



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO (P), KARANJA & KANTAI, JJA)**

**CRIMINAL APPEAL NO. 81 OF 2017**

**BETWEEN**

**MW.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a Judgment of the High Court at Machakos (B. Thuranira, J.) dated 8<sup>th</sup> October, 2015*

*in*

*H.C.CR. A 295 OF 2010)*

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**JUDGMENT OF THE COURT**

**Section 20(1)** of the Sexual Offences Act outlaws human sexual activity between family members or close relatives. This typically includes sexual activity between people in consanguinity and those related by affinity. The section categorizes incest into those committed by male and female persons. In the case of the former, it is incest if a male person does an act which causes penetration with a female person who, to his knowledge, is his daughter, granddaughter, sister, mother, niece, aunt or grandmother. On the other hand, a female person who commits an act which causes penetration with a male person who is to her knowledge her son, father, grandson grandfather, brother, nephew or uncle will be guilty of incest.

If it is proved that the male or female person, the victim of incest is under the age of eighteen years, the accused person will be liable to imprisonment for life. There is, however, a rebuttable presumption that the accused person had knowledge, at the time of the alleged offence, of his relationship with the victim.

In the appeal before us, it was alleged that on 12<sup>th</sup> March, 2010 in Makueni District, the appellant unlawfully committed an act of incest with MM, a child aged 11 years, who was, to his knowledge, his daughter.

Upon hearing the evidence, the trial Magistrate was satisfied that the offence was proved beyond reasonable doubt, convicted the appellant and sentenced him to a term of forty (40) years in prison.

His first appeal to the High Court was dismissed and in doing so, the learned Judge (B. Thuranira, J)

interfered with the sentence, describing it as illegal. Upon setting it aside, she substituted it with a term of life imprisonment.

Once again, aggrieved by this outcome, the appellant has now lodged this second appeal on four grounds arguing that the learned Judge erred in law by: upholding his conviction on a charge which was defective under the provisions of **section 214** of the Criminal Procedure Code; enhancing the sentence without warning the appellant thereby occasioning a miscarriage of justice; upholding the conviction without a proper proof of the complainant's age and; imposing a life sentence which is unconstitutional.

Arguing the appeal in person before us, the appellant highlighted his written submissions in which he contended that the charge sheet was defective as the complainant (PW2) in her evidence stated that the appellant not only defiled her but her younger sister too; that with that evidence, the prosecution ought to have brought a second charge in which PW2's sister would have been the complainant. Accordingly, he submitted that the charge sheet was defective under **section 214** aforesaid. In support of this ground, he cited the case of **Jason Akumu Yongo V. Republic**, Criminal Appeal No. 1 of 1983.

Regarding grounds 2 and 3, the appellant urged us to reject the decision of the High Court in which the sentence from 40 years was enhanced to life imprisonment, because in his view, the learned Judge ought to have warned him before hearing the appeal on merit; and that that would have accorded him a chance to consider whether to withdraw or to proceed with the appeal. Further, he argued that in the absence of proof of the complainant's age, it was in error for the learned Judge to impose a life sentence.

On the last ground, it was posited that life imprisonment is unconstitutional and defeats the purpose of rehabilitation of offenders. Citing the Supreme Court case of **Francis K. Muruatetu & Anor V. Republic**, Petition No. 15 of 2015, he urged this Court to quash his conviction and set aside the sentence of the High Court.

Learned Counsel, Mr. O'mirera for the respondent, in opposing the appeal, submitted that the evidence against the appellant was overwhelming; and that the High Court arrived at the correct decision. He noted that the complainant herself gave her age as 11 years; and that the court, after conducting a *voir dire* examination expressed satisfaction that she was possessed of sufficient knowledge and also understood the nature of the oath hence her unsworn evidence. From the totality of the evidence presented by the complainant, the clinical officer and the rest of the witnesses, counsel urged us to find no basis for interfering with the decision of the High Court.

The appellant has raised concern over the defects in the charge sheet, proof of the complainant's age, the enhancement of sentence and of course the overarching issue of proof of the offence. In considering the four issues, we remind ourselves that this is a second appeal which by **section 361(1)** of the Criminal Procedure Code, can only be entertained if it raises matters of law. In **Chemagong V. Republic** (1984) KLR 213 at page 219, this Court stressed that:

**“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did.”**

To begin with, the ground dealing with the defect of the charge sheet is being raised in this appeal for the first time contrary to settled law, that at the hearing of an appeal the appellant cannot, without the leave of the Court, argue any ground of appeal not specified in the memorandum of appeal or in any supplementary memorandum. See **Rule 72** of the Court of Appeal Rules. But for what it is worth, we add that **section 214** of the Criminal Procedure Code envisages a situation where there is variance between the charge and evidence. The evidence by the complainant that the appellant also committed incest with her younger sister did not amount to evidence adduced in support of the offence with which the appellant was charged, namely incest with M.M. In any case, we do not see how failure to charge the appellant with an additional count was prejudicial to him.

