



**DM v Republic (Criminal Appeal E010 of 2023)
[2025] KEHC 16137 (KLR) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E010 OF 2023
TM MATHEKA, J
NOVEMBER 6, 2025**

BETWEEN

DM APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was charged with incest contrary to section 20(1) of the *Sexual Offences Act*, and in the alternative – committing an Indecent Act with a child contrary to section 11(1) of the same Act. The particulars were that on diverse dates between March and December, 2020 at DWA Estate Kibwezi Subcounty within Makueni County he either intentionally and unlawfully caused his male genital organ namely penis to penetrate the female genital organ namely vagina of NGM a girl age 12 years who to his knowledge was his daughter OR that he touched her vagina with his penis.
2. He denied the charges in Makindu MCCRC S.O E006/21 and after a full trial, was found guilty, convicted and sentenced to 40 years imprisonment for the main charge on 18/11/2022.
3. Aggrieved by the conviction and sentence he filed this appeal on the following grounds’
 1. That, the learned trial Magistrate erred in law and facts by convicting and sentencing me without observing that the charges before court were defective for both were never establishing the exact date the alleged offence was committed
 2. That, the learned trial Magistrate aimed in both points of law and fact by convicting me without considering that, there was no evidence to prove penetration without which the prosecution could not prove the offence of defilement to the require standards in law beyond reasonable doubt.



3. That, the learned trial Magistrate erred in law and facts when he failed to observe that, his judgment was delivered in a way that caused prejudice, to me the appellant by indicating statements from his own theory which were not captured in the prosecution witnesses' testimonies.
4. That, the learned trial Magistrate erred in law and facts when he failed to observe that some important, features like dates and the investigation diary were not availed to the accused person.
5. That, the learned trial Magistrate erred in law and facts when he shifted the burden of prove to the appellant.
6. That, the learned trial Magistrate erred in law and facts when he convicted and sentenced me in a case whereby the evidence by the prosecution was contradicted, inconsistent and full of inefficiencies.

Reasons wherefore; I pray this Honorable Court to allow my appeal, quash the conviction, set aside the sentence and set me at liberty.

4. The appeal is opposed by the Prosecution.
5. Parties canvassed the appeal by way of written submissions, which I have considered
6. The issues that arise from the submissions are:
 - i. Whether the charges were defective for lack of specificity (no dates of when offence was alleged to have been committed)
 - ii. Whether the trial court stopped the burden of proof on the appellant.
 - iii. Whether the case for the prosecution was full of contradictions, inconsistencies, inefficiencies
7. The prosecution's case was supported by evidence of 5 witnesses, and the appellant gave sworn statement.
 1. PWI stated that she was in N...primary school in grade 5. She could not recall the date of her birth but was shown a certificate of birth that stated it was 03/03/2009. she told the court that from the Month of March to December 2020, she was living at DWA estate and it was during corona time. It was her testimony that she was living with her father the accused who was working at DWA estate, together with her younger M and A. Their mother CMM was living at Kiwanzani at that time. It was her testimony that the house had a kitchen where they slept. She said that she and the siblings slept in the kitchen while their father slept alone his father was sleeping alone. That while they were sleeping their father would do tabia mbaya to her in the middle of the night. That he identified him by the light coming from the window. That he would pull her by the hand in the middle of the night into his room where he would remove her clothes biker and pants while warning her to be silent. He would then remove his lie on her . she said in Kiswahili "akanitomba" using her vagina. She described her vagina as the place where she uses always. She said he inserted his thing into her vagina. That he would do tabia mbaya to her everyday. that she felt pain while he was inserting but he would warn her to be quiet or he would beat her. That once he was done, she would take a shower outside in the middle of the night, then make his tea which he would take before going to work.
 2. she told the court that it was her testimony that each time the mother came to visit her father would ask her to leave within a day.



3. That it was her 8-year-old sister A is who discovered the defilement when she saw her and her father in bed together. That A told their mother who went and told their uncle Gideon, who summoned her father to the village. While her father was away the head teacher whose name, she did not know took her to hospital on a motorbike . When her father returned, he was questioned about the issue. He denied the same. But on her part she told the truth. Her uncle reported the matter to the police. The police officer, her mother escorted her to the hospital. She said she was examined and the doctor said she had no illness. She said that her father never used protection when he slept with her. She said that when she started sleeping with her father she stopped wearing always as she did not have her periods . she could not recall when she started.
4. On cross examination she said that the last time he slept with her was 25th December 2020
5. PW2 Daniel Muli Mule head teacher K primary schhol told the court that he was called by Gideon Ndeke who is their BOM member to go to the family together with a child known as NM who was then 11 years old. He found the family of Gideon who was an uncle to the girl together with her father and also neighbours who had converged therein. He was informed that the his pupil was being defiled by her own father. He decided to have the case referred to the assistant chief and ministry of education. They were referred to the police station in Kibwezi.
6. PW3 Gideon Mwanzia Ndeke told the court that the accused is his cousin. On the 25/1/2021, at about 9:30pm he was going to sleep when he was summoned by his wife outside. He found the wife to the accused with her three children. She informed him that she had been living-with a problem which they could not hold. She told him that they were being used; that the brother to her husband would take her and her children and abuse them sexually. That it was at that time the complainant stated that the father was also having sex with her while threatening not to pay her fees if she revealed to anyone. The following day, he called the head teacher who came with the complainant who repeated the same to them. The matter was reported to the assistant chief who referred it to the police station in Kibwezi. He said that the accused was staying with the children alone when his wife was back home to till the land.
7. PW4 Dr Abdul Aziz was based at Kibwezi Hospital . he produced the medical evidence on behalf of Dr. James Mbiu who he told the court had been transferred to Tawa hospital. He stated that the P3 was filled on 27th January 2021. That the complainant was examined and was estimated to be 12 years old. That she gave history of repeated penile penetration on different occasions by a person known to her. it was his testimony that the complainant gave history that the first incident happened in November 2020 and last episode being 25/12/2021. She was in fair general condition with all other systems normal. The approximate age of injury was over 4 months. The probable type of weapon causing injury was a male penis. The hymen was broken with no tears and bruises. There was whitish vagina discharge which was noted with pregnancy test being negative together with syphilis. He tendered the P3 form as PEX1. It was his testimony that the assailant was the father to the complainant as per the PRC form which was filled on 26th January 2021. He produced it as as PEX3.
8. PW5 no 244991 PC Joshua Isa Makaga was the investigation officers. He told the court that he took over this case on 1st March 2021 from PC Leyagu who was proceeding on transfer. He perused the file and noted that it was a case of incest which had been reported by the complainant against her father. The witness statements had been recorded and the complainant escorted to the hospital. He produced the birth certificate as PEXI.



9. The appellant was put on his defence and testified as DWI .He told the court that in the Month of March 2020 he was staying in DWA estate with his children and wife. In the Month of November 2020, he was given one month leave and he went back home on 5/11/2020. On 10/11/2020 his wife took the complainant to her grandmother. She stayed until school were about to reopen. She did not return home He went with his wife. They brought her back and took her to school. . He denied knowing anything about his case.
10. On cross examination he said that the child was not his biological child but he took her as his child and had never discriminated against her . That the only problem was she did not want him to discipline her. That she was not good in school.
8. The appellant in his submissions reminded this court of its duty as a first appellate court - to analyze, re-evaluate, re-assess the evidence draw its own conclusion, keeping in mind that the court neither saw nor heard the witnesses.
9. He submitted that no date was mentioned in the charge sheet- except that it was between the mention of March & December – 2020. However, the P3 was filled on 27/1/2021 allegedly 4 months after the alleged offence. That the P3 only recorded that the injury was over one month, and the degree of injury was not stated. He also submitted that other than the broken hymen there were no other injuries. He pointed out that the learned trial magistrate created his own testimony regarding what the complainant said - that the record showed that in the judgment he stated that she testified that the 1st incident in 2020, the last one on 25/12/2021.

That by stating that in the judgment the trial magistrate was biased as he came up with his own facts that were not led by the prosecution.

The appellant further submitted that the investigating officer did not conduct any investigations to establish any specific dates so that the appellant could defend himself. He relied on section 134 and 137 of the Criminal procedure Code.

134. Offence to be specified in charge or information with necessary particulars

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

137. Rules for the framing of charges and informations

The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code—

(a)

- (i) Mode in which offences are to be charged.—a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;
- (ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;



- (iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;
 - (iv) the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the same effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case;
 - (v) where a charge or information contains more than one count, the counts shall be numbered consecutively;
- (b)
- (i) Provisions as to statutory offences—where an enactment constituting an offence states the offence to be the doing of or the omission to do any one of any different acts in the alternative, or the doing of or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence;
 - (ii) it shall not be necessary, in a count charging an offence constituted by an enactment, to negative any exception or exemption from, or qualifications to, the operation of the enactment creating the offence;
- (c)
- (i) Description of property. — the description of property in a charge or information shall be in ordinary language, and shall indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;
 - (ii) where the property is vested in more than one person, and the owners of the property are referred to in a charge or information, it shall be sufficient to describe the property as owned by one of those persons by name with the others, and, if the persons owning the property are a body of persons with a collective name, such as a joint stock company or "Inhabitants", "Trustees", "Commissioners" or "Club" or other similar name, it shall be sufficient to use the collective name without naming any individual;
 - (iii) property belonging to or provided for the use of a public establishment, service or department may be described as the property of the Government;
 - (iv) coin, bank notes and currency notes may be described as money; and an allegation as to money, so far as regards the description of the property, shall be sustained by proof of an amount of coin or of any bank or currency note



