



**NLZ v Republic (Criminal Appeal E047 of 2024)
[2025] KEHC 10236 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E047 OF 2024**

**M THANDE, J
JULY 11, 2025**

BETWEEN

NLZ APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was convicted of the offence of incest contrary to Section 20(1) of the [Sexual Offences Act](#) (SOA) in Malindi Sexual Offences Case No. E063 of 2021. The particulars of the offence are that on 8.7.21 at [Particulars Withheld] in Malindi Sub-County within Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of MD (the Complainant), a child of 12 years who was to his knowledge his step daughter. Following a full hearing, the Appellant was convicted and sentenced to 20 years imprisonment.
2. Aggrieved by both the conviction and sentence, the Appellant preferred the Appeal herein. The grounds are that the trial court erred in failing to consider that the prosecution did not prove its case against him beyond reasonable doubt and failing to consider his defence. The Appellant urged this 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. Section 20(1) of the SOA under which the Appellant was charged 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.

5. 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. Where the victim is under the age of 18 years, the offence carries a sentence of life imprisonment.

6. The relationship between the Complainant and the Appellant is not disputed. The Complainant stated that the Appellant was her father and that she started seeing him in their home when she was small. The Complainant's mother Sharon Mwarandu PW2, stated that the Appellant is her husband. This was not disputed by the Appellant who in his unsworn statement stated that he started taking care of the Complainant since she was 2 years old.

7. Section 22(1) of the SOA provides for the test of relationship and stated in part as follows:

1. In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half-father and an uncle of the first degree and a mother includes a half-mother and an aunt of the first degree whether through lawful wedlock or not.

8. In the case of *B.N.M v Republic* [2011] KEHC 1662 (KLR), Odera, J. stated as follows on Section 22(1):

My own understanding is that 'half father' is a term which means exactly the same as 'step-father' – it means one who is not a biological father of the child. Therefore by dint of this S 22(1) of the Act the appellant being a step-father of the complainant and one who stood in 'loquo parentis' can legally be charged and indeed convicted of the crime of Incest with her.

9. From the evidence on record, it is clear that the Appellant is the half father of the Complainant as he was her mother's husband. By dint of Section 22(1) of the SOA, he was legally charged with the offence of incest.

10. As regards her age, the Complainant's birth certificate was produced indicating that she was born on 20.5.09. She was thus 12 years old in July 2021 when the offence is alleged to have taken place.

11. On penetration, the Complainant testified that on the night of 20.7.21, the Appellant left his room and came to her bed that she shared with her 4 year old sister. Her mother had just given birth and was



- sleeping in a separate bed. The Appellant moved the small girl to the side, removed the Complainant's panty and inserted his penis into her vagina. The following day when her mother had gone to church and her siblings were outside the house, the Appellant called her into his room. He held her, removed her panty and shirt and had sex with her again. She stated that the Appellant kept having sex with her many times. The Appellant threatened to kill her if she dared tell anyone. Eventually, the Complainant reported the matter to her mother. She was then taken to Malindi General Hospital for examination.
12. PW2 stated that the Complainant explained to her (PW2's) parents that the Appellant had been having sex with her. She then reported the matter to the Malindi Police Station and the Complainant was taken to hospital.
 13. PW3 Moses Rimba, a clinical officer at Malindi Subcounty Hospital on behalf of Dr. Ibrahim Abdullahi testified that after examination, the Complainant's hymen was found to have been broken and that she had discharge from her vagina. The doctor concluded that there was vaginal penetration. From the testimony of the Complainant and of PW3, it is clear that penetration was established.
 14. On identification, the Complainant stated that it was her stepfather, the Appellant who defiled her. She clearly narrated how in her mother's absence and while her siblings were outside and even at night, the Appellant would defile her. He then threatened to kill her if she ever told anyone what he was doing to her.
 15. In his defence, the Appellant denied the charge and stated that he took care of the Complainant since she was 2 years old and that at 12 years she was complaining. His cousin Elias Lughanje Ziro DW1 stated that PW2 never reported anything to him. Further that the charges are not true and that Appellant told him that the charges are not true.
 16. The only evidence of the alleged offence is that of the Complainant. The proviso to Section 124 of the *Evidence Act* allows the court to receive evidence of an alleged victim of a sexual offence, notwithstanding that it is the only available evidence and to record the reasons for believing the evidence. Section 124 provides as follows:

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. (emphasis)
 17. For a court to convict an accused person of a sexual offence only on the basis of the evidence of the victim, such court must be satisfied that the victim is telling the truth. In its judgment, the trial court was persuaded by the Complainant's testimony and found no reason why the Complainant, a small child would fabricate charges against the Appellant with whom she had lived well. She found that the Appellant's defence did not shake the prosecution case.
 18. I have carefully considered the evidence of the Complainant. She clearly stated how the Appellant defiled her on a number of occasions during the absence of her mother and when her mother was asleep. Her evidence was consistent and without any contradictions and the same is believable.



19. In the end, having reexamined the evidence on record, I find that all the ingredients for the offence of incest were established. The prosecution proved its case beyond reasonable doubt. I see no contradictions and inconsistencies in the prosecution evidence. The Appellant was properly convicted and 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 11TH DAY OF JULY 2025

M. THANDE

JUDGE

