



**DKM v Republic (Criminal Appeal E029 of 2024)  
[2025] KEHC 15949 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 15949 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL APPEAL E029 OF 2024  
BM MUSYOKI, J  
NOVEMBER 7, 2025**

**BETWEEN**

**DKM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from conviction and sentence in the Chief  
Magistrate’s Court at Gatundu (Honourable R.N. Ng’ang’a SRM)  
in her sexual offence case number E023 of 2023 dated 13-03-2024)*

**JUDGMENT**

1. In the lower court, the appellant faced one main count and one alternative count viz;
 

Main count- Incest contrary to section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006 with particulars that on the 19<sup>th</sup> day of July 2023 at Karai Village Gatundu North within Kiambu County intentionally caused his penis to penetrate the vagina of JWK a child aged 14 years who to his knowledge was his daughter.

The alternative count was committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006 particulars being that on the 19<sup>th</sup> day of July 2023 at Karai Village Gatundu North within Kiambu County intentionally touched the vagina of JWK a child aged 14 years with his penis.
2. After a full trial where the prosecution called nine witnesses, the court found the appellant guilty of the main count and sentenced him to serve twenty years in prison. Being dissatisfied with the conviction and sentence, the appellant has mounted eight grounds of appeal which I summarise as follows;
  - a. The appellant’s constitutional rights were violated because he was not informed of his rights and there was failure to disclose intrinsic evidence.



- b. The procedural laws were violated as the original birth certificate of the minor was not produced.
  - c. The evidence of the prosecution was contradictory, inconsistent, inconclusive, inadmissible and illegally obtained.
  - d. The elements of the offence were not proved.
  - e. The witnesses were incredible.
  - f. Crucial witnesses were not called.
  - g. The court ignored the appellant's strong defence.
  - h. The sentence was unconstitutional and went against the sentencing guidelines.
3. In his submissions, the appellant sought to be allowed to introduce more grounds which in my view are a repetition of some of the grounds in different words.
  4. This is a first appeal and as established by judicial pronouncements, this court is obligated to re-evaluate, re-assess and re-analyse the evidence produced before the trial court and come to its own independent conclusion but warning itself that it did not have the privilege of hearing the witness first hand or observing their demeanour. I will proceed to do exactly that and in doing so, I will begin by reproducing the relevant parts of the evidence and testimony as below.

#### **The respondent's case**

5. The respondent called nine witnesses starting with the child who was taken through voire dire examination and certified not able to understand the nature of an oath.
6. The child told the court in unsworn statement that she knew the person who was in the dock who lived together with her, her grandparents and siblings before the case started. She added that on 19-07-2023 at around 7.00 pm, her father came home drunk, hit her mother and chased her. The mother slept outside near the window. The father asked her to go into the bedroom while the other children slept on the seat and did bad manners to her. The child went on to describe the clothes she was wearing as well as those her father wore.
7. The complainant explained that the appellant pulled her dress up, covered her face and defiled her after removing her pant. She described the act as 'her father inserted his thing in her 'kasusu' which she uses to urinate.' She stated further that she felt pain as it was her first time. He continued doing that several times and singled out one day when they went to cut grass and he did it to her when she was lying on a sack.
8. She continued and told the court that after he was done, he wiped her with a piece of cloth with her face still covered. She got off the bed and went to sleep with the other children on the seat. He told her not to tell anyone. She added that thereafter, the mother knocked and asked for the baby which she gave and the mother went to sleep at her grandparents'.
9. The child stated further that she did not tell the mother on that day as she was afraid. The following day, the father came home again drunk but slept alone and the mother slept with the children on the seats. She also stated that, the dad joined them in the bedroom where she was sleeping with her sibling one Muniu. The father put Muniu aside and defiled her again and the following evening, she ran away from home and met two ladies who used to sell chips and vegetables who she told her ordeal.



