AM v Republic (Criminal Appeal E047 of 2024)
[2025] KEHC 15828 (KLR) (7 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15828 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E047 OF 2024

S MBUNGI, J

OCTOBER 7, 2025

BETWEEN

AM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Background

1. The appellant, AM was charged with 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 the 2nd day of June, 2023, at [Particulars Withheld], Khalaba ward in Matungu Sub-County within Kakamega County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of I.N.M., who, to his knowledge, was his biological daughter.

3. The appellant denied the charges, and after a hearing in which the prosecution called four witnesses, he was convicted of the said offence and was sentenced to fifteen (15) years imprisonment.

4. The appellant was aggrieved by the conviction and sentence lodged this appeal in which he set out the following grounds of appeal;

    a. That the learned trial magistrate erred in both law and fact by relying on the evidence as a whole without proper analysis and evaluation.

    b. That the learned trial magistrate erred in both law and fact by delving into a realm of belief that the crime was committed without plausible considerations that it was not to the required standard.

c. That, the learned trial magistrate erred in both law and fact by resting the burden of proof on the appellant contrary to Section 107(1) of the *Evidence Act*.

d. That, the learned trial magistrate erred in both law and fact by failing to medically and forensically prove the contents of the P3 form, and the absence of a DNA report and results.

e. That the learned trial magistrate erred in both law and fact by failing to consider the mitigating and aggravating factors that were cogent and sound

f. That, the appellant wishes to be present during the hearing of this criminal appeal and be supplied with the certified trial court record and serial number to enable him to advance further fortified grounds for consideration.

5. The court directed that the appeal be canvassed by way of written submissions.

6. At the time of writing this judgment, the appellant was the only party that had filed their submissions.

Submissions

7. In their submissions dated 14th July, 2025, the appellant addressed his six grounds of appeal as follows;

a. That, the learned trial magistrate erred in law and in fact by inevitably failing to medically and forensically prove the content of the P3 form, and the absence of the (DNA) report and results.

8. He relied on the case of Kimatu Mbuvi T/A Kimatu Mbuvi & Bros Vs Augustine Munyao Kioko (2007) 1 EA 139 where the court of appeal stated that" Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified... A court is perfectly entitled to reject the opinion if, upon consideration alongside all other available evidence, there is a proper and cogent basis for doing so.

9. He took the issue with the evidence of PW3, a clinical officer at Matungu, who examined PW1 and filled the treatment notes and the PRC form, which he claims observed that the hymen was missing and concluded that there was penetration of the vagina using a blunt object, which could be a penis, basing the same on her observation.

10. He stated that upon cross-examination, the witness concluded that the complainant was defiled by her father.

11. He cited the case of P.K.W VS R. (2012) Eklr and the Canadian case of Queen Vs Manuel Vincent Quintanila (1999) AB QB 769. Where the court observed as follows, "Is the hymen only ruptured by sexual intercourse? Hymen, also known as the vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina through which most female infants are born. In most cases of sexual offences, we have dealt with courts that tend to assume that the absence of a hymen in the vagina of a girl child alleged to have been defiled is proof of the charge.

> That is, however erroneous an assumption, scientific and medical evidence has proved that some girls are not born with a hymen. Those who are, there are times when the hymen is broken by factors other than sexual intercourse. Those include insertion into the vagina of any object capable of tearing it, like the use of tampons, masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activities

like horse riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen."

12. According to the appellant, PW3's conclusion that PW1 was defiled based on the fact that she had lost her hymen was contrary to the above position and opined that the evidence of the clinical officer was not admissible.

> That, the learned trial magistrate erred in law and in fact by relying on the evidence as a whole without proper analysis and evaluation.

