



REPUBLIC OF KENYA



KENYA LAW
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**RO v Republic (Criminal Appeal E053 of 2023)
[2025] KEHC 7966 (KLR) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E053 OF 2023
AN ONGERI, J
JUNE 9, 2025**

BETWEEN

RO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by Hon. Khapoya S. Benson
(PM) in Taveta Sexual Offence Case No. 21 of 2018 delivered on 7th June 2019)*

JUDGMENT

1. The Appellant was convicted with the offence of incest contrary to Section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to 20 years imprisonment.
2. The particulars of the offence were that on 24th July 2018 and on 2nd September 2018 at [particulars withheld] village within Taita Taveta County, the Appellant unlawfully and intentionally caused his penis to penetrate the anus of D.O.O a child aged 13 years who was to his knowledge his daughter.
3. In the alternative, the Appellant was charged with committing Indecent Act contrary to Section 3 of 2006 in that in the same material particulars as in Count 1 above, the Appellant touched the anus of D.O.O a child aged 13 years using his penis.
4. The Appellant pleaded not guilty to the charges and the prosecution called five (5) witnesses.
5. A summary of the prosecution evidence was that PW1 RDM said the complainant used to play with her daughter.
6. That on 4th September 2018 in the evening when PW1 told the complainant to go back to their house, the complainant refused to go and started crying.



7. The complainant told PW1 that her father was in the habit of defiling her. PW1 contacted a Community Health Worker and the matter was reported to Taveta Police Station. The complainant's parents were separated.
8. The complainant was examined by PW4 (Doctor George Ombayo) a registered Clinical Officer based at Taveta Sub-County Hospital on 8th September 2018.
9. PW4 noted bruises on the anal surface. He said the child was examined a second time on 10th September 2018.
10. The complainant gave an account on how the father was sexually assaulting her on two occasions.
11. The complainant said the first time the father came home angry with the children because they had not done household chores.
12. She said her brother ran away and she prepared a meal which she ate with her father. He told her not to open the door for her brother.
13. The complainant said at night he attacked her and removed her pant and put his penis in her anus.
14. The second time the complainant said her brother was asleep when her father again inserted his penis into her anus.
15. The complainant said on the two occasions she reported to the wife of O but she did not assist her until she reported to PW1.
16. The Appellant said the complainant was coached. He said she went away from home and he did not see her until he was arrested.
17. The trial court found the Appellant guilty as charged and sentenced him to 20 years imprisonment.
18. The Appellant has appealed against both conviction and sentence on the following grounds:-
 - i. That the learned court erred in law and in fact by convicting the Appellant but failed to note that 'penetration' was not proved beyond reasonable doubt in material particulars.
 - ii. That the learned trial court erred in law and in facts by shifting the burden of proof from the prosecution to the Appellant against the provisions of Section 111 of the *Evidence Act*.
 - iii. That the learned trial court erred in law and facts when it amended the charge sheet without giving the Appellant the right to recall the witnesses as per the provisions of Section 214 of the CPC.
 - iv. That the learned trial court erred in law and facts by convicting the Appellant and failed to find that the Appellant's constitutional rights to fair trial under Article 50(g) and (h) were violated.
 - v. That the learned trial court erred in law and facts by failing to find that the prosecution did not discharge its duty of disclosure thereby violating the Appellant's constitutional rights to fair trial under Article 50(2)(5) as read with Article 50 (2) (c).
19. The parties filed written submissions as follows:- the Appellant submitted that penetration was not proved beyond reasonable doubt.
20. The appellant argued that it was not clear why the complainant was examined the second time.
21. Further, that it was very prejudicial to the appellant that the trial court heavily relied on the second examination to reach a conviction without an explanation as to why it was necessary.



22. The appellant submitted that he did not have a fair trial since he lacked representation. He indicated that it was his right to have representation as provided for under article 50 (2) (h) of the constitution and section 43 of the Legal Aid Act.
23. The prosecution alternatively submitted that the appellant did not raise any grounds for appeal based on being sentenced to 20 years imprisonment.
24. Further, that it was their contention that the court did not error in sentencing as it was sufficient and proportional to the offence committed.
25. They indicated that the trial court followed the trial procedure from the time the appellant took plea up to conviction and sentencing.
26. This being a first appeal the duty of the court is as follows; the Court of Appeal in *Okeno vs Republic* [1972] EA 32 held that:

“ 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) EA. (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 v R* (1957) EA 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 vs Sunday Post* [1958] EA 424.
27. The issues for determination in this appeal are as follows;
 - i. Whether the prosecution proved the element of penetration beyond reasonable doubt to sustain a conviction under Section 20(1) of the Sexual Offences Act.
 - ii. Whether the trial court improperly shifted the burden of proof to the Appellant in violation of Section 111 of the Evidence Act.
 - iii. Whether the trial court erred in amending the charge sheet without affording the Appellant the right to recall witnesses under Section 214 of the Criminal Procedure Code.
 - iv. Whether the Appellant’s constitutional right to a fair trial under Article 50(2)(g) and (h) of the constitution was violated due to lack of legal representation.
 - v. Whether the prosecution failed in its duty of disclosure, thereby infringing on the Appellant’s right to a fair trial under Article 50(2)(c) and (j) of the constitution.
28. Having carefully evaluated the evidence on record, the submissions by both parties, and the applicable legal principles, this court makes the following findings:
29. On the first issue, the prosecution adduced sufficient evidence to prove penetration beyond reasonable doubt.
30. The complainant’s consistent testimony, corroborated by the medical evidence from PW4 (Clinical Officer George Ombayo), established that the Appellant sexually assaulted her on two occasions.



31. The bruises noted on the anal surface, coupled with the complainant's detailed account of the incidents, leave no doubt that penetration occurred.
32. The second medical examination, though unusual, did not prejudice the Appellant, as it reinforced the initial findings without contradiction.
33. Regarding the second issue, there is no indication that the trial court shifted the burden of proof to the Appellant.
34. The prosecution discharged its obligation by presenting credible evidence, and the Appellant's defence—that the complainant was coached—was properly evaluated and found lacking in merit.
35. I find that Section 111 of the *Evidence Act* was not violated, as the Appellant was not compelled to prove his innocence.
36. On the third issue, the record does not disclose any amendment to the charge sheet that would necessitate recalling witnesses under Section 214 of the *Criminal Procedure Code*.
37. The charges as framed were clear, and the Appellant fully participated in the trial without raising objections at the time. This ground of appeal is without basis.
38. Concerning the fourth issue, while the Appellant was unrepresented, he did not demonstrate how this prejudiced his defence.
39. The right to legal representation under Article 50(2)(h) does not automatically vitiate proceedings unless unfairness is shown.
40. The trial court ensured the Appellant understood the charges, cross-examined witnesses, and presented his case. No miscarriage of justice occurred.
41. Lastly, there is no evidence that the prosecution withheld material evidence in violation of Article 50(2)(j). The Appellant had access to witness statements and medical reports, and no prejudice was shown.
42. In conclusion, the conviction was soundly based on credible evidence, and the sentence of 20 years' imprisonment was lawful and proportionate under Section 20(1) of the *Sexual Offences Act*.
43. The appeal lacks merit and is hereby dismissed. The conviction and sentence are upheld.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF JUNE, 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent

