



**SMN v Republic (Criminal Appeal E117 of 2022)
[2025] KEHC 9445 (KLR) (21 March 2025) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E117 OF 2022
TM MATHEKA, J
MARCH 21, 2025**

BETWEEN

SMN APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. SMN was charged with incest contrary to section 20(1) of the *Sexual Offences Act*. It was alleged that on diverse dates between July 2019 and 24th July 2021 at Itulu village, Ngiluni location, Mbooni East sub-county within Makueni County being a male person caused his penis to penetrate the vagina of JNM, 13 years old female who to his knowledge was his daughter. In the alternative he was charged that in the same period of time he willfully touched the child’s vagina with his penis.
2. He took plea on 27/7/2021 – and pleaded guilty to the main charge.
3. Facts were fixed for 3/8/2021. Accused was not produced and matter was fixed for 10/8/2023 – he was produced and facts were read to him as follows;
 1. On diverse dates between July, 2019 and 24/7/2021 at around 2100 hours , the complainant JNM was called by her father the accused person into the master bedroom where he sleeps. He asked the complainant to remove her dress and the accused person also removed his trouser. He then defiled the complainant. The complainant’s mother who was in the house had heard the accused person calling out to the complainant. She later on decided to check what was happening in the bedroom.
 2. She saw the accused person defiling the complainant while the accused person’s trousers was down while the complainant’s dress was up. The mother to the complainant asked them what they were doing but the complainant told her that they were having studies.



3. The following day, the complainant's mother asked for help from members of her family who informed the village elders. The matter was reported at Tawa Police Station who arrested the accused person. The complainant was taken to Tawa Subcounty Hospital. A P3 form was filled and the accused person was charged with the offence in court. Treatment notes and card from Tawa Subcounty Hospital for the complainant dated 27/7/2021 as Exh. 1. Treatment notes for the accused person dated 27/7/2021 as Exh. 2, P3 form dated 27/7/2021 for the complainant as Pexh. 3. P3 form for accused person dated 27/7/2021 as Exh. 4. PRC form for the complainant as Exh. 5.
4. The prosecutor sought for an adjournment to enable him get an age assessment report and for further facts on 17/8/2021
5. On 17/8/2021 the learned trial court directed that accused take plea afresh. He did so and pleaded not guilty.
6. A Probation Report was sought and bail was denied on account of the fact that accused was the father to the complainant. The report did recommended bail. The trial took off on 21/9/2021.
7. The prosecution called 5 witnesses.
8. PW1 JNM told the court that she was 11 years old and at I... Primary school, that she was the 3rd born child of 6 children of the accused. Then in July 2019 – the accused, her father called her to the sitting room around 9:00 pm and had sex with her. That the rest of her siblings were sleeping. That he did bad things to her. That he put his urinating thing into her vagina. That he told her never to say anything. That he had been doing that to her since she was in class 4 – that she later went to sleep. That her mother was peeping through a hole and she saw them. That her mother called the area Assistant Chief who came and arrested her father. That she did not get hurt but she later recorded her statement. On cross examination she told the court that her mother was peeping through the hole and saw them.
9. PW2 NM testified that the child was her daughter and the accused was her husband. That on 24/7/2021 she was at work and then went to get food for her children. She said her house was four bedroomed. She was in the kitchen, JNM was in sitting room. When she went to pick flour, she found her daughter and her husband having sex. She said both had removed their inner wears. She said inside the house there was a lamp and she saw them in that light. That she went out and called one Nzuki, a member of nyumba kumi and wife of Mutisya. She told the sub chief one Muli who reported to Tawa police station. Both were taken to Tawa. She testified that one S (her child) was in class 8. She identified the P3 and PRC forms and age assessment report. On cross examination she told the court that she caught the accused and the child red handed in the act. She denied setting him up, she told the court that the accused was not sending her money and had left her to fend for the children alone. On re-examination she said she was telling the truth, she saw what the accused was doing.
10. PW3 was Justus Ndisia Muli from Katikommu and the Assistant Chief Utunene sub-location. He told the court that on 26/7/2021 around 7:30 pm he was at home when he received a phone call from a village elder by name Daniel Nzuki Bulani. The village elder told him that there was a person by the name Stephen Mutuku Ngulusi who had been defiling his daughter. The following day (27/7/21) at 7:00am he went to Stephen's house and arrested him and took him to Tawa police station together with the victim. He visited the home - one house divided into the sitting room and bedroom where everyone slept. He testified that the accused had two children. That both children were female. He said he had known accused for over 5 years.
11. PW4 was Jackline Mwongeli Peter the Clinical Officer at Tawa sub-county hospital who by then had only one-year experience as a Clinical Officer. She said the child was taken to the hospital on 22/7/2021



