



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL APPEAL NO. 5 OF 2016**

**J E .....APPELLANT**

***Versus***

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence by Hon. E.Bett –Senior Resident Magistrate dated 24<sup>th</sup> September 2015 in Nanyuki Chief Magistrate Court Criminal Case No. 3 of 2015)***

**JUDGMENT**

1. **J E** was charged and after trial convicted of the **offence of incest** Contrary to **Section 20 (1) of the Sexual Offences Act**. He was sentenced by the trial court to serve life time imprisonment. He was aggrieved by both the conviction and sentence and has filed this appeal against both.

2. This is the first appellant court. As such this court is required to analyze re-evaluate the trial court's evidence and come up with its own conclusion while bearing in mind it did not see the witnesses who testified: see **Okeno – V- Republic [1972] E.A. 32**.

3. The appellant presented the following grounds of appeal:

***1. "THAT the learned Magistrate erred in law by failing to find that the charge sheet was fatally defective and further the sentence was harsh as the statement of law is contrary to the particulars of the offence.***

***2. THAT the trial Magistrate erred in Section 124 of Evidence Act in failing to find that P W 2 never made prompt report and there was no corroboration in the evidence of prosecution witnesses to support conviction.***

***3. THAT the trial Magistrate fell into error in failing to hold that the medical evidence by P W 3 and the contents in the P 3 form does not reveal that there was penetration and p w 1 was defiled.***

***4. THAT the learned Magistrate equally fell into error in failing to give my statement of defence due and sufficient consideration."***

4. E.A. ( P W 1) a 5 year old minor after voire dire examination gave unsworn testimony. In her very brief testimony E. A. said about the appellant:

***"He did 'tabia mbaya' (bad manners) on me."***

5. The mother of the minor (P W 2) confirmed that E A was her daughter and that appellant was her husband. P W 2 had lived with the appellant for 7 year. She stated that on 11<sup>th</sup> November 2014 she left for work at 5.40a.m. Ordinarily because she has to report at work very early she used to take her children to a baby care. However, since the appellant was at home that day P W 2 left E A at home with him. On her return from work she found the children playing outside. The appellant had bathed E A. E A however was sleeping on the couch. Appellant who arrived in the house later on gave E A Ksh. 50/= to buy herself cake. On 12<sup>th</sup> November 2014 E A complained to P W 2 of pain in her private parts. E A requested P W 2 to give her medicine for that pain. It was then P W 2 inspected E A and found E A's private parts were red and bruised. P W 2 reported the matter to police and took E A to hospital. Appellant disappeared from their home and only returned on 3<sup>rd</sup> January, 2015 when he was arrested.

6. The clinical officer at Nanyuki Teaching and Referral hospital on examining E A found her hymen missing, laceration at the labia minor and major. There was no spermatozoa found. The clinical officer concluded that the missing hymen, open vagina, and laceration of penetration were an indication of penetration.

7. P W 4 Samson Kamwiru a children's officer confirmed, by his evidence, that P W 2 reported to him that appellant had defiled their child. P W 2 on 3<sup>rd</sup> January 2015 reported to him that appellant, who had until that date disappeared from their home, had returned. P W 4 was part of the persons who arrested the appellant.

8. Appellant in his defence gave sworn testimony. Appellant testified of incidents that occurred on 4<sup>th</sup> November 2014 when he said he quarrelled with his wife P W 2. That their quarrel was about previous relationships that P W 2 had with other men and in particular because one of those men telephoned P W 2 which call was received by the appellant. Appellant testified that on 5<sup>th</sup> November 2014 he went away to Ethi where his brother resides and he stayed there until 3<sup>rd</sup> January, 2015 when he returned to their matrimonial home. He then stated:

***“I knocked at her house and she (P W 2) asked me what I wanted and yet we had parted ways. I told her I just wanted to see my children. She told me she had been waiting for me and that she had told me not to step in that house. She came out and told me to wait for her shortly afterwards 3 village elders came in her company.”***

That it was then that the appellant was arrested.

9. On being cross examined the appellant, contrary to his testimony in chief, stated that on 11<sup>th</sup> November, 2014 he was at his home with P W 2 an E A and other children. He also confirmed that E A was his child and that he could not commit such an act against E A.

### **ANALYSIS AND DETERMINATION**

10. In order to appreciate the determination of ground I of the appellant's appeal. I will reproduce the particulars of the charge that the appellant faced before the trial court as follows:

***“J E on the 11<sup>th</sup> day of November, 2014 at ..... village, Timau in Meru county within the Republic of Kenya intentionally touched the vagina of E A a child aged five years old with his penis who was his 9(sic) knowledge his daughter.”***

11. Appellant submitted that the particulars of the offence, in particular the words “*intentionally touched the vagina*” was at variance with prosecution's evidence. To show that variance he highlighted E A's evidence where she said appellant did “*Tabia mbaya.*” to her and the clinical officer's evidence to the effect that: “*there is an attempt [of] penetration and you can penetrate partially and cause this injury*”. Appellant added that the charge sheet failed to given detailed information of the nature of the offence he was facing before the trial court.

12. In this court's view there is no variation at all in the evidence bearing in mind the charge sheet. The clinical officer both in evidence in chief and in cross examination opined that penetration can be full or partial but in both cases that the injury caused would be similar to the injury suffered by E A. Granted that the particulars of charge mention touching of E A's vagina, but not penetration, but again Touching as per clinical officer's evidence can lead to the injury caused to E A.

13. It follows that the evidence of E A and clinical officer does not in any way contradict the particulars of the charge. The particulars of the charge were also sufficiently clear to enable the appellant defend himself.

14. The appellant erred in submitting that the charge was defective for failing to have in it the word 'unlawful'. **Section 20(1) of the Sexual Offence does not use the expression "unlawful". The Section 20 (1) is in the following terms:**

***20. (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is this 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.***

Looking at that Section it becomes clear that it does not have the word "unlawful" and there was, therefore, no obligation for the prosecution to state in the charge the word 'unlawful'. The appellant seems to have been under the mistaken belief that Section 20 (1) is similar to the repealed Section 145 of the Penal Code which required the use of the word Unlawful.

15. Contrary to the submissions of the appellant there was sufficient evidence adduce by the prosecution's witnesses which showed that it was he, rather than anyone else, who committed the offence of defilement against E A . To begin with E A in her short testimony, short because she was emotionally affected to see the appellant as she testified, she said that the appellant did to her "tabia mbaya", meaning that he did 'bad manners' to her. E A further told P W 2, her mother, what the appellant did to her while in bed. P W said in evidence.

***"she [ E A ] then demonstrated to me what you ( appellant ) did to her."***

That demonstration led P W 2 to conclude that it was the appellant who defiled E A. Further the clinical officer confirmed on examining E A that she was defiled which resulted in broken hymn and lacerations.

16. The court rejects submission in support of Ground 2 of appellant's appeal that prosecution's witnesses contradicted themselves on the date the offence occurred. P W 2 stated that she left E A in the care of appellant on 11<sup>th</sup> November 2014. On 12<sup>th</sup> November 2014 E A complained of pain in her private parts. On further inquiring E A told P W 2 that the appellant had done "tabia mbaya", to her. From that evidence it is clear that the offence was committed by the appellant on 11<sup>th</sup> November 2014 when E A was left in his care.

17. The clinical officer in his evidence also said that the offence was committed on 11<sup>th</sup> November 2014 and he examined E A on 12<sup>th</sup> November 2014.

18. P W 5 the investigating officer stated that p W 2 made the report of the offence at the Timau Police station on 12<sup>th</sup> November 2014.

19. Looking at that evidence it becomes clear there was no contradiction of the date the offence was committed.

20. Grounds 3 of appellant's appeal has already been responded to herein before because the court has found that the clinical officer confirmed that E A had ben defiled. It mattered not that the clinical officer did not state, in the P 3 form, the degree of harm E A suffered as a result of that defilement. The fact that

the clinical officer did not find spermatozoa when he examined E A could be attributed to the fact that the appellant washed E A after committing the offence as per the evidence of P W 2.

21. Appellant faulted the trial court's alleged failure to consider his defence. The appellant is in error to raise such a complainant. The trial court not only set out the defence offered by the appellant but considered it and rejected it.

22. Having considered the prosecution's evidence the defence offered by the appellant and the grounds of appeal presented to this court by the appellant this court find that the trial court rightly convicted the appellant for the offence. The prosecution's evidence was cogent and unshaken. The prosecution proved its case beyond reasonable doubt.

23. As stated before the trial court sentenced the appellant to life imprisonment. In passing that sentence the trial court had this to say:

***“ I have considered all mitigation and also the fact that the accused is a first offender. The court notes that the incident committed by the accused is beastly, inhuman and devoid of any morals.***

***I also note that mandatory sentence imposed by the Act and in light of the foregoing consideration the accused is sentenced to a (sic) life imprisonment.***

24. **Section 20 (1) of the Sexual Offences Act** has the following Provision:

***“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 persons”.***

25. The trial court is sentencing the appellant and because E A was 5 years old (as proved by the birth certificate before court) sentenced appellant to life imprisonment stating that that was the mandatory sentence as per the provision of **Section 20 (1)**. The words on sentencing of that Section 20 (1) state “shall be liable to imprisonment for life”. There are many court authorities which shows that the use of the word ‘liable’ retains discretion to the court on the sentence to impose.

26. The first decision I wish to refer to is a court of appeal decision namely: **Mohamed Famau Bakari V Republic [1206] eKIR** where the court stated:

***“This Court, in addition but in more recent decisions of Carolynne Anna Majabu –V- R CR. Appeal No. 65 of 2014, Kabibi Kalume Katsui v R, Msa Cr. App. No. 9 of 2014 and Antony Mbithi Kasyula V R, Criminal Appeal No. 134 of 2012 has reiterated that the word “ liable” in Section 4 ( a) of the Act Merely provides for a likely Maximum sentence and allows a measure of discretion to the court in imposing a sentence with a maximum limit being indicated.”***

27. Another court of appeal decision is the case; **ARTHUR MUYA MURIUKI – V – REPUBLIC [2015]eKLR** where the court held:

***“The phrase used in penal statutes (i.e. shall be liable to) was judicially construed by the East African Court of Appeal in Opoyavs Uganda [1967] E.A. 752 where the court said at page 754 paragraph B:***

***“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.”***

28. The court of appeal also expressed itself in similar manner in another case where the discussion

related to the provision on sentencing under the Narcotic Drugs and Psychotropic substance (control) Act which also provides under Section 3(2) the sentence shall be liable to term of imprisonment 10 years and 20 years. The case is: **DANIEL KYALO MUEMA – V – REPUBLIC [2009] eKLR** the court held.

*“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] E A where the court said at page 754 paragraph B.*

*“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. We have no doubt that the sentences of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of cannabis sativa are the maxima and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although Section 3 (2) (a) of the Act does not expressly provide for a fine, the court can lawfully in accordance with Section 26 (3) of the Penal Code sentence the offender to pay a reasonable fine in substitution for imprisonment.*

29. From the above decisions it will be seen that the use of the words “shall be liable” in Section 20 (1) of Sexual Offences Act does not connote mandatory life imprisonment.

30. As I approach the appellant’s appeal against sentence I am very aware that sentencing is always an exercise of discretion by the trial court. This was clear stated in the case **ARTHUR MUYA MURIUKI – V- REPUBLIC [2015] eKLR viz:**

*“Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously. In Shadrack Kipchogekogo- vs – Republic, Criminal Appeal No. 253 of 2003 (Eldoret), Omolo, O’kubasu & Onyango JJA) the court of appeal stated:-*

*“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 that the sentence was so harsh and excessive that an error in principle must be inferred”.*

31. The Learned trial Magistrate in sentencing the appellant quite rightly observed that the offence committed against E A, a 5 year old girl, was “bestial, inhuman and devoid of morals”. I would add and say it was abhorrent, detestable, repugnant and downright horrible. That the appellant, the father of E A would take such advantage of her innocence and violate her without caring what psychological or emotional long term effect such an act would have on her is beyond description. In the case **REPUBLIC – V- JAGANI AND ANOTHER [2001] KLR 590** the purpose of sentencing an offender was said to be to disapprove, denounce unlawful conduct and to be a deterrent both to the offender and others in the community. I do however find that this court can interfere with the trial court’s sentence, not because the offence was not serious but because the trial court erred to state that **Section 20 (1) of the Sexual Offences Act** provided for mandatory life sentence. The appellant’s offence was indeed heinous. He was not remorseful even after his conviction. In his, so called, mitigation the appellant

blamed P W 2 the mother of E A for the predicament he was in. Appellant deserves a harsh sentence, certainly.

32. In view of the above the appeal on sentence is allowed. The trial court sentence of life imprisonment is set aside. **The appellant is hereby sentenced to serve imprisonment for 30 years which sentence shall begin to run from the date of his conviction by the trial court. His appeal conviction in view of what is stated above is rejected.**

**Dated and Delivered at Nanyuki this 14<sup>th</sup> Day of June 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue/MariaStella

Appellant: J E .....

For the State: .....

Language:.....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**