



REPUBLIC OF KENYA



**KENYA LAW**  
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**JKN v Republic (Criminal Appeal E181 of 2022)  
[2025] KEHC 2544 (KLR) (Crim) (18 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2544 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL  
CRIMINAL APPEAL E181 OF 2022**

**CJ KENDAGOR, J  
FEBRUARY 18, 2025**

**BETWEEN**

**JKN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against conviction and sentence in Makadara Magistrates Courts  
S.O No. 250 of 2018 delivered on 22nd September, 2022 by Hon. M. Kivuti (SRM.))*

**JUDGMENT**

1. John Kiboi Njuguna the Appellant was charged with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act*. The particulars of the offence are that the Appellant on the 8<sup>th</sup> of July, 2018 in Embakasi Subcounty within Nairobi County, unlawfully and intentionally touched the vagina of JWM a child aged 7 years with his penis who was to his knowledge his niece.
2. He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 6 of 2006, which particulars of the offence are that Appellant on the 8<sup>th</sup> of July, 2018 in Embakasi Subcounty within Nairobi County, unlawfully and intentionally touched the vagina of JWM a child aged 7 years.
3. The Appellant was found guilty of the alternative count and sentenced to ten (10) years' imprisonment.
4. The Appellant was aggrieved by the conviction and sentence, and he preferred the present appeal. He based it on the grounds that the learned trial magistrate erred in matters of both law and fact by failing to find that the prosecution case was not proved beyond reasonable doubt. That the necessary elements of the offence of committing an indecent act with a child were not established to the required standard and that gross contradictions and inconsistencies marred the facts presented by the



prosecution witnesses. Furthermore, he asserted that the time spent in custody was not accounted for in accordance with Section 333 (2) of the *Criminal Procedure Code*.

5. The appeal was canvassed by way of written submissions.
6. The Appellant contends that following the trial court's finding that there was no proof of penetration, thus rendering the offence of incest unsustainable, the Court proceeded to find the Appellant guilty of the alternative charge but did not provide an analysis of the elements of the offence of committing an indecent act with a child.
7. At the time of making this determination, the Respondent had not yet filed its submissions.

### **Determination**

8. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial Court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See *Pandya vs. Republic* (1957) EA 336).

### **Whether the prosecution established its case against the appellant beyond reasonable doubt?**

9. The Complainant told the Court that she resided with her parents, who lived with the Appellant, her uncle, on the same plot but in separate houses. She recounted that on the material date, she had gone to the appellant's house, where he laid her on the bed and inserted 'his thing' into her vagina. She further referred to what she called 'thing' as 'chuchuu' and 'vitu ya boys'. She testified that the Appellant removed her panty and dress during the ordeal, and he also took off his black trousers. She stated that the Appellant subsequently wiped her with a tissue, after which she got dressed and went home. She mentioned that the ordeal occurred over three separate days while referring to one such incident that she said took place at the Appellant's house, which she referred to as being in the Matopeni plot of Mama Wambui. She testified that she did not inform her mother of the incident until three days later, as the Appellant had warned her against it. She recounted her mother's intervention to examine her and the ensuing medical examinations. She broke down in court while recounting the ordeal and stated that the Appellant had done bad things to her.
10. PW2 was the Complainant's mother. She gave the Complainant's age and stated that the Appellant was her brother-in-law (brother to her husband). She testified that she learned of the issue when she called the Complainant, intending to send her to the Appellant's house, but instead, the Complainant broke down and revealed that the Appellant had done bad things to her. She gave the date she learnt of the incident as Saturday, 6<sup>th</sup> July, 2018. She told the court that she inspected her vagina but found nothing unusual. Nevertheless, she took her to the hospital on Monday, 9<sup>th</sup> July, 2018, and later involved the police. She maintained that, although they had previously disagreed with the Appellant, she was speaking the truth and that those earlier disagreements were merely normal family issues.
11. PW3 was the Complainant's father and the Appellant's brother. His testimony was that his wife, PW2, informed him that their daughter (PW1) had told her that she had been defiled. He stated that he interrogated the Complainant, who recounted the same events. He opined that she should be taken to hospital and subsequently reported the matter to the police. He also acknowledged that they had differences with the Appellant in the past but stated that it was over a bicycle, and he did not hold a grudge. He mentioned that on 9<sup>th</sup> July, 2018, the Appellant sent him a message apologising for the incident, but indicating that he had not harmed the child.