- by the mother who told her she had noticed that the father was assaulting her sexually since 2019. She said tests conducted were normal. She produced a bundle of documents as PEX 1. She filed the Post Rape Care form on 27/7/2021. She said the complainant was 11 years old.
12. PW5 was the Investigating Officer No. 247555 PCW Pauline Theuri from Tawa police station. She told the court that on 27/7/2021 around 10:00 am she was in the office when the assistant chief came in the company of the accused and other members of the public and reported a case of incest. She booked the report and PC Kipkoech escorted them to hospital. She said it was found that the complainant was defiled. That an age assessment report revealed that she was 13 years old. She said she never visited the scene she said the child told her the accused had been defiling her since 2019. On cross examination she said the defilement happened in the home of the child and the child identified him as the one.
 13. The learned trial court found that he had a case to answer and put him on the defence.
 14. The accused made an unsworn statement of defence. He chose to make an unsworn statement of defence. He denied defiling his child. he said on the material night he spent the night with his wife. He said he saw his daughter in the morning, that she may have been defiled by the son of his boss. He told the court that he was “crazy” because he picked waste papers and bottles and was on treatment at Wote hospital. He urged the court to release him to be taken care of by his own people.
 15. In convicting him, the learned trial court stated: -

I have gone through the testimonies of the prosecution witnesses. Its alleged that the accused person has been defiling his daughter since 2019. On the material day he called PW1 to the sitting room and proceeded to defile her. His wife PW2 peeped through a hole and was able to see the whole act. She called an elder and the Assistant Chief of the area. Upon arrest, the victim and the accused [person were taken to Tawa Sub-county Hospital where upon being examined the Clinical Officer found the hymen had already been broken. That everything else was normal meaning that indeed the defilement had been happening over a period of time. I find that the testimony of PW1, PW2 and PW3 corroborated each. I find the accused person’s statement of defence unbelievable and consequently. I find that the prosecution has proved its case against the accused person beyond any reasonable doubt and I convict the accused person under Section 215 [Criminal Procedure Code](#).
 16. In mitigation the accused denied the charge that his wife had made up the case against him so that she could eat his money. The court sentenced him to life imprisonment.
 17. Aggrieved, he filed this appeal on 9/5/2023 on the grounds that the trial court erred in law and fact for convicting him on a defective charge without considering that the evidence did not prove the charge beyond a reasonable doubt; by convicting on extraneous evidence, evidence that was full of contradictions and inconsistencies coupled with poor police investigations which rendered case for the prosecution unbelievable, for dismissing his unsworn statement of defence and failing to see that the case has framed up against him.
 18. When he filed his submissions he argued the following grounds:
 - a. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant without observing that the charge sheet was defective due to the way the charge was framed.
 - b. That the learned trial magistrate erred in law and fact by convicting the appellant without considering that there was no evidence to prove the offence of incest to the required standard in law of beyond reasonable doubt.



- c. That the learned trial magistrate erred in law and fact by failing to consider that there was no evidence to prove the alternative count of indecent assault hence erred by convicting him based on extraneous evidence which was motivated by his own opinion without relying on the evidence on record.
 - d. That the learned trial magistrate erred in law and fact for failing to observe that the prosecution case was full of contradictions and inconsistencies, coupled with poor police investigations, which rendered the prosecution case unbelievable.
 - e. That the learned trial magistrate erred in law and facts when he dismissed his sworn defense which alleged the possibility of being framed up without giving cogent reasons as provided under section 169 of the CPC.
19. He filed submissions with the grounds of appeal.
20. On whether the charge sheet was defective he submitted that the charge did not contain the terms unlawful/intentionally – hence it was confusing. The appellant cited several authorities including Isaac Nyoro Kimitu & Anor v R (2014) eKLR where the Court of Appeal stated;
- “In this case, we are dealing with an alleged defective charge sheet on account of how it was framed. We therefore need to decide whether or not the allegation in the particulars of the charge that the appellants ‘jointly’ defiled the complainant, made the charge fatally defective. To determine this issue, what in our view is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either confused by the inclusion of the term ‘jointly’ in the particulars of the charge.”
21. The appellant cited Section 3 of the Sexual Offences Act which refers to the offence of rape which involves adults and has the aspect of consent: that is not applicable to children. Further, on this ground it is important to point out that incest is unlawful per se – and any sexual contact with a child is unlawful per se – there is no need to add the words unlawful/intentionally – there is no way one can have lawful sexual intercourse or penetration with a child. Whether intentional or not it is unlawful. That argument is untenable.
22. On contradictory and inconsistent evidence, the appellant points out the contradiction in the evidence of PW2 – that what she told the court, and what she recorded in her statement were two different scenarios – to the police she said she went to sleep in their bedroom leaving her husband in the sitting room. The children had already gone to sleep. She heard her husband calling the child and when she went to the sitting room, she found him and the complainant having sex. Yet in open court she told the court that on 24/7/2021 she was at work – she went to get food for her children. She was in the kitchen and PW1 was in the sitting room. She went to pick flour and found PW1 and her husband having sex- the appellant argues that that PW2 cannot be referring to the same incident. How could she not be clear on what happened? Yet she alleges it happened to her own child?
23. He also submits that the prosecution failed to prove the alternative charge.
24. He submits further that the witnesses were untrustworthy as the evidence was incredible and full of contradictions. The court did not try to reconcile the said discrepancies, and shifted the burden of proof to the appellant. He cited Josiah Afuna Angulus *Criminal Appeal No. 277 of 2006 (UR)* and argues that section 382 of the Criminal Procedure Code cannot cure the situation. He relies on *Vincent Kanyula v R* Criminal Appeal No. 98 of 2014.



25. The appellant submits further that the prosecution did not prove the charge yet the court dismissed his defence. That the case was not even investigated. He relied on *Adedeji v State* (1971) I ALL NLR 75.
26. For the respondent it was submitted that the State had proved the charge against the appellant.
27. Relying on *JKM v R* [2020] eKLR the State set out the element of incest: -
 - i. An act of penetration or indecent act and
 - ii. The victim being a female person related to the perpetrator as per section 122 of the *Sexual Offences Act*.
28. It is argued that the evidence of the complainant was supported by that of the Clinical Officer and that the evidence of the child was sufficient to prove the charge as per *Joseph Mwangi v R* [2015] eKLR and that section 124 was applicable.
29. That the appellant was properly identified by the complainant.
30. That there were no inconsistencies in the case for the prosecution.
31. With regard to the sentence it is submitted that the sentence is legal and to support this the State relies on *PMM v R* [2018] eKLR that the court has the discretion to mete a sentence of up to life imprisonment and this court has no reason to interfere with the sentence.
32. The issues for determination are:
 - I. Whether the ingredients of incest are established.
 - II. Whether the sentence was legal
 - III. Whether the appeal has merit.
33. These issues will be determined through the answers to the following questions: -
 - i. Whether the case for the prosecution was filled with contradictions and inconsistencies.
 - ii. Whether the witnesses were credible.
 - iii. Whether the trial court only set the evidence to reconcile the apparent inconsistencies.
 - iv. Whether the appellant had a plausible defence.
34. As a 1st appellate court I am obligated to re assess the evidence on record to draw my own conclusions – but always alive to the fact that I never heard or saw the witnesses testify hence I did not have the opportunity to observe them when they were giving their evidence or to interact with them at that material time. (*Okeno v R* (1972) EA 32).
35. Upon reading the record, I could not help but notice the stark difference between the facts that were read by the prosecution when the appellant had pleaded guilty to the charge and the evidence that ended up on record when the appellant pleaded not guilty, and the evidence by the witnesses as derived from their written statements from the case against the accused person on the part of the prosecution.
36. The complainant’s testimony was that her father – called her to the sitting room in July 2019, removed his trouser, removed her panty and had sex with her. She said she was 11 years then - and he had started when she was in class 4. She said she did not get hurt. That all this time her mother was peeping through a hole and saw them – but did not do anything – but went to call the chief.



