JOK v Republic (Criminal Appeal E031 of 2025)
[2026] KEHC 243 (KLR) (21 January 2026) (Judgment)

Neutral citation: [2026] KEHC 243 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E031 OF 2025

S MBUNGI, J

JANUARY 21, 2026

BETWEEN

JOK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(This is an appeal against the conviction and sentence passed by the Senior Resident Magistrate's Court at Mumias in Sexual Offence Case No. E001 of 2024)

JUDGMENT

1. The appellant was charged with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 26th February 2022 at Matungu Sub-county, Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of C.K.A., a girl aged 15 years and 7 months, who was to his knowledge his daughter.

2. The learned trial magistrate, delivered judgment on 6th March 2025, convicting the appellant on the main charge. On 20th March 2025, after considering a probation report, the court sentenced him to serve 15 years imprisonment.

3. Dissatisfied with the entire decision, the appellant filed a petition of appeal dated 25th March 2025, raising the following seven grounds of appeal:

    a. The trial magistrate failed to inform the appellant of his right to legal representation.

    b. The trial magistrate presided over an illegal trial contrary to Article 50(2)(f) of *the Constitution* and sections 213 and 310 of the Criminal Procedure Code (CPC).

    c. The conviction was based on inconsistent, contradictory, and fabricated medical evidence.

    d. The trial magistrate erroneously believed the hearsay evidence of PW2.

e. The trial magistrate failed to consider that crucial witnesses were not called.

f. The age of the victim was not conclusively proved due to alleged forgery in the birth certificate.

g. The trial magistrate erroneously rejected the appellant's defence of alibi and shifted the burden of proof.

4. The appellant prays that his appeal be allowed, his conviction quashed, sentence set aside, and he be set at liberty. Alternatively, he seeks a pronouncement that the sentence run from the date of his arrest.

5. The prosecution's case rested on the testimonies of four witnesses and documentary evidence.

6. On 26th February 2022, around 00:20 hours, the appellant, who was living with the victim and his second wife, woke the victim and took her from their house to the nearby, unoccupied house of his younger brother. There, he defiled her. After the act, he threatened to kill her if she revealed the incident. On the same day, the traumatised victim reported the assault to her paternal uncle. This uncle then informed the victim's mother (PW3) and maternal uncles, leading to the matter being reported at Koyonzo Police Station.

7. The victim was examined at a hospital on 2nd March 2022, approximately 30 hours post-incident. PW1, the clinical officer, testified and produced the P3 form, Post Rape Care form, and treatment notes. His findings were that the victim's genitalia were reddened and inflamed, there was a muwid discharge, and the hymen was freshly broken. He concluded that penetration had occurred. He noted the victim had showered before the examination, which could affect certain findings, but the observed physical injuries remained consistent with recent sexual assault.

8. A voir dire examination was conducted, and the trial court found the minor (PW2) competent to give sworn evidence. She gave a clear, consistent, and graphic account of the defilement by her father, the location, and the subsequent threat. She also mentioned that her father had tried to make her swallow P2 pills after the incident, which she refused.

9. PW3 confirmed she was called by her brother on 26th February 2022 about the incident. She produced the victim's original birth certificate, which showed the victim was born on 28th August 2006, making her 15 years and 7 months old at the time of the offence.

10. The investigating officer (PW4) testified that he recorded statements and visited the scene. He confirmed that the appellant fled immediately after learning of the police report and remained at large until his arrest on 2nd January 2024 in Busia, based on a tip-off. The victim was placed in a rescue centre in Kisumu for her safety for the entirety of 2022.

11. The pre-sentence report noted that the appellant was perceived as a violent man. His own brother, the paternal uncle to whom the victim first reported, expressed fear of reprisal, stating he pulled back from being a witness because the appellant was capable of doing something harmful.

12. The appellant gave an unsworn statement. His defence was a complete denial and an allegation of fabrication. He claimed the victim's maternal uncle masterminded the charges due to a grudge. He presented an alibi, stating he was at work on 26th February 2022 and only disciplined the victim for keeping bad company and using drugs on 25th February 2022. He alleged the victim ran away and that he was framed. He denied absconding, claiming he went to Mombasa to look for work.

Analysis

13. This being an appeal, the duty of the court is to analyze a fresh evidence adduced at trial, re-evaluate and reconsider it so as to reach an independent determination bearing in mind the fact of not having seen or heard witnesses who testified. This was insisted in the case of Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, as the court stated that;

> " This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

14. The appellant contends his right to a fair trial was violated because he was not informed of his right to legal representation and that the trial was illegal. Article 50(2)(g)(h) of *the Constitution* guarantees an accused person the right to choose, and be informed of the right to, legal representation.

> " (2) Every accused person has the right to a fair trial, which includes the right:
>
> (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly"

15. The trial record shows that at the first mention on 8th January 2024, the charge was read to the appellant in Kiswahili, a language he understood. The record explicitly stated that the accused person was informed of his right to legal representation. He further said that he would act in person. The proceedings were conducted in English, with interpretation in Kiswahili. There is no indication the appellant ever raised any linguistic or procedural difficulty. The trial complied with Sections 213 and 310 of the CPC regarding the recording of proceedings.

> " 213. Order of speeches
>
> The prosecutor or his advocate and the accused and his advocate shall be entitled to address the court in the same manner and order as in a trial under this Code before the High Court."
>
> "310. Prosecutor's reply
>
> If the accused person, or any one of several accused persons, adduces any evidence, the advocate for the prosecution shall, subject to the provisions of section 161, be entitled to reply."

16. These grounds are wholly unmerited and an afterthought. The record conclusively shows the appellant was properly informed of his rights and chose to represent himself.

17. The appellant challenges the medical evidence, the victim's testimony, and the proof of age. On the proof of age, the prosecution produced the original birth certificate. PW3, the mother, testified to its authenticity. The appellant's allegation of forgery elements was a bare, unsubstantiated claim made for

the first time on appeal. He did not challenge the document during cross-examination nor provide any evidence to support his allegation. The trial court correctly held the age was proved beyond doubt.

18. On the medical evidence, the appellant claims the medical evidence was inconsistent because the victim had showered. PW1 explained the implications of the shower but stood by his objective findings of a fresh broken hymen, redness, inflammation, and discharge. These findings were consistent with recent penetration and corroborated the victim's account. The 30 hour delay before examination was explained. The evidence was neither contradictory nor fabricated.

19. On the evidence of PW2 being considered as hearsay by the appellant, the victim gave sworn evidence after a successful voir dire. Her testimony was clear, consistent, and credible. The fact that she first reported to her uncle does not taint her own direct testimony. The rule against hearsay pertains to out of court statements offered for their truth. PW2's in-court testimony was direct evidence. The trial court was alive to the need for caution but found her credible. I find no error. In the case of Kinyathi v Republic [1984] KLR the Court of Appeal had this to say of hearsay evidence:

> " 4. Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying offers as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence
>
> 5. The rule against hearsay evidence is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of stated facts.
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> 7. The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made".

20. The appellant argues that the paternal uncle and the boy he allegedly found with the victim were not called. The prosecution has discretion to decide which witnesses to call to prove its case. It is not required to call a superfluity of witnesses. The failure to call a witness is only fatal if the witness was essential to unfold the narrative or if evidence already adduced is rendered untrustworthy.

21. The evidence of the paternal uncle would have been corroborative but not essential. The core narrative was provided by the victim (PW2) and corroborated by medical evidence (PW1) and the mother (PW3). The probation report explained the uncle's reluctance due to fear of the appellant. As for the alleged boy whom the appellant says had defiled the victim, was a figment of the appellant's defence, unknown to the prosecution. The prosecution proved its case without these individuals.

22. On the defence of alibi and burden of proof, the appellant claims his alibi defence was wrongly rejected and the burden of proof shifted to him. The appellant's alibi was vague and was first raised at trial, not at the earliest opportunity to the police. Regarding an alibi, the court in the case of Wagula v Republic [2024] KEHC 13663 (KLR), held that:

> " This court notes that the trial court addressed itself to the issue of alibi as raised by the Appellant during trial. The trial court observed that the issue of alibi did not feature during the hearing of the witnesses. The court stated that usually, "where an accused person's hypothesis is that he was not at the scene, that issue comes out prominently during cross examination especially of the complainant, the investigating officer and the arresting officer(s) and eye witness(es) (if any). In this instance, the issue of him being in Nyeri or

elsewhere never came up." Further in examining the totality of the evidence adduced the trial court held that "the point that will determine the truthfulness or otherwise of the alibi is what happened on 3/10/2018 when the accused was arraigned in court. This is what was recorded by Hon A.M Maina (SPM) as the words of the accused; "I suffered injury on my jaw and right leg. I was attended at ruiru District hospital but I am still unwell and I need medical attention." These words have the effect of completely destroying the accused persons defence. They mean the accused was at the scene of crime and was also injured; he had been treated at Ruiru District hospital between 1/10/2018 and 2/10/2018 when he was arrested; the issue if being at nyeri on 1/10/24 did not exist at the time of plea and therefore is a total afterthought."

28. The question that this Court has to determine is whether the Appellant raised a defence of alibi which the trial court disregarded. In considering this issue, this Court is cognizant that the prosecution always has the burden of disapproving an alibi where one is raised. This is a legal burden that can never be shifted to the defence. Hence allegations that an alibi was not considered has to be thoroughly examined."

23. The standard of proof required is proof beyond reasonable doubt. In reference to this Lord Denning in Miller v Ministry of Pensions, [1947] 2 ALL ER 372 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."

24. More critically, the issue of alibi raised in the memorandum of appeal, it was demolished by overwhelming prosecution evidence:

a. The victim's clear and positive identification of her father as the perpetrator.

b. The medical evidence corroborating her account of recent sexual activity.

c. The appellant's own conduct of immediately fleeing his home and remaining at large for over a year, which is a classic indicator of a guilty conscience.

d. The probation report's indication of his violent nature, lending credence to the threat he made to the victim.

25. The trial court did not shift the burden. It correctly found that the prosecution had placed the appellant at the scene through credible evidence, thereby disproving the alibi. Where the prosecution evidence is strong and credible, a trial court is entitled to reject an alibi defence. In the case of Stephen Nguli Mulili v Republic [2014] KECA 408 (KLR), it was held that:

> " As a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The provison to that section make an exception in sexual offences and provides as follows:

> "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."

26. Having exhaustively re-evaluated the evidence, I find that the prosecution proved all the elements of the offence of incest under Section 20(1) of the *Sexual Offences Act* beyond any reasonable doubt.

> " 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."

27. The prosecution proved beyond reasonable doubt the following elements:

    a. Identification of the offender

    b. Penetration

    c. Age of the victim

    d. Relationship between the victim and the appellant

28. The appellant's defence was a bare denial and an implausible allegation of family conspiracy, which was rightly rejected. None of the grounds of appeal have any merit.

29. Regarding sentence, the appellant was sentenced to 15 years imprisonment, which is the minimum sentence prescribed by law for this offence. The trial magistrate considered the probation report, which was not favourable to the appellant, and properly exercised discretion. The appeal against sentence is also without merit. His request for the sentence to run from the date of arrest considered; the15 year sentence shall be less Eight (8) months he spend in custody.

Orders

30. For the foregoing reasons, this appeal is entirely without merit and is hereby dismissed in its entirety.

31. The conviction of the appellant, Julius Omondi Kubende, for the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006 is hereby upheld.

32. The sentence of fifteen (15) years imprisonment imposed by the trial court is hereby affirmed. Eight (8) months shall be deducted from 15 years to cater for the period he was in custody.

33. Right of appeal 14 Days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA 21ST DAY OF JANUARY, 2026.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a/Wekesa

Ms. Mwaniki for the Respondent present online.

The Appellant present online.