IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MWILU & OTIENO-ODEK, JJ.A)

CRIMINAL APPEAL NO. 248 OF 2014

BETWEEN

M K…….....……APPELLANT

AND

REPUB LIC…….RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos (L. Mutende, J.) dated 25th March 2014

in

H.C.CR.A No. 89 of 2012)

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JUDGMENT OF THE COURT

1**. *M K***, the appellant, was charged with incest contrary to ***Section 20 (1)*** of the **Sexual Offences Act, No. 3 of 2006**. The particulars were that at ***[particulars withheld]*** Village in Kiou Location in Makueni District within Eastern Province, being a male person had carnal knowledge of ***M. M.*** a female person who was to his knowledge his daughter. The trial magistrate upon hearing the evidence convicted the appellant and sentenced him to a term of twenty (20) years imprisonment.

2. Aggrieved by the trial magistrate's conviction, the appellant lodged an appeal before the High Court. The learned judge (L. Mutende) upon hearing and considering the case confirmed and upheld conviction of the appellant for the offence charged. As regards sentence, the High Court held that the twenty (20) year term of imprisonment meted upon the appellant was illegal. The learned judge corrected what she called an illegal sentence and substituted the same with imprisonment for life. Aggrieved by the correction or enhancement of the sentence from twenty (20) years to a term of life imprisonment, the appellant has lodged the instant appeal.

3. In his supplementary memorandum of appeal dated 15th June 2015, the appellant urged two points of law as follows:

> "(i) *That the learned judge erred in law in enhancing the sentence from 20 years to life imprisonment contrary to the provisions of Section 354 (6) of the Criminal Procedure*

Code.

ii. *That the first appellate court erred by failing to warn the appellant of the consequences of proceeding with the appeal before it.*

iii. *That the learned judge grossly erred in law by concluding that the prosecution case was proved beyond reasonable doubt."*

4. At the hearing of this appeal, learned counsel Mr. Amutallah Robert Julius appeared for the appellant while Senior Assistant Director of Public Prosecution Moses Omirera appeared for the State.

5. Counsel for the appellant urged grounds 1 and 2 of the appeal submitting that the core argument in the appeal is that the learned judge erred in enhancing the sentence from 20 years to life imprisonment without any notice or warning to the appellant; that the appellant was unrepresented before the High Court and he did not understand or appreciate the consequences of proceeding with his appeal before the court; that the learned judge erred in considering and addressing the issue of sentence when there was neither an appeal nor a cross appeal against sentence; that the appellant's appeal before the High Court was against conviction and not sentence; that the appellant never opened or raised the issue of sentence before the High Court; that the prosecution did not argue on enhancement of sentence and no notice or warning was given to the appellant; that the learned judge did not warn the appellant that there was a possibility of the sentence being enhanced and the court did not invite the appellant to withdraw the appeal or argue on illegality of the sentence. Counsel further submitted that by enhancing the sentence without notice or any warning, the learned judge erred and acted contrary to ***Section 364 (2)*** of the **Criminal Procedure Code** and ***Article 50*** of the Constitution; that the appellant was prejudiced when sentence was enhanced without being given an opportunity to be heard and address the court; that the enhancement of sentence without notice and hearing violated the principles of fair trial under ***Article 50*** of the Constitution. Counsel cited the cases of **Charles Muriuki Mwangi -v- R, 2015 eKLR** and **Christopher Mwangangi Katumo -v- R 2007 eKLR** in support of the appeal.

6. The State in opposing the instant appeal submitted that the issue is not one of enhancement of sentence but correction of an illegal sentence; that what the learned judge did was to correct an illegal sentence; that the appellant was charged under the provisions of ***Section 20 (1)*** of the **Sexual Offences Act** and the section provides for the minimum sentence to be meted upon a convicted person; that the minimum sentence under ***Section 20 (1)*** is dependent on the age of the complainant or victim of the sexual offence; that in the instant case, there is no dispute that the complaint/victim was a girl of 14 years; that the charge sheet clearly indicated that the complainant was under the age of 18 years and the appellant had notice that the minimum sentence under ***Section 20 (1)*** of the **Sexual Offences Act** is a term of life imprisonment if the victim is under 18 years of age.

7. The State submitted that ***Section 20 (1)*** of the Act does not give discretion to the trial magistrate as regards the sentence to be imposed; the sentence being a minimum sentence; the trial court had no option but to impose the same; in erring to impose the minimum life sentence, the learned judge acted within the law in correcting an illegal sentence and substituting the same with the legal minimum term of life imprisonment.