37. Contrast this with the facts read by the prosecution that the complainant was called by the father to the master bedroom, he asked her to remove her dress, he removed his trouser – and defiled her. Her mother PW2 was in the same house heard her husband calling the child. She went into the bedroom to check and found her husband defiling her child – his trouser was down, her dress was up. That she actually asked them what they were doing and the complainant told her that they were having studies.
38. Three scenarios were presented by the state of what transpired on 24th July 2024: one where the child and her parents were all in the house. Her father called her to the master bedroom, she went and they had sex. While they were doing so her mother found them. Asked what they were doing and the child told her they were doing studies: two: the child and the father were in the sitting room. They were having sex while the mother peeped through a hole in the door: three: the mother was in the kitchen making food. Came into the house to pick flour, found the child and the father red handed having sex.
39. According to the prosecution different scenarios played out after the alleged defilement: in one the mother waited till the next day to get help from members of her family who informed the village elder; in another she called the area chief who came with the police and the appellant was arrested; in the other she called a member of Nyumba Kumi, and also told the Assistant chief;
40. The evidence of the Assistant chief is that he received the call on 26th July 2021 at 7:30 pm. He visited the home the following day on 27th and is the one who arrested the appellant, and took him and the victim to the police station.
41. From his evidence, no police officers came to the home. This was confirmed by PW5 the alleged investigation officer who dealt with the matter at the police station.
42. What is the explanation for the delay in reporting the matter? The complainant's mother caught them in the act. She did nothing for two days – the assistant chief was informed on 26th night yet the incident happened on the 24th night.
43. There was no investigation of the matter. The police received the report and the prosecution proceeded to charge. There is no evidence to support the first allegation that there was ongoing defilement since 2019, three years prior to the 24th July 2021. The complainant did not give any incident other than the one alleged to have happened on the 24th, the mother did not give any other incident of the alleged previous defilements. Hence the court had one an allegation that something had been ongoing for four years. The police had an obligation to dig into the allegation to see what pointers existed to show that this was actually the case. They did nothing. They did not visit the scene, they did not interrogate even the siblings of the child, or other persons in the home or the school. They did nothing and simply presented a bare charge evidently to ride on the proviso to s. 124 of the *Evidence Act*. That is not right. It was unfair to the child and the appellant. In *C K (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others* [2013] eKLR the court dealing with the failure by the police to investigate similar cases made the following orders:
 1. A declaration be and is hereby made to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' complaints of defilement violates the first eleven petitioner's fundamental rights and freedoms-
 - a. to special protection as members of a vulnerable group,
 - b. to equal protection and benefit of the law;
 - c. not to be discriminated against,



