REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

HIGH COURT CRIMINAL APPEAL NUMBER 215 OF 2014

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 335 of 2014, **L Simiyu, Ag.SRM** on 27th October, 2014)

M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant, **M M**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 335 of 2014 with two counts. The first count was in respect of the offence of incest contrary to section 20(1) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant, on the 27th day of February, 2014 at [Particulars Withheld] Village, in Mwala District, within Machakos County, being a male person caused his penis to penetrate the vagina of **D N M**, a girl aged 16 years who was to his knowledge his daughter. The second count was that of the offence indecent act contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he unlawfully and indecently assaulted **D N M**, a girl aged 16 years, by touching her private parts namely vagina and breasts.

2. Upon being found guilty, the appellant was convicted of the offence of incest and was sentenced to life imprisonment. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

> **1. That, the evidence brought forward by the prosecution was not sufficient to have based his conviction on a charge of incest.**
>
> **2. That the burden of proof was not discharged as the law demands.**
>
> **3. That the Learned Trial Magistrate erred in law and facts by shifting the burden of proof upon the appellant.**
>
> **4. That the appellant's defence was not properly considered in compliance with section 169(1) of the CPC.**

3. In support of the prosecution's case the prosecution called 5 witnesses.

4. The first witness, **W N M**, the mother of the complainant testified that the appellant was her husband while the complainant was her daughter who was born in 1998. According to her she used to live with her husband till February, 2014 when a conflict arose and the appellant sent her away but retained the custody of the children.

5. According to the witness on 2nd March, 2014 at 8.30 am she was from church when she was informed that the complainant was sick. She decided to pass through her matrimonial home at 9.00 am where she found the complainant in bed. However, the complainant informed her that she was not sick but had been defiled at night on 27th February, 2014 and that since then she was feeling unwell and had a swelling. Upon undressing the complainant she saw blood on her underpants and her vagina was wide showing that she was nolonger a virgin. The complainant's inner thigh and vagina was swollen. The witness then decided to bathe the complainant and took her to the police. At the hospital, the doctor asked her for the complainant's clothes which he availed to the police. At Wamunyu Health Center, she was used with a P3 form that was later filled. In her evidence, the accused who was the father to the complainant was later arrested as he was following PW2 to the Hospital. It was her testimony that the accused and the complainant used to sleep in separate rooms.

6. In cross examination, the witness said that the complainant informed her that the appellant had told her to fabricate a story and blame the appellant's blood cousin.

7. The complainant testified as PW2. According to her PW1 was her mother while the appellant was her father. It was her evidence that when her mother went back to her parents in February, 2014, she remained with her father, the appellant and her brother and that each one of them had own houses. While the house she slept in had a room attached to her brother's room, her father was sleeping in a house about 50 metres away.

8. On 27th February, 2014 at about 2200 hours while she was asleep, the appellant opened her bedroom, pulled away her blanket and threw it away. He then removed the complainant's underpants and inserted his penis into her vagina and had sex with her for about 15 minutes. After that he left after threatening to kill her if she reported him. When the complainant woke up she realised that her underpants had saliva secretions and had blood that oozed from her vagina. She also had a swelling that burst and she bled. She then placed the pants in a polythene bag. The following day she went to school and when she returned she found her mother at home. However on Saturday, she fainted in church but did not disclose to anybody about the incident till Sunday when she disclosed to PW3 that the appellant had had sex with her. It was then that her mother called by and took her to the hospital.

9. According to the complainant she was born in 1998. According to her, this was not the first time the appellant was defiling her as he had done so severally before one being the day the appellant sent PW1 away.

10. In cross examination, the complainant confirmed that she loved the appellant who was his biological father and did not lie that the appellant defiled her.

11. PW3, **Bernice Ndunge Mwania**, testified that on 1st March, 2014 while they were practicing choir in church, she was called and informed that the complainant had fainted while she had left them briefly to go and ran an errand. Upon rushing back to the church she found that the complainant had gone home. On 2nd March, 2014 upon being informed by the complainant's brother that the complainant was in bed, she decided to visit her at 9.30 am. She found the complainant in bed and the complainant informed her that she was dizzy and upon further probing the complainant broke down and disclosed to hr that the appellant had defiled her. When PW1 went, she told the complainant to repeat the story to her after which she was taken to the hospital by PW1. According to her the appellant is a cousin to her husband but she had no grudge with the appellant. According to her, it was her who pointed out the appellant to the police when she saw him with PW1.

