REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & AZANGALALA, JJA)

CRIMINAL APPEAL NO. 21 OF 2015

BETWEEN

THOMAS MWAMBU WENYI.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(*Appeal from the Judgment of the High Court of Kenya*

at Nyeri (Wakiaga, J) Dated 28th October, 2014

in

H.C.CR. A. NO. 21 OF 2005)

****

JUDGMENT OF THE COURT

The Appellant **Thomas Mwambu Wenyi (the appellant)** was arraigned before the Chief Magistrates Court at Nanyuki, tried and found guilty of the offence of defilement of **JKM** a girl under the age of sixteen years contrary to **Section 145(1)** of the Penal Code; and indecent assault on **SKM** also a girl under the age of sixteen (16) years Contrary to **Section 144(1)** of the Penal Code.

The appellant denied the offences, provoking a trial in which the prosecution called a total of Eight (8) witnesses in support of the charges, while the appellant was the sole witness for the defence.

It was the testimony of **JKM** and **SKM** that on the 14th April, 2004 the appellant lured them to his house where he placed them on his laps. He started fingering their private parts before carrying **JKM** to his bed, proceeded to unzip his trouser, lowered it and then forcefully removed both the trouser and inner pant of **JKM**, straddled her and inserted his penis into her vagina. She felt pain and tried to scream but he threatened and covered her mouth. **SKM** on seeing what was happening to **JKM** released the latch on the appellant's door and ran out to report to **M M (PW4)**, who left immediately for the appellant's house only to meet **JKM** headed away from the direction of the appellant's house.

A report was made to Nanyuki Police Station on the same date by **M, J K M (Judith)** PW6 and **S K M (S)** PW3. They were issued with P3 forms and then referred to Nanyuki District Hospital, where the minors, were examined by **Geoffrey Mwirichia**, PW5, (**Geofrey)** a clinical officer, who detected no injuries on **SKM** save for an infection whose cause he could not determine, while **JKM** had bruises in the external genitalia and an infection, but no blood, spermatozoa or any other discharge was detected. The hymen was however intact. The appellant was also examined by **Pauline Lekorere PW7, (Pauline)** who detected a sexually transmitted infection (S.T.I.) in his urine sample.

When put to his defence, the appellant gave sworn testimony denying the offences and alleging fabrication of the charges against him because of an existing grudge between him and the father of JKM who was a fellow employee at his place of work.

The learned trial magistrate **P.C. Tororey,** SRM found the prosecution case proved to the required threshhold, and convicted the appellant for the defilement of JKM, and sentenced him to life imprisonment, and of indecent assault on **SKM** and sentenced him to serve seven (7) years imprisonment both sentences to run concurrently.

The appellant was aggrieved and appealed to the High Court. His appeal was dismissed by **J.Wakiaga, J** on the 28th day of November, 2014. Undeterred, the appellant is now before us on a second appeal. He raised six (6) homemade grounds of appeal which he subsequently supplemented by five (5) homemade supplementary grounds filed on the 4th day of July, 2016 namely, that the learned appellate Judge erred in law.

> *1.* ***When he upheld the sentence of life imprisonment contrary to section 145(1) of the Penal Code.***
>
> *2.* ***When he upheld his conviction based on the prosecution evidence which was riddled with doubts and inconsistencies.***
>
> *3.* ***When he upheld the appellants conviction on charges that had not been proved.***
>
> *4.* ***When he upheld the appellants conviction without fully evaluating and analyzing the entire record as he was duty bound to do.***
>
> *5.* ***When he upheld the appellants conviction without complying with the provision of Sections 169(1) of the Criminal Procedure Code.***

The appellant who appeared in person handed in written submissions which he adopted as his submissions in support of his appeal. In these, the appellant submits that the two courts below never complied with **Section 169(1)** of the **Criminal Procedure Code;** they failed to consider the appellant's defence; the first appellate court did not independently evaluate and analize the entire record afresh and arrive at its own different considerations from that of the trial court; the sentence of life imprisonment was unlawful; the evidence of the three key prosecution witnesses namely PW1, 2, and 4 was doubtful, questionable, contradictory and inconsistent; the offence of defilement of PW1 was not proved, proof of the age of PW1 and 2 was doubtful in the absence of production of birth certificates as exhibits; and that failure to call the father of PW1 as a witness was fatal to the prosecution case.

