



**SV v Republic (Criminal Appeal E045 of 2024)
[2025] KEHC 9794 (KLR) (8 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E045 OF 2024**

RK LIMO, J

JULY 8, 2025

BETWEEN

SV APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. SV the appellant herein was charged with the offence of Incest contrary to Section 20(1) of *Sexual Offences Act* No.3 of 2006 vide Kitale CM’S Court Sexual Offence Case No.E054 of 2023. The particulars were that on diverse dates between September 2023 and February 2023 in Kinyoro Location within Trans-Nzoia County being a male person caused his penis to penetrate the vagina of V.K. a female person aged 16 years who was to his knowledge his niece.
2. He also faced an alternative charge of Committing an Indecent Act with a child contrary to section 11(1) of *Sexual Offences Act* but the alternative count is not relevant in this appeal because the appellant after trial was found guilty and convicted of the principal count of incest.
3. Before I look at the grounds raised in the appeal this court will give an overview of the evidence tendered at the trial court by the prosecution and the defence raised.
4. The complainant testified as PW1 and stated that she was a student in Form One at [particulars withheld]. She stated that the appellant herein was an uncle as he was a brother to her father. She recalled that sometime in November 2022 while Brian had gone to school, the appellant grabbed her and defiled her by force. She stated that she did not scream as a result of threats and that after the act she did not tell anyone.
5. She further recalled another incident in the house when the appellant defiled her and was caught in the act by her sister named SI. She stated that she had told the appellant that she was unwell but he told her that she would gain strength upon defilement.



6. She stated that she was taken to hospital and found to be two months pregnant and that she then opened up about the defilement upon which she was taken to Kinyoro police station to report and thereafter to Kitale County Hospital. She stated that she was born on 5/8/2006 and had a birth certificate which she identified in court.
7. She stated under cross-examination that she was sure it was the appellant who had made her pregnant because she had not had sex with anyone before. She stated that she could not recall the exact dates when she was defiled but recalled missing her periods in February 2023 and March 2023.
8. SI (PW2) a minor aged 14 years testified on oath after voire dire examination revealed she understood the nature of oath. She testified that she was in Class 8 and recalled sometime in 2022 when she went home around noon and as she went looking for pasture for a cow, she found the appellant defiling the complainant. She stated that when the appellant saw her, he told her to go home and never to tell anyone. She also recalled another incident she could not recall the date, when she found the appellant again defiling the complainant in Sammy's house. She was firm under cross-examination by the appellant that she witnessed the incidents of the defilement and that the appellant was her uncle too.
9. David Maliwa (PW3), a clinical officer running a clinic testified that on 18/3/2022 the complainant was taken to his clinic complaining of stomachache. He stated that he examined her and found that she was pregnant. He stated that he informed the appellant in the evening and the following day he informed her father. He stated that during a family meeting the appellant admitted responsibility for the pregnancy.
10. Nelson Lusiola (PW4), a clinical officer working at Kitale County Hospital testified that he examined the minor on 19/3/2023 and found her pregnant. He stated that he also found her suffering from candidiasis and treated her. He stated that because of pregnancy, penetration was positive and tendered treatment notes as PExhibit 2 and P3 Form as PExhibit 3.
11. PC John Ochieng (PW5) who was based at Kinyoro police station at the material time testified that a report about incest was reported on 19/3/2023 at Kinyoro police station. He stated that the complainant in the company of PW3 and another person made the report upon which he referred the complainant to hospital for medical examination. He stated that he got the report that the appellant had defiled the complainant severally whenever people were not at home. He tendered birth certificate as PExhibit 1 which indicated that the complainant was 16 years old.
12. When the appellant was placed on his defence, he denied committing the offence and blamed his brother's child called J who he claimed had prophesied that he was in deep sea killing people and that he had killed her mother and another sister in law. He stated that he had a land dispute with his brother but gave no connection or link to the charge facing him. He concentrated his defence on alleged prophesy of J alleging that people including PW3 would die. He conceded having stayed with the complainant and PW2 stating that he had raised them.
13. The trial court upon hearing the appellant ordered for a DNA stating that the ends of justice will be met.
14. Godwin Khamala Wahama (PW6) a Government Analyst stated that samples from the appellant, complainant and her child were presented to him and upon DNA analysis, he found that the appellant was the father. That DNA profiles showed that there was 99.9% positive chances that he was the biological father. He stated under cross-examination by the appellant that a brother cannot share DNA profile with another brother.



