CWW v Republic (Criminal Appeal E015 of 2024)
[2025] KEHC 17122 (KLR) (13 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E015 OF 2024

DKN MAGARE, J

NOVEMBER 13, 2025

BETWEEN

CWW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement of the honourable Hon. Angima, Senior Resident Magistrate, delivered on 6.9.2022, in Nyeri CMCSO No. E039 of 2021.

2. The Appellant was charged with incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that between 08.09.2021 and 10.09.2021, at [Particulars Withheld], Nyeri central subcounty, within Nyeri county, being a male person, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of EWW who to his knowledge was his daughter.

3. There was also an alternative charge of committing an indecent act with an adult contrary to Section 11(1) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on between 08.09.2021 and 10.09.2021, at [Particulars Withheld], Nyeri central subcounty, within Nyeri county, the Appellant intentionally and unlawfully touched the vagina of EWW, a child aged 11 years.

4. The Appellant was arraigned and he denied the charges. A plea of not guilty was consequently recorded. The court gave directions regarding bond and a hearing date.

Evidence

5. Six prosecution witnesses testified while the appellant testified on oath and did not call any witnesses.

6. PW1 was the chief, Mukaro location. He stated that he knew both the Appellant and the wife of the appellant. He knew that the appellant was the father of the minor herein, aged 11 years. The minor

used to attend a special school. On 9.9.2021, he received information from a villager that the appellant defiled his daughter EWW. He went and interrogated the minor who told him that the father removes her clothes and does tabia Mbaya. she had been defiled that day. He took action and took the minor to hospital. He called PW3 to accompany him to hospital. They escorted the minor to Nyeri PGH together with PW2 and PW3. Thereafter they went to Nyeri police station and booked the report. He left the two ladies, PW2 and PW3 to assist the child, he went on his way. Later on, 27.09.2021 he recorded his statement. The mother of the child had been admitted to hospital with another child, leaving the appellant, and the victim alone at home. He identified the appellant on the dock.

7. On cross examination, he stated that they interrogated the child with the appellant. The child at the time said the appellant was not in. The witness knew the appellant was a watchman at Kingongo. He continued that the child was examined and a P3 form filled.

8. PW2 was Alice Wangui Kiarie a business lady residing in Kiawara, testified that the appellant was her tenant, and they resided within the same compound. She stated that when the appellant initially rented the premises, he was alone, but was later joined by his wife and a child whom she knew to be mentally challenged. She further recalled that on 10.09. 2021, which was a Friday, PW1, the area chief, informed her that the appellant had defiled her daughter. The witness had also had rumours to that effect but did not have evidence.

9. When the child came back at 3.00 pm, PW2 interrogated her. The child informed PW2 that the appellant had defiled her that morning. the witness asked a nyumba kumi Elder to call the chief, since she did not have the chief's contact. the child has earlier told her the appellant did tabia mbaya to her, which meant that the father defiled her. The earlier incident was two months before 10.09.2021. The witness learnt of the defilement from the appellant's sister-in-law., who was a neighbour. she stated that they summoned the appellant, who arrived with the elder. They left the issue with the chief. the witness identified the appellant on the dock.

10. On cross examination, she stated that the child told her voluntarily what the appellant did to the minor. she said that he asked the minor immediately she came back from school and informed the chief to take over.

11. PW3, Margaret Wamukuria Mwangi, a paralegal in Consolata Mathari hospital. She stated that she did not know the appellant before he was arrested. She went to Kiawara on 3.09.2021, and met another child with disability, CC, who schools with the complainant. The complainant went where they were, at about 3.30 pm. and informed her that she was doing well in school but there was a problem at home. The mother had been admitted at PGH with another child JJ.

12. She received information from the minor that that the father, took her to the mother's bed, removed her clothes and defiles, habitually in the morning, before going to school. He advised the minor to tell PW2, if it happens again. On 10.09.2021, she was working and about 1615 hours. PW2 called and informed her that the appellant had defiled the minor again. The chief, PW1, also informed her that the minor with disability was defiled again. They agreed to meet at PGH, Nyeri.

13. She continued that on arrival at PGH, she met the chief, mama Jimmy and the complainant awaiting examination. On enquiry from the minor, the minor said that the appellant removed the minor's clothes in the morning and defiled her. After the minor was attended to medically, they proceeded to the police station and reported. The mother was indeed at PGH. She recorded her statement. She stated that the minor can understand some things and not others, she is able to speak, hear and see.

