



REPUBLIC OF KENYA



KENYA LAW
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**SBNM v Republic (Criminal Appeal E104 of 2023)
[2025] KEHC 1783 (KLR) (Crim) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL E104 OF 2023
KW KIARIE, J
FEBRUARY 11, 2025**

BETWEEN

SBNM APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S. O. Case No. E041 of 2022 of Senior Principal Magistrate's Court at Engineer by Hon. E. Wanjala(miss)– Principal Magistrate)

JUDGMENT

1. SBNM, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on diverse dates between March 2022 and the 14th day of April 2022 at Ol Kalou sub-county in Nyandarua County being a male person caused his penis to penetrate the vagina of LSN, a female child aged eight years, who was to his knowledge his daughter.
3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence. Ndegwa Wahome advocate represented the appellant. He raised the following grounds of appeal:
 - a. The learned trial magistrate erred in law and facts by convicting the appellant with inconsistent evidence, theorising conspiracy and fabrication against the appellant.
 - b. The learned trial magistrate erred in law and fact by convicting the appellant, and penetration was not proved.



- c. The learned trial magistrate erred in law by convicting the appellant, yet the purported recognition did not positively prove the appellant's identification.
4. The state opposed the appeal through *Odero vena*. It was contended that the prosecution proved its case to the required standards and that the appeal lacked merit.
5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of *Okeno vs Republic* [1972] E. A 32 to guide my decision-making process.
6. Section 20 (1) of the *Sexual Offences Act* provides:

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.

7. From the provisions of this section, the ingredients for incest are as follows:
 - a. The accused must be a male;
 - b. The victim must be a female;
 - c. She must be his daughter, granddaughter, sister, mother, niece, aunt or grandmother;
 - d. He must know the relationship; and
 - e. There must be penetration.
8. PC Martha Mukami (PW3) testified that the appellant confessed to her to have committed the offence. A confession is defined under section 25 of the *Evidence Act* in the following terms:

A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

9. Section 25A (1) of the *Evidence Act* has limited persons who can take a confession from a suspect as follows:

A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.



The purported confession allegedly made to PW3 is inadmissible evidence and should not have been admitted. She was not qualified to record a confession, so I expunged it from the record.

10. The complainant and the appellant are father and daughter, and it is not disputed that the complainant was eight years old.
11. The complainant testified that the appellant defiled her per vagina and anus severally. At times, he would give her alcohol. In her evidence, MW (PW2) confirmed that this is what the complainant told her. Though the description of the alcohol varied from Tusker to clear alcohol, I find this to be a minor variation which does not dent her credibility.
12. She was the eldest child. Her mother had travelled to Saudi Arabia for a job. Her evidence was that the appellant had warned her of dire consequences should she disclose to anybody what was happening. Her grandmother discovered the affair accidentally after her sibling had wetted the bed.
13. Dr Joseph Mburu (PW4) examined the complainant and found a gaping vulva, which he considered abnormal for her age. There was a laceration of labia majora, and the hymen was broken. The complainant had faecal incontinence. The rectal examination revealed weakness, which caused the incontinence.
14. SBNM, the appellant, contended that he was falsely implicated. The proviso to section 124 of the Evidence Act states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, 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.
15. The medical evidence supports the evidence of the complainant that she was indeed defiled. There is nothing on record to support the contention by the appellant that he was falsely implicated.
16. I find that the prosecution proved to the required standards that the appellant defiled his daughter.
17. The proviso to section 20 of the Sexual Offences Act states:

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.
18. The life sentence has been declared unconstitutional. I set aside the sentence by the learned trial magistrate and substituted it with a sentence of forty years imprisonment. The sentence will run from the date the trial magistrate sentenced him.
19. The appeal only succeeds to that extent.

DELIVERED AND SIGNED AT NYANDARUA THIS 11TH DAY OF FEBRUARY 2025

KIARIE WAWERU KIARIE

JUDGE