In response to the appellant's submissions, **Mr. J. Kaigai,** the learned Senior Assistant Director of Public Prosecutions submitted that the appellant's conviction on both counts was safe as it was based on sound evidence of PW1 and 2 as corroborated by PW4, 5,6 and 7 and the sentences are lawful. In his view, PW5's failure to determine the source of the infection; the finding that the complainants hymens were intact and the failure to determine whether there was penetration or not did not oust PW1's evidence that she had been defiled by the appellant. He added that the prosecution tendered evidence through all relevant witnesses which established the appellant's guilt beyond reasonable doubt; the failure of the court to record the questions put to the minors by the court and their responses thereto during the *voir dire* examination of the minors exercise is a mere technical error which is not fatal to the prosecution's

case as it did not occasion any prejudice or miscarriage of justice to the appellant; there is clear demonstration on the record that it was as a result of the *voir dire* examination of the minors that the learned trial magistrate formed the impression that the said minors were possessed of sufficient intelligence, understood the obligation to speak the truth and hence directed them to give sworn testimony.

In reply to the respondent's submissions, the appellant maintained that PW2 was not truthful and that nothing was detected on him that could link him to the commission of the offence.

This is a second appeal. Our mandate which is as set out in **Section 361(1)** of the Criminal Procedure Code is that we are restricted to the addressing ourselves to matters of law only. We also bear in mind that we should not interfere with the concurrent findings of fact by the two courts below unless such findings were based on no evidence or they were based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings.

See **Kaingo versus Republic [1982] KLR 213** at page 219 wherein this Court stated thus:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with the concurrent findings of fact 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 (Reuben Karoti S/O Karanja versus Republic [1956] 17EACA 146)"***

We have revisited the record on our own and considered it in the light of the impugned judgment and the rival submissions set out above. In our view, the following issues fall for our determination:-

> *i. Whether the two courts below complied with the provisions of sections 169(1) of the Criminal Procedure Code.*
>
> *ii. Whether the first appellate court discharged its mandate judiciously.*
>
> *iii. Whether the sentence of life imprisonment imposed against the appellant by the trial court and affirmed by the first appellate court is unlawful.*
>
> *iv. Whether the failure to reflect on the record by the learned trial magistrate of the questions put to the minors by the court and their respective responses thereto during the voir dire examination was prejudicial and or occasioned a miscarriage of justice to the appellant.*
>
> *v. Whether the burden of proof was shifted to the appellant.*
>
> *vi. Whether the appellant's defence was accorded the weight it deserves.*
>
> *vii. Whether material witness (es) were not tendered by the prosecution.*
>
> *viii. Whether there were any contradictions, inconsistencies and discrepancies in the prosecution evidence which tended to make it unworthy of belief.*
>
> *ix. Whether the age of the two minors namely PW1 and 2 was properly ascertained.*
>
> *x. Whether proof of penetration was necessary in order to sustain a conviction for the defilement of PW1.*

Section 169(1) of the Criminal Procedure Code provides *inter alia* thus:-

> ***"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, and shall contain the point or points for determinations, the decision thereon and the reason for the***

decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

In his judgment, the learned judge of the first appellate court set out the offences the appellant faced at his trial, the submissions of either side; evidence tendered by either side; drew out from the appellants grounds of appeal two issues raised against his conviction and sentence; set out the provisions of **Section 19** of the Oaths and Statutory Declarations Act Cap 15, applied the principle in the **Francisio Matovu v. Republic [1961] EA 260** and then rendered the following conclusions on the first issue:-

"2" In this present case whereas the record does not show the question asked the record shows "*that upon examination of the minor I do accept her affirmed****" and in the judgments the court had this to say: "****It is no doubt the two children were talking the truth."*

22. I therefore take the view that whereas the trial court did not follow the procedure outlined in the case of Fransisio Matovu versus Republic (supra) the same complied with the provisions of Section 19 of the oaths and Statutory Declarations Act and further note that the said section is for the benefit of the court and therefore the appellant was not prejudiced."

Turning to the second issue, the learned Judge made findings that:-

" (23) From the evidence tendered as considered herein and in particular the evidence of PW1 and PW2 which although requiring no corroboration was corroborated by the medical evidence of PW5 and PW7. I find that the prosecution case against the appeal (sic***) was proved beyond reasonable doubt and therefore his conviction was safe."***

We have considered the above observations on the mode of procedure adopted by the High Court, in the light of the provisions of **Section 169(1)** of the Criminal Procedure Code (supra) and we are satisfied that both the trial magistrate and the learned first appellate Judge fully complied with the prerequisites in **Section 169(1)** of the Criminal Procedure Code (supra) and their judgments are unassailable on this aspect.

