



**HKL v Republic (Criminal Appeal E006 of 2022)
[2025] KEHC 12708 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E006 OF 2022
JK NG'ARNG'AR, J
SEPTEMBER 18, 2025**

BETWEEN

HKL APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Conviction and Sentence in Sexual Offence Case Number
67 of 20218 by Hon. Kibelion K. in the Magistrate's Court in Bomet)*

JUDGMENT

1. The Appellant was charged with the offence of incest contrary to section 20(1) the [Sexual Offences Act](#). The particulars of the offence were that on 15th December 2018 at [Particulars withheld] Village in [Particulars withheld] Location within Bomet County, the Appellant caused his penis to penetrate the vagina of D.C aged 7 years, a female person who to his knowledge his daughter.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of the offence were that on 15th December 2018 at [Particulars withheld] Village in [Particulars withheld] Location within Bomet County, he intentionally touched the vagina of D.C, a child aged 7 years with his penis.
3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case. The Appellant on the other hand gave unsworn testimony.
4. In its Judgment dated 9th July 2020, the trial court convicted the Appellant of the charge of incest and sentenced him to serve life imprisonment.
5. Being aggrieved with the Judgment of the trial court, the Appellant, HKL filed an Appeal on 4th November 2021 appealing against his conviction and sentence.



6. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh and come to my own independent conclusion See David Njuguna Wairimu v Republic [2010] KECA 495 (KLR).
7. I proceed to briefly summarize the case that was before the trial court in the succeeding paragraphs and the submissions in the present Appeal.

The Prosecution's/Respondent's case.

8. It was the Prosecution's case that the Appellant had sexual intercourse with his daughter D.C (PW2) aged 7 years old on 15th December 2018. PW2 testified that on the material day, the Appellant did bad thing to her. SL (PW1) who was the victim's mother testified that she found her daughter (PW2) in hospital the following day and PW2 told her that the Appellant had defiled her. PW1 further testified that she found that PW2 was bleeding from her private parts.
9. Julius Magut (PW5), a clinical officer at Longisa Hospital testified that he examined PW2 on 27th December 2018 and found that the PW2 had a swollen vulva, had bruises on both her labia minora and majora and that her hymen had been freshly torn. PW5 further testified that PW2 had a renal tear extended to anal region which was a 3rd degree tear and that she had vaginal bleeding.
10. In its written submissions dated 4th December 2023, the Respondent submitted that there was evidence of penetration. That the victim's oral account was manifestly clear as she narrated how the Appellant touched her private parts with his private parts. The Respondent further submitted that independent medical evidence led credence to the victim's testimony. That the clinical officer (PW5) found labial bruises, a freshly torn hymen and vaginal bleeding.
11. It was the Respondent's submission that it was not in dispute that victim was the Appellant's daughter. That all the Prosecution's witnesses confirmed the same and the Appellant did not deny that the victim was his daughter. It was the Respondent's further submission that PW2 and PW3 confirmed that PW2 had been in the Appellant's care the night she was defiled. That there was no other explanation as to how the Appellant was defiled other than by the Appellant.

The Appellant's defence.

12. The Appellant (DW1) denied committing the offence. He testified that he had disagreed with his wife (PW1) and that PW1 was framing him. DW1 further testified that he became aware of the charge of creating disturbance after disagreeing with his mother.
13. At the time of writing this Judgment, the Appellant had not filed his written submissions despite being directed to do so by this court on 22nd May 2025.
14. I have gone through and considered the trial court's proceedings; the home-made Petition of Appeal filed on 4th November 2021 and the Appellant's written submissions dated 4th December 2023. The following issues arise for my determination: -
 - i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether the Appellant's defence cast any doubt on the Prosecution's case
 - iii. Whether the sentence preferred against the Appellant was just and fair.



i. Whether the Prosecution proved its case beyond reasonable doubt.

15. 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 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.

16. In *F O D v Republic* [2014] KEHC 8847 (KLR), Majanja J. (as he then was) held:

“While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest.”

17. Further, in *MG vs Republic (Criminal Appeal E051 of 2021)* [2022] KEHC 14454 (KLR) (27 October 2022) (Judgment), Mativo J. (as he then was) held: -

“Thus, the ingredients for the offence of incest are:

- i. Proof that the offender is a relative of the victim.
- ii. Proof of penetration or indecent Act.
- iii. Identification of the perpetrator.
- iv. Proof of the age of the victim.”

18. I agree with the above persuasive authorities which aptly explain the ingredients of the offence of incest.

19. Regarding the age of the victim, the Court of Appeal in *LOA v Republic* [2020] KECA 927 (KLR) held: -

“..... It is trite that the prosecution ought to prove the age of the victim either by direct testimony of the parent, guardian, or victim herself, birth certificate, medical assessment or by other expert means.....”

20. SL (PW1) who was the victim’s mother testified that the victim was born on 12th December 2012. This testimony was uncontroverted upon cross examination. No. 96180 PC Irene Kemboi (PW6) who was the Investigating Officer produced an Age Assessment Report as P. Exh 5. I have looked at the Report and it stated that the victim was estimated to be aged between 4 to 6 years old. Based on the mother’s testimony and the Age Assessment Report, it is my finding that the victim (PW2) was aged 6 years at the time of the commission of the offence.

21. With regard to the issue of identification, the victim (PW2) identified the Appellant as her father. Similarly, the victim’s mother (PW1) also identified the Appellant as the victim’s father and that the Appellant had chased her away from their home sometime in May 2018. Both testimonies on identification of the Appellant were uncontroverted upon cross examination.



22. JL(PW3) who was the Appellant's sister-in-law testified that she found the victim (PW2) in their home on 16th December 2018 very weak and bleeding from her private parts. PW3 further testified that she took the victim to hospital.
23. The Appellant in his defence acknowledged the PW1 to be his wife and that they had disagreed. That PW1 had framed him as a consequence of their disagreement.
24. Flowing from the above, it is clear to me that the issue of positive identification of the Appellant by the victim was beyond doubt. Further, the Appellant's relationship with the victim was in consonance with the provisions of section 20(1) of the *Sexual Offences Act*.
25. With regard to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. Penetration can be proved through the evidence of the victim corroborated by medical evidence.
26. I thus proceed to carefully evaluate the victim's testimony and other oral evidence presented by the Prosecution witnesses.
27. The victim (PW2) testified that on the material day, the Appellant did bad things to her at their home. When she was cross examined, she reiterated that the Appellant defiled her at night. As I have earlier noted, JL(PW3) testified that she found the victim the following day in their home and she was bleeding from her private parts.
28. Julis Magut (PW5), a clinical officer testified that he examined the victim (PW2) and found that she had lower abdominal tenderness, swollen vulva, bruised labia and minora, a freshly torn hymen and a renal tear extended to the anal region which was a 3rd degree tear. It was PW5's conclusion that there had been vaginal penetration. When PW5 was cross examined, he stated that he did not examine the Appellant and only documented the victim's injuries.
29. PW5 produced the P3 Form, PRC Form and treatment notes, as P. Exh 1, P. Exh 2 and P. Exh 3 respectively. I have looked at the exhibits and the findings on the treatment notes, P3 and PRC Forms mirrored the testimony of PW5. I accept the medical evidence and PW5's conclusion that the victim (PW2) had been penetrated. It is therefore my finding that the Prosecution proved the element of penetration to the required legal standard. The medical evidence corroborated the victim's evidence of having been penetrated.
30. The sum total of the above is that the Prosecution provided sufficient evidence to sustain the charge of incest.

ii. Whether the Appellant's defence cast any doubt on the Prosecution's case

31. The Appellant denied committing the offence. He stated that he was being framed by his wife (PW1) as a result of a marital disagreement.
32. I have looked at the defence in its entirety and it is my finding that it is an afterthought. I say so because the Appellant did not raise the issue of being framed by his wife when he cross examined her and the victim (PW2). He only brought up the issue late in the day during his defence. It is my finding that the Appellant's defence was weak, an afterthought and did not cast any doubt on the Prosecution case which I have found proven.



iii. Whether the sentence preferred against the Appellant was just and fair.

33. Having found that the Prosecution had proved the offence of incest, the penal section is found in section 20(1) of the *Sexual Offences Act* which 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

34. Recent jurisprudence specifically the Court of Appeal in *Manyeso vs Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) and *Ayako v Republic* [2023] KECA 1563 (KLR) held that a life sentence was indeterminate in nature and the same was declared unconstitutional. However, this position was overturned by the Supreme Court when it pronounced itself on the matter and held that the Court of Appeal had no jurisdiction to substitute a life sentence with a 30-year sentence. The Supreme Court in Petition Number E002 of 2024, *Republic vs Evans Nyamari Ayako* held: -

“In the circumstances, we agree with the Appellant that the Court of Appeal assumed original jurisdiction over the interpretation and application of *the Constitution*, a mandate of the High Court under Article 165(3)(d) of *the Constitution*. In stating so, we reiterated In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application No. 2 of 2011) [2011] KESC 1 (KLR), that the High Court has the mandate to interpret *the Constitution*, while the Court of Appeal and the Supreme Court have appellate jurisdiction over the same matters having been resolved by the High Court at first instance. Equally, in the *Republic vs Mwangi Case* (supra) we held that before courts can consider the constitutionality or legality of minimum sentences and mandatory sentences, the issue must first have been canvassed and escalated through the proper channels.....

.....In the *Republic vs Mwangi Case*, this Court held that, whilst sentencing is an exercise of judicial discretion, Parliament sets the parameters for sentencing for each crime in statute. We stated as follows:

“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific

law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed”.....



.....In view of the foregoing, we find that the Court of Appeal ought not to have proceeded to set a term sentence of thirty (30) years as a substitution for life imprisonment, as the effect would be to create a provision with the force of law while no such jurisdiction is granted to it. The term of thirty years was arrived at arbitrarily without involvement of Parliament and the people. In consequence, we find that the Court of Appeal ventured outside its mandate and powers.”

35. The take home from the above is that the life sentence as provided for in section 20(1) of the *Sexual Offences Act* is a lawful and valid sentence.
36. I have noted from the trial court record that the circumstances of this case were aggravating. The victim suffered gruesome injuries that required surgery and to inflict such on a young girl and from someone who was supposed to be a protector and care giver is beyond brutal. In the circumstance thereof, the sentence therefore should be proportionate to the offence.
37. Flowing from the above, it is my finding that the trial court did not err when it sentenced the Appellant to life imprisonment. In my view, the sentence was lawful and proportionate.
38. In the end, I uphold the Appellant’s conviction and sentence. The Appeal is therefore dismissed.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 18TH DAY OF SEPTEMBER, 2025.

HON. JULIUS K. NG’ARNG’AR

JUDGE

Judgement delivered in the presence of:

Siele/Susan (Court Assistants)

Koech For the Republic

Appellant present in person