- d. to inherent dignity and the right to have the dignity protected;
 - e. to security of the person,
 - f. not to be subjected to any form of violence either from public or private sources or torture or cruel or degrading treatment; and
 - g. to access to justice as respectively set out in Articles 21(1), 21(3), 27,28,29,48,50(1) and 53(1) (c) of the *Constitution of Kenya*.
2. A declaration be and is hereby made to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' respective complaints violates the first eleven petitioners' fundamental rights and freedoms under-
- a. Articles 1 to 8(inclusive) and 10 of the *Universal Declaration of Human Rights*,
 - b. Articles 2, 4, 19, 34 and 39 of the *United Nations Convention on the rights of the child*;
 - c. Articles 1, 3, 4,16 and 27 of the *African Charter on the Rights and welfare of the child*, and
 - d. Articles 2 to 7(inclusive) and 18 of the *African Charter on Human and people's rights*.
44. In this case the police failed to conduct prompt, effective, proper and professional investigations: Other than receiving the report and booking it in the OB, issuing P3 the officers did nothing within their professional capacity establish that indeed the invest had been ongoing as alleged. The Prosecution on their part failed to direct the investigations so as to obtain the requisite standard of evidence, to reconcile the glaring inconsistencies in the circumstances of the offence.
45. The evidence on record does not even attempt to explain the apparent lack of reaction by the mother, lack of immediate action on her part, an alarm, a confrontation or shock. There is nothing. And if indeed it had been going on for that long what was the reason for no action? Nobody tried to explain that omission.
46. Her testimony is that she found the complainant and the father in the sitting room having sex. "Both had removed their inner wears" question is; which is which? was she peeping through a hole? Did she find them in the sitting room? Or were they in the master bedroom? Had they removed their clothes or the accused's trouser was just down, and the victim's dress pulled up – were they lying down or they were standing. If she was peeping through the hole was the door locked from inside, and where were the other children? There is scanty description of what it is that she saw.
47. According to PW2 her house is four bedrooms – according to PW3 the assistant chief – he visited the scene and the house has two rooms – the sitting room and the bedroom and everyone slept in that house – according to the complainant there were five other siblings – and she had two elder siblings – all of whom were sleeping and they never heard anything. The PW3 on his part said the accused had only two daughters.
48. All these take away from the credibility of the evidence and gives the impression that the witnesses were not being truthful.



49. The child was taken to hospital on 27/7/2021 with history of defilement. The treatment card indicates that the –
- “The patient reported the father has been having sex with her since 2019 when mother is asleep. Mother reports that for some time she noted that the father having sex with the girl and took the action of reporting to the chief last episode was on 24/7/2021”.
50. The clinical officer testified that upon examination of the complainant she found that everything was normal except the absence of the hymen. She produced the P3 and the PRC.
51. In convicting the appellant, the learned trial court relied on this evidence: stating that everything was normal except the broken hymen and that was proof of defilement.
52. He also concluded that the testimony of PW1, PW2 and PW3 corroborated each other.
53. On the issue of the hymen it is now settled that a missing hymen per se is not proof of defilement because there are other proven ways in which a hymen could be broken or be missing and which do not involve defilement or sexual abuse.
54. I have found that the evidence given by the prosecution witnesses 1 and 2 was, though not a requirement, not corroborative, was inconsistent and gave the impression of not being true.
55. The trial court did not state much about the impression made by the complainant hence I did not find anything on record on the demeanor of the complainant and whether or not s. 124 of the *Evidence Act* was applicable. The court was persuaded by the testimony which I found unreliable. It is noteworthy that the trial court did not consider the statement of defence of the appellant.
56. The appellant was unrepresented and he told the court in an unsworn statement that he had a mental health issue, that he was on treatment at the Wote Hospital
57. The record contains the pre-bail which indicates that in 1990, the Appellant suffered from cerebral malaria but he recovered after treatment. Further, the report indicates that the Appellant was ‘reported to be mentally impaired though he never produced any medical document to support this allegation.’
58. I am aware of section 11 of the *Penal Code* which provides that; “Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved”. Further, section 12 of the *Penal Code* provides that;
- “A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission, he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission”.
59. This having been raised in a preliminary report, the trial court should have taken a precautionary step of sending him for mental assessment to ensure that he was fit to stand trial. The only way to prove the contrary, as per section 11 of the *Penal Code*, was to call for a mental assessment report. The need to ensure that an accused person is fit to stand trial was discussed in Blackstone, Commentaries on the Laws of England, Clarendon Press, Oxford, 1769, Vol IV, P 250 and the justifications were given to be;
- a. A recognition that it is fundamentally unfair to try an unfit accused;