The role of a first appellate court has been crystallized by a long line of case law. See **Patrick & Another versus Republic [2005] 2KLR 162**; in which the court held *inter alia* 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 own decision on the evidence. 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 courts findings and conclusions; it must make its own findings and drew its own conclusions."

There is no formal reminder of the mandate of a first appellate court endorsed on the record by the learned judge, but this notwithstanding, the record demonstrates clearly as already highlighted above, when dealing with compliance or otherwise with **section 169(1)** of the Criminal Procedure Code that the learned judge properly discharged his obligation as was expected of him.

It is not disputed that the offences the appellant faced at the trial had been laid under **Sections 144(1)** and **145(1)** of the **Penal Code** respectively. These provided then as follows:-

"144 (1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment with hard labour for five years with or without corporal punishment

……

145(1) Any person who unlawfully and carnally knows any girl under the age of fourteen years is guilty of a felony and is liable to imprisonment with hard labour for fourteen years together

with corporal punishment.

……..”

The above provisions were amended by the Criminal law (Amendment) Act No.5 of 2003. It was assented to by the President of the Republic of Kenya on the 18th day of July, 2003 and commenced operation on the 25th day of July, 2003. The amendment of **Sections 144(1)** and **145(1)** of the Penal Code are found in **Sections 18** and **19** of the Criminal law (Amendment) Act. (supra). The relevant portions read as follows:-

1“(8) Section 144 of the Penal Code is amended-

(a) In subsection (1), by deleting the words “five years with or without corporal punishment” and substituting therefore the words twenty –one years”

…….

(19) The Penal Code is amended by repealing section 145 and replacing it with the following section-

145(1) Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.”

The offences the appellant faced were committed on the 14th day of April, 2004 after the commencement of the above amendments.

It is not disputed that the questions put to the minors by the court and their responses thereto were not reflected on the record. When confronted with a similar complaint, the learned first appellate court Judge set out the provisions of **Section 19** of the **oaths and Statutory Declaration Act Cap 15 Laws of Kenya,** enshrining the *voir dire* principle. He then drew inspiration from the case of **Fransisio Matovu versus Republic [1961] E.A 260** for the holding *inter alia* that:-

“(I) The trial magistrate should question the child to ascertain whether the child understands the oath and;

(2) If the court does not allow it and not to be sworn, it should record whether or not in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth.”;

In **Mohamed versus Republic [2005] 2KLR 138** the court pronounced itself on this issue as follows:-

“The recording of a voir dire (under section 19 of the Oaths and Statutory Declarations Act) in the form of questions and answers may be an appropriate procedure where the procedure for recording proceedings is an elaborate one with short hand personnel and electronic recording it as it is England. The requirement for recording of proceedings in Kenya is however, regrettably, still in long-hand and it is not mandatory to record both the questions and answers from witness unless in the circumstances of any particular case, there is need for emphasis.”

The position in the **Mohamed** case (supra) was restated by the court in the case of **DWM versus Republic [2016] eKLR** thus:-

11. The need for the administration of voir dire on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in Section 19 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In Sula versus Uganda [2001] 2EA 556 the Supreme

Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make its conclusion thereafter.

12. In Patrick Kathurima versus Republic Nyeri CRA 137 of 2014 this Court after reviewing case law on the subject observed thus:-

"It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina versus Campell (Times) December 20,1982 and Republic versus Lalkhan [1981] 73 CA190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."

13. On account of the above observation this Court in the Kathurima case vitiated the prosecution case totally on account of it having been anchored on the minor's contradictory evidence and on that account allowed the appeal in its entirety.

14. There was however no hard and fast rule laid down by this Court in the Kathurima case (supra) that in all cases where voir dire procedure had not been strictly administered the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-

"It is best though not mandatory in our context that the questions put and the answers given by the child during the voir dire examination be recorded…"

The trial magistrates' failure to reflect on the record the questions put to H.W during the voir dire examination was not therefore per se fatal to the prosecutions' case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt. (Emphasis added)"

The reasoning in the case law highlighted above, is that although it is desirable that the questions put by the court on the one hand and the responses of the minor (s) thereto on the other should be reflected on the record during the *voir dire* examination of minor witnesses the failure to do so is not *per se* fatal to the prosecutions' case, so long as there is demonstration on the record that the trial court bore the need to carry out this exercise in mind, and in fact did carry it out. We therefore find no fault in the conclusion reached by the learned Judge that no prejudice or miscarriage of justice was occasioned to the appellant by the trial court's failure to reflect on the record both the questions put by the court to the minor (s) and the responses made by the minor (s) thereto in response to those questions.