13. The appellant submitted that the prosecution failed to corroborate and prove its evidence beyond a reasonable doubt and cited the case of Miller vs. Minister of Pension (1947)

14. He said the evidence of PW1 and PW2 were contradictory for PW1 claimed that she was sweeping the appellant's bedroom when the appellant held her hand and did "tabia mbaya." To her while PW2 evidence was that she was informed by PW1 that she was washing utensils when her father called her. When she went, her father held her and had sexual intercourse with her. And the prosecution failed to call the complainant's brother, Jose, whom the complainant ran to after the alleged incident as a witness.

15. He faulted PW1, voir dire examination for she gave her name as Irene Bulongo, and when she was sworn, stated that her name was Irene Wamalwa Wafula. Further the clinical officer at Matungu who examined PW1 states PW1's name as Irine Nafula in the treatment notes.

16. According to the appellant, PW1 age was not proved for she said she was 12 years old and the clinical officer who examined her estimated her age to be 15 years.

17. He challenge the accuracy of her age as no formal age assessment was conducted and no document verifying the age was presented in court.

18. He further submitted that the complainant was motivated by a grudge against him

. THAT, the learned trial magistrate erred in law and in fact by resting the burden of proof on the appellant c/sec. 107(1) of The *Evidence Act*.

19. On this ground he reffered to the court to the case of Pius Arap Maina Vs Rep. (2013) Eklr, the court of appeal made it clear that, "The prosecution must prove criminal charges beyond a reasonable doubt and, as a contrary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused."

20. He held that the prosecution had failed to prove the charges against him beyond a reasonable doubt.

Prosecution's Case

21. The prosecution's case was supported by four (4) witnesses.

22. PW1 Irene Wanalwa Wafula testified that she is 12 years old, in Class 5, she identified the accused, AM as her father.

23. She stated that on 2nd June 2023, while sweeping the accused's bedroom, he closed the door, held her hand, removed her pants, and lay her on his bed. He then inserted his genital organ into hers after he finished she ran out and informed Jose. The matter was reported to the Village Elder and later she went to the hospital and Harambee Police Station. She was examined and issued with treatment notes from Khalaba Health Centre (PMFI 1 and PMFI 2).

24. On cross-examination, PW1 stated that she had been residing with her mother but came to stay with the accused so that she can go to school. She affirmed that no one told her what to say and that her testimony reflected what happened.

25. PW2 Mathayo Macode stated that he is a Village Elder and farmer from Musamba Location.

26. He testified that he had known the accused since birth and confirmed that the Complainant is the accused's daughter. On 2nd June 2023, he found the Complainant crying and was informed of an alleged incident involving and her father. He took her to Khalaba Hospital, she was referred to Kabula, and later to Matungu Hospital, the matter was reported to the Assistant Chief, and Musamba Police Post.

27. On cross-examination, PW2 clarified that he was not present during the alleged incident and did not witness it firsthand. He confirmed that his actions were based solely on what the Complainant told him. He accompanied the Complainant and another child, Jose, to the hospital and later to the police station.

28. PW3 Dorah Aurah, a Clinical Officer at Matungu, testified that she examined the Complainant, Irene Nafula, on 6th June 2023. She stated that the patient reported having been defiled.

29. Upon examination, she observed that the hymen was missing and concluded that there had been vaginal penetration using a blunt object, possibly a penis.

30. She filled out treatment notes, a P3 Form, and a Post Rape Care (PRC) Form, all of which reflected the same findings. She produced the treatment notes as P Exhibit 1 and 2, the P3 Form as P Exhibit 3, and the PRC Form as P Exhibit 4.

31. On cross-examination, PW3 testified that the Complainant came accompanied by an older woman and disclosed that the perpetrator was her father.

32. She stated that her conclusion was based on the patient's history, clinical observation, and laboratory tests. She acknowledged that the accused was not examined and that she could not confirm whether he committed the offence, only that her findings supported the account given by the patient.

33. PW4 Corporal John Chebii, number 84041, testified that he is stationed at Harambee Police Station and was the Investigating Officer in this case.

34. On 6th June 2023 at 2:30 p.m., he was instructed by the OCS to investigate a matter reported by one Irene. The report had already been entered in the Occurrence Book. He recorded the statement of the Complainant, who alleged that on 2nd June 2023 at around 9:00 a.m., while sweeping the house, her father, who is the accused, pulled her to the bed and raped her.

The Defence Case

35. The accused testified that he resides at Musamba and works as a farmer and casual labourer. He stated that upon returning home from seeking work, he found his door open and food missing. Neighbours informed him that his children had been seen in the area, and upon further inquiry, he was told that PW2 was involved.

36. He claimed the children took the food to his wife, and when he confronted her, she became angry and allegedly conspired to frame him with the present charges. He denied committing the offence. PW2 did not finish the alleged incident.

37. On cross-examination, he maintained that PW2 collaborated with the Complainant to accuse him falsely. He denied having any grudge against the Complainant.

Analysis and determination

38. Being the first appellate court, the court should re-evaluate all the evidence on record and draw its own conclusions, whilst bearing in mind the fact that it did not have the benefit of observing the witnesses as they testified.

39. The Court of Appeal's decision in the case of Okeno vs. Republic (1972) EA 32 has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."

40. The appellant submitted that while he was charged under section 20(1) of the *Sexual Offences Act* (SOA), the evidence did fail to medically prove that he committed the offence and that the prosecution's case was marred with contradictions, fabrications, discrepancies, inconsistencies, and invariances.

41. According to the appellant, none of the prosecution witnesses was able to prove that he actually committed the alleged offence, and they based their allegation only on the testimony of PW1.

42. The respondent did not file any submissions with regard to the appeal.

Issues for Determination

43. Based on the grounds of appeal and submissions, the issues for determination are:

    a. Whether the trial court erred in relying on the prosecution's evidence without proper analysis and evaluation.

    b. Whether the trial court convicted the Appellant without evidence meeting the standard of proof beyond a reasonable doubt.

    c. Whether the trial court shifted the burden of proof to the Appellant contrary to Section 107(1) of the *Evidence Act*.

    d. Whether the trial court erred in relying on the P3 form without forensic proof and in the absence of a DNA report.

    e. Whether the trial court failed to consider mitigating and aggravating factors in sentencing.

44. Section 20(1) of the *Sexual Offences Act* No. 3 of 2006 defines incest as knowingly having sexual intercourse with a person within the prohibited degrees of relationship, such as a parent and child. The penalty for incest with a minor is life imprisonment, subject to judicial discretion for a lesser term.

45. On the first ground raised in the appeal, the appellant held that the trial court relied on the evidence without a proper analysis of the evidence on record.

46. The Appellant submits that the trial court failed to properly analyse the evidence, citing inconsistencies in PW1's testimony where she claimed that she was sweeping, then later claimed that she was washing the utensils. He further faulted the prosecution for their failure to call the witness, Jose, whom the complainant claimed she ran to report after the incident occurred.

47. He relied on the case of Miller v. Minister of Pensions [1947] 2 All ER 372, which defines proof beyond a reasonable doubt as evidence carrying a high degree of probability.

48. The prosecution's case rested on PW1's testimony, corroborated by PW3's medical findings and PW2's confirmation of the familial relationship. PW1 testified that the Appellant penetrated her vagina when she went to sweep his bedroom.

49. Her account was consistent on cross-examination, and she denied being coached. The discrepancy between PW1's testimony (sweeping) and PW2's account (PW1 washing utensils) is minor and does not undermine the core fact of penetration, as it pertains to the activity preceding the incident, not the offence itself.

50. The way to treat contradictions in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR, where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6, where it was held that "with regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions, unless satisfactorily explained, will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

51. The failure to call Jose, to whom PW1 first reported, is not fatal. In Keter v. Republic [2007] 1 EA 135, the Court of Appeal held that the prosecution is not obliged to call all witnesses unless their absence prejudices the case. Jose's testimony would have been hearsay regarding the incident itself, as he was not a witness to it. PW2's actions in reporting the matter corroborate PW1's prompt complaint.

