



**WO alias B v Republic (Criminal Appeal E023 of 2023)
[2025] KEHC 15130 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E023 OF 2023
JK NG'ARNG'AR, J
OCTOBER 28, 2025**

BETWEEN

WO ALIAS B APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Kisii (C.A. Ogweni, SRM) delivered on 24th May 2023 in Criminal Case (SO) No. E082 of 2022)

JUDGMENT

1. The appellant WO alias B was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. The particulars of the offence were that on 27th November 2022 at Matunwa location Kisii central sub-county within Kisii County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of RN, a child aged 4 years, who was to his knowledge his niece.
2. The appellant also faced an alternative count 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 the same date and place, the appellant intentionally and unlawfully touched the vagina of RN a child aged 4 years with his penis.
3. The appellant was arraigned before the trial court. He pleaded not guilty to both counts. After a full trial, the appellant was convicted on the main charge of incest. He was sentenced to life imprisonment. It is those findings that have implored the present appeal.
4. The appellant filed his undated petition of appeal. He raised 8 grounds disputing the findings of the trial court. In summary, he argued that the prosecution failed to discharge its burden of proof to the required standard. He lamented that he was convicted in the absence of the complainant's testimony. In his view, without her testimony, the offence had not been proved beyond reasonable doubt. In any event, the evidence of the prosecution was marred with contradictions, inconsistencies



- and insufficiencies. He pointed out that his constitutional right to legal representation was violated as he was not afforded counsel. Lastly, he complained that the sentence meted out was harsh and excessive.
5. For those reasons, the appellant prayed that his appeal be allowed, the conviction be quashed, the sentence be set aside and that he be set at liberty. Alternatively, the appellant prayed for the conviction and sentence to be reviewed.
 6. The appeal was disposed of by way of written submissions. The appellant filed his written submissions dated 12th August 2025. He submitted that from the record, PW1 was not a truthful witness. Furthermore, the trial court failed to provide the appellant with a lawyer thereby violating Article 50 (2) (n) of *the Constitution*. That given the nature and seriousness of the offence, it was incumbent on the trial court to do so.
 7. The appellant continued that the absence of the complainant's evidence proved fatal the evidence presented by the prosecution. In his view, without her evidence, the offence of incest was not proved beyond reasonable doubt. He challenged the evidence of PW1, PW2 and PW4 suggesting that the complainant was simply found with her but not committing the offence. Thus, he concluded that PW1 framed him because of a land dispute.
 8. Turning to the manner of investigations, it was the appellant's considered view that they were shoddy. That PW5, in his testimony, revealed the lack of seriousness in unearthing the truth of the matter. For instance, he failed to avail the complainant to adduce her evidence at trial. He pointed out that though the offence was said to have occurred on 27th November 2022, PW3 in her report, wrote that the offence occurred on 2nd November 2022. In his penultimate address, the appellant submitted that the trial court unfairly took advantage of his lack of representation and convicted him. For that reason, the conviction ought to be set aside. Lastly, on sentence, he prayed that the same be reviewed.
 9. The respondent opposed the appeal. It filed written submissions dated 1st September 2025. Learned Prosecution Counsel Mr. Henry Koima submitted that all the ingredients to a charge of incest namely, the age of the complainant, the aspect of penetration, the identity of the offender and existence of the relationship between the appellant and the complainant, were all proved beyond reasonable doubt. On whether the appellant's right to legal representation was infringed upon, the respondent submitted that it was not demonstrated that substantial injustice would have occurred absent legal representation. In any event, the appellant did not raise this issue at trial. Finally, on sentence, it was submitted that the sentence meted out was lawful. Prosecution Counsel prayed that the appeal be dismissed.
 10. I have considered the submissions, examined the record of appeal and analyzed the law. As a first appellate court, I am called upon to re-examine, re-consider and re-analyze the evidence tendered afresh while bearing in mind that I do not have the advantage of hearing or seeing the witnesses testifying and should make due allowances in that regard. [See *Erick Onyango Ondeng' vs. Republic* [2014] KECA 523 (KLR)].
 11. The evidence before the trial court is as follows: PW1, the mother of the complainant and PW2 DM testified that her daughter was 4 years old. She was born on 18th December 2018. Her birth certificate was produced in evidence. The appellant is her elder brother and the complainant's uncle. On 27th November 2022 at 3:00 p.m., PW1's evidence was that she was at the shopping centre having left her two children at home with their father. Later, PW2 came running to her and told her that the appellant had defiled the complainant in his house while covering her mouth.
 12. PW1 rushed to the house. He lived near her father's house. She found the appellant in bed next to the complainant. The door was open and so was his trouser zipper. The complainant was wearing a trouser. The appellant denied the allegations when PW1 inquired from him.



13. PW1 rushed the complainant to a dispensary where they were referred to Kisii Teaching and Referral Hospital. When examined, the PW1 noticed that the complainant was in pain and her genitalia was swollen. At this juncture, the court noted that PW1 was emotional. The complainant was treated and discharged. Later, the appellant was arrested by the clan elder and surrendered to the police at Kiogoro police station. The complainant recalled that her children had a habit of going to his house prior to the incident.
14. Eight-year-old PW2 confirmed that the complainant was his younger sister and PW1 was his mother. His evidence was that on 27th November 2022, he was at his uncle's house; the appellant herein. He then saw the appellant do "tabia mbaya" to the complainant inside his house. He saw the appellant committing the offence through the window when he was outside. PW2 rushed and informed PW1 who was at the shopping centre. He confirmed that PW1 returned and found the appellant together with the complainant. Later PW1 took the complainant to the hospital.
15. PW3 Daniel Nyameino, a senior clinical officer at Kisii Teaching and Referral Hospital testified that he examined the complainant on 28th November 2022. Upon examination, he discovered that the complainant had lacerations and swelling on her genitals. On touch, the complainant confirmed that it was painful. She also suffered psychological harm. His opinion was that the injuries were caused by a blunt object, particularly a human penis, with evidence of penetration. He produced the treatment notes and P3 form in evidence.
16. PW4 Maragert Kambuni a village elder at Matunwa sub-location testified that the appellant is the complainant's uncle and PW1's brother. She confirmed that the complainant was living with PW1 and her grandparents. On that fateful day at 3:00 p.m., PW4 was called by Rael Ongori. She found a large crowd near the clinic. She saw PW1 carrying the complainant who was crying. It was alleged that the complainant was found in bed with the appellant.
17. PW4 continued that the complainant was taken to the Hospital. She accompanied PW1. During the examination, PW4 saw that the complainant's outer genitalia was swollen. PW4 traced the appellant and took him to Kiogoro police station. To her knowledge, she was not aware of any dispute between the parties.
18. PW5 PC Faith Sagasi from Kiogoro police station received the report on 28th November 2022 from the complainant, PW1 and PW4. She recorded witness statements after interrogating the witness, collected the evidence and preferred the charges against the appellant after his arrest.
19. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. His sworn testimony was that on 27th November 2022, he was at home after visiting the farm. He then heard his sister PW1 screaming. He went to his father's house and was arrested and charged. He confirmed that the minor was his niece. He denied committing the offence that he had been charged with and negated the evidence of the prosecution witnesses. He accused PW1 of demanding for a share of the land. That he asked his two brother to discuss the dispute with PW1 but he was arrested before talks commenced.
20. For a conviction to be sustained in a charge of incest, the following crucial conjunctive ingredients must be proved: whether there was a relationship between the victim and the offender, the age of the victim, penetration and the identity of the offender. On the existence of a relationship, PW1, the complainant's mother confirmed that the appellant was her brother and the complainant's uncle. This evidence was corroborated by PW2 and even the appellant. I therefore find that the said ingredient was proved beyond any shadow of a doubt.



21. On the complainant's age, PW1 testified that the minor was born on 18th December 2018. Her birth certificate was produced in evidence. It was also testified by PW2 that the minor was his younger sister. I therefore find that the age of the minor was proved as that of four years old. I therefore see no reason to disturb those findings.
22. Was the appellant the perpetrator that caused penetration on the complainant? In this case, the complainant was not summoned as a witness. However, the prosecution relied on the evidence of PW2, the complainant's 8-year-old brother. He testified that on 27th November 2022, he was at the appellant's house when he saw him do "tabia mbaya" to the complainant inside his house. He was outside and witnessed this incident through the window. He rushed and informed PW1 who was at the shopping centre.
23. PW1 confirmed that in her evidence that PW2 came running to her and informed her what he had witnessed. The complainant was later taken to hospital. PW1, PW3 and PW4 were present. According to the medical evidence adduced by PW3, the complainant's genitalia was swollen and had lacerations. It was painful on touch. He formed the opinion that there was penetration.
24. It is apparent that the complainant did not testify. Was this fatal to the prosecution's evidence? Section 143 of the *Evidence Act* provides that no particular number of witnesses shall in the absence of any provision of the law to the contrary be required for the proof of any fact. Such that, if the court is sufficient with the evidence (qualitatively), it is of no significance that certain witnesses did not testify (quantitatively).
25. The trial court considered this issue and the reasons advanced to explain why the complainant was unable to testify. The trial court was satisfied with those reasons which this court take a similar view. As stated by the trial magistrate, the failure to summon the complainant to testify was not deliberate. In fact, it was to be noted that the minor was present in court when her mother and brother gave evidence. The appeal on this issue must therefore fail and is accordingly dismissed.
26. PW2 witnessed on his part the offence. I find that PW2 was being truthful and explained what he saw. He saw the appellant defiling his niece. I also find that his evidence was credible enough to establish that the minor had been defiled by the appellant causing penetration. Furthermore, I do not discount that when PW1 was recalling what happened on that fateful day, she was emotional. This was a heinous offence that must have caused trauma on the victim's mother. PW1 confirmed that PW2 rushed to him and reported the appellant. I find that there was a chain of events that was corroborated by the witnesses herein. Accordingly, I see no reason to disturb the findings on penetration and identity of the culprit.
27. The appellant complained that the trial court did not consider that he had been framed because of a land dispute. However, as properly stated by the trial court, he never put it to the witnesses when he cross examined them. The appellant further complained that the evidence of PW3 was incredible because from the record, he testified that the offence occurred on 2nd November 2022. I have however looked at the P3 form executed by the witness. It confirms that the minor was assaulted on 27th November 2022. I therefore find that contradiction too minor as to affect the ultimate findings of the trial court. That contradiction did not go to the root of a miscarriage of justice. The appeal on that ground fails.
28. Lastly, the appellant lamented that he was not afforded an advocate in line with Article 50 (2) (g) of *the Constitution*. The same provides that an accused person has the right to choose, and be represented by, an advocate, and to be informed of this right promptly as a necessary precursor to the right to a fair trial. The Court of Appeal in the case of William Oongo Arunda (Hitherto referred to as Patrick



Oduor Ochieng) vs. Republic [2022] KECA 23 (KLR) gave meaning to this provision in the following words and this court wholly adopts:

“The operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial.”

29. The appellant did not raise this issue at trial. I also find that he was given an opportunity to cross examine all the witnesses. He did so. I therefore find that his allegation that he was not afforded a fair hearing because of not being given an advocate was an afterthought. Accordingly, the appeal on that issue must fail and is hereby dismissed. In the end, I find that the appeal on conviction lacks merit and is hereby dismissed.
30. The appellant was sentenced to serve life imprisonment in line with the dictates of section 20 (1) of the *Sexual Offences Act*. The minor was 4 years old. The provision dictates that a person convicted of the offence shall, as a mandatory requirement, be sentenced to life imprisonment. I therefore find no reason to interfere with the findings on sentence. Its appeal is hereby dismissed.

It is so ordered.

JUDGEMENT DELIVERED, DATED AND SIGNED VIRTUALLY THIS 28TH DAY OF OCTOBER, 2025.

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HON JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:

Siele/Kipchirchir (Court Assistants)

Appellant Present

Koime for the Respondent

