



**RJK v Republic (Criminal Appeal E048 of 2024)
[2025] KEHC 15238 (KLR) (14 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E048 OF 2024
S MBUNGI, J
OCTOBER 14, 2025**

BETWEEN

RJK APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the Conviction and Sentence in SPM's Mumias Sexual offences case No. 3 of 2006 Delivered on 13th May, 2024 by Hon G. P Omondi(PM))

JUDGMENT

1. The appellant, Rostron Sasi Kweyu alias Jasi, 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 diverse dates between 2019 and 30th January, 2023, at Camcon Estate, Mumias Township, Nabongo Location in Mumias West Sub-County within Kakamega County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of FT, a child aged 15 years, who, to his knowledge, was his biological daughter.
3. The appellant denied the charges, and after a hearing in which the prosecution called three 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 magistrate grossly erred in both law and facts by convicting him on an incurably defective charge sheet contrary to section 134 and 214(2) of the CPC.
 - b. That the learned trial magistrate erred in law and facts by presiding over a trial that violated my right to a fair trial under Article 50(2)(c) of *the Constitution*.



- c. That the learned trial magistrate erred in both law and fact by sentencing me to 15 years' imprisonment without exercising the judicial discretionary powers in sentencing.
 - d. That the learned trial magistrate grossly erred in both law and facts by finding penetration proved without noting that the absence of the hymen alone was not conclusive proof of penetration.
 - e. That the learned trial magistrate erred in law and fact by failing to interrogate the medical evidence tendered.
 - f. That the learned trial magistrate wrongfully admitted the medical evidence without appreciating the period the offence took before it was reported to the police.
 - g. That the learned trial magistrate erred in both law and fact by imposing on me a harsh, excessive sentence and failed to consider that this was a systematic, planned strategy to implicate me in this case.
 - h. That more grounds will be adduced during the hearing and after receiving the proceedings of the trial court.
5. The appellant later filed three amended grounds of appeal on 3rd July 2025, being;
- a. That, the trial court erred in law and in fact in breaching the appellant's constitutional right envisaged in Article 25(c) as read with 50(2) (g) (h), hence an unfair trial that occasioned a substantial injustice.
 - b. That the trial court erred in law and in fact in not making a finding that the appellant was unreasonably delayed in a police cell for more than 24 hours (7 days) without an explanation, contravening his constitutional rights envisaged in article 49(f) (i) COK 2010.
 - c. That, the trial court erred in law and in fact in denying the appellant his absolute right to at least the prescribed sentence entitled to him by the law pursuant to article 25(c), 50(2) (p) COK 2010 and section provision 333(2) CPC.
6. The court directed that the appeal be canvassed by way of a written submission. At the time of writing the judgment, only the appellant had filed their submissions.

Submissions

7. In his written submission dated 3rd July 2025, the appellant relied on the 3 grounds in his amended grounds.
8. On the first ground that the trial court breached his constitutional rights under Article 25(c) as read with 50(2) (g) (h), where he was subjected to an unfair trial, he held that he had a right to be represented by an advocate and further to be informed of his rights promptly.
9. His second ground was that he was unreasonably delayed in a police cell for more than 24 hours, therefore contravening his constitutional rights under Article 49 (f) of *the Constitution*.
10. He relied on the case of Republic vs. Amos Karunga Karatu (2008) Eklr, where the court stated that, "A prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore



a nullity. It matters not the nature of a violation. It matters not that the accused was brought to court on a day after the expiry of the statutory period required to arraign him in

court. Finally, it matters not that the evidence available against him is weighty and overwhelming as long as that delay I not explained to the satisfaction of the court, the prosecution remains a nullity."

11. He equally quoted the Court of Appeal case of Paul Mwangi Murungu v. Vs Republic.
12. The appellant held that he was arrested on 01/02/2023 and arraigned in court on 07/02/2023 with no explanation as to the delay, and hence should be acquitted.
13. He further submitted that the trial court erred in law in denying him the absolute right to a prescribed sentence entitled to him in law under article 25 (c)50(2) (p) COK 2010 and section provision 333(2) CPC.
14. He claimed that he was arrested on 01/02/2023 and sentenced on 13/05/2024 and that his sentence was said to run from the date of sentence rather than from the date of arrest. He was in custody during the trial. Hence, his sentence ought to run from the date of arrest.

Evidence In Brief

Prosecution's Case

15. The prosecution's case was supported by three (3) witnesses.
16. PW1 Faith Teresa testified that she is in Form 1 at St. Christopher Secondary School, Nyapora, and identified the accused, Rostron Sasi, as her father.
17. She stated that while residing with the accused in 2019, he began sexually abusing her at night. He would remove her clothes, touch her breasts and vagina, and have unprotected sex with her while her younger siblings were relocated to sleep elsewhere. He warned her not to tell anyone and would quarrel with her if she resisted.
18. In January 2023, the accused arrived with police officers. One officer questioned her privately, and she disclosed that the accused had had sex with her several times. She later went to Bonwani Police Station, then to the Children Department, and was taken to Mumias Level 4 Hospital for examination. Treatment notes (PMFI 2a), laboratory reports (PMFI 2b), and a P3 Form (PMFI 3) were issued.
19. On cross-examination, PW1 affirmed that she was not coached and that her testimony was truthful. She confirmed that the accused had instructed her not to tell anyone.
20. PW2 Boniface Olaka Mutobera, a Senior Registered Clinical Officer with 12 years of experience and in charge at Mumias Level 4 Hospital, testified that he examined Teresa Faith on 1st February 2023.
21. He stated that Teresa, aged 14, reported being defiled by her biological father since she was 12 years old. The accused allegedly threatened her with death and would enter her bedroom at night while her siblings were asleep.
22. Upon examination, PW2 found that her hymen was broken (not recently), and she had whitish vaginal discharge. Laboratory tests showed negative results for VDRL and pregnancy, hemoglobin at 11.8 g/dl, and signs of urinary tract infection.



23. Medication was prescribed for the infection and pregnancy prevention. He filled the P3 Form on 2nd February 2023 and concluded that she had been defiled. Relevant exhibits included treatment notes (P Exhibit 2a), laboratory report (P Exhibit 3b), and P3 Form (P Exhibit 3).
24. On cross-examination, PW2 confirmed the hymen was broken and noted recent friction based on epithelial cells found in the lab. He clarified that he did not examine the accused and relied on the victim's history and clinical findings.
25. PW3 No. 101817 P.C. Linet Balaka, stationed at Mumias Police Station in the Gender-Based Section, testified that on 1st February 2023, she received a referral from the Children Department involving a child and her aunt.
26. She stated that the victim had been residing with the accused, her biological father, since the mother had left. The victim appeared fearful and disclosed that she had been having sexual relations with the accused since 2019, often during the day, and had kept silent due to threats.
27. The last incident occurred on 30th January 2023 at Cumcon. After intervention by the Assistant Chief and Village Elder, the matter was reported to the Children Officer and then to the police. PW3 booked the report and escorted the victim to Mumias Level 4 Hospital for tests, which confirmed repeated sexual activity.
28. The accused was arrested the following day. The victim's birth certificate was presented as P Exhibit 1. PW3 confirmed the accused as the victim's father.
29. On cross-examination, PW3 stated that the victim consistently repeated her account in multiple statements. She clarified that the mother was working in Nairobi and had not attempted to take the child. PW3 affirmed she held no personal grudge against the accused

The Defense Case

30. DW1 Roston Jasi Kweyu testified that he resides at Camcon and works with a security firm. He stated that on 2nd February 2023, while seeking school admission for his daughter Faith Tereza at St. Elizabeth, he received a call to report to the AP Camp in Mumias.
31. Upon arrival, he was escorted inside by a police officer and met his in-law, Everline, who identified him to the officers. He was placed in a cell and informed that he had assaulted his wife, Emeldah, whom he had separated from in 2013. He was later taken to the police station, where he met both Emeldah and Everline. He retrieved Faith's birth certificate from his house and was subsequently charged in court on 7th February 2023.
32. DW1 claimed that the charges were fabricated to allow his estranged wife to take custody of the child. He maintained that he had been living with Faith without her biological mother and denied any wrongdoing.
33. On cross-examination, DW1 acknowledged that Faith Tereza is his daughter and confirmed that he was residing with her. He stated that the assault allegation was made on 2nd February 2022 and insisted that there were no disputes while they lived together. He alleged that the court was misled by coached testimony.



Analysis And Determination

34. 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.
35. 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.”
36. The appellant contends that he was arrested on 1st February 2023 and arraigned in court on 7th February 2023, a seven-day delay exceeding the 24-hour limit under Article 49(1)(f), without explanation.
37. He relies on *Republic v Amos Karunga Karatu* [2008] eKLR and *Court of Appeal in Paul Mwangi Murungu v Republic* [2008] eKLR to argue that this renders the prosecution a nullity.
38. Article 49(1)(f) mandates that an arrested person be brought before a court within 24 hours, except where the period falls outside court hours or is extended by a court.
39. In *Albanus Mwasia Mutua v Republic* [2006] eKLR, the Court of Appeal held that unexplained detention beyond 24 hours violates constitutional rights and may nullify proceedings if it prejudices the accused.
40. In *Republic v Amos Karunga Karatu* [2008] eKLR, the High Court ruled that a prosecution mounted in breach of constitutional timelines is a nullity, regardless of the evidence's strength, unless the delay is justified.
41. The trial record confirms the appellant's arrest on 1st February 2023 and arraignment on 7th February 2023, a six-day delay that excludes the date that the accused was brought in court.
42. The prosecution did not explain this delay, such as logistical issues, public holidays, or court unavailability, as required under Article 49(1)(f).
43. The delay occurred in a case involving a minor, where prompt investigation, which in this case was the medical examination, collection of the witness statements, which was critical in determining the case outcome.
44. PW3 testified that the victim was examined on 1st February 2023, and the appellant was arrested the same day, suggesting no immediate investigative barriers to arraignment.
45. The appellant was in custody during this period, and the delay potentially prejudiced his ability to prepare a defense, as he had no access to legal counsel or opportunity to challenge the charges promptly. However, the trial record does not show direct prejudice, which as held in *Albanus Mwasia Mutua v Republic* [2006] eKLR requires for nullification of the trial.



46. While in the case of *Republic v Amos Karunga Karatu* [2008] eKLR, declares such breaches a nullity, recent jurisprudence, such as *Julius Kamau Mbugua v Republic* [2010] eKLR, suggests that courts may uphold convictions if the delay did not materially affect the trial's fairness, particularly where the evidence is overwhelming.
47. Article 50(2) guarantees every accused person the right to a fair trial, which is non-derogable under Article 25(c). Among the key rights is the right to be informed promptly of the charge (Art. 50(2)(b)), the right to legal representation (Art. 50(2)(g) and (h)), and the right to trial without unreasonable delay (Art. 50(2)(e)).
48. In *David Njoroge Macharia v Republic* [2011] eKLR, the Court of Appeal emphasized that legal representation, particularly in serious offenses, is integral to safeguarding the fairness of a trial.
49. It is the role of the trial court to inform the Accused person of his right to legal representation(See *legal aid Act*) failure makes the entire trial annulity see the case of *Albanus Mwasia Mutua v Republic* [2006] eKLR.
50. The second ground raised by the appellant was that the court in its sentencing failed to consider the time he was in custody before his sentencing under Article 50(2)(p) and Section 333(2), CPC.
51. The appellant submits that the trial court erred by ordering the sentence to run from the date of sentencing, which was 13th May 2024, rather than the date of arrest, which was 1st February 2023, despite his being in custody during the trial, contravening Article 50(2)(p) and Section 333(2) of the CPC.
52. Section 333(2) of the CPC mandates that a sentence of imprisonment takes effect from the date the accused was taken into custody, unless the court orders otherwise with reasons. In *Ahamad Abolfathi Mohammed v Republic* [2018] eKLR, the Court of Appeal held that failure to backdate a sentence to the date of arrest, when the accused was in custody, is an error requiring correction.
53. Article 50(2)(p) entitles an accused to the least severe punishment prescribed at the time of the offence, which includes proper computation of custodial time.
54. Internationally, *R v Richards* [1980] 2 Cr App R (S) 43 (UK) supports crediting pre-trial detention toward sentences, influencing Kenya's approach.
55. The appellant was arrested on 1st February 2023 and remained in custody until sentencing on 13th May 2024, a period of approximately 15 months. The trial court's judgment does not indicate that the sentence was backdated or provide reasons for not doing so, as required by Section 333(2).
56. The failure to credit the custodial period violates Section 333(2) and Article 50(2)(p), as it effectively increases the appellant's punishment beyond the 15-year sentence imposed. This is a clear error, as per the case of *Ahamad Abolfathi Mohammed*.
57. The minimum sentence for incest with a child under 18 is ten years, with life imprisonment possible as per Section 20(1). The 15-year sentence was within the legal range, but the failure to backdate undermines fairness.
58. In conclusion, I hold that the trial court erred by failing to backdate the sentence to 1st February 2023, contravening Section 333(2) of the CPC and Article 50(2)(p). This ground succeeds, necessitating a correction of the sentence start date.
59. It is my finding that the appeal partly succeeds and that the trial court committed procedural errors by:



- a. Failing to inform the appellant of his right to legal representation under Article 50(2)(g) and (h), breaching the non-derogable right to a fair trial under Article 25(c), which likely caused substantial injustice in a serious offence
 - b. Failing to backdate the sentence to the date of arrest (1st February 2023), contrary to Section 333(2) of the CPC and Article 50(2)(p) (Ahamad Abolfathi Mohammed).
60. The procedural irregularities, particularly the failure to inform appellant right to legal representation, warrant a retrial to ensure fairness, given the seriousness of the offence and sentence.

Orders:

- a) The conviction and sentence of the trial court dated 13th May 2024 are set aside due to breaches of Article 25(c) and Article 50(2)(g) and (h).
- b) The matter is remitted to the Mumias Chief Magistrate's Court for a retrial before a different magistrate, to be conducted expeditiously.
- d) The trial court shall ensure the appellant is informed of his right to legal representation, and legal aid shall be provided if substantial injustice would otherwise result as required by Article 50(2)(h)
- e) Right of Appeal 14 days.
- f) Mention 27.10.2025 before the Chief Magistrates Court for hearing or reallocation to another court.
- g) File closed.

DATED SIGNED, and DELIVERED in open court at KAKAMEGA THIS 14TH OF OCTOBER, 2025.

S.N. MBUNGI

JUDGE

In The Presence Of;

CA: Angonga

Ms Osoro for DPP

Accused present online.

