



**MMK v Republic (Criminal Appeal E006 of 2024)
[2025] KEHC 10196 (KLR) (15 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E006 OF 2024
GL NZIOKA, J
JULY 15, 2025**

BETWEEN

MMK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of the Hon. J. Ndengeri (PM) delivered on the 10th July 2023 in CMCR S/O No. E054 of 2023 at Naivasha Chief Magistrate's Court)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate Court at Naivasha, charged vide Chief Magistrate's Criminal Case S/O No. E054 of 2023 with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006 (herein "the Act").
2. The particulars of the offence are that on diverse dates between the year 2018 and the 8th day of August 2022, in Naivasha Sub County within Nakuru County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of TWK a girl aged 13 years old, whom to his knowledge is his daughter.
3. The appellant was also charged in the alternative count 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.
4. The particulars thereof are that, on diverse dates between the year 2018 and the 8th day of August 2022 in Naivasha Sub County within Nakuru County unlawfully and intentionally did cause his genital organ namely penis, to come into contact with the genital organ namely vagina of TWK a girl aged 13 years old.
5. The charges were read to the appellant and he pleaded not guilty thereto. The prosecution case is supported by the evidence of four (4) witnesses. In a nutshell, it is the prosecution case that (PW1)



- 'FWK (herein 'the complainant') was residing in the same house with the appellant, who is her step father, her mother and elder brother. That on several occasions in the year 2018 and August 2022, the appellant defiled the complainant.
6. The complainant testified that, while her mother was away the appellant used to remove his clothes and remain stark naked before her. That he would then tell her to rub his back and, also take a bath in front of her. That on other occasions, he would go to her bed and have sex with her, after stripping off her clothes.
 7. The complainant further testified that, the appellant gave her Kshs 5 and Kshs 50 on different occasions to silence her from disclosing the sexual assault. However, her mother overheard her telling the appellant not to touch her breasts and her mother sought to know what was going on. That she revealed to her mother what had transpired all along and her mother moved out of the house for one (1) week but returned thereafter. At that point, the complainant informed her biological father of what had transpired and he reported the matter to the police station.
 8. (PW2) PK testified that, he is the complainant's biological father and that upon receipt of report that, the appellant was defiling the complainant, he reported matter to the police officers. That the complainant reported to him that the appellant used to touch her private parts and then defile her. That upon reporting the matter, he was given P3 form and the complainant was taken for a medical examination. That subsequently, he got the custody of the complainant through the assistance of the Children Department.
 9. (PW3) No. 57xxx Corporal Benjamin Njuguna who investigated the matter testified that, he referred the complainant for medical examination and later received the P3 and Post Rape Care form (Pexhibit 2 and 3) fully filled. That it was confirmed that, the complainant had been defiled. Subsequently, he recorded the statement of witnesses, and obtained the birth certificate of the complainant (Pexhibit 1). He then arrested the appellant and charged him accordingly.
 10. At the close of the prosecution case, the appellant was placed on his defence. He opted to keep silent and offer no evidence in defence.
 11. By a judgment dated 10th July 2023, the appellant was acquitted of the charge of incest but found guilty of the offence of committing indecent act with a child, convicted and sentenced to serve ten (10) years imprisonment.
 12. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds: -
 - a. That the learned trial Magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt.
 - b. That the trial Magistrate erred in law and fact in finding that the evidence of the victim was credible which was not supported by the evidence.
 - c. That the learned trial Magistrate erred in both law and fact in failing to give reasons as to why she believed the victim's evidence hence contravening Section 124 of the Evidence Act (Cap 80) Laws of Kenya.
 - d. That the trial Magistrate erred in both law and fact in convicting the appellant on flimsy and frivolous allegations that thrived on a grudge.
 13. The respondent opposed the appeal on the following grounds of opposition dated 28th January, 2025: -



- a. That the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006 was committed by the appellant herein and the same was sufficiently proved to the required standards.
 - b. That the evidence of the victim was credible and could not be shaken.
 - c. That the evidence of the victim was truthful and believable and the trial Magistrate did not whatsoever contravene section 124 of the *Evidence Act* (Cap 80) Laws of Kenya.
 - d. That the appellant opted not defend his case and the court proceeded to sentence him to 10 years imprisonment.
 - e. That considering the circumstances of the case, we implore this Honourable court to sustain the sentence imposed by the trial court.
14. The appeal was disposed of vide filing of submissions. The appellant filed submissions dated 30th December, 2024 and argued that, the prosecution failed to prove its case beyond reasonable doubt. That, the complainant's evidence was inconsistent, contradictory and unclear as she could not recall the exact dates or events of the alleged abuse thus raising doubts about the truth of the allegations. That, the trial court did not address these contradictions.
 15. The appellant faulted the trial Magistrate for relying solely on the evidence of the complainant and failing to address her credibility. Further, that the trial Magistrate did not comply with the provisions of section 124 of the *Evidence Act* as she did not provide adequate reasons why she believed the complainant's evidence in light of the inconsistencies and contradictions. That, the omission undermined the fairness of the trial and raised concerns to the soundness of the conviction.
 16. Lastly, the appellant submitted that, the trial Magistrate did not take into consideration that, he had a long-standing grudge with the complainant's biological father (PW2) K which likely influenced the allegations against him. That it was suspicious that, PW2 had abandoned his family and only returned to the complainant's life after the allegations of abuse had been reported. Furthermore, that the complainant's evidence appeared to have been influenced by her father (PW2).
 17. However, the respondent vide submissions dated 28th January, 2025 submitted that Section 2 of the Act defines indecent. That in the instant matter, the appellant's male organ, the penis, came into contact with the complainant's private part, the vagina.
 18. That, the provisions of Section 124 of *Evidence Act* of the *Evidence Act* were complied with, as the trial court recorded the victim's evidence and believed that she was saying the truth and did not require corroboration. The case of *JWA vs Republic* [2014] eKLR was relied on.
 19. The respondent finally argued, that the appellant kept quiet in his defence and blew up the opportunity to prove that, he was framed. As such, the appeal lacks merit and be dismissed.
 20. At the conclusion of the arguments on appeal and in considering the material before the court, I note that the main issue to determine is whether the prosecution adduced adequate evidence to prove the charge in the alternative count.
 21. In that regard, the offence is provided for under Section 11(1) of the Act as follows: -
 - “(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”



22. The key word is ‘indecent act’. The same is defined under Section 2 of the Act as;
- “an unlawful intentional act which causes—
- (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
 - (b) exposure or display of any pornographic material to any person against his or her will;”
23. Further, the Court of Appeal in *Robert Mutungi Muumbi v Republic* [2015] KECA 584 (KLR) stated that: -
- In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement.
24. Consequently, the ingredients of the offence herein that the prosecution ought to prove are that; the complainant was a minor, and that there was contact between any part of the body of the accused and the genital organs, breast or buttocks of the complainant, and/or there was exposure or display of any pornographic material against the complainant’s will. Pursuant to the aforesaid, and in recognition of the fact that the role of this court as the first appellate court is to re-evaluate the evidence afresh and arrive at its own conclusion albeit without the benefit of the demeanor of the witnesses. I note, that, the complainant confirmed that the appellant is her step-father. That they were staying in the same house. She narrated how the appellant would strip naked before her, take a bath in front of her, touch her breasts, ask her to rub his back while naked and showed her pornographic materials on phone. Notably by keeping quiet during the defence hearing, the appellant has not rebutted that evidence.
25. Further, in cross-examination, the complainant reiterated that, the appellant would take a bath as she watched pornographic material on the phone and he would ask her to do the same with him and that he gave her Ksh 5 and told her not to report the sexual assault.
26. Further, (PW2) PK testified that, when the complainant called him, she reported that the appellant was defiling her repeatedly and was touching her private parts. Furthermore, (PW3) Corporal Benjamin Njuguna testified that the complainant had undergone trauma and failed to answer his question and he called in a female colleague to conduct interrogation and that is when the complainant opened up. Finally, (PW4) Preston Otinde who produced the P3 and post rape care forms stated that the medical examination supported a case of defilement.
27. The question at this stage is whether the complainant lying in stating that the appellant indecently assaulted her? What reason does she have to lie? If indeed she was not indecently assaulted by the appellant, then who did it and why would she pick on the appellant. Would she conspire with the biological father to frame the applicant and is there evidence to that effect to fix the appellant? In any case, has the appellant substantiated the allegation of bad blood between him and the complainant’s biological father.
28. In considering the issues raised in the appellant’s submissions on the inconsistency in complainant’s evidence, non-compliance with the provisions of Section 124 of *Evidence Act*, I find that the same holds no water for several reasons.



29. First and foremost, the evidence on record does not reflect any contradictions as PW1 the complainant is the only witness who witnessed the sexual assault or indecent act that occurred. No other witness has testified and contradicted her evidence. Secondly, though not indicated in the judgment that the complainant's evidence was admitted pursuant to Section 124 of *Evidence Act*, the trial court's judgment indicates that based on her demeanor, the court believed her evidence and that she was quite consistent in her statement and oral testimony to the police and medics that her father engaged in sexual intercourse with her. Thirdly, the appellant cannot fail to advance defence and turn the submissions at the appeal stage into evidence on how he is being framed due to bad blood between him and (PW2) K.
30. In summation, I find that there is adequate evidence that the appellant committed an indecent act with the complainant, by inter alia touching her private parts/vagina with his genital part/penis, touching her breasts, asking her to rub his back while naked and/or exposing himself to her while naked and bathing in front of her.
31. Consequently, the grounds of appeal advanced have no merit. I therefore dismiss the appeal on conviction and uphold the same. As regards the sentence, I find that the same is lawful and/or legal as provided for under the Act. The upshot is that, the appeal is dismissed in its entirety.

DATED, DELIVERED AND SIGNED THIS 15TH DAY OF JULY, 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Ms Chepkonga for the State

Ms Hannah Court Assistant