8. Counsel distinguished the cases of **Charles Muriuki Mwangi -v- R, 2015 eKLR** and **Christopher Mwangangi Katumo -v- R** ***2007*** **eKLR** cited by the appellant submitting that these cases involved offences under ***Section 296 (2)*** of the Penal Code; that under the Penal Code provisions, discretion is given to the trial court as to the sentence to be meted out ranging from probation to death sentence; that in the instant case, ***Section 20 (1)*** of the **Sexual Offences Act** does not confer any discretion on sentencing; that so long as the appellant is not challenging his conviction; notice or warning given to him would make no difference as a minimum term of life imprisonment is the sentence to be meted out. The State further submitted that there is a proviso to ***Section 364 (2)*** of the ***Criminal Procedure Code*** which is applicable to this case; that under the proviso, the general provision to ***Section 364 (2)*** is inapplicable to this case. It was submitted that under the proviso, the High Court can alter an illegal sentence and even prejudice an accused person without an opportunity of being heard either personally or by advocate in his own

defence.

9. This being a second appeal and by *dint* of ***Section 361(1)*** of the **Criminal Procedure Code, Chapter 75**, **laws of Kenya,** this Court's jurisdiction is limited to matters of law only. In **Chemagong vs. Republic (1984) KLR 213** at page 219 this Court held,

> **"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. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)".**

10. We have considered the judgments from the two lower courts, the grounds of appeal, able submissions of counsel and the law. This appeal is not against conviction of the appellant. At the heart of the appeal is the application of ***Section 364 (2)*** of the Criminal Procedure Act in relation to ***Section 20 (1)*** of the **Sexual Offences Act** and the correction and or enhancement of the sentence meted upon the appellant from a term of 20 years to life imprisonment. It is not in dispute that the appellant was not given notice or any warning on correction or the possibility of enhancement of sentence.

11. It is the appellant's case that it is mandatory that a notice or warning of enhancement of sentence must be given to an accused person who is thereby accorded an opportunity or choice to make his submission on illegality of the sentence or to withdraw his appeal. ***Section 364 (2)*** of the **Criminal Procedure Code** upon which the appeal is grounded provides as follows:

> **"No order under this Section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence."**

12. It is the appellant's contention that the learned judge erred by enhancing or correcting the sentence without giving the appellant an opportunity of being heard as stipulated in ***Section 364 (2)*** above. On the other hand, it is the State's submission that the learned judge properly corrected the illegal sentence of 20 years imprisonment and substituted it with a term of life imprisonment and this is proper in law under the proviso in ***Section 364 (2)***. The proviso in ***Section 364 (2)*** reads as follows:

> "**Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned."**

13. The relevant part of ***Section 20 (1)*** of the **Sexual Offences Act** provides as follows:

> **"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…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….**
>
> **(emphasis ours).**

14. There are two critical issues for us to consider and determine in this appeal. First is whether there is a minimum mandatory sentence of a term of life imprisonment in the proviso to ***Section 20 (1)*** of the **Sexual Offences Act**. Second whether the twenty (20) year term of imprisonment imposed by the trial court was illegal. We have considered the authorities cited by the appellant and it is our considered view that the authorities are not relevant to the determination of the two pertinent issues in this appeal. The

appellant was charged with an offence under the Sexual Offences Act which prescribes the sentences to be meted out to persons convicted thereunder.

> 15. Readings of the diverse provisions of the **Sexual Offences Act** reveal that in most sections, a minimum sentence is provided for. For example, under ***Section 3 (3),*** a person guilty of the offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years….; ***Section 4*** of the Act stipulates that a person convicted of attempted rape is liable upon conviction for imprisonment for a term which shall not be less than five years….. ***Section 5 (2)*** of the Act provides that a person convicted of sexual assault shall be liable to imprisonment for a term of not less than ten years…. ***Section 8 (3)*** of the Act provides that a person convicted of defilement when the child is between the ages of twelve and fifteen years shall be liable to imprisonment for a term of not less than twenty years.

16. Our reading of the Sexual Offences Act shows that whenever a minimum sentence is imposed, the phrase not less than is used.

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?

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.

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".***

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.

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.

22. Based on the foregoing interpretation, we are of the considered view that in the instant case, the learned judge erred in law in holding that the twenty (20) years term of imprisonment meted to the appellant by the trial court was an illegal sentence. We find that the twenty (20) years term of imprisonment was not an illegal sentence and was lawful in the context of the decision in **Opoya -v- Uganda (1967) EA 752.** It follows that the learned judge erred in correcting and or enhancing the sentence from 20 years to life imprisonment. We reiterate the principles in the case of **Ogolla s/o Owuor, (1954) EACA 270** wherein the predecessor of this court stated:

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

23. We are of the considered view that the High Court misinterpreted the proviso to ***Section 20 (1)*** of the **Sexual Offences Act** and acted on wrong principles and overlooked the decision in **Opoya -v- Uganda (1967) EA 752.**

24. In conclusion, we are inclined to follow the decisions in **Opoya -v- Uganda (1967) EA 752.** The upshot of the foregoing is that we find that this appeal has merit. We allow the appeal on sentence to the extent that the corrected or enhanced term of life imprisonment is set aside and it its place, the original sentence of twenty (20) years meted out to the appellant is reinstated with effect from the date the trial court passed it.

Dated and delivered at Nairobi this 31st day of July, 2015.

M.K. KOOME

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR