



**AKK v Republic (Criminal Appeal E013 of 2023)  
[2024] KEHC 8307 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8307 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E013 OF 2023  
REA OUGO, J  
JUNE 27, 2024**

**BETWEEN**

**AKK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal conviction and sentence delivered on 3/3/2023 in  
Bungoma CMCRC No E005 of 2022 by Hon. G Adhiambo (PM))*

**JUDGMENT**

1. The appellant herein was charged and convicted of the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* No 3 of 2006. He was sentenced to serve 20 years in jail. The appellant has now filed a petition of appeal on the 17/3/2023 and is challenging the sentence meted out by the trial court claiming it was manifestly harsh and excessive given the gravity of the offence.
2. The appellant on 24/4/2024 also filed an amended supplementary ground of an appeal raising the ground that 20 years imprisonment is a minimum mandatory sentence, denying the appellant the right to a fair hearing. It was submitted that the discretion of the trial magistrate was curtailed and he sought a lesser sentence. He also urged the court to consider section 333 (2) of the *Criminal Procedure Code* when reducing sentence considering the time spent in remand.
3. The appellant in his submissions argues that in the case of *Dismas Wafula Kilwake v Republic* (2018) eKLR, the court held that section 8 of the *Sexual Offences Act* must be interpreted to take away the court's discretion. He also cited the case of *Malaki & 5 others v Director of Public Prosecution & another*, Petition e107 of 2021 (2022) KEH B 118. He submits that the minimum mandatory sentence of 20 years imprisonment should be set aside. He also submitted that he should benefit from the provisions of section 333 (2) of the *Criminal Procedure Code* which provides that the sentence shall take into account the period spent in custody which should include both police custody and remand.



4. The respondent opposed the appeal and submitted that the sentence was neither harsh nor excessive. The complainant was the appellant's daughter aged 15 years and the sentence was lenient.

### Analysis And Determination

5. The only issue before the court is whether the sentence was excessive. The Court of Appeal, on its part, in *Bernard Kimani Gacheru v Republic* [2002] eKLR stated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

6. Section 20 of the *Sexual Offences Act* provides as follows:

“20.

- (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.

- (2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.
- (3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as “section 114 orders” under the Children’s Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.”

7. Although the appellant argues that the sentence imposed by the trial magistrate under section 20 (1) of the *Sexual Offences Act* was mandatory, in my view, the section merely provides a maximum sentence



and the courts have the discretion to impose sentences of life imprisonment. The Court of Appeal had the opportunity to interpret Section 20(1) of the *Sexual Offences Act* in the case of *M. K v Republic* (Nbi) Criminal Appeal No 248 of 2014 (C.A)(2015) eKLR where it stated:

- “ 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 imprisonment.”
8. The victim in this case was the appellant’s 15-year-old daughter who was below the age of 18 years. The 20-year sentence meted out by the trial court was after the court considered the appellant’s mitigation. The sentence meted out by the trial court was proper. The sentence shall run from 11/1/2022 when the appellant was first arraigned in court and thereafter held in remand. The appellant has a right of appeal within 14 days.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 27TH DAY OF JUNE 2024**

**R.E. OUGO**

**JUDGE**

In the presence of:

Andrew Kagota Kadenge / Appellant - Present in person

Miss Matere - For the Respondent/ State

Wilkister/ Diana -C/A

