**Odhiambo v Republic (Criminal Appeal E071 of 2024)**
**[2025] KEHC 10369 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10369 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT SIAYA**

**CRIMINAL APPEAL E071 OF 2024**

**DK KEMEI, J**

**JULY 18, 2025**

**BETWEEN**

**MICHAEL ODUOR ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal against conviction and sentence from the judgment of Hon. E.O. Okore (SRM) in Siaya Chief Magistrate's Court Criminal Case No. 174 of 2014 dated 23/4/2015)***

## JUDGMENT

1. The Appellant herein MOO has lodged the present appeal against the conviction and sentence of Hon. Okore (SRM) in Siaya Chief Magistrate's Court Criminal Case Number 174 of 2014 wherein she ordered him to serve a sentence of life imprisonment for an offence of Incest contrary to Section 20(1) of the *Sexual Offences Act* No. 2006.

2. Aggrieved by the said conviction and sentence, the Appellant lodged his Petition of Appeal on 27/12/2024 wherein he raised the following grounds of appeal namely:

    i. That the learned trial magistrate erred in law and fact in failing to consider the Appellant's alibi defence.

    ii. That the learned trial magistrate erred in law and fact when she imposed a harsh sentence without considering jurisprudential development in Kenya.

    iii. That the learned trial magistrate imposed a sentence of life imprisonment without considering his mitigation.

    iv. That the learned trial magistrate erred in law and fact in convicting the Appellant yet the ingredients of the offence were not proved.

The Appellant therefore prayed that the conviction be quashed and sentence set aside and that he be set at liberty forthwith.

3. This being the first appellate court, its duty is to re-evaluate and analyze the evidence of the trial court and subject it to an independent analysis and to arrive at its own conclusion as to whether or not to uphold the decision of the trial court. This court will also take into account the fact that it did not see or hear the witnesses testify and thus to make an allowance for that. See Okeno Vs. R [1972] EA 32.

4. A perusal of the record of appeal shows that the Appellant faced a main charge of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 22nd day of February 2014 at East Alego Location in Siaya District within Siaya County being a male person caused his penis to penetrate the vagina of JJA. A female child aged 13 years who was to his knowledge his niece.

   The Appellant also faced an alternative charge 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 22nd day of February 2014 at about 1530 hours at East Alego Location in Siaya District within Siaya County intentionally touched the vagina of JJA a child aged approximately 13 years.

5. JJA (PW1) was the Complainant and who testified that she is a pupil in grade four at [Particulars Withheld] School and that the Appellant was her uncle whose name is M. That on the material date at 3.30 pm, she was at come when the Appellant came and took her to his house where he directed her to undress and lie on his bed and that the Appellant did "tabia mbaya" to her by inserting his penis into her vagina which she pointed (as per the record). That the Appellant had defiled her on several occasions but not daily. That she later ran to O's homestead where M stayed. That she was alter assisted to hospital. She identified the age assessment report and P3 form.

6. Silah Omondi Oluoch (PW2) testified that he is the clinical officer attached at Siaya District Hospital and that he had examined the complainant and noted the hymen was absent and that a vaginal swab revealed the presence of spermatozoa and epithelial cells. He confirmed that there was a vaginal penetration. He produced the P3 form for the complainant. He also examined the Appellant whose HIV test turned positive and that the urinalysis test revealed some pus cells. It was his conclusion that the presence of spermatozoa in the minor's vagina was ejaculation by the culprit.

7. Joshua Onyango (PW3) who was the assistant chief of Olwa sublocation stated that he visited the scene and met the complainant and upon learning from her that the Appellant was the culprit, he arrested him from his house.

8. Joseph M Odhiambo (PW4) was the village elder of Kogwany village. That on receiving the complainant, he alerted the area assistant chief and that he Appellant was later arrested and escorted to the police station.

9. No. 88270 PC (W) Caroline (PW5) testified that she received the complainant at Siaya police station. That she escorted the complainant and Appellant to Siaya District hospital for examination and that she issued P3 forms. That she arranged for an age assessment of the complainant and that she produced the report as exhibit 2.

10. The trial court later found that the Respondent had made out a prima facie case against the Appellant who was subsequently placed on his defence. He opted to tender a sworn testimony and called one witness.

11. MOO (DW1) was the Appellant. He stated that on the material date at 5.00 pm he was at home when the assistant chief arrived and instructed him to accompany him and the complainant to Siaya police station. That earlier in the day, he had taken his parents to Nyangoma for a funeral.

    On cross examination, he stated that he did not invite the complainant to his house. That he had been granted permission by his workmate Twela to be away on that day.

12. ROA (DW2) testified that the Appellant was her las born son. That on the material date, they had gone to attend a burial in Nyangoma and that she was in company of the Appellant and her husband from 11.30 am to 4.00 pm and that thy arrived home at 5.00 pm. That the complainant was her granddaughter.

