



**RJV v Republic (Criminal Appeal E120 of 2023)
[2025] KEHC 6158 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E120 OF 2023**

**M THANDE, J
MAY 16, 2025**

BETWEEN

RJV APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appeal herein arises from the conviction of the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* (SOA) and sentenced to 50 years imprisonment. The particulars of the offence are that on 3.7.21 at xxxxxxxxxxxx village in Malindi sub-county within Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of ZRJ, (the Complainant), a child of 9 years, who was to his knowledge, his daughter.
2. Aggrieved by both the conviction and sentence, the Appellant preferred the Appeal herein. The summarized amended grounds of appeal are that the trial Magistrate erred in fact and in law by:
 - i. shifting the burden to the Appellant.
 - ii. Failing to appreciate the inconsistencies, contradictions and lack of corroboration of the prosecution evidence.
 - iii. failing to consider that the matter was poorly and shoddily investigated.
 - iv. convicting the Appellant on unreliable and questionable documents and medical exhibits.
 - v. failing to appreciate that there was a miscarriage of justice.

The Appellant urged the Court to allow the Appeal and quash the conviction and set aside the sentence.



3. I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that I neither saw nor see the witnesses. In this regard I am guided by the holding in the case of *Okeno v. Republic* [1972] EA 32 where the Court of Appeal stated:

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya Vs. Republic* (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See *Peters V. Sunday Post*, (1958) E.A. 434).

4. The facts of this case according to the prosecution are that the Complainant lived with her mother and 2 siblings N and T . Her father the Appellant, lived in a separate house. He would often take the children to his house where they would sleep with him on the same bed. The Complainant told the trial court that the Appellant used to put his “mdudu” in her “mdudu”. She stated that “mdudu” is used to urinate. He did that many times but told the Complainant to never tell anyone. After reporting the matter to her grandmother, the Complainant was taken to hospital.
5. PW2, Hamisi Kalume , a village elder of xxxxxxxxxx testified that the Complainant was taken to him by villagers and she was crying. The Complainant told him that she ran away because the Appellant had made her a wife and had been sleeping with her. PW2 went to the Malindi Police Station with the Appellant and the Complainant. While there, the Appellant ran away and was later found in the village.
6. PW3 Dr. Ibrahim Abdullahi stated that the Complainant was 7 years old and was treated at Malindi Sub-county Hospital and found to have no physical injuries. She was however bleeding in the vagina and hymen perforated or broken down. PW3 produced the P3 form of the Complainant that was filled by Dr. Rimba on 3.9.21, treatment notes, age assessment report.
7. PW4 No. 92xxx Cpl. Mariam Hussein from Malindi Hospital Gender and Children Department who investigated the matter stated that on 4.9.21, she received PW2, and the Complainant. PW2 told her that the Complainant had been taken to his house and stated that the Appellant had defiled her on 3.7.21. She stated that the Complainant had told her that on the material night as they were sleeping, the Appellant removed her panty and defiled her 3 times and told her not to tell anyone or he would beat her. The following morning, she told her grandmother who did nothing. The Complainant was found on the road crying and was taken to the village elder who took her to the police station. She recorded the report and took the Complainant to Malindi Subcounty Hospital for treatment. Age assessment was done and it was established that the Complainant was 9 years old. PW4 then stated that she got information that the Appellant wanted to run away so she went to Mijikenda and arrested him. After investigations, the Appellant was later arraigned in court. PW4 produced the P3 form and treatment notes and age assessment. She produced the P3 form, treatment notes and age assessment report.
8. At the close of the prosecution case, the learned Magistrate found that the Appellant had a case to answer and placed him on his defence. In his unsworn statement, the Appellant stated that prior to the Complainant accusing him of committing the offence, he had beaten her for losing money. He further stated that the Complainant had told him that someone used to go into their house where they slept



and that before he completed his investigation, he was told that his child had gone to the village elder to report him. The village elder declined the Appellant's request that they investigate to determine who had done the act. He then stated that this case was reported a month after he declined the request by the village elder that fishing gear given to him by the local Member of Parliament be used by a chama. The Appellant denied committing the offence.

9. Section 20(1) of the SOA 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.

10. In order to establish the offence of incest, the prosecution must prove first, that the assailant is a relative of the victim; second, that there was penetration or indecent act; third, that there is positive identification of the perpetrator and finally, proof of age of the victim. Proof of age is critical because the offence of incest where the victim is under the age of 18 carries a sentence of life imprisonment.
11. It is not disputed that the Complainant and the Appellant are related. The Complainant referred to the Appellant as "daddy". She positively identified the Appellant and stated that he is her father. On his part, the Appellant referred to the Complainant as his child.
12. As regards the age of the Complainant, an age assessment report was produced, indicating that she was 9 years old. This was not disputed by the Appellant.
13. On penetration, PW3 stated that from the P3 form of the Complainant that was filled by Dr. Rimba and treatment notes, the Complainant was treated at Malindi Sub-county Hospital and found to be bleeding in the vagina. Her hymen was perforated or broken down.
14. On identification, the Complainant stated that it was her father, the Appellant who defiled her. She clearly narrated how the Appellant who lived in a separate house would often take the children to his house where they would sleep with him on the same bed. The Complainant told the trial court that she slept at the foot of the bed while the Appellant slept on the opposite side. The Appellant would then take her to his side and insert his "mdudu" into her "mdudu". He did that many times.
15. In her judgment, the trial Magistrate found that from the Complainant's statement that "mdudu" is used to urinate, the only organ she was referring to was a penis in males and a vagina in females. The trial Magistrate then stated that the understanding one would have, is that the Appellant inserted his penis into the Complainant's vagina. Further that the medical evidence indicated vaginal bleeding and a perforated hymen was proof that there was penetration. The trial magistrate thus found that the prosecution had proved its case beyond reasonable doubt.
16. Having reexamined the evidence by the prosecution witnesses and the Appellant's unsworn statement, I am persuaded that the prosecution proved its case against the Appellant beyond reasonable doubt. The Appellant was properly convicted of the offence of incest. I find no reason to interfere with the decision of the trial court. Accordingly, both conviction and sentence are upheld and the Appeal which lacks merit is hereby dismissed.



DATED SIGNED AND DELIVERED IN MALINDI THIS 16TH DAY OF MAY 2025

M. THANDE

JUDGE