The correct position in law with regard to the discharge or otherwise of the burden of proof in criminal trials is that enunciated by the predecessor of the court in **Sekitoleko versus Uganda [1976] EA53** that:

"As a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else"

See also **Ajwang versus Republic [1983] KLR337** for the proposition that the burden of proving the ingredients of an offence is entirely on the prosecution and the accused cannot be called upon to prove his innocence.

It is evident from the record that the two courts below considered evidence tendered in support of the prosecution case as well as the appellant's defence and gave reasons for the conclusions reached.

The first appellate court had this to say about the appellant's defence.

"24. On the issue of the appellants defence, I agree with the submissions by Miss Mandu that the same was considered by the trial magistrate as follows:-

"If indeed there was a grudge between the father of PW1 and himself what mature would PW4 Micheline Mwaria neighbor have for stating she saw him washing clothes that morning outside his house at about 11.00am. And also stating that she saw PW1 leaving his house."

The observations made above and reflection on the record by the 1st appellate court of how the trial court evaluated the appellants defence is a clear indication that the two courts below analized the appellant's defence and weighed it against the prosecution's evidence and found it ousted for the reasons given by each court in their respective judgments. We are therefore satisfied that no burden of proof was shifted to the appellant by the two courts below as claimed by the appeallant.

Section 143 of the Evidence Act Cap 80 Laws of Kenya makes provision that no number of witnesses is required to prove any fact. The predecessor of the court in **Bukenya and others versus Uganda [1972] EA 549** stated clearly that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; second, that the court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case; and third, that where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

In **Keter versus Republic [2007] 1EA135** the court was categorical that:-

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

The material witness allegedly not called was the father to PW1. From the record the father of PW1 was not the prime mover of the prosecution process against the appellant. It was PW4 who set the ball rolling when she believed the story of PW2 and PW1 that the appellant had sexually molested the two minors. His role was limited to accompanying the minors and PW3, 4 and 6 to police and the hospital. Failure to tender the father of PW1 as a witness in the circumstances highlighted above was not fatal to the prosecutions' case and therefore no prejudice or miscarriage of justice was occasioned to the appellant by his exclusion from giving evidence.

The trial court discounted evidence of the alleged existence of a grudge between the appellant and the father to PW1 and found it baseless as it did not oust the testimony of PW1, 2 and 4, that the appellant was in his house on the material date and sexually molested the minors, which finding was affirmed by the first appellate court.

In **Keter versus Republic** (supra) 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"

The moment the two courts below concurrently disbelieved the appellant on the allegation of existence of a grudge between him and the father of PW1 as a basis for the alleged fabrication of charges against him, a factual conclusion was arrived at which this Court is not at liberty to re-examine.

With regard to the complaint that the prosecution's case was based on doubtful, questionable, inconsistent, contradictory and therefore untrustworthy evidence, the court in the case of **Joseph Maina Mwangi versus Republic Criminal Appeal No.73 of 1993** held inter alia that:

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of 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."

From the appellants written submissions, the alleged doubts, contradictions and inconsistencies in the evidence of PW1, 2 and 4 related to how PW4 reacted to PW1 and 2s' reports that they had been sexually molested by the appellant. Save for purposes of consistency, all these relate to events after the act and carry no weight in so far as proof of the prosecutions' case against the appellant was concerned. It is also evident from the record that what the trial court relied upon to convict and the first appellate court to affirm that conviction is the truthful and believable graphic description of the sexual molestation committed against the minors by the appellant. What the appellant has therefore invited us to do, is to depart from the concurrent findings of fact by the two courts below.

In **Daniel Kabiru Thiongo versus Republic Nyeri Criminal Appeal No.13 of 2002 (UR**) the court gave this as a caution:-

"An invitation to this court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court, unless it is shown that there are compelling reasons for doing so"

We find no compelling reasons in the instant appeal for us to so depart from the said concurrent findings of fact by the two courts below as these were supported by the evidence on the record.

As for proof of the age of the minor, there is no dispute that no birth certificates were tendered in evidence as proof of their ages.

In **Basil Okaroni versus Republic [2016] eKLR** the Court had this to say:

We agree with the appellant that in Sexual Offences, ascertainment of the victim's age is crucial and the court's have underscored the necessity of this requirement.

In Criminal Appeal No.504 of 2010 Kaingu Alias Kasomo vs. Republic, this Court stated thus:

"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"

In the case of **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2 of 2000** it was held *inter alia* 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 be proved by birth certificate, the victim's parents or guardian and by observation and common sense…."

In the instant appeal, the two courts below acted on the oral testimonies given by PW3 and 6 who were close relatives of the minors as to the age of the minors as at the time of their sexual molestation by the appellant, given as Eight (8) years. These ages were confirmed by PW5 through medical assessment. The above two methods used to establish the age of the minors were accepted by the trial court for proof of the minors age and affirmed by the first appellate court. We find this approach proper as both were in line with the principles of law approved by the court in **Basil Okaroni versus Republic** (supra).

As for lack of proof of penetration of PW1, neither the Penal Code (supra) under which the offences the appellant faced were laid nor the Criminal Law (Amendment) Act 2003 under which the sentences for

those offences were amended define what is meant by penetration, defilement or indecent Act. These have however been defined by **Section 2** of the **Sexual Offences Act No.3 of 2006** as follows:

> "***Indecent act***" ***means an unlawful intentional act which causes (a) any contact between any part of the body of a person with the genital organs , breast or buttocks of another but does not include an act that causes penetration***." Whereas "***Penetration means the partial or complete insertion of the genital organ of a person into the genital organ of another person." Defilement on the other hand is defined in Section 8(1) of the Sexual Offences Act (supra) as: "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"***

In our view, since these definitions relate to sexual offences, they are the correct definitions for Sexual Offences whether preferred under the Penal Code or the Sexual Offences Act. We would therefore adopt those definitions as the correct definitions for the offences the appellant faced.

The testimony of PW1 was that the appellant straddled her on his laps and then inserted his penis into her private parts. She felt pain and struggled to free herself from him and as he struggled to silence her PW2 released the latch on his door and bolted out. In the circumstances, it is our finding that, the struggle put up by PW1 and the fear of the consequences of PW2 bolting out of the appellant's house may well have interrupted complete penetration of PW1 by the appellant. This explains why the hymen of PW1 was found intact and also for the lack of either blood or any other discharge from her private parts. The offence was however complete upon partial penetration as defined above. As for PW2, all that the appellant did to her was to insert his fingers into her private parts. She never said that she felt any pain, which in our view accounts for the absence of any injuries on her private parts. The absence of injuries does not however negate the indecent act which was complete by the appellants' finger(s) which form part of his body coming into contact with PW2s private parts.

The upshot of all the above assessment is that, we find that the prosecution case was proved beyond reasonable doubt. The convictions were sound and safe.

As for the sentence, the Supreme Court of India in **Alister Anthony Pereira vs State of Maharashtra** at paragraphs 70-71 had this to say on sentencing:-

> **"70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.**
>
> **71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence**
>
> **As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."**

It is not disputed that upon conviction for the offence of defilement, the appellant was "**liable to imprisonment with hard labour for life."** Sir Henry Webb C.J. in **Kichanjele S/O Ndamungu versus Republic (1941) 8EACA 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."

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"

See also **Shadrack Kipchoge Kogo versus Republic** Eldoret Criminal Appeal No. 253 of 2003 where 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.

Bearing the totality of the above principles in mind, it is our view that the use of the words "**shall be liable to imprisonment for life with hard labour**" in **section 145** of the Penal Code gave room for the exercise of judicial discretion. The two courts below fell into error when they took the words "***liable to***" to mean that only the maximum sentence could be meted out against the appellant. The appellant was a first offender, and the prosecution did not advance any other reasons to justify the maximum sentence. We must therefore interfere with the sentence of imprisonment for life with hard labour which we set aside and substitute therefor a sentence of sixteen years imprisonment with hard labour to run concurrently with the sentence on count 2 from the date of conviction by the trial court. To this extend only does the appeal succeed but is otherwise dismissed.

DATED AND DELIVERED AT NYERI THIS 1ST DAY OF MARCH, 2017.

P.N. WAKI

.....

JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR