



**JWW alias KK v Republic (Criminal Appeal E001 of 2024)
[2026] KEHC 295 (KLR) (21 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E001 OF 2024
LN MUTENDE, J
JANUARY 21, 2026**

BETWEEN

JWW ALIAS KK APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. JWW alias KK, the Appellant, was charged with the offence of Incest contrary to Section 20(1) of the *Sexual Offences Act*. The particulars were that on diverse dates between 1st November, 2019 and 28th February, 2020, at Pesi Sub-Location in Aberdare Sub-County within Nyandarua County, he caused his penis to penetrate the vagina of E.W.N., a child aged 17 years who to his knowledge was his step-daughter.
2. In the alternative, he faced a charge of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars being that on diverse dates between 1st November, 2019 and 28th February, 2020, while at Pesi, he intentionally touched the vagina of E.W.N. a child aged 17 years who to his knowledge was his step-daughter.
3. He was subjected to trial, found guilty and convicted for the offence of incest and sentenced to serve life imprisonment.
4. Aggrieved, he appeals on grounds that the charge sheet was defective, there were inconsistencies apparent; the Complainant’s mother was not the Appellant’s wife; DNA samples of the Appellant were not taken; the trial court allowed amendment of the charge but the Appellant was not made to peruse, read and understand what it entailed which was against his rights; the finding was against the weight of evidence and the sentence meted out was harsh and excessive.
5. Briefly, facts of the case were that PW1 JWM divorced SN and married the Appellant. She sired the Complainant in her previous relationship and after she settled down the Complainant went to live



with her and her husband, the Appellant. In the course of their stay between November, 2019 and February, 2020, the Appellant molested the Complainant and she conceived. Upon being asked she identified the Appellant as the one responsible for the pregnancy. The matter was reported to the Chief and ultimately the police. Investigations were conducted that culminated into the Appellant being arraigned.

6. Upon being placed on his defence the Appellant who opted to make an unsworn statement testified that he knew the Complainant E.W. but he was not related to her. That he was arrested on 7th April, 2022 and arraigned on 14th April, 2022, having been framed. That the Complainant lied as she did not avail any evidence to prove that she was defiled, as the incident occurred in 2019 but dates are not given and she went to hospital in 2022.
7. The appeal was canvassed through written submissions. It is urged by the Appellant that the charge sheet does not incorporate the familial relationship into the statement of the offence hence defective. That the description of diverse dates in the particulars of the offence lack specificity.
8. That although courts presume the continuity of an oath once administered, a prolonged lapse of four (4) months interval raises legitimate concerns about procedural fairness and integrity of the testimony.
9. That Section 214(1)(ii) of the Criminal Procedure Code mandates that when the charge is amended during trial, the accused must be informed of the right to re-call any witness who previously testified and failure to do so renders the trial defective. Reliance is placed on the case of Joseph Kamau Gichuki v Republic [2013] eKLR in that respective.
10. That failure to present DNA evidence to link the Appellant to the act was unsafe and that by the court ignoring the Appellant's HIV positive status and the Complainant's HIV negative results was fatal as there could have been transmission had the act occurred.
11. It is submitted by the Respondent that evidence adduced established the act of penetration and the fact of the victim having become pregnant and a DNA test conducted confirmed the Appellant as the father of the victim's child that resulted from the sexual abuse.
12. That the defence by the Appellant was a mere denial with no merit. On sentence, the Respondent relied on the provision of Section 20(1) of the *Sexual Offences Act* and argued that the birth certificate established that the victim was 17 years at the time of the act.
13. This being a first appellate court it is duty bound to re-examine evidence adduced at trial and scrutinize the findings bearing in mind that it did not have the opportunity of seeing or hearing witnesses to assess their demeanour, then form its independent conclusions. This, was summed up in *Okeno v Republic* (1972) EA 32 thus;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) 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. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). 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; it must make its own findings and draw its own 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, see *Peters v. Sunday Post*, [1958] E. A. 424.”



14. The initial argument is that the charge sheet was defective. The Appellant complains that Section 214 of the Criminal Procedure Code was not strictly adhered to. Section 214(1)(ii) of the Criminal Procedure Code provides thus;

(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—

(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.

15. Initially, the Appellant was charged with defilement contrary to Section 8(1)(4) of the *Sexual Offences Act* with an alternative count of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*; charges that he denied and the prosecution called four (4) witness prior to the charge being amended.

16. Upon the charge being amended to one of incest the charges were read to the Appellant and the court directed that the matter proceeds. In *Silvian Ouma Owino & Another v Republic* [2019] KECA 54 (KLR) where the court failed to take a fresh plea following amendment of the charge, the Court of Appeal stated that;

“Compliance with Section 214 of the Criminal Procedure Code is mandatory. The proviso in Section 214 is worded in mandatory terms and it stipulates that when a charge is altered or amended “the court shall thereupon call upon the accused person to plead to the altered charge.” We find the failure by the trial court to read the amended charge and to require the appellants to take a fresh plea rendered the trial process defective. In *Yongo – v- Republic*, [1983] KLR 319 it was held that it is a mandatory requirement that the court must not only comply with Section 214 of the Criminal Procedure Code but the court shall record it has so complied. 40. In the final analysis, we find that non-compliance with Section 214 of the Criminal Procedure Code vitiates the trial of the appellants.”

17. The record reads thus;

“Later, Coram as before;

Prosecutor: There is an amendment the Investigating Officer has effected on the charge sheet.

Court: Read the amended charges. Amended charges read in Kiswahili.

Accused replies:

Main Charges;

Si ukweli – plea of not guilty entered.

Alternative Charge;

Si ukweli – plea of not guilty entered.



Court:

Hearing to proceed.”

18. The learned Magistrate was silent on what provisions of law she complied with. Apparently the requirement by the proviso of paragraph (ii) was not complied with. In *Jason Akumu Yongo v Republic* [1983] KECA 44 (KLR) the Court of Appeal stated as follows;

“Unfortunately, though the magistrate recorded that he had complied with section 214, and that the amended charge was read to the appellant, he did not record that the requirement under the second proviso, namely the appellant’s right to recall the witnesses, was also complied with. This he should have done, particularly as regards Robert, who gave the only material evidence. In view of the fact that Robert’s story as to the gravamen of the charge, namely the words used, had obviously changed, we think the appellant should have been given the opportunity further to question him with a view to showing that he was unworthy of credit. We cannot say that this failure to observe the requirements of the section occasioned no prejudice to the appellant in the circumstances of the case. Such further questioning might well have caused the magistrate to form a different view.”

19. The Appellant having pleaded to a new charge had the right to demand that witnesses who had testified be recalled for further cross – examination but, he was denied the opportunity. The court failed to explain the requirement to him. This rendered the trial defective, and hence a nullity. The trial having been vitiated by the court the question to be posed is whether a retrial should be ordered.

20. In *Ahmed Sumar v Republic* [1964] EALR 483 the East African Court of Appeal stated that;

“...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;

The Court of Appeal likewise had the following to say in the case of *Samuel Wahini Ngugi v. R* (2012) eKLR: -

The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of *Ahmed Sumar vs. R* (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.’



21. In *Fatehali Manji v Republic* [1966] EA 343 it was stated by the Court of Appeal that;
- “In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”
22. This is a case where it was established that the victim was born on 22nd July, 2003, hence at the time of the act she was 17 years old hence a minor. There is further evidence that a child was born of the sexual abuse since the victim was a minor. A DNA test done showed that there was 99.99+% more chances that JWW is the biological father to the baby that was born of the victim.
23. The prosecution was not to blame for the defective trial. It was the court to blame. Interest of justice require a determination of the matter hence if a retrial is ordered there will be no prejudice occasioned. In event that a ‘guilty’ verdict is returned, then the court must take into consideration the period spent in custody.
24. The upshot of the above is that the appeal is allowed. The conviction is quashed and sentence meted out set aside. The Appellant shall be produced before the Nyahururu Chief Magistrate’s Court for a retrial on 26th January, 2026.
25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF JANUARY, 2026.

.....

L.N. MUTENDE
JUDGE