52. The Appellant's submission on PW1's name discrepancy (Irene Bulong at voir dire vs. Irene Wamalwa Wafula when sworn, and Irene Nafula in PW3's records) does not undermine her identity, as the trial court, having conducted a voir dire, was satisfied she was the complainant. Such variations are common in naming conventions and do not negate her testimony's reliability.

53. It is my finding that the trial court properly analysed the evidence, and the minor discrepancies raised do not affect the prosecution's case. This ground lacks merit.

54. The second ground raised by the appellant was that he was convicted without the prosecution having met the required standard of proof.

55. The Appellant argues that the trial court convicted him based on belief rather than evidence meeting the standard of proof beyond a reasonable doubt, as per Miller v. Minister of Pensions. The elements of incest under Section 20(1) are: (i) penetration, (ii) identity of the perpetrator, and (iii) a prohibited familial relationship.

56. Penetration was proven by PW1's detailed testimony of penile penetration, corroborated by PW3's medical findings of a missing hymen and signs of penetration.

57. His Identity was established by PW1's unequivocal identification of the Appellant as her father. The relationship was confirmed by PW2 and the Appellant's own testimony. In John Mutua Munyoki vs Republic (2017) eKLR, it was held consistent victim testimony, supported by medical evidence, meets the threshold of proof beyond a reasonable doubt. No material contradictions or evidence creating doubt were presented.

58. It is this court's finding that the trial court applied the correct standard of proof, and the evidence met the required threshold. This ground is unmeritorious.

59. The appellant stated that the trial court shifted the burden of proof to him and cited Pius Arap Maina v. Republic [2013] eKLR. Arguing that the trial court shifted the burden of proof to him, contrary to Section 107(1) of the *Evidence Act*.

60. I find that the prosecution proved the elements of incest through PW1's testimony, PW3's medical evidence, and PW2's corroboration. The Appellant's defence of a conspiracy by his wife and PW2 was unsupported by evidence.

61. The trial court, as implied, rejected this defence as it did not raise a reasonable doubt. In Okeno vs Republic (1972) EA 32, it was held the accused is not required to prove innocence, and there is no indication that the trial court imposed such a burden. The court evaluated the defence and found it insufficient against the prosecution's case.

62. The Appellant asserts that PW1, the complainant, was a deceitful witness driven by a personal vendetta, as argued in his submissions, citing Pius Arap Maina v. Republic [2013] eKLR.

63. This contention is unsupported by any evidence in the record and remains entirely speculative. The complainant's testimony was consistent throughout the trial, and her prompt reporting of the incident to Jose and subsequently to PW2, the Village Elder, undermines the allegation of a malicious motive.

64. I find that the Appellant's claim that PW1 was motivated by a grudge lacks substantiation and is contradicted by her coherent and timely account of the incident. This ground is without merit.

65. The Appellant further submitted that PW3's conclusion of defilement based on a missing hymen was inadmissible citing P.KW VS Republic (2012) eKLR, where it was held that a missing hymen is not conclusive proof of sexual intercourse, as it may be absent due to natural causes or other factors.

66. PW3, a qualified clinical officer, testified that the P3 form (P Exhibit 3) and PRC form (P Exhibit 4) documented a missing hymen and signs of penetration, based on clinical observation, patient history, and laboratory tests. Her qualifications were unchallenged, and her findings were consistent with PW1's account.

67. In John Mutua Munyoki v. Republic [2017] eKLR, the court held that medical evidence is not mandatory, and credible victim testimony suffices under Section 124 of the *Evidence Act*. PW1's testimony was credible and corroborated by PW3's findings, satisfying the element of penetration.

68. The Appellant's reliance on P.K.W VS R. (2012) Eklr and the Canadian case of Queen Vs Manuel Vincent Quintanilla (1999) AB QB 769 is noted, but these cases do not preclude reliance on a missing hymen as corroborative evidence when supported by the victim's testimony. PW3's conclusion was based not solely on the missing hymen but also on the complainant's history and clinical signs.