- b. A recognition that it is inhumane to subject an unfit accused to trial and punishment;
 - c. A perception that, a trial of an unfit accused is comparable to trial of an accused in absentia,
 - d. A procedure the legal system repudiates; and a concern to avoid diminution of the public's respect for the dignity of the criminal justice process if unfit accused are subjected to trial and punishment.
60. The Court of Appeal in *Leonard Mwangemi Munyasia v Republic* (2015) eKLR as follows;

“We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus, it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop. What must be avoided and what this court has warned against in the two decisions relied on by the appellant’s advocate in this appeal, is the likelihood of sentencing to death a person with a mental disorder. Therefore, it is the duty of trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person’s history or antecedent, to inquire specifically into the question. Indeed, it would serve as a good practice... to call evidence based on the opinion of an expert in such cases in terms of; Section 48 of *Evidence Act* to explain the state of mind. It is the duty of both the investigating officer and the defence, to have the accused person subjected to a medical examination to establish whether he suffered from the disease of the mind that affected his mind and made him incapable of understanding his action. In addition, and in order to ascertain the accused person’s state of mind at the time of the offence, the expert opinion of a forensic psychologist, may also be sought. The field of forensic psychology has become a popular field of psychology in Kenya, yet their expertise is hardly sought in criminal trials.”

61. Further, the pre-bail report went on to state; ‘The area Chief confirmed about the alleged incidence and stated that the accused is always at home and never goes out to work. His constant presence at home is torture to the victim. Elsewhere, the report indicates; ‘He is reported to be an idler who has absconded his parental responsibility. He has left the responsibility of fending for the family to his wife. The wife holds him in great fear and his word is said to be law. The victim is the beast of burden in the family since the accused prefers her service to those of the wife. The wife is forced to buy the accused tobacco without which she stays at home...’. The statement about tobacco is contradictory in my view because the same report indicates; ‘The subject doesn’t abuse alcohol or any other substance and is reported to be of good character.
62. This report contains contradictory assertions about the appellant. It contains things that even the witnesses did not tell the court. Other than the parental responsibility issues, the appellant’s wife did not state anywhere that her husband was having sex with her daughter in lieu of her. She spoke about this specific incident. The Chief testified in court and never stated any of the things he is said to have stated in the PACs report. If indeed he was aware as the report indicate that the defilement was going on yet he never took any action, then he is guilty of omission as an authorized officer under *Children Act*, whose duties and responsibilities include taking necessary action when they become aware of any child in need of care and protection. The child herein is a child in need of care and protection by the mere fact of the allegations against her father. The big question to be posed is why did the chief, the



mother, the community keep this monster of a father covered? If the mother was indeed in fear, then the chief and the rest of the community was obligated to speak out.

63. We cannot afford to prosecute such cases on hearsay. We must as a child justice system, put in place the appropriate mechanisms that enable us to catch the abusers the first time round. We cannot afford to play with the innocence of our children who become victims of abusers but we must also uphold the rule of law and the Constitutional Rights of all involved, the suspect and the victim.
64. If indeed this child was defiled by the father, we failed her.
65. In the totality of the circumstances of this case I find that the conviction was unsafe. The appeal succeeds. The conviction is quashed and the sentence is set aside. The appellant is to be set at liberty unless otherwise legally held.

**DATED, SIGNED AND DELIVERED, IN OPEN COURT, THIS 21ST MARCH 2025 MUMBUA
T MATHEKA**

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

In the presence of Appellant

Chrispol Court Assistant Mr. Kazungu for State