10. One of the ladies took her home and gave her clothes to put on. They then went to the home of a man she called of Kameme TV and she narrated her story. They took her to Igegenia hospital where police were called. She also reported to her head teacher. She also claimed that she once told her mother who said nothing about it. She added that her grandmother said that the child was lying. She identified treatment chits from Igegenia hospital, P3 form, PRC form and age assessment report.
11. In cross-examination, PW1 stated that the mother was not at home when her dad defiled her. She was with her siblings Pyurah and Mwaura and her grandmother was in the compound. She insisted that the father came home drunk and that was what she told the police. She also denied having been coached.
12. Lucy Nduta was the second prosecution witness who told the court that she knew the victim's mother and father. She also knew the child. She stated that on 19-07-2023 at about 9.00 pm when she was closing business, they saw a child who was in the company of Maureen and Elizabeth crying. Maureen was the witness's friend while Elizabeth used to sell vegetables and potatoes at the trading centre. The child told them that her mother left home after being beaten by the father and ran away with the other children.
13. She added that they took her to Teresiah's place where she explained what had happened and then took her to the hospital and reported the incident at Gatukuyu police station then to Igegenia hospital. The doctor at the hospital confirmed that she had been defiled and the child slept at Elizabeth's place.
14. She was cross examined by the appellant and said that they could not have taken the child home as she told them that her mother had been chased away. She added that the Kameme person came to Teresiah's place and he is the one who aired the story.
15. PW3 was one Teresiah Wangui Nganga. She told the court that on 19-07-2023, at about 9.00 pm, three neighbours came to her place with a child and told her that the child had been defiled by her father. She added that the victim confirmed that she had been defiled. She gave them her asked her driver to take them to hospital in her vehicle. She saw the victim's father for the first time when the incident happened. When she was cross-examined, she stated that the child told them that her father had done dirty things to her.
16. Elizabeth Nduta was the fourth witness who said that she was a green grocer at Mangu Kirai. On 19-07-2023 at 9.00 pm, she and Lucy Nduta saw a girl crying and shaking and called her. The child told them that her father had beaten and chased their mother away and that he defiled her after the mother left. They proceeded to Teresiah's place who asked her driver to take them to the police. At the police station, they were given an OB entry and they went to hospital where the doctor confirmed that the child was defiled after which she went with her to her house. She took the child to the police the following day. The witness added that she knew the child's parents. She had no grudge against the appellant or his family.
17. When she was cross-examined, she stated that she knew the appellant and his wife, mother and sisters. She added that the child bathed the following day and that the child was examined before changing and showering. She added that they found the mother roaming looking for the child.
18. Bernard Muiruri Ngige was the fifth witness who stated that he was employed by PW3 as a driver. She told the court that he was called by his employer and asked to take the child to hospital. They went to the police station first then to hospital. He confirmed that he was in the company of PW1, PW2 and PW4. He was not cross examined.
19. Susan Njeri Ndungu a farmer from Mangu told the court that she knew the appellant who was her husband of fifteen years and that they had five children and proceeded to give their names and ages.



The victim was their first child. She added that on 19-07-2023, she had gone for a burial at Makwa and returned at 5.00 pm when the appellant asked her where the child was. She did not find the child at home and went looking for her but never found her. She returned home at 10.00 pm but she did not find the appellant home as he had gone to his mother's place.