15. The trial court evaluated the evidence tendered and found that the prosecution’s case had been proved to the required standard and convicted the appellant. It sentenced him to serve 40 years in jail.
16. The appellant felt aggrieved and filed this appeal raising the following grounds namely;
 - i. That the DNA test was not carried out transparently as he was not involved after the samples were collected.
 - ii. That the medical officer formed an opinion that there was penetration because of pregnancy yet pregnancy can occur without penetration.
17. In his written submission the appellant raised fresh grounds but without leave of this court. He submits that his right to be represented by an advocate was violated as he was not informed of that right. He contends that his right to legal representation exposed him to unfair trial.
18. He further submits that his defence was not considered. He contends that the children were staying with their father in Eldroet and that he was not at home when the incidents occurred.
19. The respondent through the ODPP has opposed this appeal vide written submissions dated 27/3/25. The respondent has given a summary of the background of the case against the appellant.
20. The State submits that all the ingredients of the offence of incest were proved and lists the ingredients as;
 - i. The victim must be a female person related to the perpetrator and the perpetrator had knowledge of the same.
 - ii. An Indecent Act or an act causing penetration.

The respondent relies on the decision of R –vs- JMK (2022)KEHC 13494(KLR). It submits that the appellant was an uncle to the complainant and that the fact was admitted by the appellant.

21. The respondent further submits that penetration was proved by pregnancy and DNA analysis which showed that the appellant was the father of the child.
22. On age the respondent submits that the birth certificate established that the child was under the age of 18 years.
23. The respondent defends the decision by the trial court to re-open the case and call for DNA citing that Section 150 of [Criminal Procedure Code](#) allows the court to do so.
24. The State seeks for enhancement of sentence under Section 345(3) (b) of [Criminal Procedure Code](#) contending that the appellant was duly cautioned but chose to proceed with the appeal.
25. This court has considered this appeal and the response made. The mandate of this court as a first appellant court is to re-evaluate the evidence tendered with a view to making own conclusions.
26. The appellant was charged and convicted of the offence of incest contrary to section 20(1) of [Sexual Offences Act](#). Section 20(1) of [Sexual Offences Act](#) 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”.

The necessary ingredients necessary to sustain a charge of incest going by the above are as follows;



- i. Act of penetration or indecent act by a male person with a female person.
 - ii. Relationship of the perpetrator to the victim.
 - iii. Knowledge by perpetrator that the victim is a close relative.
27. On the first element of penetration, it is clear that the same was proved beyond any reasonable doubt. The complainant's evidence was corroborated by PW2 who caught the appellant in the very act on at least two occasions. The evidence by PW3 who was the first medical officer to discover the pregnancy, corroborates the evidence of PW1 and PW2, PW4 another medical officer added more weight to the prosecution's case. He stated that he examined the minor and found her two months pregnant on 19/3/2023. He tendered P3 Form as PExhibit 3. That evidence particularly with respect to the age of pregnancy was quite consistent with the evidence of PW1, PW2 and PW3.
28. The trial court for good measure and to clear any doubts invoked the provisions of Section 150 of the Criminal Procedure Code by re-opening the case after the child born as a result of incest was born. Section 150 Criminal Procedure Code provides;
- “A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:
- Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness”.
- The trial court was correct and in order to order for DNA to establish if the child born belonged to the appellant. PW6 (Godwin Khamala), an expert witness testified that he received samples from PW5, the investigating officer in the case and generated DNA profiles. He stated that upon analysis, he found that the appellant was indeed the biological father of the infant.
29. This court finds that the element of penetration was proved beyond any shadow of doubt by the evidence tendered.
30. On the element of relationship, the prosecution witnesses PW1 and PW2 stated that the appellant was their uncle. The appellant during the trial and in this appeal never contested that fact. In fact the fact is admitted by the appellant. He had full knowledge that the complainant was his niece or a daughter to his brother. The element of relationship and the gender of both the appellant and the complainant were proved beyond any reasonable doubt.
31. This court therefore finds that the trial court was right to render a conviction against the appellant because all the ingredients of incest were proved beyond doubt.
32. On sentence, Section 20(1) provides that where the female victim is a child below 18 years, the sentence prescribed is up to life imprisonment. The act stipulates that an accused person found guilty is liable to imprisonment for life and it is immaterial if the act causing penetration was obtained by consent.
33. The appellant was cautioned by this court on the sentence prescribed and the possibility of enhancement of sentence. The State has asked for enhancement of sentence and has listed aggravating



circumstances which includes the fact that in many African traditions, the appellant is considered a father and was therefore a taboo to impregnate his daughter. The appellant breached trust bestowed upon him and the scar left on the victim and the child born will be a permanent one. That child is likely to grow up stigmatized and ostracized on account of his paternity and through a fault which is not of his own. The appellant more importantly is showing no remorse and I have no hesitation in enhancing his sentence.

This court finds no merit in this appeal. The same is dismissed. The sentence for the aforesaid reasons is enhanced to 50 years imprisonment due to serious aggravating circumstances.

He has 14 days Right of Appeal.

DELIVERED, DATED AND SIGNED AT KITALE THIS 8TH DAY OF JULY, 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Mr Mugun for the Respondent

SV the appellant in person

Duke/Chemosop – Court assistants

