REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J

CRIMINAL APPEAL NO. 24 0F 2017

PMM……..……..APPELLANT

VERSUS

REPUBLIC.…….……..…….……RESPONDENT

JUDGMENT

Background

1. The appellant was charged with the offence of incest contrary to **section 20 (1)** of the **Sexual Offences Act.** He also faced an alternative charge of committing an indecent act with a child contrary to **section 11 (1)** of **the Sexual Offences Act**. He was found guilty on the first charge and sentenced to life imprisonment. Dissatisfied with the decision of the lower court, he filed this appeal on the grounds set out below:

> *1. That the magistrate erred in law and fact by relying on the wrong principle and giving a wrongful sentence by holding that the sentence was mandatory while it is a maximum sentence.*
>
> *2. That the trial magistrate erred in law and fact by failing to give the appellant's unsworn defense a fair, objective and open minded analysis and casually rejected the appellant's defense.*
>
> *3. That the trial magistrate erred in law and fact by convicting the appellant on evidence of PW1 but failed to note that her age was not proved in the evidence.*

2. The appellant seeks that the conviction and sentence be set aside. He also seeks that the court should evaluate the evidence and make an independent finding on conviction and sentence.

3. The brief background of the case is as follows: The complainant (PW1), a thirteen year old standard eight girl, was at home alone with her father (the appellant) and younger sister. Their mother (PW2) was away at hospital attending to their sick grandmother. That night the complainant and her sister went to their bedroom to sleep, when her father called her and asked her to get a matchbox, light a lamp and take it to his bedroom. When she finished the tasks, her father blocked her way out, and when she asked him to get out of the way, he threw her onto his bed. He then covered her mouth, pulled off her clothes, removed his clothes, and had sexual intercourse with her.

4. When the ordeal was over the complainant ran out weeping, and fled into the darkness to her neighbour's (Mama Jack's) house where she banged on the door until Mama Jack opened. This was at about 11.00pm. She told Mama Jack that she had been raped by her father. Mama Jack asked the complainant for her mother's number, who she called, and told her all that had happened. They then went to her grandmother's homestead where they told the complainant's Aunt L W, PW3. Aunt L sent Mama J to get the complainant's sister.

5. PW3 and her sister took the complainant to Maella Health Centre, where the watchman called for the doctor. He came, treated the complainant and told them that they were to return on the Monday for tests to be carried out and that they needed to get a P3 form from the police. They went with the doctor to Maiela Police station where they were told to return the following day for a P3 form. When it was finally issued they took it to Naivasha District hospital. The appellant was later arrested and taken to Maella Police station from where he was arraigned in court.

Issues for determination.

6. Having looked at the submissions of the appellant and the material before the court, the issues that arise are only two, the first of which was an issue in the lower court :

a. Whether the complainant's age was proved beyond reasonable doubt to warrant conviction of the appellant.

b. Whether life imprisonment is a mandatory sentence for the offense of incest c/s 20(1) of the sexual offences act.

Whether the complainant's age was proved beyond reasonable doubt

7. In her decision, the learned trial magistrate addressed the issue of age and referred to the case of **Hilary Nyongesa v Republic (2010) eKLR** where Mwilu J (as she then was) stated as follows:

> ***"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved…***
>
> ***And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim"***

8. PW 1 testified that she was thirteen years old and in standard 8. Her mother, PW2 testified that the complainant was 13 years. From the proceedings birth certificate appears to have been produced and marked PMFI1 indicating that the complainant was 13 years old having been born on 17th June, 2003. However the actual document appears not to have been produced as an exhibit, as none is in the lower court's file.

9. The P3 Form Exhibit …shows that the complainant was aged 13 years old. PW4, the Clinical Officer testified that the estimated age of the victim was 13 years. Further, the trial magistrate who had the benefit of seeing the minor testify concluded that she was certainly not an adult, stating:

> ***"In the present case no birth certificate or age assessment report was produced. However the evidence of PW1, PW3 and PW4 was consistent that she was 13 years old.…the upshot is that the complainant was below eighteen years"***

10. As earlier stated, the complainant was in primary school and in class 8 at the time of giving evidence. The trail magistrate saw the complainant and did not hesitate to conduct a *voire dire* examination having formed the view that it was necessary. Although no documentary evidence was adduced to support the age of 13 year, the evidence of the mother and the complainant suggests to me that there was no reason for the court to reach a conclusion that the complainant was an adult.

11. Whilst it is true that the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to her age does not constitute such proof, the Court may in certain circumstances rely on evidence other than an age assessment report or birth certificate. In the case of in **Musyoki Mwakavi v Republic [2014] eKLR** held that:_

> ***"…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…".***

12. In the case of **Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000**, it was held that:

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."***

13. What emerges from the authorities is that whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant. Here, the medical evidence adduced by the clinical officer, which was not discredited by the appellant, estimated the age of the victim as 13 years. In addition, the appellant did not broach the question of age during cross examination. In the circumstances, I do not find it prudent to disturb the finding of the trial magistrate.

Whether life imprisonment is a mandatory sentence for offense of incest

14. **Section 20 (1)** 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***.

15. From the above provision, it is clear that the sentence for incest is predicated upon the age of the complainant. If the complainant is an adult, that is over eighteen years old, the court has discretion to mete a sentence of imprisonment of any length not being less than ten years. If the complainant is under eighteen years of age the court has discretion to mete a sentence of up to life imprisonment.

16. The above interpretation is gleaned from the Court of Appeal decision in **M K v Republic [2015] eKLR** which clearly pronounced itself

on this matter as follows:

> ***"17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the Sexual Offences Act. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?***
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> ***18. The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20 (1) of the Sexual Offences Act. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.***
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> ***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".***
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> ***20. On our part, we contrast the wordings in Section 8 (2) of the Sexual Offences Act with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.***
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> ***21. Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the Sexual Offences Act is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.***

17. As stated in the **Opoya Case** (supra) cited in the above decision of **MK** (supra), the Court of Appeal for East Africa interpreted and clarified and gave legal meaning to the words ***"shall be liable"*** to mean as follows: ***"shall be liable on conviction to suffer death"*** means that the court has discretion ***"to provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment".***

18. In conclusion therefore, the proviso to **Section20 (1)** simply means 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)** the Court of Appeal stated 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.

19. It was therefore wrong for the trial magistrate to hold that life imprisonment as the only sentence applicable for the offense in question, and to treat the case as though that were the only sentence which could be meted out. It must be pointed out, however, that the sentence imposed was not invalid since, clearly, life imprisonment is well within the scope of proper sentence for the offense of incest in relation, as in this case, to a child under eighteen years of age.

Disposition

20. In the circumstances, the decision that commends itself in this matter is that the appeal is forthwith remitted back to the trial Magistrate with the direction that the trial Magistrate do exercise her discretion given the material on record including the mitigation and probation officer's report and, if appropriate, she shall re-sentence the appellant, or uphold the sentence originally imposed.

21. Subject to the aforesaid direction, the appeal otherwise fails.

22. Orders accordingly.

Dated and Delivered at Naivasha this 6th Day of November, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. PMM – Appellant in person
2. Mr. Koima for the State
3. Court Clerk – Quinter Ogutu