20. She narrated that the following day, she went to buy potatoes at PW5's place who told her what had transpired the previous night upon which she returned home. She was called by a lady who worked at the D.O's office. According to her, she thought that the child had gone to her birth place at Mwirigo. PW5 told her that the child was at the D.O.'s office Kamwangi where she went with her identity card. She claimed that the child never told her of the ordeal but she told outsiders. She added that she heard that this was the second time. She claimed that she had once reported such an incident at Mwea. She claimed that she had not asked the child what happened as she would not tell her. She added that the appellant would assault and chase her and she would go away with her children. She added that the appellant married another wife and it is the said other wife who asked him to do what he did so that the witness would go away. She denied coaching the child to implicate the appellant.
21. In cross-examination, the witness stated that the appellant had severally told her that he did what he did to the child so that they could be separated. She added that the appellant started assaulting her when she learned of the other wife and that he had threatened her and even demolished the house so that she could go away. He had also burned her clothes at some point which she reported to the police.
22. PW7 was Corporal Peter Mulunge Ikuyu who was in charge of for Mutuma police post. He testified that on 1-08-2023, sergeant Nyakundi came to the post seeking assistance to arrest a defilement culprit by the name Kangai. He called PC Maurice and using an informer, they went to the appellant's home and found him in the kitchen and arrested him.
23. PW8 told the court that he was Joshua Nyakundi of Gatukuyu police station performing general duties and added that on 19-07-2023, he got a report that a girl had been defiled by her father and P3 form and PRC form had already been issued. He started looking for the suspect and succeeded in the morning of 2-08-2023 with assistance of PW7. He interviewed the complainant and recorded her statement then charged the appellant. The mother of the child said that she did not have a birth certificate for her. He then took the child for age assessment which confirmed that she was between 12-14 years. He produced the report and dental X-ray as exhibits.
24. PW8 was put to cross-examination and told the court that he was the investigating officer and that he visited the scene but did not find anything but the doctor confirmed that the child had been defiled. He admitted that nothing was brought to the station in proof of the defilement. He clarified in re-examination that by saying that there was nothing brought to the station in proof of defilement, he meant that there were no clothes to show that it happened. He concluded by stating that the reportees came with the girl physically and escorted her to the hospital.
25. The last witness was Stephen Mwangi a clinical officer in Igegania level 4 hospital where he had worked for 8 years. He testified that the child's P3 form was issued on 19-07-2023 and filled at the hospital on 24-07-2023. Her clothes were dry and she had pain in the vagina. She also had pain in the lower abdomen and legs. The weapon used was identified as penile and the degree of injury classified as grievous harm. The hymen was broken and there were pus cells and infection and the dirt was too much. The examination also identified many dead semen. The witness also filed a PRC form which he produced as exhibit together with the P3 form and treatment notes.
26. When he was placed under cross examination, PW9 stated that he examined the child at the hospital and took samples which were still in the hospital's refrigerator. At this point, the prosecution applied for the accused to be escorted to Kenyatta National Hospital for analysis which was allowed with the



court ordering that the samples, the complainant and the appellant be subjected to DNA analysis. When the matter came for mention on 23-11-2023, the court was told that the appellant, the complainant and the samples had been escorted to the government chemist for analysis but the chemist rejected the spermatozoa samples because they had developed molds and the need for analysis had to be abandoned.

### **The appellant's case**

27. The appellant was placed on his defence upon which he opted to give an unsworn statement. In his statement, he told the court that on 19-07-2023, he was in Ndururumo to look for work on invitation by his sister, one Elizabeth Waithira. They had a burial of his aunt at Makwa where they arrived at 11.00 am. The funeral service ended at 4.00 pm and he went home leaving his sister at the burial. He went to Kirai Mangu where he found his sister who was unwell at home. He also found his wife and children missing and when he asked his mother where they were, he was told that his wife was also at the funeral with their youngest son Peter Muriu.
28. The appellant added that his sister joined them at home at 4.30 pm and she said that she did not know where the other children were. Him and his sister went to Juja. He stated further that the case was a fabrication and added that the child was a big-headed liar, undisciplined and used to run away from home when she offended. He stated further that he was not at home at the time of the alleged defilement and according to him if he defiled her, she would have reported to his mother and the neighbours. He stated that the alleged dead sperms were not his.
29. The appellant called two witness in support of his defence. DW2 was one Ruth Wacuka Mburu a businesswoman in Kirai trading centre. She stated that the complainant came to her shop at 7.30 pm, stood there and said nothing. She instructed the child to wait for her to close the shop and upon checking around, the child was nowhere. According to her, she went and told the mother and the mother said that she won't look for her as she was tired of the child who did not go to school and loitered along the road.
30. DW2 alleged that she did not see the appellant that day but she saw the child the following day surrounded by many people. According to the witness, there was an upbringing problem and she swore that the appellant did not do what he was accused of and that he was a very hardworking person. She concluded that there was possibility that the child was defiled by other people.
31. In cross-examination, DW2 said that the appellant was her neighbour but she was not with him at all times. She also stated that the child did not go to school and used to hide in the forest and return in the evening but she never reported to any authorities. She did not know any of the prosecution witnesses.
32. Silvester Mbugua was the third defence witness. He was a Senior Chief of Mangu location. He told the court that the complainant had been going to her office and that she was of bad habits. He also stated that the appellant and his wife had marital problems and the mother used to involve the children in their domestic issues. He alleged that the complainant once reported being defiled by one Nduati Muigai but recanted the same at the police station. The witness added that the complainant had said that her mother had told her to lie. He stated that the girl had lying tendencies and there were several defilement reports. He also added that she had been defiled in the trenches by boys.
33. Upon cross-examination, he stated that he never saw the medical reports and that he could not tell whether the girl had been defiled or not as the cases were dealt with at the police station. He acknowledged knowing Teresiah, Lucy, Elizabeth and Ruth. He added that he did not know where the appellant was on the date he was said to have defiled the child.



## Analysis and determination

34. I have read the submissions of the appellant and those of the respondent dated 24<sup>th</sup> June 2025 and 8<sup>th</sup> September 2025 respectively which I do not wish to reproduce in this judgment. I will begin my analysis with the argument by the appellant that his constitutional rights were violated and that the charge sheet was defective.
35. The appellant pleaded violation of his constitutional rights but when it came to submissions, he concentrated on alleged violation of the evidence law and what he termed as criminal/procedural law. A party who claims that their constitutional rights were violated must identify the specific rights and demonstrate in which way they were violated. Throwing words and averments to court and expect the court to understand their case is not enough.
36. Having gone through the appellant's submissions, I am unable to decipher which constitutional rights and in which way they were violated. In the entire proceedings, the appellant was given opportunity to cross-examine witnesses which he did without obstruction from the court or the prosecution. I have also not seen any incident where the appellant asked for time to prepare for the case and was denied neither is there a time he complained of not being provided with evidence prior to the hearing. I have also not seen any breach of any procedural law as claimed by the appellant.
37. The appellant has also claimed that the charge sheet was defective. This is an issue the appellant has raised for the first time in the appeal as he never challenged the form or substance of the charge in the lower court. The appellant has also not specified how the charge sheet was defective or the prejudice he suffered. I do not see any defect in the charge sheet or any prejudice the appellant may have suffered due to the manner the charge sheet was drawn.
38. The purpose of a charge sheet is to inform the accused person the nature of the allegations he is facing and the particulars or details of the allegations leveled against him. A charge sheet that discloses information that is sufficient to make the accused understand the allegations and enable him to adequately defend himself is good and sufficient.
39. I now turn to the substance of the appeal. The appellant was facing a charge of incest contrary to section 20(1) of the [Sexual Offences Act](#) which provides as follows;
- “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.”
40. It is clear from the above Section that the ingredients of the offence of incest are; sex of the victim, relationship between the victim and the accused, penetration, identification and the age of the victim where the victim is alleged to be a minor. In *LOA v Republic (2020) KECA 927 (KLR)*, the Court of Appeal held that;

“We have no doubt at all that for an offence of incest to be proved, pursuant to section 20 of the [Sexual Offences Act](#), the prosecution need to prove the sex of the victim, the



relationship of the victim to the perpetrator, penetration and the age of the victim. The latter requirement is for purposes of sentencing."

Similarly, in *MGK v Republic* (2020) KECA 84 (KLR), it was held that;

"Therefore the ingredients that must be established for the offence of incest by a male person is, first, that the victim and the offender are related within the categories stated under section 20(1) of the *Sexual Offences Act*. Secondly, that the offender committed an act which caused penetration with the victim, and thirdly, the age of the victim must also be established for the proviso to apply."