12. PW4 was a medical officer from the medical facility where the Complainant was examined on 9<sup>th</sup> July, 2018. He summarised that the medical findings did not support that there was penetration. He testified that the vagina appeared normal, with a normal hymen and anus, although abnormal discharge was noted in the vagina. He recounted that the medical history given was that;
 

‘nilikua naenda kuwatch Kumkum kwa uncle. He removed my clothes and inserted finger on vagina nad put his penis on my private parts.’
13. The Investigating Officer testified that the Complainant was made at the police station on 10<sup>th</sup> July, 2018 and duly booked in the occurrence book. He stated that the programme known as Kumkum was aired on Inooro TV, and that the Complainant maintained that the Appellant had defiled her at his house where she had gone to watch the programme. He further stated that the medical notes were provided by the Complainant’s parents when they reported to the police, and he mentioned that he issued them the P3 form and accompanied them to the hospital where it was duly filed.
14. The Appellant, in his defence, stated that he lived on the same plot as the Complainant’s father (PW3) and indicated that before the case, they had differed over PW3’s bicycle. He also mentioned assisting PW3’s ex-wife during an incident when PW3 assaulted her, for which he subsequently testified against him. According to the Appellant, both PW3 and PW2 had threatened to take action against him, and he connected his arrest and charges with the earlier threats made. He denied touching the Complainant’s private parts and asserted that she was not present at his house on the alleged date.
15. The Appellant was convicted on the alternative charge of the offence of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. In the main charge, which the Court acquitted him of, he was charged with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act*.
16. The learned magistrate found that there was no evidence of penetration and proceeded to overlook the main charge of incest as a result. Her reasoning appears to be that, for the offence of incest to be sufficient, there must be evidence of penetration. The provision of Section 20(1) of the *Sexual Offences Act*, 2006 provides as follows: -
  - a.
 

“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.  
[Emphasis mine]
17. On the other hand, under Section 11 (1) of the Act, the offence of indecent act with a minor which was the minor alternative offence provides as doth:
  - a. Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.
18. Section 2 (1) of the Act defines indecent act as an intentional act which causes;
  - a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.



- b. exposure or display of any phonographic material to any person against his or her will, but does not include an act which causes penetration.”
19. In this instance, the trial court, having found no evidence of penetration, erroneously diverted to consider the merits of the alternative count instead of exhausting its consideration of the twin elements of the main charge.
20. Further, Section 382 of the *Criminal Procedure Code* provides:
- “ a. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.
- b. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings.” (Emphasis mine).
21. Nonetheless, I note that the Respondent did not contest the same, and I do not delve into it. See Court of Appeal in *Mark Oiruri Mose v Republic* [2013] KECA 67 (KLR). That said, I shall proceed to the merits of this appeal as preferred herein.
22. The Appellant faults the trial Court on the pretext that in as much as the offence of incest was unsustainable, owing to the want of proof of penetration, the Court proceeded to find the appellant guilty of the alternative charge but did not provide an analysis of the elements of the offence of committing an indecent act with a child.
23. The record before me shows clearly that the complainant was properly subjected to *voire dire* examination, at the end of which the learned Magistrate concluded that she was intelligent and understood the duty of speaking the truth, directing her to give an unsworn statement. The Complainant and the Appellant are well known to each other; they are related, with the Complainant being the Appellant’s niece, and they lived in the same compound.
24. The triune ingredients that must be proved on a charge of committing an indecent act with a child are the age of the victim (must be a minor), contact of one’s body part to either the genitalia, breast or buttocks of another, and that contact was done intentionally.
25. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo v Republic* [2016] eKLR stated as follows in respect of proving the age of a victim in cases of defilement:
- a.
- “ ... 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 documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

26. The age of the minor was established by the production a copy of the minor's birth certificate (Pexh4) by which settled that the Complainant was born on 30<sup>th</sup> September, 2011, and therefore as at the time of the incidence on 8<sup>th</sup> July, 2019 she was 7 years. Needless to add, the appellant in his submissions did not contest the age of the minor.
27. The second issue for the offence of indecent act is whether the prosecution established intentional contact of any part of the Appellants body with the minor's genitalia, breasts or buttocks. I agree with the trial Court that the evidence examined as a whole did not support that there was penetration. I reviewed the Complainant's testimony about what she referred to as the bad things she accused the Appellant of doing to her. The Complainant stated that the Appellant inserted 'his thing' into her vagina. She referred to what she called 'thing' as 'chuchuu' and 'vitu ya boys'. Her mother examined her, and there were no visible injuries, this was similarly noted during the medical examination. She mentioned the insertion of a finger during her presentation at the hospital as well as the penis.
28. In *Muganga Chilejo Saha v Republic* [2017], eKLR the Court of Appeal analyzed various cases where descriptive terms had been used to narrate sexual abuse;