14. On cross examination, she stated that the minor was from school that evening. They needed to rescue her. On re-examination, she stated that the minor was in a children's home.

15. The prosecutor prayed for mental assessment to be conducted on a child, which was duly allowed.

16. Subsequently, the minor testified as PW4. She stated that the appellant is the father. She has a younger brother JJ. (The names have been anonymised with different initials to protect the identity of the minors, both the victim and the sibling).

17. It was her testimony that currently they were staying with a grandmother at A, with so many children. She does not remember who took her to A. She was not living at A before. She was living with the mother XMJ and brother JJ. She stated that the appellant used to live at work. she stated that the father did not wrong her. She remembered one day, when the mother was in hospital with JJ, the younger child, the father, baba, slept on her, in the morning. He had remained home with the father, Charles Waruingi. She went to school, that morning, the father slept on her. She removed clothes, when the father told her so. The appellant slept on her; she was under him. He using the thing for urinating and put it inside her place of urinating (showing the pudenda). She felt pain and told the landlady, Mama Wambui.

18. She was beaten on that day by the landlord. Later a lady doctor looked at her private parts (a place she uses to urinate) and gave her medicine. She continued to say that nobody else had done that except her daddy. She told no one else the story. She stated that she went to the police station, where there were two female police officers. She pointed to the father at the dock while scared, as per the magistrates' notes.

19. On cross examination, she stated that she was taken to hospital and then to the police. She had not seen the appellant from the fateful day until the day of testimony. That morning she had come from kihathia.

20. On re-examination, she stated that the act was done in the morning, as she went to school at 8.30 am. She did not know why she was beaten.

21. PW 5 was IP, Elizabeth Kinoti, attached to Nyeri police station. On 10.9.2021, she was in Nyeri police station as in charge of the gender office. One Margaret Mukuria, PW3, went to the office accompanied by PW4. PW3 informed the witness that the appellant, who was the father of PW4, defiled PW4 in the morning when he came from work. The child had told her that the appellant placed 'his thing' in the minor and does tabia mbaya. This was also from previous occasions.

22. The child had not taken a shower as earlier instructed by PW3. The minor was sent for medical examination. She pointed to PW4 who was in court. She carried out investigations. The minor gave the father's name as Charles Waruingi. He arrested the appellant in court on Sunday.

23. She stated that the child was aged 13 years she tried getting a birth certificate but the mother refused but she got a copy from the minor's school. She was born on 09.07.2008. The copy of a birth certificate was produced as Exhibit 3.

24. She stated that PW4 was currently in the named children's home. She confirmed that the in charge is referred as grandma by the children. She stated that upon examination, defilement was confirmed. This resulted in the charges before the court. she identified the appellant on the dock.

25. On cross examination, she stated that she did not investigate whether the child was defiled earlier in March 2018. This was because the child was complaining that the appellant was the one who defiled her. She stated that the child was EWM.

26. PW6, was William Muriuki a medical officer from PGH since 2017. He has a degree in Bachelor of Medicine and Bachelor of Surgery (MBChB) from the university of Nairobi, 2016. He had a mental assessment carried out by Dr Mwenda, a psychiatrist at PGH. He was not available but the duo

had worked together since 2017. He knew his signature and handwriting. The report was admitted pursuant to section 77 and 33 of the *evidence act*. The appellant opposed production, which was overruled.

27. The report indicated that the child had moderately severe intellectual disability, was slow, though her thought was coherent and recalls events from the past and present. He fitness was limited to identifying the perpetrator of the act, though she was of permanently abnormal status. The cause of the mental problem was not known, but the same was suspected to be since she was young.

28. On cross examination, the witness stated that PW4 was not mentally stable as suggested by the appellant.

29. The appellant was found with a case to answer. He opted to give sworn evidence and did not call any witness.

30. The appellant testified as DW1, stating that PW4 was his wife's daughter. On 9/9/2021, he left work and arrived home at 7.45 am and found none, two officers came and arrested him. He was kept at the police station for four days, without being told the reasons. On the 5th day, he was interrogated and taken to court. He stated that all these things are strange.

31. On cross examination, he stated that the minor was then 13 ½ years and was his step daughter. The minor had been defiled at her maternal home, so he asked the wife to bring them minor to a new school. He stated that he lived with the wife, XMJ, her grandson and her daughter, EWM, PW4. He stated that there was time the wife slept at hospital and only the complainant was at home. The appellant could cook and leave food at home since the times were not meeting he could report at 6.00 pm and leave at 6.00 am. He stated that he could sleep for two hours and do other things at home. He stated that on 9.11.2021, PW4 was in school and had not been sent home for school fees. He stated that he had no grudge against the landlady. He stated he owed the landlady a sum of Ksh. 1,000/=, but she could not bring him to court over the same. He stated that the minor was told the girl had been defiled in 2018.

32. The Trial Court considered the case and rendered the Judgement. The Court found the Appellant guilty and convicted him of the offence of incest. The Appellant was also sentenced to 10 years imprisonment.

33. The Appellant, aggrieved, lodged this Appeal. The Petition of Appeal dated 25.3.2024 raised grounds that the learned magistrate erred in law and fact in:

    a. Failing to appreciate that the case was not proved on a balance of probabilities.

    b. Failing to find that the charge was defective as framed.

    c. Failing to find that the critical elements of incest were not proved.

    d. Convicting the Appellant on a mandatory minimum sentence.

    e. Failing to find that the matter was riddled with discrepancies and an attempt to rely on the accused defence to fill gaps in the prosecution case.

34. Both parties did not file submissions.

Analysis

35. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate

court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

36. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

37. Therefore, this Court will not interfere with the exercise of judicial discretion by the court below unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

38. This court dealing with the instant appeal is entitled to consider the evidence in the trial court as a whole as being submitted a fresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. In Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated as follows: -

    1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

    2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

39. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence

given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

40 In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth: -

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

41. The legal burden refers to the burden of proof which remains constant throughout the trial. It is the obligation of a party to establish the facts and contentions necessary to support its case, in this case the prosecutor. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

42. The standard of proof required in such cases was addressed by Brennan, J. in the United States Supreme Court decision of In re Winship 397 U.S. 358 (1970), at pages 361–364, where he stated that:

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

43. The offence of rape is created under Section 20(1) of the *Sexual Offences Act* as follows:

(1) 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.

44. Proof beyond reasonable doubt does not impose a standard of proof beyond the shadow of a doubt. Where the evidence tendered is so strong as to leave only a remote possibility in favour of the accused person, which can be dismissed with the sentence of course it is possible, but not in the least probable, then it can be said in law that the case is proved beyond reasonable doubt. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

What then amounts to reasonable doubt? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-

> 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'

45. At the trial, PW4 was the minor. It was her stated case that she was living with the mother XMJ and brother JJ. She stated that the appellant used to live at work. She remembered one day, when the mother was in hospital with JJ, the younger child, the father, Appellant slept on her, in the morning. He had remained home with the father, Appellant. On the material day, she removed clothes, when the Appellant told her so. The appellant slept on her, she was under him. He using the thing for urinating and put it inside her place of urinating. She felt pain and told the landlady, mama Wangui. She also testified that the land lady beat her. She went to school, that morning.

46. PW4's evidence was not supported by an eye witness. However, PW2 confirmed that PW4 had informed her about the incidence. This, however, brings into focus the question of reliance on a single identifying witness. Other than the provisions of Section 124 of the *Evidence Act*, which allow for a conviction based on the testimony of a single witness in sexual offences if the court believes the complainant and records the reasons for such belief, the court must nonetheless exercise caution and warn itself of the dangers of relying solely on the evidence of a single identifying witness. In the case of R v Turnbull & Others [1976] 3 All ER 549, which decision has been generally accepted and greatly used in our judicial system, the court set out the guidelines to be observed when the evidence of visual identification is relied upon, emphasizing the need for the court to consider the circumstances under which the identification was made. The said court stated as doth:

> The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the

original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....

47. While addressing evidence of a single witness, the court, C.N. Njagi posited as follows in the case of Vincent Manyonge v Republic [2018] KEHC 164 (KLR):

> before the court convicts on the evidence of a single identifying witness, the court has to warn itself of the dangers of convicting in reliance of such evidence. The evidence has to be thoroughly examined and be ruled to be free from the possibility of error. This was well set out in the case of Kiilu Vs Republic (2005) 1KLR 174 where the court of Appeal held that :-
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> ' subject to certain well known exceptions , it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error. See also Abdalla Wendo & Another Vs Republic (1953) 20 EACA(166) KLR 198.
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> In Maitanyi Vs Republic (1986) KLR 198 the same court held that :-
>
> '1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
>
> 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.
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> 3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made.
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> The court continued and held that:
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> 'That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves".

48. However, this being a sexual offence, the evidentiary rules have been modified to better serve the interests of justice and society. In such cases, the critical issue is not the need for a warning on the dangers of relying on a single witness, but rather whether the court has recorded cogent reasons for believing the complainant's testimony in accordance with Section 124 of the *Evidence Act*.

49. In the present appeal, the PW4's testimony was clear, consistent, and detailed. She gave a coherent account of the events of that morning and remained firm under cross-examination. The court below observed her demeanour and found her to be a truthful and credible witness. She knew the appellant well as her father and had ample opportunity to recognize him lying on top of her. This was unfortunate. Accordingly, the court is satisfied that PW1 was a credible witness whose testimony could be relied upon without the need for corroboration. The court below was equally satisfied. There was no shadow of doubt in the evidence of PW1. Consequently, the court rightly applied Section 124 of the *Evidence Act*.

50. The court is mindful that the law does not prescribe any particular number of witnesses necessary to prove a fact. What matters is the quality and credibility of the evidence, not the quantity of witnesses called. is Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides as follows:-

> No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.

51. Evidence tendered by the prosecution was that of recognition and not identification. PW4 recognized her father as the assailant. She maintained that she saw the appellant and knew him as her father. This evidence remained not only unrebutted and unchallenged but also admitted. Whereas the Appellant appeared to hold the position that PW4 was his wife's daughter, I do not accede to the position that having admitted that PW4's mother was his wife with whom they stayed together as spouses with PW4 and JJ as their children provided any ground to challenge the fact that the Appellant was father of PW4 under duty to protect her.

52. It must be remembered that the key issue in respect of the single witness was recognition. Madan JA, as he then was, addressed the difference in approach between identification and recognition in Reuben Taabu Anjononi ,Benjamin Akisa Anjononi and Monya Anjononi v Republic [1980] KECA 23 (KLR)

> Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).
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> We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal.

53. The question of identifying the appellant as the assailant was proved beyond reasonable doubt. In this case, there is no doubt that the Appellant was known to PW4 by familiarly as her father. I am fortified by Section 22 of the *Sexual offences Act* as follows:

> 22. Test of relationship

(1) In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half-father and an uncle of the fist degree and a mother includes a half-mother and an aunt of the first degree whether through lawful wedlock or not.

(2) In this Act—

(a) "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;

(b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;

(c) "half-brother" means a brother who shares only one parent with another;

(d) "half-sister" means a sister who shares only one parent with another; and

(e) "adoptive brother" means a brother who is related to another through adoption and "adoptive sister" has a corresponding meaning.

(3) An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

(4) In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the Children's Act (Cap. 141).

54. In the circumstances, the appellant was a half father of the minor. The relationship was established beyond reasonable doubt. It is irrelevant that the appellant is not a biological father of the minor.

55. PW3, acted on information, from the minor. It was corroborated in material particulars. Though the minor was intellectually challenged she was aware that the mother and JJ were in hospital. PW4 testified both as PW4 and PW6. He produced the assessment report, which confirmed what had been done during voire dire. The hymen was observed as freshly broken. The P3 was reported 10 days later. A PRC form was filled. The details of both documents are fairly consistent with penile penetration.

56. The next question is proof of penetration. According to the medical evidence tendered by the medical officer, PW4 was capable of recognizing events and persons and although her intelligence was slow, he thoughts were coherent and could remember the past. According to him, PW4 had injury to the pubic area and the hymen was not freshly broken.

57. Regarding penetration, as has been above observed, the minor was quite clear that the daddy, the appellant herein was the one who penetrated her on Thursday and Friday morning. The evidence of the appellant did not displace the cogent evidence. The medical evidence was to the effect that there was penetration. The PRC and P3 showed the minor was penetrated. There were bruises on the outer genitalia.

58. PW1 did not have any grudge with the appellant and had no reason to frame the appellant. The information received was consistent with that of the minor. The minor was intellectually challenged hence incapable of receiving and digesting suggestions of assailants from any quarter on the evidence to

tender. The appellant penetrated her but she did not conceive this to be a bad thing. she gave consistent evidence on the happenings on the material date.

59. PW2, was able to give simple instructions which were not followed. The minor was to report when it happened. The said evidence is therefore clear that the minor could only testify on events she witnessed. Cross examination did actually cement the said witness's testimony.

60. The next issue is the appeal on sentence. This has three elements that must be addressed both generally and specifically. On sentence, the principles upon which an appellate Court will act in exercising its discretion to interfere with a sentence imposed by the trial court are now sell settled. The Court of Appeal in the case of Ogolla s/o Owuor vs Republic, [1954] EACA 270, pronounced itself on this issue as follows:

> The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. To this, we would add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263). See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-
>
> sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R. (1989 KLR 306)

61. The appellant stated that the court erred in imposing a mandatory minimum sentence. I have perused the proceedings and do not find anywhere, where the court erred in relation to the mandatory minimum sentence. By granting the Appellant 10 years imprisonment, the court was most lenient and contrary to the proviso to section 20(1) of the *Sexual Offences Act* as follows:

> 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. The supreme court[MK Koome, CJ, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ] had this to say on minimum sentence in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR):
>
> Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

62. The age of the minor was found to be 13 years as opposed to 11 years. This was because the parents hid the birth certificate. It does not make any difference to the offence since, it is not age relevant. It is relationship based. However, age is relevant if the victim is below 18 years of age. Both the pleaded age and the actual age make the minor under 18 years of age.

63. The age of the minor was established to be 13 years as opposed to the initially stated 11 years. This variation arose because the parents had concealed the birth certificate. Nonetheless, this discrepancy does not affect the nature of the offence, which in this instance is relationship-based rather than age-dependent. However, age remains a relevant factor to the extent that the victim is a minor, that is, below 18 years of age. In this case, both the pleaded and the established age confirm that the victim was a child within the meaning of the *sexual offences act*, section 20(1), the proviso thereof.

64. This evidence was also corroborated by the investigating officer. The question of when the arrest took place was not raised with the investigating officer. The only question was whether, the minor was defiled before. No other questions were fielded to the investigating officer.

65. There was no alteration of the charge at all. There was no inconsistency vis-à-vis the charge. On this, this court has to establish whether the alleged discrepancies and contradictions were fundamental as to cause prejudice to the Appellant. In Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held:

> In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.

66. In Philip Nzaka Watu vs. Republic [2016] eKLR, the Court of Appeal held that:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

67. Consequently, it was the primary duty of the trial court, to carefully analyze the contradictory evidence and determine which version of evidence, on the basis of judicial reason, it could prefer. In Erick Onyango Ondeng' vs. Republic [2014] eKLR, the Court of Appeal held that:

> "The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See Okeno Vs Republic (1972) EA 32). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

68. Contractions, unless satisfactorily explained, will usually but not necessarily lead to the evidence of a witness being rejected. As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

69. However, in this case, there were no material discrepancies. The evidence was within the limitations of what is expected of human recollection.

70. The alleged defect under Section 214 of the Criminal Procedure Act, was not pointed out. the said section provides for Variance between charge and evidence, and amendment of charge as follows:

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

71. Liable to means that a sentence of upto life is on the table as the maximum sentence. In the case of Thomas Mwambu Wenyi v Republic [2017] KECA 756 (KLR), the court of appeal addressed the question of liable to as follows:

> Sir Henry Webb C.J. in Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64 had this to say on the proper construction of the words liable to:
>
> The wording used throughout the code is shall be liable to but a consideration of the various sections shows in our judgment, that the use of the words shall be liable to does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated.

72. In the case of M K v Republic [2015] KECA 468 (KLR), the court of appeal[Koome, Mwilu & Otieno-Odek, JJ.A] posited as follows:

> 18. The first observation to note is that the phrase not less than has not been used in the proviso to Section 20 (1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.
>
> 19. What does shall be liable mean in law? The Court of Appeal for East Africa in the case of Opoya -v- Uganda (1967) EA 752 had an opportunity to clarify and explain the words shall be liable on conviction to suffer death. The Court held that in construction of penal laws, the words shall be liable on conviction to suffer death provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in James -v- Young 27 Ch. D. at p.655 where North J. said:
>
> But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced.
>
> We consider such to be the correct approach to the construction of the words shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are shall be sentenced to death.
>
> 20. On our part, we contrast the wordings in Section 8 (2) of the *Sexual Offences Act* with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence

in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that 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. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.

21. Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

22. Based on the foregoing interpretation, we are of the considered view that in the instant case, the learned judge erred in law in holding that the twenty (20) years term of imprisonment meted to the appellant by the trial court was an illegal sentence. We find that the twenty (20) years term of imprisonment was not an illegal sentence and was lawful in the context of the decision in Opoya -v-Uganda (1967) EA 752. It follows that the learned judge erred in correcting and or enhancing the sentence from 20 years to life imprisonment. We reiterate the principles in the case of Ogolla s/o Owuor, (1954) EACA 270 wherein the predecessor of this court stated:

The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.

73. The Respondent proved all the essential ingredients of the offence of incest beyond reasonable doubt and the trial court was correct in convicting the Appellant.

74. The next question is whether, the sentence is befitting. The court is under obligation to increase the sentence. This is line with the duty of the court to set aside an illegal sentence. Where a sentence is lawful but lenient, the court is under duty to warn. However, an illegal sentence must be set aside, nonetheless. In the case of Joseph Muerithi Kanyita v Republic [2017] KECA 387 (KLR), the court of appeal [Waki, Nambuye, & M'inoti, JJ.A.] posited as follows:

> In JJW v. Republic, Cr. App. No 11 of 2011, this Court held that notwithstanding the fact that section 354(3) of the Criminal Procedure Code empowers the High Court to enhance or alter the nature of the sentence imposed by the trial court, in the absence of an appeal against sentence, the court must warn the appellant before it enhances the sentence. The Court stated:
>
> It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on

sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.

And in Samwel Mbugua Kihwanga v. Republic, Cr. App. No. 239 of 2011, the Court explained that although the practice of warning the appellant before enhancing the sentence was not a requirement of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice of the consequences that would befall him depending on the outcome of the appeal.

In this appeal, we are satisfied that the appellant was appropriately warned that should his appeal fail the State would seek enhancement of the sentence on the ground that it was too lenient. The warning took the form of a notice of enhancement of sentence that was duly served upon the appellant's advocate. In view of the fact that the filing and service of the notice is not challenged or otherwise contested, we do not see any basis in law for the contention that the appellant, who was represented by a lawyer, had to be personally served with the notice of enhancement of sentence.

The question still remains whether in the circumstances of this appeal the first appellate court was entitled to enhance the sentence. It is common ground that the sentence imposed by the trial court was a lawful sentence, which was within its jurisdiction to impose.

75. Section 20(1) of the *Sexual Offences Act* provides as follows:

(1) 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.

76. The appellant argued that the minor is a daughter of his wife hence not a daughter. I do not know what difference it will make to increase to define what a daughter is, when the minor was under 18 years. However, in order to set the record straight, it does not matter, whether a daughter is a biological daughter, step daughter or adopted daughter.

77. Section 22 of the *Sexual Offences Act* provides for test of relationship as follows:

1. In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half-father and an uncle of the fist degree and a mother includes a half-mother and an aunt of the first degree whether through lawful wedlock or not.

2. In this Act—

a. "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;

b. "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;

c. "half-brother" means a brother who shares only one parent with another;

d. "half-sister" means a sister who shares only one parent with another; and

e. "adoptive brother" means a brother who is related to another through adoption and "adoptive sister" has a corresponding meaning.

3. An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

4. In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the Children's Act (Cap. 141).

78. Though the sentence of 10 years still lawful, it is lenient for incest with a thirteen-year-old child. By failing to consider the age of the minor, the court meted out a lenient sentence. A sentence of 20 years is more reasonable. The Appellant was informed of the possibility of enhancement. He opted to continue. The court must keep culpability and sentencing uniform for similar conduct. It cannot pay to commit incest with a thirteen-year-old daughter while punishing to defile a thirteen-year-old child. The sentence of 10 years is therefore set aside. I substitute the same with a twenty-five year imprisonment.

79. The appeal on conviction is dismissed. The sentence of ten years is enhanced to twenty-five years, starting from, 26.09.2021, the day of arrest.

Determination

80. I make the following final Orders:

a. This Appeal on conviction lacks merit and is consequently dismissed.

b. The sentence of ten years is set aside and substituted with an enhanced sentence of twenty-five years, starting from 26.09.2021, the day of arrest.

c. 14 days Right of Appeal.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI, THIS 13 TH DAY OF NOVEMBER, 2025 . JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

The Appellant

Mr. Kimani for the State

Court Assistant - Michael