



**HOM v Director of Public Prosecution (Criminal Appeal  
E068 of 2023) [2025] KEHC 10974 (KLR) (15 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E068 OF 2023**

**S MBUNGI, J**

**JULY 15, 2025**

**BETWEEN**

**HOM ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

*(Being an appeal from the Judgment delivered on 29.11.2023 by Honorable  
Joseph Ndururi, SPM in Kakamega Sexual Offences Case No. E024 of 2023)*

**RULING**

**Introduction**

1. The appellant was charged with incest contrary to section 20(1) of the [sexual offences Act](#) No. 3 of 2006. The particulars were that on the 26<sup>th</sup> day of December, 2022 at [Particulars withheld] village in Navakholo Sub-County within Kakamega County being a male person caused his penis to penetrate the vagina of CKO A female person who was to his knowledge his daughter.
2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on the 26<sup>th</sup> day of December, 2022 at [Particulars withheld] village in Navakholo Sub-County within Kakamega County caused his penis to come into contact with the vagina of CKO a child aged 13 years.
3. During trial the prosecution called seven witnesses who testified in support of their case. The appellant was placed on his defence and gave unsworn evidence statement in written form. The trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of incest and proceeded to sentence him to forty (40) years imprisonment.



## Facts at Trial.

4. PW1 CKO, gave an unsworn evidence, stating that the appellant who is her father told her to accompany him to a nearby shop to buy a needle. The Accused then led her along a path through a sugarcane farm. When they reached the middle her ordered her to undress. She refused, the accused person took off her dress and underpants. He then put her on the ground and proceeded to defile her.
5. PW1 stated that the accused person told her that if anyone asked her what had happened, she should say that she had gone to buy a needle. She bought it and went home someone who had seen her and the accused in the sugarcane reported the matter to the area village elder.
6. PW2 Aconcet Tobias a clinical officer at Navakholo Sub County Hospital stated that he examined CKO on 26<sup>th</sup> December, 2020. She had bruised on the vaginal wall and whitish discharge . The hymen was however intact.
7. PW3 MO testified she had gone to the river to wash clothes a neighbors child came and informed her that she was wanted by PW6. PW6 also called her and ordered her to go to take CKO to her home. She went home but did not find CKO not the accused person. She headed to PW6'S home , where she found a crowd of people where she was informed her husband (the accused person) had defiled CKO. PW6 then escorted her to the chief's (PW6's) office where they reported to him what had happened,
8. PW3 later learned CKO was at her grandmothers home, and grandmother was refusing to let CKO report the matter. PW3 later interrogated CKO who informed her what had happened. She later took her to Navakholo Sub-County Hospital where she was examined. She reported the matter at Navakholo Police Station the following day.
9. PW4 Douglas Waswa Wambani testified that on 20<sup>th</sup> February, 2023 he received a telephone call from a member of public who informed him that the accused person who was wanted in connection with this case and had gone into hiding had resurfaced. He telephone OCS Navakholo Police Station who asked him to arrest the accused persons. He went together with an Assistant Chief and arrested him on 24<sup>th</sup> February, 2023 and took him to police station. He said accused had disappeared for one and half months and only returned when his brother lost a child.
10. PW5 Martin Sifuna Sikenya testified that on 26<sup>th</sup> December, 2022 at about 11.00am he went to survey his maize farm. Inside the farm, he saw the accused person lying on top of a child. He identified the child as CKO , the accused person's own child. He went to call PW6 to witness the scene, and when they returned, they found that the accused person and CKO had left. They saw that the scene was disturbed.
11. PW6 Roseline Namwaya Wekesa stated 26<sup>th</sup> December, 2022 at about 11.00am, PW 5 went her home and reported to her that the accused person defiling his own child. PW6 accompanied PW5 back to the scene, but they found that the accused person and the child had left. PW6 examined the scene and saw some wetness on the ground, which she suspected to be semen.
12. PW7 testified that this case was reported at Navakholo Police Station on 30<sup>th</sup> December, 2022. At that time CKO had already been examined at Navakholo Sub-County Hospital. After recording statement, PW7 escorted CKO back to Navakholo Sub-County Hospital for the P3 form to be filled. When the accused person resurfaced, he was arrested by PW4 and taken to the police station whereby PW7 charged him with the offence herein.



