REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 58 OF 2017

AK.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence of the Chief Magistrate's Court

at Eldoret (Hon. C. Obulutsa) delivered on 19 May 2017 in Eldoret

Chief Magistrate's Court Criminal Case No. 2377 of 2012)

JUDGMENT

[1] AK, the Appellant herein, was arraigned before the court of the Chief Magistrate at Eldoret on **30 May 2012** on a Charge of Incest contrary to **Section 20(1)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged that on **13 May 2012** at [Particulars withheld] Village in Uasin Gishu District within the Rift Valley Province, being a male person, he caused his penis to penetrate the vagina of SJ, a female person aged 14 years who was to his knowledge his daughter. The Appellant was, in the alternative, charged with Indecent Act with a Child contrary to **Section 11(1)** of the **Sexual Offences Act**, in respect of the same facts.

[2] The Appellant denied the Charges against him, was tried and found guilty of the Substantive Charge in respect of which he was sentenced to serve life imprisonment. Being aggrieved by his conviction and sentence, the Appellant, preferred this appeal through **M/s J.K. Kiplagat & Company Advocates** on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law and in fact in arriving at his decision whereas the Prosecution had not established their case to the required standard set by law.
>
> **[b]** That the Chief Magistrate erred in law and in fact by meting out a conviction which was harsh and excessive in the circumstances.
>
> **[c]** That the Learned Trial Magistrate erred in law and in fact in convicting and sentencing the Appellant.

Accordingly, the Appellant prayed that his appeal be allowed and the Judgment of the lower court be set aside and the conviction quashed.

[3] Mr. Kiplagat, Learned Counsel for the Appellant, relied on the written submissions filed herein by him on **6 December 2018**, along with the List and Bundle of Authorities filed therewith. Counsel relied on **Article 50(2)(c) and (g)** of the **Constitution** in urging the Court to find that the Appellant was not accorded a fair trial by the lower court. According to him, on several occasions, the Appellant appeared in court alone in the absence of his Advocate; and was therefore not given time to prepare to act in person or to employ another Advocate. He cited **High Court Criminal Appeal No. 69 of 2012: Joseph Ndungu vs. Republic** and **High Court Criminal Appeal No. 63 of 2015 G.O.O vs. Republic** in which a conviction was quashed because **Article 50(2)(b), (c), (g) and (j)** of the Constitution had been breached.

[4] It was also the submission of Learned Counsel for the Appellant that the medical evidence did not incriminate the Appellant at all. He urged the Court to note that the Complainant was taken to hospital 11 days after the occurrence; and that no explanation was given for the delay. He further submitted that although it was alleged that the Complainant's hymen was broken, the type of weapon used was not stated with certainty, as the Doctor's opinion was that "it could be penis". In his view therefore, the case against the Appellant was premised on mere speculation and hence fell short of proof beyond reasonable doubt.

[5] Counsel for the Appellant also took issue with the fact that not all the witnesses were called by the Prosecution. He mentioned **Eva**, the

neighbour to whose house the Complainant ran for refuge; **Mark Tarus**, who is said to have brought the matter to the attention of the Complainant's mother; and one **Simon**. Counsel relied on **Edward Shivanji Makanga vs. Republic [2015] eKLR** and **Bukenya and Others vs. Uganda [1972] EA 549** for the proposition that where crucial witnesses are not called, the Court may draw the inference that, had they been called, their evidence would have been adverse to the Prosecution Case.

[6] Mr. Kiplagat also made reference to what he termed as gaps and inconsistencies in the Prosecution Case and posited that the effect thereof was to further cast doubt on the Prosecution's weak case. For instance, he pointed out that there was no explanation why it took 11 days for **PW2** to take the Complainant to hospital for medical attention. He also pointed out the contradictions with regard to the dates when the P3 Form was issued and filled. In addition to the inconsistencies, Counsel submitted that reasonable doubt was created by the evidence of **DW2,** the Complainant's sibling, who was at home at the material time; and which evidence the lower court did not, in his view, pay attention to. He relied on **Woolmington vs. DPP [1935] UKHL 1** for the holding that:

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."**

[7] On sentence, it was the submission of **Mr. Kiplagat** that, although sexual offences attract stiff penalties on conviction, life imprisonment is not mandatory; and that consideration ought to have been given by the trial court to the fact that the effect of the sentence imposed was to completely shatter the life of the Appellant. Counsel therefore urged the Court to find that the kind of evidence adduced against the Appellant before the lower court did not meet the threshold of proving beyond reasonable doubt that he committed the offence of incest against the Complainant. He accordingly prayed that the appeal be allowed, conviction quashed and the sentence imposed against the Appellant set aside. In addition to the aforementioned authorities, Counsel relied on the following cases:

> **[a] Mombasa High Court Criminal Appeal No. 24 of 2014: Arthur Mishila Manga vs. Republic**;
>
> **[b] Kakamega High Court Criminal Appeal No. 17 of 2008: Jackson Oyako vs. Republic;**
>
> **[c] Nyeri High Court Criminal Appeal No. 224 of 2011: Ndereva vs. Republic.**

[8] Ms. Mumu, Learned Counsel for the State, opposed the appeal contending that the Prosecution proved its case beyond reasonable doubt; notably that the Complainant was then a minor; that she is the daughter of the Appellant; and that she was defiled by the Appellant. She pointed out that the P3 Form, duly filled by a Doctor, was produced as an exhibit to confirm that the minor's hymen had been torn, thereby confirming penetration. She further submitted that the Appellant was accorded a fair trial and given a chance to cross-examine the Prosecution Witnesses and to present his defence. She added that the few instances when the matter proceeded before the lower court without the Defence Counsel, the court did so at the instance of the Appellant. She gave the proceedings of **12 October 2015** as one such instance. **Ms. Mumu** thus urged for the dismissal of the appeal.

[9] This being a first appeal, the Court is under obligation to reconsider and re-evaluate the evidence adduced before the lower court and come to its own conclusions thereon. Hence, in **Okeno vs. Republic [1972] EA 32** the Court of Appeal for East Africa held that:

> **"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 whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 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..."**

[10] The Complainant testified before the lower court as **PW1**. She stated that she was at home with her siblings on the night of **13 May 2012** when her father, the Appellant herein, returned home drunk at about 1.00 a.m. and asked to be served with some food. It was her evidence that she warmed the food for him and served him and then went to the kitchen to sleep. That the Appellant then went to the kitchen, pushed the door open, got hold of her and then forcefully inserted his penis in her vagina. That she struggled with the Appellant and managed to escape to Eva's place. She explained that their mother had separated from her father and was therefore not living with them at the time; and that when she informed her of the occurrence, she took action by taking her to **Moi Teaching and Referral Hospital** for examination after reporting the matter to **Eldoret Police Station**. She identified the P3 Form that she was issued with at the Police Station (**the Prosecution's Exhibit No. 1)** and her Birth Certificate **(the Prosecution's Exhibit No. 2)** before the lower court as exhibits in support of her evidence.

[11] Dr. Cynthia Kibet testified before the lower court on **29 April 2013** and confirmed that she examined the Complainant on **24 May 2012** and her notable observation was that she had healed hymenal tears at position 3 and 9 o'clock. She had no vaginal discharge and no spermatozoa was seen in her urine. HIV and syphilis tests done yielded negative results. She produced the P3 Form that she filled and signed as the Prosecution's Exhibit No. 1. In cross-examination, **Dr. Kibet** stated that the Complainant's hymenal tear could have been caused by a blunt weapon and could have been caused by a penis.

[12] The Complainant's mother **(PW2)** testified that she separated herself from the Appellant in **2006** and that the Complainant is their first born child with the Appellant. It was her further evidence that on **21 May 2012** she received a call from **Mark Tarus** who was their best man; and that he reported to her that the Complainant had been defiled. She then proceeded to the Complainant's school where she confirmed the occurrence; and that the Complainant reported to her she had been defiled by the Appellant. She then took action by having the incident

reported at the Chief's camp. She thereafter escorted the Complainant to the Police Station where she was issued with a P3 Form; and thereafter to **Moi Teaching and Referral Hospital** for examination.

[13] The Prosecution's last witness before the lower court was **Cpl. Faith Muchemi (PW4),** a Police Officer then attached to **Eldoret Police Station**. She told the lower court that she was on duty on **26 May 2012** when the Complainant was taken there by her mother to report an allegation of incest. She booked the report and issued the Complainant's mother with a P3 Form. She thereafter obtained the Complainant's Birth Certificate, which she produced herein as the **Prosecution's Exhibit No. 2** before the lower court.

[14] The Appellant, upon being placed on his defence, told the lower court that he went home on the night of **13 May 2012** and was given food by his children as his wife had deserted him. He conceded that the Complainant is his eldest daughter; and that when her siblings complained of not having had enough to eat that night, she got annoyed and wanted to beat them. He further told the lower court that he simply asked the Complainant why she was getting frustrated; and that in reaction, the Complainant ran away and spent the night in a neighbouring home. He therefore denied the allegations that were levelled against him before the lower court.

[15] The Appellant called one of his sons, **NK (DW2)** as his witness. The evidence of **DW2** was that on the night of **13 May 2012** the Appellant returned home a bit drunk; that he was given food, after which the Complainant beat their younger brother for asking for more food; and that when the Appellant asked her why she was unhappy, she ran away to the neighbour's and slept there. According to **DW2**, their mother went to their school three days later accompanied by their grandmother alleging that the Complainant had been defiled by the Appellant; and that he told them that nothing of the sort happened. He however admitted in cross-examination that after they went to bed, he heard some noise in the night as the Complainant was trying to hit the Appellant with a bucket.

[16] It was on the basis of the foregoing evidence that the lower court found the Appellant guilty of the Substantive Charge and convicted him thereof. He set out the issues for his determination at page 49 of the Record of Appeal to be:

> **[a]** Whether the Accused is the father of the Complainant;
>
> **[b]** Whether the Accused caused his penis to penetrate her vagina;
>
> **[c]** In the alternative, did he cause his penis to come into contact with the vagina of the Complainant; and,
>
> **[d]** Whether there is legal jurisdiction.

[17] The Learned Trial Magistrate then proceeded to analyze the evidence and to make findings on those issues. He also sought guidance from **W.O.O. vs. Republic [2016] eKLR** and **F.O.D. vs. Republic [2014] eKLR** as to the probative value of a minor's evidence, and the ingredients of the Charge of Incest, in coming to the conclusion that:

> **"...The court finds the testimony of S credible. The accused, her father, knowing her to be his daughter had carnal knowledge of her. He has not shown any legal jurisdiction. The prosecution has proved the charges beyond reasonable doubt. The accused is found guilty and is convicted accordingly..."**

[18] Having re-evaluated the evidence, the Court is satisfied that the lower court had the pertinent issues in mind and addressed them in his determination dated **19 May 2017**. Those key issues, in my view, are:

> **[a]** What is the relationship between the Appellant and the Complainant?
>
> **[b]** What was the age of the Complainant at the material time?
>
> **[c]** Whether there was penetration of the Complainant's vagina.
>
> **[d]** Whether the penetration was attributable to the Appellant.

[19] A re-consideration of the evidence placed before the lower court does confirm that the Appellant is the father of the Complainant. Both the Complainant and her mother testified before the lower court on this and their evidence was not challenged in any way. Indeed, the Appellant, in his defence, expressly conceded that the Complainant is his biological daughter. Accordingly, there was credible evidence before the lower court to prove that the Complainant is the indeed the daughter of the Appellant and that he full knowledge of this relationship.

[20] There is similarly no dispute that as of **13 May 2012**, the Complainant was a minor. She gave evidence as to her age; saying she was 14 years old at the time, having been born on **17 November 1998**. Her mother **(PW2)** availed her Certificate of Birth and it confirms the date of **17 November 1998** as the Complainant's date of birth. Hence, the evidence that was adduced before the lower court was sufficient to prove beyond reasonable doubt that the Complainant was a child for purposes of **Sections 2 and 20(1)** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**.

[21] Thus the two key issues that fall for re-evaluation by this Court are whether penetration was proved and whether the same was perpetrated by the Appellant. In this regard, the evidence adduced before the lower court was principally that of the Complainant. She told the lower court that she was at home with her siblings on the night of **13 May 2012** when her father, the Appellant herein, returned home drunk at about 1.00 a.m. and, having served him with some food, the Appellant went to the kitchen where she had gone to sleep, pushed the door open and forcefully inserted his penis in her vagina. Her evidence was corroborated by the evidence of **Dr. Cynthia Kibet**, who

confirmed that she examined the Complainant on **24 May 2012** and noted that she had healed hymenal tears at position 3 and 9 o'clock**. Dr. Kibet** produced the P3 Form that she filled and signed as the Prosecution's Exhibit No. 1. That evidence was sufficient to prove penetration, which is defined in **Section 2** of the **Sexual Offences Act, "penetration"** as follows:

> **"Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

[22] On whether the penetration was perpetrated by the Appellant, his Advocate pointed out that the incident occurred at night and therefore that the evidence of identification was critical to the case. He referred the Court to the cases of **Woolmington vs. DPP** (supra) and **Turnbull vs. Republic [1976] EA 549,** and submitted that evidence of identification ought to be watertight to found a conviction for a serious offence such as incest. In **R. vs. Turnbull & Others [1973] 3 AllER 549,** it was held that:

> **"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

[23] Likewise, in **Wamunga vs. Republic [1989] KLR 426**, the same principle was restated thus:

> **"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."**

[24] However, this was not a case of identification at night in difficult a situation of adversity. This was a case of a father and a daughter. The Complainant had just served his father and was trying to settle down and sleep when the father pushed the kitchen door open and proceeded to defile her. She also mentioned that she struggled with him as he tried to hold her back from escaping his grip; and that in the course of their struggle, the Appellant spoke to her telling her that she was tough headed. This was therefore a case of identification of a person well known to the Complainant, with whom she had been sharing an abode for 14 years. Hence, in **Anjononi & Others vs. Republic (1980)KLR 59** by the Court of Appeal:

> ***"....recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another."***

[25] There was therefore cogent evidence upon which the lower court based its findings; and it matters not that there was no medical evidence to connect the Appellant with the penetration. Indeed it is now well settled that the fact of defilement is not often proved by medical evidence such as DNA profiling. In **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..." (**see also **AML vs. Republic [2012] eKLR)**

The Court of Appeal cited, with approval, the case of **AML vs. Republic [2012] eKLR in which it was held that:**

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

[26] *Similarly, there can be no merit in the Appellant's contention that his defence was not taken into account. This is because, at page 48 of the Record of Appeal the Defence Case was given specific attention by the trial magistrate. In particular, the evidence of* ***DW2*** *was summarized and analyzed at pages 48 and 50 of the Record of Appeal. The lower court found it noteworthy that* ***DW2*** *had mentioned that the Complainant had a struggle with the Appellant and had hit him with a bucket, thereby offering corroboration to the evidence of the Complainant.*

[27] *Regarding the contention by Learned Counsel for the Appellant that critical witnesses were not called to testify before the lower court, it is true that the Appellant's neighbour known as* ***Eva****, in whose home the Complainant spent the rest of the night of* ***13/14th May 2012*** *was not called to testify. Likewise,* ***Mark Tarus,*** *described by* ***PW2*** *as their best man, who reported the incident to her, was also not called as a witness before the lower court. However,* **Section 143** of the **Evidence Act, Chapter 80** of the Laws of Kenya, does provide that:

> **"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of**

any fact."

Hence, in **Keter vs. Republic [2007] 1 EA 135**, it was held, *inter alia,* that:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

[28] In the premises, the Prosecution was only obliged to avail such witnesses as were sufficient to establish the charge beyond reasonable doubt. This was emphasized by the Court of Appeal in the case of **Daniel Muhia Gicheru vs. Republic Criminal Appeal No. 90 of 2007 (UR)** thus:

> ***"The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In BUKENYA AND OTHERS V. UGANDA [1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses. That Court, however, qualified that general principle by stating that:***
>
> ***"…. There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent …. While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

[29] There was therefore nothing that **Eva** or **Mark Tarus** could have said beyond what the lower court was told by the four Prosecution Witnesses, as neither of them were eye-witnesses to the act of incest. It is for the same reason that I find Counsel's arguments that the Prosecution case was riddled with inconsistencies and gaps untenable. The lower court was under duty to give attention to the entire body of evidence produced before it in making its determination. This is because contradictions and discrepancies are not uncommon in criminal prosecutions. Accordingly, the question the Court must bear in mind is whether their sum total is serious enough as to create reasonable doubt on the guilt of the person accused. Indeed, in ***Philip Nzaka Watu vs. Republic*** **[2016] eKLR** the Court of Appeal expressed the view that:

> ***"...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 recognized 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."***

[30] Similarly, in **Joseph Maina Mwangi –Vs- Republic Criminal Appeal No. 73 of 1992** it was held that:

> **"An appellate court in considering those discrepancies must be guided by the wording of section 382 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."**

Thus, having given due consideration to the discrepancies pointed out by Counsel for the Appellant as to when to the P3 Form was issued and when it was filled by **Dr. Kibet**, I am not convinced that they are pertinent or that they could have affected the outcome of the trial before the lower court.