Turning to the merit of the appeal, the evidence that the appellant, a male person committed an act which caused penetration with the complainant, his daughter, was overwhelming. The trial magistrate was convinced that both medical evidence and the testimony of the complainant provided sufficient proof. Significantly, she found the complainant a truthful witness whose account of the incident was detailed and graphic. Although the trial magistrate found sufficient corroborative evidence, in terms of the proviso to **section 124** of the Evidence Act, she could convict if satisfied that the complainant was telling the truth and record the reasons for believing her. She did so.

Under the Sexual Offences Act proof of age of the victim is critical for purposes of sentencing. The appellant insisted that the age ought to have been proven by either the production of a birth certificate or an age assessment report; and that without its proof the learned Judge was not justified in enhancing the sentence to life imprisonment. We reiterate what this Court stated in the case of **Kaingu Elias Kasomo V. Republic**, Malindi Criminal Appeal No. 504 of 2010, that:

**“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.**

The age of the victim can be established by medical evidence, birth certificate, the victim himself or herself, parents or guardian through their testimony before the trial court. For this position we are persuaded by the Ugandan case of **Francis Omuroni V. Uganda**, Criminal Appeal No. 2 of 2000, where the Uganda Court of Appeal stated thus:

**“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 ....”**

This case has been cited with approval in our jurisdiction in the case of **Mwalango Chichoro Mwanjembe V. Republic**, Mombasa Criminal Appeal No. 24 of 2015 where this Court stated:

**“The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R, Cr.Appel No.19 of 2014 and Omar Uche v R, Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim.Appel No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable.”**

Based on the foregoing principles, a perusal of the record shows that the complainant in her testimony stated that she was 11 years old. The evidence of the Clinical Officer (PW1) who examined her and contained in the P3 Form confirmed that indeed she was 11 years old. Though the complainant's mother did not testify, the foregoing evidence was sufficient to prove the complainant's age. Both courts below were unanimous on this question.

Having so concluded on the complainant's age, we now turn to consider whether it was proper for the learned Judge to set aside 40 years' sentence imposed by the learned magistrate and to substitute it with life imprisonment. As stated earlier, by **section 20(1)** of the Sexual Offences Act, if it is proved that the female victim is under the age of eighteen years, the accused person would be **“liable”** to imprisonment for life upon conviction. The emphasis on the word liable is deliberate as we shall shortly demonstrate.

In enhancing the sentence, the learned Judge expressed herself as follows;

**“20. Section 20(1) of the Sexual Offences Act provides for a sentence of up to life imprisonment if the victim is under the age of eighteen years. The sentence of 40 years is therefore illegal and I substitute the same with a life sentence.”**

It has been held in a long line of decided cases that where a statute creating an offence makes provision that an accused person shall, upon conviction, be liable to some form of punishment, there is judicial discretion to impose the sentence provided or any other less severe sentence. The Court of Appeal for East Africa in the case of Opoya V. Uganda (1967) EA 752, for instance, clarified that the words “shall be liable on conviction to suffer death” provides a maximum sentence only; and that 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”.**

See also M.K V Republic, Criminal Appeal No. 248 of 2014.

We consider such to be the correct approach to the construction of the words “shall be liable on conviction to imprisonment for life” in **section 20** of the Sexual Offences Act.

Although the trial magistrate did not expressly explain why she did not impose life imprisonment, it is apparent from the record that she arrived at the decision after considering the appellant’s mitigating circumstances.

Consequently, we are of the considered view that it was erroneous for the learned Judge to enhance the sentence to life, believing that it was unlawful to impose any other sentence less than life.

As explained by the predecessor of this Court in Ogolla s/o Owuor V. Republic, (1954) EACA 270, sentence can only be enhanced in clear circumstances, that:

**“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”.**

While still on this we may add also that to adjust, without any warning or notice, the 40 years imprisonment term to life when the least the appellant expected when he moved the first appellate court was a reduction, if not an acquittal was itself unwarranted. This Court in the case of J.J.W V. Republic, Criminal Appeal No. 11 of 2011, reminds appellate courts of the importance of informing an appellant of the possibility of the sentence being enhanced. It stated:

**“In this appeal, the prosecution did not urge enhancement of sentence and did not file cross appeal to that effect. The court did not warn the appellant of that possibility or in any case there is no record of such a warning if any was issued, yet all of a sudden, in the judgment, the learned judge enhances the sentence from seven years to ten (10) years. The need for prior information to be given to the appellant in such a situation is to enable him to prepare and argue his side of the case as regards such intended enhancement. In this case, the enhancement of the appellant’s sentence to ten (10) years was done without affording him opportunity of persuading the court against such a proposal. We have perused the Memorandum of Appeal that was before the first appellate court and we note that save for a small part in passing, the appellant did not specifically appeal against sentence in that court and hence the need to inform him of the possibility of enhancing the sentence.”**

See also: Josea Kibet Koech V. Republic (2010) eKLR and Isaac Muriithi Wambui V. Republic, Nyeri Criminal Appeal No. 42 of 2013.

This duty is even more critical where, like here the appellant was unrepresented by counsel.

For all the foregoing reasons, we reject the appeal on conviction but allow that on sentence to the extent that the enhanced term of life imprisonment is set aside and in its place the original sentence of forty (40) years imposed by the trial court is reinstated.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of January, 2020.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

**DEPUTY REGISTRAR**