13. The appeal was canvassed by way of written submissions. It is only the Appellant who complied.

14. The Appellant's submissions are inter alia; that the Respondent failed to prove all the essential ingredients of the offence; that the learned trial magistrate failed to consider his alibi defence; that the sentence imposed is excessive and harsh.

15. I have given due consideration to the evidence of the trial court and the submissions filed. I find the issues for determination are firstly, whether the Respondent proved its case against the Appellant and secondly, whether the sentence imposed was appropriate.

16. As regards the first issue, it is noted that the Appellant had been charged with a main count of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The same provides as follows:

    > " Any person who commits and indecent act which causes penetration with a female person who is to his knowledge as his daughter, granddaughter, grandmother, sister, niece, aunt or sister is guilty of an offence termed as incest and 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 eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or indecent act was obtained with the consent of the female person.

    The Respondent was therefore under obligation to prove several ingredients inter alia; proof of relationship between the Appellant and the complainant; proof of the age of the complainant; proof of penetration or indecent act and finally proof that the Appellant was the perpetrator.

17. As regards the aspect of Appellant's relationship with the Complainant, it transpired from the evidence that the Appellant was a maternal uncle to the complainant as he was the brother to the complainant's mother. The Appellant's mother ROA (DW2) confirmed that the complainant was her granddaughter while the Appellant was her last-born son. I am satisfied that the evidence tendered by the Respondent did establish beyond doubt that the complainant was a niece to the Appellant and which supported the charge of incest contrary to Section 20(1) of the *Sexual offences Act* No. 3 of 2006. It was with the knowledge of the Appellant that the Complainant was his niece.

18. As regards the aspect of age of the Complainant, it is noted from the evidence of the complainant that she did not know her age. However, the complainant was escorted to hospital where an age assessment report was carried out and which established the age as 13 years. The age assessment report was produced by the investigating officer (PW5) as exhibit 2. The issue of age in sexual offences is a critical component more particularly the proviso to Section 20 (1) of the *Sexual Offences Act* so as to

determine whether a sentence of life imprisonment would be imposed. In the case of Kaingu Elias Kasomo Vs R Criminal Appeal No. 504 of 2010 (UR) the court held:

> " Age of the victim of Sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

It is noted that the Appellant in his submissions has maintained that the age assessment report was produced unprocedurally as the investigating officer was not the author thereof. However, the record indicates that the Appellant did not raise any objection and even went ahead and cross examined the said witness. The Appellant did not seek to have any of the witnesses recalled to give further evidence on the age assessment report. I am satisfied that the Respondent proved the ingredient of age beyond reasonable doubt.

19. As regards the aspect of penetration, it was the evidence of the Complainant that the Appellant took her to his house and ordered her to lie on a bed and then inserted his penis into her vagina. It was further her evidence that the Appellant had been defiling her in the past but not every day. The Complainant was examined by the clinical officer (PW2) who established that the hymen had been broken and that spermatozoa cells were found inside her vagina. It was the opinion that penetration of the complainant's vagina had taken place. Section 2 of the *Sexual offences Act* defines penetration as the partial or complete insertion of the Sexual organs of a person into sexual organs of another person. In Mark Olruri Mose Vs R [2013] eKLR the Court of Appeal held:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and that penetration need not be deep inside the girl's organ."
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> It is noted from the Appellant's submissions that the prosecution should have gone ahead to call for DNA tests on the spermatozoa found in the complainant's vagina so as to establish whether the same would link him to the alleged offence. Indeed, the Appellant was also examined the same day just like the complainant and that a urinalysis test revealed that there were presence of pus cells and that a HIV test turned positive.
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> Going by the definition of penetration under Section 2 of the *Sexual Offences Act* and the authority in Mark Oiruri Mose Vs. R (supra) I must reject that a DNA test was mandatory. As penetration was established by the clinical officer (PW2), I find the same corroborated the evidence of the Complainant that the Appellant inserted his penis into her vagina. I am satisfied that this ingredient was proved beyond reasonable doubt.

20. As regards the aspect if identification of the Appellant as the perpetrator, the complainant stated that the Appellant was her uncle and well known to her and that he had been defiling her previously but not every day. The incident took place during the day and that the Complainant had no difficulty in recognizing her own uncle with whom they lived in the same compound. The Appellant was apprehended the same day at around 5.00 pm by the assistant chief (PW3) and the village elder (PW4). There was no question about the identity of the Appellant as the perpetrator.

21. The Appellant in his grounds of appeal has contended that the trial court did not consider his alibi defence. The Appellant in his evidence, stated that he had accompanied his parents to Nyangoma for a funeral and only returned home at 5.00 pm. Section 309 of the *Criminal Procedure Code* provides

that if the accused person adduces evidence in his defence including new matters which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.