“Naturally, children who are victims of sexual abuse are likely to be devastated by the experience, and given their innocence, they may feel shy, embarrassed, and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, “alinifanyia tabia mbaya” (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), “he pricked me with a thorn from the front part of this body.”, (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), “he used his thing for peeing” (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), “he inserted his "dudu" into my "mapaja", (Jose Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), “he used his munyunyu”, (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement.
29. I am persuaded that there was an indecent act from the descriptive words as stated by the Complainant. She maintained that the Appellant did bad things to her, which can be understood as her expression of the pain and distress caused by that experience. I do not conclude that just because there was no penetration when she described the ordeal as 'inserted', she was therefore lying; the Appellant claimed that her assertion of penetration when there was none undermines her credibility. I find, however, that while it did not constitute penetration, she referenced the contact between the sexual organs of the penis and vagina using her euphemism; she was only seven years old.
30. The provisions of Section 124 of the *Evidence Act*, are informative to the end that a conviction can rest squarely on the sole testimony of the victim/Complainant. See *Daniel Maina Wambugu v Republic* [2018] KEHC 5656 (KLR).
31. Section 124 of the *Evidence Act*, Cap 80 provides as follows:
  - a. “Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that Section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual



offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

32. The Appellant argued that there are undeniable contradictions and inconsistencies between the complainant’s testimony and that of PW2. One such inconsistency is that the Complainant stated she did not tell her mother about the incident, only disclosing it to her friend, M., who subsequently informed her mother. However, PW2, the Complainant’s mother, recounted that when she called the Complainant, the latter began to cry and told her that she had been defiled. This did not undermine the credibility of the Complainant’s testimony, as she indeed recounted that she did not report the events to her mother on the very day.
33. With regards to discrepancies and contradictions, in *John Mutua Munyoki v Republic* [2017] KECA 376 (KLR) the Court of Appeal noted as follows;
  - a. “How about inconsistencies and contradictions? There were quite a number though the respondent dismissed them as inconsequential. In cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eye witness. Contradictions and inconsistencies therefore matter in deciding who to believe. The contradictions have to be considered and weighed carefully.”
34. Further, I cede guidance to the case of *Philip Nzaka Watu v Republic* [2016] eKLR where the Court of Appeal stated as follows:
  - a.

“ However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.
35. In assessing the Complainant’s testimony, I find that her recollection of the nexus events of that fateful day consists of detailed and vivid accounts; thus, this Court cannot doubt her truthfulness.
36. Although the Appellant argues about the inconsistencies regarding when the Complainant revealed the ordeal to her mother, I find this inconsequential at best. It has not undermined the Complainant’s testimony or cast doubt on its veracity in any way.
37. Further, PW5 gave an account of the Complainant’s fresh statement during her interrogation. She reported that the Appellant appellant took her to his bed, removed her clothes, defiled her and inserted his fingers into her vagina, and later wiped her with a piece of tissue. Her statement was corroborated by the PRC report (Pexh1) on record.
38. From the foregoing, there leaves no room for doubt that there was indeed contact from the Appellant by his fingers and penis on the Complainant’s genitalia. The Appellant’s intention is undoubtedly manifest in the nexus of events culminating in the very act itself.



39. The Appellant's defence that the allegations were fabricated and orchestrated to bring about his downfall as purported vengeance over a family dispute remains unsubstantiated. The cross-examination instead illuminated that they were not the reason for the appellant's charges. The Appellant was merely clinging to them in an attempt to undermine the prosecution's case, which I find established beyond reasonable doubt that the Appellant did indeed commit an indecent act with the child. He even fled from the home and was not arrested until November, 2018.
40. In the foregoing, I have no reason to deviate from the trial magistrate's findings, who had the opportunity to hear and see the Complainant as she testified, weigh the same against the Appellant's defence, and test their demeanour.
41. As to the 10-year custodial sentence imposed on the Appellant, it is noteworthy that he neither questioned its legality or lack thereof nor submitted the same in his written submissions. In my view, the trial court duly exercised its discretion. It proceeded to sentence on the minimum sentence pursuant to Section 11 (1) of the Sexual Offence Act, which stipulates that any person who is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.
42. The Appellant was granted bail during the trial; however, I note that in his petition of appeal, the Appellant indicated that the trial court failed to consider the time he spent in custody. Nevertheless, he neither argued nor addressed this point in his written submissions. Thus, I deem this ground to be abandoned, which I uphold.
43. For the above reasons, I find and hold that the prosecution proved its case against the Appellant beyond reasonable doubt. Accordingly, I uphold the conviction and sentence of the trial court. Consequently, the appeal is hereby dismissed in its entirety.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 18TH DAY OF FEBRUARY, 2025.**

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**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Appellant: JKN

For the Appellant (s): Ms Kibiti Advocate

For the Respondent: Mr. Omondi, ODPP