12. PW4, **Alice Mane**, was a clinical officer at Wamunyu Health Centre. According to her the complainant was seen on 3rd March, 2014 with a case of defilement by her father on 27th February, 2014 though she reported that there had been other incidences. According to her, she personally interviewed the complainant who gave her the history. It was her evidence that the complainant was walking with a limp. It was her evidence that the symptoms were normal save for the pain in the lower limb and hip. In was her opinion that the probable weapon was a blunt object such as a penis.

13. It was her testimony that both majora and minora were swollen while the vaginal opening was red, swollen and painful. It was also inflamed and was bruised while pus was oozing out of it. Her hymen was however not intact while urine and puss cells showed an infection though pregnancy and syphilis tests were negative.

14. It was her opinion that there was vivid penetration because the hymen was broken and the vagina swollen and inflamed.

15. PW5, **PC Martin Wamunane**, who was attached to Wamunyu Police Post was on call on 2nd March, 2014 when at about mid-day that the complainant accompanied by her mother and PW3 reported that she had been defiled by her father on 27th February, 2014 at 2200 hours. She recorded her statement, booked her case and referred her to Wamunyu Health Centre since the complainant appeared dazed and had a limp. He later issued her with a P3 Form which was filled at Wamunyu Health Centre. The appellant who was the biological father of the complainant was later arrested on 2nd March, 2014. It was his evidence that the complainant was aged 16 years having been born in 1998. The witness produced as exhibits the clinic card and the stained underpants of the complainant.

16. It was his evidence that the complainant informed him that the appellant had defiled her on another occasion and threatened her with a knife.

17. Upon being placed on his defence, the appellant gave sworn evidence. According to him, the charge against him was false. According to him there was a funds drive from which Kshs 28,000.00 was raised towards their child's school fees. However PW1 asked for Kshs 5,000.00 to buy scrap metal. Though the appellant resisted, he gave in when PW1 insisted. Thereafter there was a quarrel between them and he forbade her from using the money. Following the quarrel PW1 let stayed was away for one week before the police arresting him on the allegation of defilement.

18. It was his evidence that he was arrested for an offence he never committed and that the offence was fabricated by his wife to put him in jail. He however admitted that the complainant was is biological child and that she was injured having informed him that she had an injury on the thigh four days prior to his arrest though he did not take her to the hospital.

19. According to him on 27th February, 2014 the complainant who used to sleep in a room alone was at home. He however confirmed that the complainant who was 16 years was defiled, injured in her private parts and bled. He further confirmed that the complainant had good understanding and intelligence and could properly identify people and knew him very well hence could not confuse him. He however insisted that the complainant lied that he defiled her.

20. The appellant called **M M** as DW2. According to her, she did not live close to the appellant hence could not tell what happened. It was her evidence that the complainant mentioned the appellant's name in order to extort the appellant. It was her case that though the

complainant informed her that she had a boil in her private part, upon examining her she did not see the boil. To her the appellant did not defile the complainant because he had lived with the complainant for long. It was her evidence that when PW1 left the home she threatened the appellant that he would face the law very soon.

21. In her judgement the Learned Trial Magistrate found that the complainant was aged 16 years at the time of the offence based on oral and documentary evidence. Though the Court found that there was no eye witness and that the evidence was circumstantial, it was her finding that the same pointed to the guilt of the appellant since the complainant testified that she knew that it was the appellant who had opened the door as he had done it before and that the appellant spoke to her. The Court also took issue with the failure by the appellant to take the complainant to the Hospital, conduct which in the Court's opinion was inconsistent with the appellant's innocence. The Court formed the view that the failure by the appellant to take the complainant for treatment was out of fear that the incident would be revealed.

22. Based on the medical documents, the Court found that there was evidence of penetration.

23. Regarding the defence of the appellant, it was the Court's view that the same was fabrication and an afterthought and did not dislodge the prosecution's case. Having warned herself of the dangers of convicting on the singular account of evidence the Court found that the complainant appeared truthful.

24. In his submissions, the appellant contended that the evidence adduced was not sufficient to convict him as charged. To him the Learned Trail Magistrate erred in failing to rule out the possibility of mistaken identification by voice. As there was no witness, it was submitted that the case was based on circumstantial evidence and that there was no other independent evidence in order for the circumstantial evidence to be complete.

25. It was the appellants case that the Learned Trial Magistrate shifted the burden of proof to him and that his evidence ought to have been weighted as against the prosecution's evidence instead of forming theories of questions in relation to his defence.

26. It was therefore the appellant's case that the Learned Trial Magistrate misdirected himself.

27. In response to the appellant's submissions, it was submitted by, **Ms Mogoi**, Learned Prosecution Counsel that generally the issues for determination in a sexual offence relating to incest are whether the prosecution proved the relationship between the accused and the complainant, whether there was penetration and whether the penetration was caused by the appellant. In this case the fact that the complainant was the daughter was confirmed by even the appellant himself. It was further submitted that the prosecution's case was proved beyond reasonable doubt by the five prosecution witnesses.

28. It was submitted that the appellant's identity was proved by the complainant who recognised him by his voice and that this was therefore a case of recognition and it is not true that the conditions for voice identification were unfavourable as the appellant was well known to the complainant. It was further submitted that the appellant did not explain why he did not take the complainant to the hospital when she reported that she had a boil on her inner thigh.

29. It was submitted that the correct approach is for the trial court to exhaustively examine the entire prosecution's case as against the defence case and make a finding supported by reasons. In this case it was submitted that the appellant's defence was considered and could not exonerate him from the offence of incest. Accordingly the prosecution proved its case beyond reasonable doubt.

Determination

30. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

31. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

32. Section 20 of the ***Sexual Offences Act*** provides as follows:

(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

> ***Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.***

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as "section 114 orders" under the Children's Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.

33. In explaining the distinction between the offence of defilement and incest, **Majanja, J** in **F O D vs. Republic [2014] eKLR** held that:

> **"While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest."**

34. It is therefore clear that in order to prove incest the evidence must prove that the accused committed an indecent act or an act which causes penetration. In other words once there is evidence of indecent act, penetration is not necessary. Section 2 of the ***Sexual Offences Act*** defines "penetration" as:

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

35. "Indecent act" on the other hand means an unlawful intentional act which causes-

> ***(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.***
>
> ***(b) exposure or display of any phornographic material to any person against his or her will.***

36. The second ingredient of the offence of incest is that the accused ought to have the knowledge that the complainant is his daughter, granddaughter, sister, mother, niece, aunt or grandmother.

37. The last condition is that it must be proved that the indecent act or an act which causes penetration was caused by the accused.

38. In this case, it is clear both from the oral evidence of PW1 and PW2 as well as the documentary evidence that there was penetration of the complainant's genital organs. It was PW1's evidence that upon undressing the complainant she saw blood on her underpants and her vagina was wide showing that she was nolonger a virgin. According to PW4 who examined the complainant, both majora and minora were swollen while the vaginal opening was red, swollen and painful. It was also inflamed and was bruised while pus was oozing out of it. Her hymen was not intact while urine and puss cells showed an infection. This was clear evidence of penetration and corroborated the complainant's evidence that she had been penetrated. The appellant's case that DW1 examined the complainant and found no injuries cannot therefore hold any water. In any case the appellant himself admitted that the complainant had been defiled.

39. As regards the relationship between the complainant and the appellant, there was ample evidence from PW1, PW2 and the appellant himself that the complainant was the appellant's biological daughter.

40. With respect to the issue whether it was the appellant who defiled the complainant, the complainant testified that she knew the appellant's voice very well and that the appellant was well aware of how to open her door. In fact according to her the appellant had previously defiled her. After the incident, the appellant threatened her that he would kill her if she disclosed to anyone what he had done to the complainant.

41. In this case the complainant had been left in custody of the appellant. The appellant did not contend that on that night he was not within the vicinity. He therefore had the opportunity to defile the complainant. Although the Learned Trial Magistrate approached the case from the position of circumstantial evidence, it is my view that the case was not based purely on circumstantial evidence. The complainant's evidence was direct that it was the appellant who defiled her. Whereas it was the evidence of a single witness, that does not make it circumstantial. The Learned Trial Magistrate believed that the complainant was telling the truth. In **Keter vs. Republic [2007] 1EA135**, the Court held *inter alia* that:-

> **"Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."**

42. This Court appreciates that prosecution's case as regards the commission of the offence was based on the evidence of the complainant

who was a minor. On the issue of whether the evidence of the complainant, a minor, required corroboration, the law is quite clear: it does. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the ***Evidence Act*** makes this quite clear that:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*** [Emphasis added]

43. Dealing with a similar issue in the case of **Mohamed vs. R, (2008) 1 KLR G&F 1175,** the Court held that:

> **"It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."**

44. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

> **"The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the *voir dire* examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful."**

45. In **John Mutua Munyoki vs. Republic [2017] eKLR**, the Court of Appeal held that:

> **"What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief."**

46. In this case the Learned Trial Magistrate expressed himself as follows:

"I have warned myself on the dangers of convicting on the singular account of evidence and find that the minor appeared truthful."

47. It is true that that statement taken alone does not show the basis for forming that opinion. However from the evidence of the appellant, the appellant appreciated that the complainant was of good understanding and intelligence and could properly identify people.

48. The gist of the appellant's defence was however that the offence was a fabrication by PW1 with whom he had disagreed. However the totality of the evidence does not support this allegation. Had that been the position, the complainant would not have taken time before disclosing the incident if the only reason for that disclosure was to fulfil PW1's threat that the appellant would face the law soon as DW2 alleged. Apart from that this issue does not seem to have been put to PW1 when she testified. In **D W M vs. Republic [2016] eKLR**, the Court of Appeal expressed itself as hereunder:

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

49. Similarly in this case I cannot find any credible evidence that PW1 and PW2 acted in concert in fabricating the charge against the appellant. The conduct of PW2 in concealing the incident until she could nolonger bear the pain is not compatible with the conduct of a child who was couched by the mother to concoct a case against the father. In the premises I have no reason to fault the Learned Trial Magistrate's finding that it was the appellant who defiled the complainant. Dealing with similar circumstances the Court in **Tito Kariuki Ngugi vs. Republic [2008] eKLR** expressed itself as follows:

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

50. As regards the conduct of the appellant following the report by the complainant that she was unwell, I similarly cannot fault the Learned Trial Magistrate's reliance on the inaction of the appellant as corroborating the evidence of the prosecution. In this case the complainant was the appellant's daughter and the mother was not around. Ordinarily one would have expected the appellant to take the complainant's allegation of illness seriously and not to just rely on the opinion of DW2 who had no medical knowledge as the final decision in the matter. The conduct of an accused, it has been held may properly be found as corroborating the prosecution case. This was the position of the Court of Appeal in **Francis Charo Opo vs. Republic [1980] eKLR** where the said Court held that:

> **"At the trial, and before this Court, the appellant's defence was an alibi: he was at Kibarani, some distance away. We have come to the same conclusion as the judge; his alibi was false. The appellant was with the complainant on the material afternoon and had the opportunity to commit the offence; he has consistently lied in maintaining otherwise; and we think that these falsehoods give to the proved opportunity a complexion such as to amount in the circumstances of this case to corroboration; see *R v Erunasani Sekoni s/o Eria* (1947) 14 EACA 74, 76."**

51. I am therefore unable to fault the conviction of the appellant.

52. As regards the sentence, the Learned Trial Magistrate was of the opinion that section 20(1) of the ***Sexual Offences Act*** has a mandatory sentencing. With due respect that is not the correct legal position. That section states "***shall be liable to imprisonment for life"***. **Sir Henry Webb C.J.** in **Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64** had this to say on the proper construction of the words "**liable to**":

> **"The wording used throughout the code is "*shall be liable to*" but a consideration of the various sections shows in our judgment, that the use of the words "*shall be liable to*" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."**

53. The predecessor of the court went further in **Opoya versus Uganda [1967] EA 752** at page 754 where **Sir Clement DeLestang V.P**. picked up the conversation *inter alia* thus:

> **"It seems to us beyond argument that the words "*shall be liable to*" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."**

54. A similar position was adopted in **D W M vs. Republic** (supra) where the Court held that:

> **"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."**

55. That the life sentence is not mandatory appears from the sentence meted in **Tito Kariuki Ngugi vs. Republic** (supra) where the Court held that:

> **"The appeal against sentence has also no merit. The Appellant defiled his own daughter and caused her trauma which she will have to live with for the rest of her life. The 20 years he was given against life imprisonment provided for by the section under which he was charged cannot in the circumstances of this case be said to be harsh."**

56. Therefore bearing the totality of the above principles in mind, it is my view that the use of the words "***shall be liable to imprisonment for life***" in section 20(1) of the ***Sexual Offences Act*** gave room for the exercise of judicial discretion. The court below fell into error when it took the words "***liable to***" to mean that only the maximum sentence could be meted out against the appellant. In **Shadrack Kipchoge Kogo vs. Republic Eldoret Criminal Appeal No. 253 of 2003** the Court had this to say:-

> **"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.**

57. Accordingly, the Learned Trial Magistrate applied a wrong principle in his decision on sentencing and hence imposed a sentence that was so harsh that an error of principle must be inferred.

58. However this Court cannot lose sight of the fact that the culprit here was the complainant's father who ought to have been in the forefront in protecting the complainant. Instead of doing so, he took it upon himself to be the instrument through which the complainant would be traumatized.

59. While appreciating the appellant was a first offender, and the prosecution did not advance any other reasons to justify the maximum sentence, and while I appreciate this was and a heinous act on the part of a father against his daughter, I set aside and substitute therefor a sentence of sixteen years imprisonment from the date of his incarceration. To this extent only does the appeal succeeds but is otherwise dismissed.

60. Right of appeal 14 days.

61. Judgement accordingly

Judgement read, signed and delivered in open court at Machakos this 14th day of November, 2018.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Mr. Mwakio for Miss Mogoi for the Respondent

C/A: Geoffrey