In the case of Karanja Vs R, [1983] KLR 501, the court held:

> " In a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt take into account the fact that he had not put forward his stage in the case so that it can be tested by those responsible for investigation and thereby present any suggestion that the defence was an afterthought."

It is noted that the learned trial magistrate found that there was no reason as to why the complainant who was a niece to the Appellant could fabricate the case against him. It is also noted that the Appellant did not issue the alibi warning early in time so as to enable the Respondent to investigate the same. I find that it is highly unlikely for the complainant to frame her own uncle with whom they reside in the same compound yet there was no evidence that differences existed between the Appellant and the complainant's mother. I am satisfied that the Appellant's defence evidence and his alibi did not shake or cast doubt upon the evidence of the Respondent which was overwhelming against him. I find the ingredient on the identity of the Appellant as the assailant was proved beyond any reasonable doubt by the Respondent.

22. Upon an analysis of the entire evidence, it is clear that the Respondent proved its case against the Appellant beyond any reasonable doubt. The Appellant's defence evidence was properly considered and found not to cast doubt upon that of the Respondent and was properly rejected by the trial court. Hence, the finding on conviction against the Appellant herein was quite sound and must be upheld.

23. As regards the sentence, it is noted that the Appellant was ordered to serve life imprisonment under Section 20(1) of the *Sexual Offences Act*. A person convicted therefor is liable to imprisonment for a period of not less than ten years but which may be enhanced to life imprisonment. The Appellant has urged this court to interfere with the sentence of life imprisonment. It is trite law that sentencing is usually the preserve of the trial court and that an appellate court should be slow to interfere with the exercise of discretion by the trial court. There has been some confusion regarding the sentences of life imprisonment under Section 20(1) of the *Sexual Offences Act* where the victim is below the age of 18 years as well as Section 8(2) of the same Act where the victim is aged eleven years or less. The Court of Appeal in the case of MK Vs. Republic [2015] eKLR held as follows:

> " 17. In the instance case, the Appellant was charged with an offence under Section 20(1) of the *Sexual Offences Act*. This Section provides for a minimum term of ten years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned Judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?
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> "18 the first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20(1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and

wording in the proviso is that the accused shall be liable to imprisonment for life.

"19 What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of Opoya Vs Uganda [1967] EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death." The court held that the construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or imprisonments. The court cited with approval the dicta in James Vs Young 27 Ch.D at p.655 where North J. said:

> "But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced."
>
> We consider such to be the correct approach to he construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death."

20. On our part, we contrast the wording in Section 8 (2) of the *Sexual Offences Act* with the proviso in Section 20(1) is minimum mandatory or otherwise. Section 8(2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20(1) provides that the accused shall be liable to imprisonment for life.

21. Guided by the decision in Opoya -vs- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch.D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20(1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. Read in conjunction with the general provision in Section 20(1) we hereby state that the correct interpretation of the proviso in Section 20(1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

In view of the foregoing authority, it is clear that the trial court has discretion to decide the appropriate sentence upon conviction which should be between ten years and life imprisonment.

24. Being guided by the foregoing authority, I am of the view that the appropriate sentence in the matter should be ten years imprisonment. It is noted that the Appellant was accorded an opportunity to mitigate but he opted not to tender any. The record also indicates that he is a first offender. The record also indicates that the Appellant did not manage to post bail and thus remained in custody throughout his trial. This period must be taken into account as per Section 333(2) of the *Criminal Procedure Code*. The sentence should therefore commence from the date of arrest namely 22/2/2014. It must also be noted that the action of the Appellant in engaging in sexual intercourse with his niece to be abhorrent as this has psychologically affected the complainant for the rest of her life. The Appellant was expected

to be the protector of his vulnerable nice but he took advantage and stole her innocence. A deterrent sentence was called for. It is instructive that the Appellant was later examined and found to be HIV positive and thus he had endangered the life of the complainant.

25. Looking at the circumstances of the case and the fact that the Appellant was a first offender, I find the sentence of life imprisonment imposed by the trial court to be excessive and which warrants interference by this court.

26. In view of the foregoing observations, it is my finding that the Appellant's appeal on conviction lacks merit and is dismissed.

However, the appeal on sentence succeeds to the extent that the sentence of life imprisonment is hereby set aside and substituted with a sentence of ten (10) years imprisonment which shall commence from the date of arrest namely 22/2/2014. As the sentence has already been served, I order the Appellant to be set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT SIAYA THIS 18TH DAY OF JULY 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

MOO.....Appellant

M/s Kerubo.....for Respondent

Okumu.....Court Assistant