[31] As to whether the Appellant was accorded a fair trial, the contention of his Counsel was that the appellant was not given adequate time and facilities to prepare his defence; and to choose and be represented by and advocate. The Appellant relied on **Article 50(2)(c) (g) and (h)** of the Constitution which provides that:

> **"Every accused person has the right to a fair trial, which includes the right:-**
>
> **(c) to have adequate time and facilities to prepare a defence**
>
> **...**
>
> **(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;**

[32] Counsel for the Appellant submitted that on several occasions, the Appellant appeared in court without his Advocate; and yet the matter proceeded without any consideration about the prejudice that was being visited on the Appellant. He further submitted that the Appellant was not given an opportunity to be heard or to defend himself fully before Judgment was delivered; and that this amounted to a clear violation of the Appellant's constitutional rights to a fair hearing. However, a perusal of the record shows that the Appellant engaged the services of a

lawyer soon after plea in readiness for the trial which commenced in earnest on **5 September 2012**. Hence, **Advocate Meli** attended court and represented the Appellant from **5 September 2012,** when the hearing commenced to **17 February 2014** when the Prosecution closed its case.

[33] The record further shows that because the Defence Counsel was not in court for the Defence Case to commence, adjournments were granted by the court on **2 July 2014, 8 December 2014,** and **13 July 2015.** Numerous other adjournments, including last adjournments, were thereafter given at the instance of the Defence before and after **12 October 2015** when the Appellant specifically informed the court that he wished to dispense with the services of his Advocate. He asked for more time and his request was granted. Notwithstanding that order, **Mr. Melly** continued to act for the Appellant and further adjournments were granted by the lower court at the instance of **Mr. Melly**. The Appellant was granted a series of adjournments on **5 August 2016, 25 August 2016** and **27 September 2016** for the reason that his Advocate was not available. In those circumstances therefore, it cannot be said that the Appellant was not accorded time and facilities to prepare his defence or to be represented by an Advocate before the lower court's Judgment was delivered. I therefore find no merit in his argument that his right to a fair trial was infringed.

[34] Section 20 of the **Sexual Offences Act** provides that:

> **"(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."**

[35] In the premises, the sentence of life imprisonment for the offence of incest by a male in which the complainant is under 18 years is not mandatory. **I**n **M.K. vs. Republic [2015] eKLR**, the Court of Appeal had occasion to interpret the words **"shall be liable"** in the proviso to **Section 20** of the **Sexual Offences Act**, and here is what the Court had to say:

> **"...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".***

[36] In the aforementioned case, the Court of Appeal approved the sentence of 20 years imposed by the lower court for the offence of Incest by a Male Person. Clearly therefore, whereas the sentence of life imprisonment is not mandatory, it is not unlawful either. Hence, the Learned Trial Magistrate cannot be faulted on sentence; save that he failed to specify that the conviction recorded was in respect of the Main Charge as is required by law. **Section 169 of the *Criminal Procedure Code, Chapter 75 of the Laws of Kenya,*** is explicit that:

> ***(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***
>
> ***(2) 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.***
>
> ***(3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty.***

[37] *In respect of the provision aforementioned, it was held in* ***James Nyanamba v Republic* [1983] eKLR** that;

> ***Again the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal***

Procedure Code.

[38] In this case however, no prejudice or injustice was occasioned granted that the trial magistrate made it clear in the last paragraph of his Judgment that the conviction was in respect of the Charge of Incest and that the accused, **"...knowing her to be his daughter had carnal knowledge of her..."** Thus, having re-evaluated the evidence adduced before the lower court, I am satisfied that the essential ingredients of the principal charge of Incest by a Male contrary to **Section 20(1)** of the **Sexual Offences Act** were proved against the Appellant beyond reasonable doubt. In the premises, I would uphold the Appellant's conviction as it was based on sound evidence. He was sentenced to life imprisonment in accordance with the proviso to **Section 20(1)** of the **Sexual Offences Act**. That sentence is therefore lawful.

[39] In the result, I find no merit in the appeal either on conviction or sentence, and would accordingly dismiss the same in its entirety.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF FEBRUARY 2019

OLGA SEWE

JUDGE