## Defence Case

13. The appellant was placed on his defence, he choose to present the defence in written form. The Appellant stated that on 26<sup>th</sup> December, 2022 he was engaged in providing security during some games and was therefore not at home. He was then telephoned and summoned to the police post and when he arrived there he was informed that a report had been made that he had defiled his own child.
14. At the police post, a police officer informed him that CKO had been taken for medical examination and instructed him to go home and return the following day. When he returned at the post the following day, he was arrested and put in cells but later released the same day. He assumed that the matter had ended and left for Busia for some work. He returned home after death of his brothers child, and it was during the funeral wake that PW4 arrested him.
15. The appellant dismissed the charges against him as a frameup by PW5 so that he can get jailed in order for him to continue having an affair with his wife (PW3).
16. The trial court considered the evidence adduced and found the Appellant guilt of the offence of incest. The Appellant was allowed to mitigate and was thereafter sentenced to serve 40 years imprisonment.
17. The Appellant being dissatisfied by the conviction and sentence filed this petition of Appeal on 8.12.2023. The grounds raised were: -
  - i. That the learned magistrate erred in law and in fact in convicting the appellant when there was insufficient evidence and in case that did not reach the threshold of beyond reasonable doubt.
  - ii. That the learned trial magistrate erred in law and in fact in ignoring material contradiction in the prosecutions.
  - iii. That the learned trial magistrate erred in law and in fact in failing to ascertain the proper age of the complainant.
  - iv. That the learned trial magistrate erred in law and fact heavily relying on un collaborated circumstantial evidence.
  - v. That the learned trial magistrate erred in law and in fact in failing to take into account contradictions in medical report and P3 form.
18. The applicant prayed that the appeal be allowed, conviction be quashed and sentence of life be set aside and he be set at liberty.
19. The merits of this appeal were to be canvassed by way of written submissions but at the time of writing the judgment no party had filed. Therefore I will rely on the evidence adduced in the lower court, the judgment and the grounds of appeal.

## Analysis and Determination.

20. This being first appellate court, it is guided by principles set out by the court of appeal in the case of *David Njuguna Wairimu v Republic* [2010] eKLR where the court stated as follows:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think



there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

21. The issue for determination is whether the trial court was right in finding the appellant guilty for the offense of incest and whether the sentence was appropriate.

22. The offence of incest is defined in Section 20(1) of the *Sexual Offences Act* as:

“ 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 that the female person is under the age of eighteen years, the appellant 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.”

23. For the prosecution to establish an offence of incest the following ingredients should be proved:

- i. That the offender is a relative of the victim
- ii. Proof of the age of the victim.
- iii. Penetration.
- iv. Proper identification of the perpetrator

24. From the evidence tendered in the lower court there is no dispute that the appellant was the father of the complainant.

25. A birth certificate was produced during the trial showing that the complainant’s Date of Birth was 31.4.2009 so at the time of the alleged commission of the offence, the complainant was then 13 years old. The age factor was proved.

26. Production of a birth certificate is one way of proving the age of a person. 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:

“... 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...”

27. On the issue of penetration the medical examination showed that the hymen of the complainant was not broken. The external genitalia was normal but it had lacerations. The complainant in her evidence told the court that the appellant inserted the thing he uses to urinate into her thing she uses to urinate, the lacerations shows that there was penetration in her vagina though not complete for the hymen was not broken.



28. In the case of *Andrew Runya Munga v Rep* (2021) eKLR the court held that:
- “...The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and collaborated by the medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration...”
29. The *sexual offences Act* defines Penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.
30. On the issue of the identity of the perpetrator, the complainant vividly recall the events of that day narrated how the appellant took her to a sugar plantation forcibly removed her clothes, pushed her to the ground and laid on her and inserted his penis into her vagina then after he finished he gave her some money and told her not to tell anybody.
31. PW5 Martin Sifuna Sikenya testified that he saw the Accused lying on top of the complainant people he knew well. Therefore there is no way someone can confuse his/her father and given that the incident happened during the day time. So there is not doubt that it is the appellant who was the perpetrator.
32. I have looked at the judgement of the trial magistrate , he concisely analyse the evidence and law and correctly arrived to the appropriate findings that the above elements were proved beyond reasonable doubt. Having re-evaluated the evidence the learned magistrate cannot be faulted. I therefore find the conviction was safe and it is hereby upheld.
33. On sentence the appellant was sentenced to serve 40 years imprisonment from 27<sup>th</sup> February, 2023. The magistrate considered the mitigation tendered by the appellant and also considered the report presented by the probation officer.
34. When it comes to sentencing the court is guided by the *Judiciary Sentencing Policy Guidelines* (2016), particularly paragraphs 4.1 and 4.2, which emphasize that sentencing must promote rehabilitation, reintegration, and restorative justice. And also the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015, which set out the following as some of the factors to consider as a guide in sentencing.
- a. age of the offender
  - b. being a first offender;
  - c. whether the offender pleaded guilty;
  - d. character and record of the offender;
  - e. commission of the offence in response to gender-based violence;
  - f. remorsefulness of the offender;
  - g. the possibility of reform and social re-adaptation of the offender;
  - h. any other factor that the Court considers relevant.
35. I note in the sentencing notes the trial magistrate considered that the appellant was a first offender and the fact that the victim was her own daughter, that he breached the trust the victim had on him as a father. That there was need to keep the appellant away from society, for he was a danger to his own daughters and other peoples daughters.



36. The trial magistrate cannot be faulted for imposing a sentence of 40 years imprisonment against the appellant given the above scenario.
37. The act of sentencing being a discretionary role of the sentencing court , unless it is shown the sentencing court acted capriciously in that did not judiciously exercise its discretion an appellate court should always be hesitant to interfere, in this case I find there is no evidence to show that the sentencing court did not exercise its discretion judiciously I therefore refrain from interfering with the sentence consequently the sentence is upheld.
38. The upshot of the foregoing is that the appellants appeal on both conviction and sentence is devoid of merit and it hereby dismissed entirely.
39. Right of Appeal 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 15<sup>TH</sup> DAY OF JULY, 2025.**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Court Assistant – Elizabeth Angong’a