69. On the issue of failling to do DNA testing and in William Okelo v. Republic [2016] eKLR, the Court of Appeal held that its absence does not negate a conviction when other evidence is sufficient.

70. The Appellant's submission on PW1's age, 12 years per PW1 and 15 years per PW3's estimation and the lack of a birth certificate or formal age assessment is noted. However, the trial court, having conducted a voir dire, accepted PW1 as a minor. In Francis Omuroni v. Republic [2014] eKLR, the court held that age can be established by credible testimony or medical estimation if documentary evidence is unavailable. The discrepancy between 12 and 15 years does not alter the offence, as both ages fall within the minor category under Section 20(1).

71. It is my finding that the contents of the P3 form were adequately explained through PW3's testimony, and the absence of DNA evidence or a formal age assessment does not invalidate the conviction. This ground lacks merit.

72. Finally, the appellant argues that the trial court failed to consider mitigating and aggravating factors. Section 20(1) of the *Sexual Offences Act* prescribes life imprisonment for incest with a minor but allows judicial discretion for a lesser term. In my view, the 15-year sentence reflects leniency on the part of the trial court that exercised its discretion.

73. The Aggravating factors include PW1's young age of 12 or 15 years and the Appellant's position of trust as her father.

74. His mitigating factors, such as the Appellant's occupation as a farmer and casual labourer, were likely considered, though not explicitly detailed.

75. In Wanyonyi v. Republic [2017] eKLR, the Court of Appeal held that sentencing is within the trial court's discretion, and appellate courts intervene only if the sentence is manifestly excessive or based on wrong principles. The 15-year sentence is proportionate given the offence's gravity.

76. I find that the trial court exercised its discretion appropriately in sentencing. This ground is not sustainable.

77. The appellant further raised their concern about the timeline that he was arrested and charged before his sentencing. The Appellant submits that PW4's testimony that he was arrested on 8th June 2023, which contradicts PW2's claim that the Appellant was arrested the day after the incident, which was on 3rd June 2023.

78. PW2 testified that he reported the matter to the police on 2nd June 2023, and the Assistant Chief found the Appellant already arrested the following day. PW4, however, stated the arrest occurred on 8th June 2023, aligning with the report on 6th June 2023. This discrepancy in dates is minor and does not affect the substance of the offence, as the core evidence and therefore PW1's testimony and PW3's findings remain unchallenged.

79. In Erick Onyango v. Republic [2014] eKLR, it was held that minor inconsistencies in procedural timelines do not vitiate a conviction unless they prejudice the accused's defence.

80. Hence, the discrepancy in arrest dates is immaterial and does not undermine the prosecution's case.

81. Having re-evaluated the evidence as required by Okeno v. Republic, this Court finds that the prosecution proved the elements of incest under Section 20(1) of the *Sexual Offences Act* beyond a reasonable doubt:

    a. Penetration was established by PW1's consistent testimony, corroborated by PW3's medical findings of a missing hymen and signs of penetration.

    b. Identity was confirmed by PW1's unequivocal identification of the Appellant as her father.

c. Familial relationship was proven by PW2 and the Appellant's own admission.

82. The trial court's reliance on PW1's testimony was lawful under Section 124 of the *Evidence Act*, as it was credible and corroborated by medical evidence. The Appellant's defence of a conspiracy was speculative and unsupported. Minor discrepancies such as sweeping vs. washing utensils, confusion of PW1's names and the differences in the arrest dates do not affect the core evidence.

83. The 15-year sentence is proportionate and within the trial court's discretion.

84. Accordingly, this Court makes the following orders:

i. The appeal is dismissed.

ii. The conviction and sentence of fifteen (15) years' imprisonment imposed by the Senior Principal Magistrate's Court at Mumias are upheld.

85. Right of Appeal 14 days explained.

86. File closed.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 7TH DAY OF OCTOBER, 2025.

S.N. MBUNGI

JUDGE

Appellant present online.

Osoro for DPP present.