniel Kyalo Muema vs. Republic** [2009] eKLR thus:

> ***"The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs Uganda [1967] EA 752 where the Court said at page 754 paragraph B:***
>
> ***a. "It seems to us beyond argument the words "shall be liable to" do 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".***
>
> ***We respectfully adopt that construction which conforms with the opinion of Mr. Kaigai and which is supported by our preceding observations…"***

[40] *It is plain, then, that for purposes of the proviso to* ***Section 20(1),*** *the penalty of life imprisonment is the maximum limit. Hence, the Court of Appeal proceeded to hold thus in the* ***Daniel Kyalo Mwema Case*** *(supra):*

In searching for the intention of the Parliament, the first observation to make is that generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty. This principle is contained in Section 66 (1) of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) which provides:

> ***"Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed".***

The second observation is that the principle of law in Section 66 aforesaid is entrenched in Section 26 of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence of a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment."

[41] Likewise, in **M K vs. Republic** [2015] eKLR, the Court of Appeal held that:

"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.

[42] The foregoing clarification was given long before **the Muruatetu** decision; and therefore there would be no need to seek succor in **the Muruatetu case**; granted that the penalty provided for in the proviso to **Section 20(1)** of the **Sexual Offences Act** is not and has never been a mandatory minimum sentence.

[43] Last but not least, is the question whether life imprisonment was justified in the case of the appellant. The general principle is that a first offender, which is what the appellant was, ought not to be given the maximum penalty. In **Arissol vs. Republic** [1957] EA 449 the Court of appeal for East Africa expressed the view that:

"It is unusual to impose the maximum sentence on a first offender and it would be wrong to depart from that rule because on the evidence she might have been convicted of a graver offence…" (also see Otieno vs. Republic [1983] eKLR)

[44] For good reason then, in **Paragraph 23.9** of the **Judiciary Sentencing Guidelines,** which are guidelines formulated to ensure objectivity and uniformity in sentencing, it is suggested that:

"The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances."

[45] Within the foregoing backdrop, it is manifest that the sentence imposed on the appellant was excessive and that the trial overlooked pertinent principles in arriving at the sentence of life imprisonment. Thus, taking into account the foregoing principles, I have looked at the record of the lower court and noted that, in his mitigation, the appellant urged the lower court to consider that he was an orphan, having lost both parents as well as his stepmother/mother to the complainant, in death; and that he was then responsible for the upkeep and education of his siblings. The Probation Officer's Report filed before the lower court also revealed that none of their relatives is concerned enough to assist the children. On the other hand, the lower court had to take into account the seriousness of the offence the appellant committed and the immense breach of trust entailed thereby. Indeed, the Probation Officer's Report revealed thus about the appellant:

"…He claims to be the care giver of his siblings and administrator of his parents' property but from our social inquiry, we found out that his siblings had been supported by Ampath. He is said to be squandering his parents' money. His siblings' welfare has been at stake, of his youngest siblings is currently living with a well-wisher, a neighbour at Chepkoilel village, and the victim is suffering for lack of school fees and also psychologically…given the seriousness of the offence and the current state of the victim and the rest of the siblings, we feel according him a non-custodial sentence will adversely affect them…"

[46] I note that in **K N N vs. Republic** [2020] eKLR the sentence of life imprisonment for incest was reduced to 20 years, taking into account, *inter alia,* that the offender had already served 15 years by the time his appeal was decided. Thus, bearing in mind that the appellant has been in custody since **30 January 2018**, when he was arrested, it is my considered view that a term of imprisonment of 20 years' imprisonment would serve the ends of justice in this matter.

[47] In the premises, the appellant's appeal is partially successful. The sentence of life imprisonment imposed on him on the main count is hereby set aside and substituted with imprisonment for 20 years, to be reckoned from **30 January 2018** when the appellant was arrested.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF JUNE, 2021

OLGA SEWE

JUDGE