



**SNN v Republic (Criminal Appeal E031 of 2024)  
[2025] KEHC 16236 (KLR) (Crim) (12 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16236 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL APPEAL E031 OF 2024  
KW KIARIE, J  
NOVEMBER 12, 2025**

**BETWEEN**

**SNN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. Cases No. E020 of 2023 of the Principal Magistrate's Court at Engineer by Hon. H.O. Barasa – Chief Magistrate)*

**JUDGMENT**

1. SNN, the appellant herein, was convicted of 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 February 2023 and June 2023 at the [Particulars Withheld], North Kinangop sub-county in Nyandarua County, being a male person, caused his penis to penetrate the vagina of W.W.N, a female child aged thirteen years, who was, to his knowledge, his daughter.
3. The appellant was sentenced to twenty years' imprisonment. He has appealed against both conviction and sentence.
4. The state opposed the appeal through M/s Odero Vena, learned counsel. It was contended that the prosecution had proven its case to the required standards.
5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses testify. Therefore, I will follow the well-known case of *Okeno vs Republic* [1972] E. A 32 to guide my decision-making process.



6. Section 20 (1) of the *Sexual Offences Act* provides:

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. Based on the provisions of this section, the elements of incest are as follows:

- a) The accused must be male;
- b) The victim must be female;
- c) She must be his daughter, granddaughter, sister, mother, niece, aunt, or grandmother;
- d) He must be aware of the relationship; and
- e) Penetration must occur.

8. The complainant and the appellant are father and daughter, and it is undisputed that the complainant was thirteen years old. A copy of her birth certificate shows she was born on 17 October 2009. As of February 2023, she was thirteen years and four months old.

9. W.W.N. (PW1), the complainant, testified that the appellant took her mother to the hospital for delivery. He returned at about 11:00 p.m., and she opened the door for him. She then went to her bedroom, which she shared with her siblings who were sound asleep at the time. He wore a condom and sexually assaulted her. She felt pain but did not scream out of fear. Her father told her that he loved her and then left.

10. The second incident happened in June 2023, when her mother was away visiting Elsie's. While she was fetching some firewood, her father restrained her and pulled her into their bedroom, where he again used a condom and sexually assaulted her. She told him she was in pain, but he did not stop until he finished.

11. In July 2023, when she went to ask him for some money, he threatened to strangle her if she told anyone what had happened. That was when she reported it to her teacher, who then called her mother to the school and informed her of what the appellant had done to her. The matter was subsequently reported to the police.

12. R.W.W. (PW2) is the mother of the complainant. She testified that a teacher named Mrs Njoroge called her to the school and told her about what the complainant had reported.

13. PC Tabitha Getuna (PW4) served as the investigating officer. She stated that the complainant decided to report the incident because the appellant did not pay her school fees after being sent home for non-payment. She testified during cross-examination that the P3 form indicated that the offences were committed on 24th June 2023 and 6th July 2023. However, she conceded that nothing relevant occurred on 6<sup>th</sup> July 2023.

14. Dr Karanja Newton (PW3) examined the complainant on July 10, 2023. Her external genitalia were normal. The hymen was broken with old tags. He formed the opinion that she had been defiled.



15. SNN denied any involvement in the offence.

16. The proviso to section 124 of the *Evidence Act* states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

17. The complainant contradicted her evidence when initially she stated that her sister M.N. was older than her. She later changed her story, saying she was the appellant's eldest child. I was willing to overlook this inconsistency as minor, given that she was in unfamiliar territory that might have overwhelmed her. However, the way she described the defilement on the two occasions raised a red flag that the trial court ought to have investigated further.

18. I have previously observed in other cases that non-consensual sexual intercourse between a child and an adult is a distressing experience accompanied by intense pain. Although she said she felt pain, the actual experience was likely more severe than she testified to. In the case of *Ben Maina Mwangi v Republic [2006] eKLR Lesiit, J.* (as she then was) observed:

Bearing in mind she was a child of tender years being only 4 years at the time, for the offence to be proved there should have been evidence adduced to show that the Appellant used some force on her or something tending to show an assault or infliction of pain. At least some evidence needed to be adduced from which it could be construed that defilement took place. Considering the Complainant's age as compared to the Appellant, if any attempt were made to penetrate the Complainant's private parts it would be expected that the Complainant must have felt pain, if not excruciating pain. There is no way the Complainant would forget the experience or that detail in her evidence.

19. The P3 form included some dates linked to the complaint, but the investigating officer admitted that nothing relevant to the case had occurred. The 6th of July 2023 was too recent for the complainant to claim she had forgotten. It was only a day before she filed the report. The Court of Appeal in the case of *Ndungu Kimanyi vs Republic [1979] KLR 283 (Madan, Miller and Potter JJA)* held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, raise suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

20. In this case, it was unsafe to rely on the complainant's evidence without verifying its truthfulness.

21. The prosecution failed to call Mrs. Njoroge, the teacher to whom the complainant is alleged to have reported. Her evidence could have shed light on the veracity or otherwise of the complainant's allegations. The Court of Appeal in the case of *Bukenya vs Uganda [1972] EA 549 (Lutta Ag. Vice President)* held:

The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.



Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

22. The only logical conclusion to make is that her evidence could have negated the prosecution's case.
23. The medical evidence presented by Dr Karanja Newton (PW3) indicated that when he examined the complainant on 10<sup>th</sup> July 2023, her external genitalia was normal, except for a broken hymen with old tags. A broken hymen alone cannot serve as proof of penetration. This was also the view of the Court of Appeal in *P. K.W vs Republic* [2012] eKLR. The court observed as follows:
  - “ 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified” Is hymen only ruptured by sexual intercourse.
  16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when the hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it, like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of *The Queen vs Manuel Vincent Quintanila* [1999] AB QB 769.”
24. In light of the observations I have made above, it was unsafe to conclude that there was penetration by the appellant without some corroborative evidence.
25. The Appellant's conviction was unsafe. It is hereby quashed, and the sentence is set aside. The appellant is to be released unless lawfully detained.

**DELIVERED AND SIGNED AT NYANDARUA, THIS 12<sup>TH</sup> DAY OF NOVEMBER 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

