



**NMM v Republic (Criminal Appeal E044 of 2022)
[2025] KEHC 14700 (KLR) (21 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14700 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E044 OF 2022
KW KIARIE, J
OCTOBER 21, 2025**

BETWEEN

NMM APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in S.O. Case E005 of 2020 of the
Chief Magistrate's Court at Makueni by Hon. J. Otieno– Resident Magistrate)*

JUDGMENT

1. NMM, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on diverse dates between the 25th day of January 2020 and the 9th day of January 2020 in Kathonzweni Sub-County within Makueni County, being a male person, caused his penis to penetrate the vagina of WKN, a female child aged thirteen years, who was, to his knowledge, his daughter.
3. The appellant was sentenced to twenty-five years' imprisonment. He has appealed against both conviction and sentence. He was in person and raised the following grounds of appeal:
 - a. The prosecution's case is replete with monumental inconsistencies and contradictions, which would have attracted an acquittal verdict.
 - b. The trial court erred in law and fact by failing to conduct a holistic scrutiny of the whole evidence on record to base its conviction and sentence.
4. The state opposed the appeal through Mr. Vincent Maina, prosecution counsel, on the following grounds:



- a. The prosecution proved its case to the required standards.
 - b. The sentence meted out was legal.
 - c. The appeal lacks merit.
5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of *Okeno v Republic* [1972] EA 32 to guide my decision-making process.
6. Section 20 (1) of the *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:
- 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.
7. From the provisions of this section, the ingredients for incest are as follows:
- a. The accused must be a male;
 - b. The victim must be a female;
 - c. She must be his daughter, granddaughter, sister, mother, niece, aunt or grandmother;
 - d. He must know the relationship; and
 - e. There must be penetration.
8. The appellant is undoubtedly male. His name suggests as much; had it been otherwise, the trial court could have seen to the contrary.
9. Both the prosecution and the appellant agree that the complainant is the daughter of the appellant.
10. WKN (PW1) stated that on 27 January 2020, her mother was not at home. She had taken the complainant’s grandmother to the hospital, and this was confirmed by her mother (PW4), who also stated that she had stayed with the patient at Makueni Referral Hospital for a week.
11. At around 7 p.m., when the complainant’s siblings were asleep, PW1 stated that the appellant fondled her breasts and then instructed her to take off her clothes. She did so, and he defiled her. She was in pain. Due to the pain, she missed school the following day. She told some neighbours about it, and when she went to school, she informed teacher Maureen. PW3, Phyllis Mwau, the deputy principal of Kathonzweni H.G.M. school, confirmed the report. Her evidence was that on 29 January 2020, at around 7:30 a.m., teacher Maureen and the complainant went to her office, with the complainant crying. She accused the appellant of defiling her.
12. When the complainant was examined, she reported having been abused multiple times since 2019 by the appellant. On examination on 31 January 2020, no spermatozoa were observed, there were no bruises, and both the labia minora and majora appeared normal. The hymen, however, was broken.



13. NMM, the appellant, contended that the complainant was being used by his cousin due to a land dispute. He further said that Phyllis Mwau (PW3) was part of a scheme to force his wife to go back to her former husband.
14. The proviso to section 124 of the *Evidence Act* states:

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.
15. In the instant case, the conduct of the complainant to report to the neighbours and her teacher is a clear indication that she was raising a genuine complaint against her father. The contention that she was being used due to a land dispute and an attempt to make his wife return to her former husband was an afterthought. The prosecution witnesses were not confronted with these allegations during cross-examination.
16. I, therefore, find that the prosecution proved its case against the appellant to the required standards.
17. The proviso to section 20 of the *Sexual Offences Act* states:

“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.”
18. The prosecution did not issue a notice of enhancement of the sentence to the appellant. Although the sentence imposed was illegal, increasing it without notice to the appellant would be prejudicial to him.
19. The conclusion of the above analysis is that the appeal has no merit. The appeal is accordingly dismissed.

DELIVERED AND SIGNED AT MAKUENI, THIS 21ST DAY OF OCTOBER 2025.

KIARIE WAWERU KIARIE

JUDGE

