



**SI v Republic (Criminal Appeal E080 of 2024)  
[2025] KEHC 16846 (KLR) (17 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16846 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E080 OF 2024  
AC BETT, J  
NOVEMBER 17, 2025**

**BETWEEN**

**SI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment and Sentence by Hon. R. S. Kipngeno (PM)  
in Butali Sexual Offence Case No. E056 of 2022 delivered on 12th July 2023)*

**JUDGMENT**

1. The Appellant in this matter was charged, convicted and sentenced to serve life imprisonment after a full trial for the offence of incest, contrary to Section 20(1) of the *Sexual Offences Act*. The particulars of the said charge were that on diverse dates from the year 2020 to 18<sup>th</sup> July 2022, at (particulars withheld) within Kakamega County, he intentionally and unlawfully caused his genital organ, namely the penis, to penetrate the genital organ, namely the vagina of S.K., a girl aged 14 years, having knowledge that she is his daughter.
2. Being dissatisfied with the conviction and sentence, the Appellant lodged a petition of appeal in which he faulted the trial Magistrate on the following grounds:-
  - a. That the learned Magistrate erred in both law and facts by failing to observe and consider that the age of the Complainant was not proved beyond reasonable doubt.
  - b. That the learned trial magistrate erred in both law and facts by not considering that the Appellant was not subjected to medical corresponding investigation as underlined under Section 36 of the *Sexual offences Act* No. 3 of 2006.
  - c. That the sentence meted on the Appellant was unconstitutional and not warranted on plea.



- d. That the learned trial Magistrate erred in both law and in fact by failing to note and consider that the evidence tendered by the prosecution was full of contradictions, inconsistencies and doubtful and hence pointing a fabricated case.
  - e. That the learned trial Magistrate did not observe the circumstantial evidence in reaching to his decision.
  - f. That the trial court erred in law and fact by failing to give the Appellant the benefit of doubt and also imposing punitive sentence which is erroneous.
  - g. That the trial Magistrate court erred in both law and facts by convicting the Appellant without analysing the evidence on record and arrived at erroneous decision.
  - h. That since I cannot remember everything, I humbly pray to be served with the certified trial records to enable me erect more grounds and submit under the same.
3. The appeal was disposed of through written submissions. This being a first appeal, the duty of the court is as laid out in the case of *Okeno v. Republic* [1972] EA 74 which is to re-evaluate the evidence afresh with a view to arriving at its own conclusion, bearing in mind that it did not have the opportunity to hear and observe the witnesses as they gave evidence first-hand.
  4. Having perused the petition of appeal, the original record, and the submissions of the parties, the issue before the court is whether the offence of incest was proven to the required standard.
  5. The ingredients to be proved in a case of incest were set out in the Court of Appeal case of *LOA v. Republic* [2022] KECA 927 (KLR), where the court stated as follows,

“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.”
  6. For avoidance of doubt, Section 20, Sub-section 1 of the Sexual Offences Act provides inter alia:—“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.”
  7. The gender of the victim was not in doubt. It was deducible from the evidence on record. The Complainant reported that there was a time she was defiled and consequently she became pregnant and miscarried. It is trite that only a person of the female gender can get pregnant. Secondly, the doctor, PW2, testified that he did a vaginal examination on the Complainant and the genital organs referred to by the Doctor signify that the person who was examined was of the female gender. To this extent, the sex of the Complainant was well established as being a female.
  8. Section 22 of the *Sexual Offences Act* sets out the relationships with the prohibited degree of consanguinity that are considered incestuous. Among the said relationships is that of father and daughter. The Complainant testified that she was the daughter of the Appellant. The Appellant did



not refute this assertion. The disclosure to the court by the Complainant was affirmed during the defence hearing, and this issue was therefore not contested.

9. On the proof of age of the Complainant, in the case of JMK v. Republic [2019] KEHC 6528 (KLR) the court stated as follows:-

“On the age of the complainant, it is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement, and; secondly it establishes the age of the complainant for purposes of sentencing. See Moses Nato Raphael v. Republic, [2015] KECA 787 (KLR).”

10. It cannot be gainsaid that for the offence of incest involving a child, the actual age of the child does not need to be proved as the conviction is not dependent on age provided the apparent age of the victim is demonstrated to be under the age of 18 years.
11. The Complainant testified in court and stated that she was 14 years of age. The Doctor corroborated this evidence. The P3 form, which was produced before the court, confirmed her age. The Complainant’s age was conclusively proven to be below 18 years, with an apparent age of 14 years.
12. On the issue of penetration, reliance was placed on the evidence of the Complainant, which was corroborated by the evidence of the Doctor. According to the Complainant, she had had sex with the father on two occasions. The Complainant’s treatment notes, which were produced as PEx. 1, indicated that the Complainant revealed that she had intercourse with her boyfriend shortly before she was taken for treatment. Furthermore, on examination, it was found that the Complainant’s hymen was missing and that there was the presence of numerous epithelial cells in her vagina. In the premises, the Doctor formed the opinion that she had been defiled. I have no reason to disagree with the court’s findings.
13. The final ingredient for the offence of incest to be proven is whether there was proper identification of the Appellant as a person who defiled his daughter. The Complainant went missing from her home after attending Sports Day at school, and on the following day, she was found at her boyfriend’s house. The evidence was that she had had sex with the same boyfriend within one day of leaving home. The evidence in totality depicts the Complainant as a troublesome child who had the habit of sneaking from home and disappearing for days, and who had an active sexual life. Her troubled nature led to her expulsion from school. The evidence also shows that the Appellant tried to ensure that his daughter maintained a good character. He took her for counselling and even enlisted the help of people, such as the village elder, to impart some words of wisdom to her, but to no avail.
14. When the Appellant accosted the girl with her boyfriend, that is when the Complainant alleged that the Appellant had defiled her on several occasions.
15. The fact that the Complainant had also had sexual intercourse with her boyfriend does not have any reciprocal effect in instances where it is alleged that she had been defiled by her father. This was the holding in the Court of Appeal case of PMM v. Republic [2010] KECA 220 (KLR) where the court stated that it matters not and would not assist the Appellant that his daughter was having sexual intercourse with someone else. The only matter of concern to the court and to the prosecution, which rightly conceded this appeal is the timing of the disclosure by the Complainant. The Complainant decided to disclose the matter at the time she had been caught with her boyfriend. The question would be, was she making her report on her own volition or was it that she needed a scapegoat to assist her escape censure for her wayward activities?



16. The Complainant indicated that the defilement started in the year 2020 and continued in the year 2022. However, during the intervening period, the Complainant never reported the matter to the school administration, the Chief, the Children's Office, or her alleged boyfriend, who appeared to have been her confidant. The Complainant stated that she reported the matter to her grandparents, but they were never called to corroborate this fact. Moreover, the Complainant alleged that she had become pregnant as a result of the defilement and that she later miscarried. In that case, it would have been prudent if the prosecution had produced the medical evidence of the said miscarriage from the hospital that attended to the Complainant, as this would have fortified the prosecution's case by corroborating the Complainant's allegations.

17. While considering a case similar in nature, the Court of Appeal in *Paul Kanja Gitari v. Republic* [2016] KECA 741 (KLR) had this to say:-

“What we find troubling about this case is that J.M.K did not on her own volition make a complaint that the appellant had defiled her. Her testimony was that after the “bad things”, she went home where she met her aunt (PW2) who beat her up to reveal what had transpired. It was the appellant's contention that J.M.Ks' testimony was procured by threats and that it was only given as instructed by PW2. We cannot dismiss this as an idle or insubstantial contention...Given the totality of the evidence and the specific circumstances of this case, we are not satisfied that evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere.”

18. In the case of *John Mutua Munyoki v. Republic* [2017] KECA 376 (KLR), the court held that in cases such as this, it needs to scrutinize the evidence and be satisfied that the Complainant's report is free from undue influence, threats or ulterior motives. The court stated as follows:-

“...Despite the fact that she was 16 years old, she did not on her own volition report or make a complaint to the school administration after the alleged act of defilement. In *Paul Gitari v Republic* (supra) a case with more or less similar facts as this appeal, we observed:

“What we find troubling about this case is that J.M.K did not on her volition make a complaint that the appellant had defiled her. Her testimony was that after the ‘bad thing’ she went home where she met her aunt (PW2) who beat her up to reveal what transpired. It was the appellant's contention that J.M.K's testimony was procured by threats and that it was only given as instructed by PW2. We cannot dismiss this as an or insubstantial contention..... Given the totality of the evidence and the specific circumstances of this case, we are not satisfied that the evidence was tendered that proved the case against the appellant. His conviction was unsafe and this entitles us to interfere.”

The appellant's case is not any different. As already stated the complainant did not volunteer the information. She only came through after PW3 came down hard on her twice. Was there possibility that the complainant did something untoward from the time she left home in the morning when she was alone until rescued by the appellant? Both the High Court and the trial court failed to interrogate this aspect of the case.”

19. Whereas the Complainant in this matter suffered by reason of being defiled, it was incumbent on the prosecution to ensure that there was a watertight case against the alleged defiler. The Appellant denied defiling the Complainant. In fact, he cross-examined her extensively, challenged her on her allegations



and that is when it came out that she was a recalcitrant child with wayward behaviour, not befitting a child of her age. It also emerged that even when she miscarried in the year 2021, the Appellant was the one who took her to the hospital.

20. In his defence, the Appellant denied the offence and said that on 18<sup>th</sup> July 2022, when he returned home, he found that the Appellant was not at home. The next day he looked for her. She had arrived home and said she wanted to go to church and he allowed her to attend but when he came back home from his workplace he found she was not there and was told that she had gone to school. By 7 p.m., she had not come back, and he looked for her, informing her Principal about the development. The Principal investigated and reported to him that she had gone home with one GW, a high school student. He said that he reported the matter to the area Chief who referred him to Lumakanda Police Station, and then went to look for the Complainant at GW's home where they found the Complainant and GW, and upon their arrest, the Complainant lodged that complaint against him. According to him, he lives with people in the family home and there was no way he would have defiled the Complainant.
21. In his judgment, the trial Magistrate chose to believe the Complainant but did not give reasons as to why he chose to believe her and not to believe the Appellant who had vigorously cross-examined the Complainant, challenged her on her allegations, and demonstrated that the Complainant was a wayward child.
22. Taking the evidence in totality, I find that the Complainant's claims that the Appellant defiled her were not on her own volition and may have been made in a bid to escape punishment after being caught red-handed in her boyfriend's house. Therefore, her credibility is in doubt.
23. Moreover, the fact that she never made any report to anyone before she was accosted in the company of her boyfriend makes her allegations suspect. The lingering questions are, could she have levelled the accusations out of anger, rage or malice as against her father, who has become a thorn in her flesh and an impediment to her untoward activities?
24. The question raises doubt in the mind of the court, and in the circumstances, I find that the conviction against the Appellant was unsafe. I hereby set aside the conviction and sentence and order that the Appellant be released forthwith unless otherwise lawfully held. Those are the orders of the court.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF NOVEMBER 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Appellant in person

Ms. Chala for the Respondent

Court Assistant: Polycap

