HKJ v Republic (Criminal Appeal E062 of 2023)
[2025] KEHC 18428 (KLR) (9 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18428 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E062 OF 2023

M THANDE, J

DECEMBER 9, 2025

BETWEEN

HKJ ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was tried and convicted of the offence of attempted incest contrary to Section 20(2) of the *Sexual Offences Act*. The particulars of the offence are that on 2.1.2020 at [Particulars Withheld], Chakama location, Langobaya division in Malindi subcounty within Kilifi county, the Appellant attempted to cause his penis to penetrate the vagina of MH (the Complainant) a child aged 3½ years. Following trial, the Appellant was sentenced to 15 years imprisonment.
2. Being dissatisfied with both the conviction and sentence, he preferred this Appeal.
3. The summarized grounds of appeal are that the trial Magistrate erred by:
    1. failing to appreciate the breach of Article 49(i)(f) of *the Constitution*.
    2. shifting the burden of proof on to the Appellant.
    3. convicting the Appellant on poorly, shoddily and inadequately investigated matter.
    4. Failing to consider the Appellant's alibi.
4. In her testimony, PW1, KA, the Complainant's mother testified that on the material day, she was in bed with the Appellant who is her husband when at 4 am, the Complainant called her and told her to take her to the toilet. When they returned, she placed the Complainant on her (PW1's) bed and they slept. After 1 hour, she heard the bed shaking. She woke up and touched the Complainant's buttocks and felt a slippery liquid on her thighs and it was semen. She confronted the Appellant but he did

not respond. It was only when she called relatives that the Appellant pleaded with her to forgive him. When her relatives arrived, the Appellant locked himself inside the house and the door had to be cut down with a saw. They all went and reported the matter to the police and the children's officer took her to the hospital where the Complainant was examined. The doctor said that there was no penetration. PW1 stated that the semen was on the Complainant's buttocks and thighs and she PW1 had not had sex with the Appellant that night.

5. PW2 No. 74589 P. C. Thomas Simiyu the investigating officer stated that on the material day, the Appellant was brought to the Lango Baya Police Station together with the Complainant and PW1, on the accusation that he had defiled the Complainant. PW1 narrated to him what had transpired. He took the child to Malindi General Hospital and the doctor's report showed there was no penetration. On interrogating the Appellant, he told him that he desired his wife but because she was on her monthly period, he turned on the child but did not do anything. It is then that he charged the Appellant with the offence.

6. The Respondent conceded the Appeal on the grounds that the ingredients of the offence were not proved. The Respondent faulted the trial court for finding that the age of the child had been proved yet it never saw the Complainant and no evidence was brought to support the same. Further, that the trial court erred in finding that there was an overt act. Additionally, the trial court erred on identification as it was PW1 and not the Complainant who identified the Appellant. The Respondent further faulted the trial court for relying on what it deemed to be a confession by the Appellant, yet the same did not amount to a confession under the law. The Respondent concluded that the Appellant's conviction was not safe.

7. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See Okeno v. Republic [1972] EA 32.

8. Section 20(2) under which the Appellant was charged provides:

> If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

9. To sustain a conviction for the offense of attempted incest the prosecution must prove the ingredients of incest except penetration. The prosecution must prove that the assailant is a relative of the victim and that there is positive identification of the assailant. The prosecution must also demonstrate the steps taken by the Appellant to execute the incest which did not succeed.

10. As regards the relationship between the Complainant and the Appellant, PW1 stated that the Complainant is the child of the Appellant. This was not disputed by the Appellant. I accordingly find that the relationship was established.

11. In its judgment, the trial court stated:

> The evidence of the mother is that she found spermatozoa on the thighs of the minor. The investigation officer stated under oath that the accused said he had desired his wife who was at the time on her periods and so he went to where the child was but did not do anything, effectively corroborating the evidence of PW1 who stated that upon hearing their bed shake, she woke up and found the accused coming from the side of where their child lay thus showing that there was commission of an indecent act on the child which completion thereof was precluded by impossibility as the mother was right there.

12. To begin with, there is nothing in the testimony of PW1 that indicates that when she woke up, she found the Appellant coming from the side where the child lay. The trial court thus erred in stating so.

13. The Court notes that the trial court stated that what the Appellant allegedly told PW2 corroborated PW1's evidence. PW2 had stated that the Appellant had told him that he desired his wife who was on her monthly period so he turned on the child but did not do anything.

14. Section 25 of the *Evidence Act* defines confession as follows:

> A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

15. What the Appellant allegedly told PW2 amounts to a confession. The law is the confessions are generally inadmissible. Section 25A of the Act provides instances where a confession would be admissible as follows:

> A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.

16. In the instant case, the confession by the Appellant was made to the investigating officer who is of the rank of a police constable. Such confession, having not been made in court or before an officer not below the rank of Inspector of Police, and a third party of the Appellant's choice, was inadmissible. (see Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743(KLR).

17. Further, Section 29 of the *Evidence Act* provides:

> No confession made to a police officer shall be proved against a person accused of any offence unless such police officer is—
>
> (a) of or above the rank of, or a rank equivalent to, Inspector; or
>
> (b) an administrative officer holding first or second class magisterial powers and acting in the capacity of a police officer.

18. The confession made by the Appellant to PW2 even if it were true, could not legally be proved against the Appellant for want of compliance with the cited provisions of the *Evidence Act*. In the premises, the trial court erred in relying on the said confession as proof of the offence against the Appellant.

19. The evidence on record on the whole raises doubt in the mind of the Court as to whether the allegations against the Appellant are true. The record shows that PW3 who removed the Appellant, PW1 and the Complainant from the house after the door was broken stated that he did not know anything about the Appellant defiling the child. Being the one who entered the house, one would have expected PW1 to show him the semen on the Complainant's buttocks and thighs. Additionally, PW2, the investigating officer stated that the Complainant's clothes had been washed. Further, upon examination of the Complainant, even if there was no penetration, the semen allegedly on the child's buttocks and thighs even if dry, ought to have been seen and noted by the doctor who examined her. This raises the question as to why the doctor was not called to testify.

20. Further, why was the victim of the alleged offence not brought before the trial court. This was a serious omission on the part of the prosecution. The Complainant ought to have been presented to court for her evidence to be taken by the court. It was the Complainant and not just PW1 who ought to have identified the Appellant as the perpetrator of the offence. The trial court misdirected itself in relying on the evidence of PW1 and proceeding to convict the Appellant without the benefit of seeing and hearing the evidence of the alleged victim of the offence.

21. After considering the evidence on record, I do find that the prosecution case was not proved to the required standard.

22. The upshot is that the Appeal herein is merited and is hereby allowed. The Appellant's conviction is quashed and the sentence is set aside. The Appellant is set at liberty unless otherwise lawfully held.

DATED SIGNED AND DELIVERED IN MALINDI THIS 9TH DAY OF DECEMBER 2025

M. THANDE

JUDGE