(although the particular species of coin of which the amount was composed or the particular nature of the bank or currency note is not proved); and, in cases of stealing and defrauding by false pretences, by proof that the accused person dishonestly appropriated or obtained any coin or any bank or currency note, or any portion of the value thereof, although the coin or bank or currency note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering it or to another person and that part has been returned accordingly;

- (d) Description of persons.—the description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as "a person unknown";
- (e) Description of document—where it is necessary to refer to a document or instrument in a charge or information, it shall be sufficient to describe it by any name or designation by which it is usually known, or by the purport thereof, without setting out a copy thereof;
- (f) General rule as to description—subject to any other provisions of this section, it shall be sufficient to describe a place, time, thing, matter, act or omission to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to;
- (g) Statement of intent—it shall not be necessary, in stating an intent to defraud, deceive or injure, to state an intent to defraud, deceive or injure a particular person, where the enactment creating the offence does not make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence;
- (h) Mode of charging previous convictions—where a previous conviction of an offence is charged in a charge or information, it shall be charged at the end of the charge or information by means of a statement that the accused person has been previously convicted of that offence at a certain time and place without stating the particulars of the offence;
- (i) Use of figures and abbreviations.—figures and abbreviations may be used for expressing anything which is commonly expressed thereby;
- (j) Gross sum may be specified in certain cases of stealing.—when a person is charged with an offence under section 280, 281, 282 or 283 of the Penal Code (Cap. 63), it shall be sufficient to specify the gross amount of property in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed without specifying particular times or exact dates.

10. That the lack of specified dated rendered the charge uncertain and ambiguous. That the prosecution failed in the proper framing of the charge, and did not take advantage of section 214 to amend the same, rendering the same incurable under section 382 of the Criminal Procedure Code.

11. On the 2nd ground the appellant submits that the purpose of a trial is to establish the truth – that failure to accord a fair trial to parties violates the minimum standards of due process of the law. He relies on



Article 159(2) 25(c) & 50(1) of *the Constitution* and Zahira Habibullah Sheikh & another Vs state of Gujarati & others A.I.R 2006 SC 1367.

12. On the 3rd ground he emphasizes the need for fair trial – and that it is a fundamental and non – derogable right.
13. That the information in the charge sheet was insufficient to enable him defend himself. He submitted that the charge was totally defective. He relied on Isaac Omambia V R [1995] eKLR where it was held that the statement of the offence and the particulars are an integral part of the charge and failure of the particulars to disclose when exactly the offence was committed on under which section the charge sheet is framed renders the charge sheet defective - especially if the date could have been established during investigations and the charge sheet could have been amended during trial.
14. The appellant urged the court to analyze the evidence of the complainant and the court would not find any evidence of penetration.
15. On ground 4 it is submitted that the appellant was not supplied with the investigation diary. That this was particularly important because PW1 testified that the appellant was pulled for from her sleep in the middle of the night and defile her.
16. On ground 5 the appellant submitted that there was no evidence of penetration.
17. He also submitted that the evidence of identification was shaky. The complainant said she identified the appellant through the light from a window. He cited Mwaura V R(1987) KLR645 where the court stated;

“ In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as length of time the witness had for seeing who was doing what is alleged, the position from the accused and the quality of the light.”

He cited other cases on identification including Kiarie V R (1984) KLR 739 where the court warned of the risk of mistakes in identification being made through the honest mistake of a witness.
18. The appellant urged the court to find that the prosecution had failed to reconcile the inconsistencies and contradiction in the prosecution case.
19. Relying on Dorcas Jemutai Sang VR [2018] eKLR, he submits that the trial court shifted the burden of proving his innocence on him – where the court stated that he did not call any witnesses.
20. The respondent filed submissions opposing the appeal. It was submitted that the prosecution had proved the age of the complainant, and her relationship with the appellant.
21. That on penetration – that the complainant had described what had happened, that the medical report confirmed that penetration was by a penis.
22. That the appellant defence was a mere denial and that the only issue between the appellant and the complainant was for poor performance in school.
23. On sentence the respondent submitted that the appellant was given 40-year imprisonment yet section 20(1) provided for life imprisonment. The respondent cited CR. Appeal 44 /2019 (S O Incest) 500 V R [2021] eKLR the words of Madan J in Yasmin Vs Mohammed (1973) EA 370 where it was stated:

“ The High court is especially endowed with the jurisdiction to safeguard the interests of infants as the court is the parent of all infants. The welfare of the infants is paramount and



is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe and sect fall within the purview of the Guardianship of infants Act and the court is charged with the sacred duty of ensuring interests remain paramount and are duly preserved."

24. I have carefully considered the evidence on record and the submissions by the appellant and the respondent.

It is trite that this court must re-evaluate the evidence on record, draw its own conclusion always keeping in mind that it never saw nor heard the witnesses.

25. It is not in dispute that the complainant is the daughter of the appellant. That is not contested.

26. According to PW3 the appellant is his cousin. On 25/1/2021, he was in his house at 9.30 pm when his wife – told him that there was a woman outside with her three children.

He states:-

"The mother informed me that the brother to the husband used to take her and her children and abuse them sexually. It was at that time that the complainant told us that the father used to abuse her while asking her not to say or else he would stop paying her fees... the following day... she repeated to us how father was abusing her sexually"

27. It is very clear that the 1st report was about the brother to the accused – that he is the one who was abusing the appellant's wife and her children. This was a very serious allegation coming from the complainant's mother. Here was an adult complaining about sexual abuse of herself and her children by her own brother-in-law.

28. It is crucial here that the complainant's mother who was the one who reported the matter was not called to testify. True, she is not a compellable witness but there the prosecution ought to have had her statement recorded even to aid in their investigations. There is also no evidence that the other children recorded any statements to verify whether what was being alleged was true.

29. However, it is instructive that before this, the complainant had not said anything. It is when the mother reported what her brother-in-law was doing that the complainant got the courage to report that her own father was defiling her. From the record this was spontaneous. It was not drawn from her by anyone asking her whether her father had done anything to her while her mother was away. She repeated this to other people leading to the arrest of her father. Under the proviso to s. 124 of the Evidence Act, I can see why the trial court could not but believe her evidence.

30. In addition, she had described in detail how her father would do it. His identity could not have been in doubt because they slept in the same bed till morning, when she would get up to make tea. At some point her own sister found them in bed.

31. I agree with the appellant that specific dates were not in the charge sheet. But there were specific months. Considering the age of the child and the time the incident happened, this child was able to establish one specific date, the last sexual intercourse she had with her father. Failure by the prosecution to establish those other specific dates, and in view of the age of the child, could not invalidate her story. I would not agree that the appellant was prejudiced by the absence of those specific dates because the whole time the complainant was living in the same house with him. The complainant due to her age may not have recollected the exact dates, and the duty remained that of the prosecution to establish the dates.

32. The charge sheet was not defective.



33. Her evidence was not rendered incredible, neither was the appellant prejudiced. She recalls the details of what was done to her and in view of s. 124 of the Evidence Act I am persuaded that she told the truth and the subordinate court had good reason to believe her.
34. Hence, it is my considered view that penetration was established and the appellant was properly identified by the complainant.
35. It is true that the words that the accused's defence was a mere denial give the impression that the trial court expected him to explain his innocence, something not fathomed by presumption of innocence. An accused person can choose to keep quiet and the court cannot hold that against him. Whatever he states in his defence may dislodge the case for the prosecution, amount to a defence, create an alibi or create a doubt in the mind of the court that the thing did not happen as it did, among other things.
36. In this case I found that it did not disturb the case for the prosecution. I found that the case for the prosecution was well established.
37. Were there inconsistencies, contradictions etc in the case for the prosecution? In my view not enough to create doubt about the guilt of the appellant.
38. Regarding the sentence, I looked at the comparative s. 8(2) of the SOA where the mandatory minimum sentence for defilement of a 12 years old is 20 years. It is my understanding that when s. 20(1) of the same Act states that a person found guilty on incest with a child below the age of 18 years is liable to imprisonment for life, the baseline would be the age provided for by section 8 as follows:
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
 - (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
35. The Charge sheet says that she was 12 at the time of the offence. The baseline section for the sentence would be s.8(3) with a mandatory minimum of 20 years. The trial court needed to at least explain why the sentence would go to 40 years. In my view the fact that this was his child a sentence above the minimum would send a message. I would revise the 40 years to 30 years' imprisonment.

In the circumstances I find that the appeal on the conviction is not merited. On sentence it is successful in part. The sentence is revised from 40 years to 30 years imprisonment.

Right of Appeal explained.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF NOVEMBER 2025

MUMBUA T MATHEKA

JUDGE

Chrispol - Court Assistant

Appellant

Mr. Kazungu for state