41. The appellant argues that there was no proof that the victim was his daughter. In my view, going through the evidence of the parties including that of the appellant, there could not be valid contention that the victim was the appellant's daughter. The chief who stated that he knew the couple well, PW2 and PW4 who are their neighbours and the victim confirmed the relationship. This was also confirmed by the mother of the child and the appellant himself who was living together with the family. There was no doubt in the testimony of these witnesses and I find that the argument that there was no proof of the relationship is an afterthought that lacks merits.
42. The most contentious issues here are penetration and identification. There is no doubt that the child had been defiled. The medical records are clear that the hymen was missing, the child had fresh injuries in her genitalia, she had infection and there was presence of dead spermatozoa in her vagina. The examination on the child was done soon after the alleged incident and when the child had not taken bath.
43. PW2 and PW4 were clear that they met the child and escorted her to hospital on the same night where she was examined and penetration confirmed. In the circumstances, I have no doubt while holding that it was proved beyond reasonable doubt that the child was penetrated on the stated date.
44. The other issue was the identification of the perpetrator. I have gone through the evidence of the complainant. The same does not strike me as coming from someone who was not telling the truth. Although she appeared to falter during *voire dire* examination, I find her testimony consistent and clear on the sequence of events of the day which is consistent with that of PW2, PW4 and PW5 told the court.
45. The appellant argues that since DNA analysis was not done, there was a reasonable doubt as to his identification as the perpetrator. It is true that the analysis was not done because the Government Chemist rejected the sperms sample because it had developed molds. I take this to mean that any analysis from the sample and those taken from the victim and the appellant would have been of no use or would not have given any useful results. In my view, lack of the analysis cannot in itself weaken the prosecution's case to the point of an acquittal if the other available evidence was strong enough to sustain a conviction. In *IW v Republic* (2021) KEHC 1560 (KLR) the court held that;

"A DNA test helps to fortify the prosecution's evidence but is not a requirement to establish the offence of defilement or rape."
46. The appellant claimed that he was not at home on the date of the defilement. I take this to be a defence of alibi. DW2 said that she did not see the appellant on the said date but it is notable that the act was not done in public. The witness was not aware where the appellant was neither did she tell the court that she saw the child that very day. According to her, she saw the child on the following day surrounded by many people but she did not say whether she sought to find out what was going on.



47. In any event, the law on defence of alibi is that notice of the same should be given at the earliest opportunity to enable the investigating team to make inquiries and investigate the same. In this matter, the appellant raised the defence for the first time during his testimony. Nothing appeared in his cross-examination of witnesses which would indicate that he intended to raise the defence. In *Elizabeth Waithiegeni Gatimu v Republic* (2015) KEHC 1136 (KLR), the Honourable Justice John M. Mativo as he then was restated this position by holding that;

“ An alibi must be raised at the earliest opportunity in answer to the charge and once a defence of alibi is promptly and properly put up, the burden shifts to the prosecution to investigate it and rebut such evidence in order to prove the case against the accused beyond reasonable doubt.”

48. The appellant and his witnesses tried to paint the complainant as an undisciplined child who would tell lies after lies. I have not seen the reason the child would have in falsely implicating her father in such heinous act. If indeed she was a habitual liar, I don't believe she could have chosen a day like the one in this matter when she coincidentally met neighbours with clear proof of defilement. Her evidence was collaborated by other witnesses who rescued and escorted her to the hospital.

49. The evidence of the Senior Chief and DW2 is not convincing. This court would expect a Senior Chief who is aware of a delinquent child who lies on serious issue of defilement to do a follow-up and establish facts about cases reported to him and not to casually paint a bad picture of a child victim of defilement the way DW3 did. Indeed, if what he told the court were true, this court thinks that he failed in his duty to protect vulnerable members of the society within his jurisdiction. Otherwise, how did he know that the child was defiled in trenches by boys yet he did not seem to care?

50. On the issue of age, the prosecution did not produce a birth certificate since none was availed to the investigating officer. However, an age assessment report was produced as exhibit 4. The report shows that the child was between 12 and 14 years. The range is below the age of 18 which is relevant in the charge facing the appellant. All that matters is that the child was below 18 years. The appellant did not produce any evidence to show that the child was over 18 years and in the circumstances the court could only go by the age assessment report. The report was as good as a birth certificate as proof of age.

51. Finally, the appellant has argued that the sentence imposed on him was harsh and excessive. The penalty provided in the law for this offence is life imprisonment. The appellant was handed twenty years in jail. The circumstances of the case show that the appellant was very mean and violent to his family. The act of pouring his frustration on an innocent child is to say the least cruel and animalistic. He deserved a long sentence noting that the child was 14 years. The attempt to brand the child as a liar does not wash away the guilty of the appellant. He was the father who had the responsibility to nurture and care for his children. Instead, he did the opposite and put the child in life threatening situation. I do not think that the sentence was excessive and I proceed to uphold it.

52. The inevitable conclusion from the above discussion is that the appeal is unmerited and it is hereby by dismissed.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Judgment delivered in presence of the appellant in person and Miss Torosi for the respondent.

