BAO v Republic (Criminal Appeal E134 of 2025)
[2026] KEHC 2304 (KLR) (26 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2304 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL E134 OF 2025

DR KAVEDZA, J

FEBRUARY 26, 2026

BETWEEN

BAO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. Z. Abdul (P.M) on 18th September 2025 at Kibera Chief Magistrate's Court Sexual Offences Case No. E094 of 2024 Republic vs Benson Andewa Otera)

JUDGMENT

1. The appellant was charged and after a full trial convicted for two counts of offences: incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006 and child abuse contrary to section 22(1) as read with section 22(2) of the Children's Act No. 29 of 2022. He was sentenced to life imprisonment in count I and five years imprisonment in count II. The sentence in count II, was held in abeyance.

2. Aggrieved, he filed the present appeal, challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He complained that the trial court failed to consider his alibi defence. Finally, the sentence imposed was harsh and excessive.

3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration to that. (See Okeno v Republic [1972] EA 32).

4. The prosecution called five witnesses. PW1, the complainant, a minor, gave unsworn testimony after a voir dire examination. She identified the appellant, seated in the dock, as her father. She stated that he cut her fingers with a knife and defiled her, describing the act as "tabia mbaya" done to her with his

"susu". She recounted that the appellant removed her sweater, trousers and pants, made her lie down on a mattress, and had carnal knowledge of her. This occurred on three occasions. She reported the incidents to the landlady, their neighbour. The court noted visible scars on the minor's hands. In cross-examination, PW1 maintained her evidence, denied being instructed what to say, and affirmed she was telling the truth.

5. PW2, Josephine Wangui Mbugua, the landlady, testified that on 14th April 2024 a neighbour brought PW1 to her and reported that the child had been hurt. PW2 escorted PW1 home, observed visible marks on her hands, and questioned the mother about the beating with a knife. The mother claimed the child was stubborn and had wet the bed. PW2 questioned the use of a knife. Social workers subsequently attended and the matter was reported at Riruta Police Station.

6. PW3, John Njuguna, Clinical Officer at Nairobi Women's Hospital, produced the P3 and PRC forms on behalf of his colleague Mercy Cheptoo. Examination who was not available. It disclosed multiple septic wounds on the ear lobes, healed bruising on the neck, healing wounds on the left back, bilateral swelling and septic wounds on the first and second fingers, multiple septic wounds on the left side of the back, and a septic wound on the left ankle. Genital examination confirmed a torn hymen with no bruises noted.

7. PW4, PC Loraine Gitiba, the investigating officer, confirmed the complaint was lodged at Riruta Police Station. A social community worker brought three children, including PW1, who displayed visible injuries and attributed them to her father. PW1 was examined at Nairobi Women's Hospital and, with her siblings, placed at Mary Faith Children's Home for safety. She later confided in a social worker that her father beat and defiled her. A further statement was recorded, the appellant arrested and charged. An age assessment report estimated PW1's age at between 15 and 16 years and was produced as an exhibit.

8. PW5, Emma Wambui, social worker at Mary Faith Children's Centre, testified that in August 2024 PW1 disclosed to her that her father assaulted her with a knife on the hands and defiled her.

9. At the close of the prosecution case, the appellant was placed on his defence. He gave sworn testimony and denied committing the offences. He stated that on 15th May 2024 his wife telephoned him to collect the children from Riruta Police Station. Upon arrival, a police officer accused him of neglecting them; he explained they had been living with their mother in Kibra. He learned of the charges only upon arraignment. He called two witnesses his wife and brother who maintained his innocence.

10. The appellant was convicted accordingly.

11. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. The essential ingredients of the offence of incest contrary to section 20(1) of the *Sexual Offences Act* are: that the victim and the appellant fall within the prohibited degrees of relationship; that the complainant was under the age of eighteen years; proof of penetration; and positive identification of the perpetrator.

12. The first issue is the relationship between the complainant and the appellant, and whether he was positively identified. PW1 testified that the appellant is her father. The appellant, in his sworn defence, did not dispute this relationship and made no assertion to the contrary. The evidence therefore establishes beyond reasonable doubt that the complainant is the biological daughter of the appellant, placing them within the prohibited degrees of consanguinity prescribed by section 20(1) of the Act.

13. On the age of the complainant, PW4, the investigating officer, produced an age assessment report estimating the complainant to be between 15 and 16 years at the time of the offences in 2024. This

places her well below the age of eighteen years required by section 20(1) of the *Sexual Offences Act*. The age ingredient is accordingly proved.

14. Regarding penetration, PW1 gave a clear and consistent account in her unsworn testimony. She stated that the appellant defiled her on three occasions, describing the act as "tabia mbaya" done to her with his "susu". She recounted that he removed her sweater, trousers and pants, made her lie on a mattress, and inserted his penis into her vagina.

15. This direct evidence of penetration was materially corroborated by the medical examination conducted by PW3 at Nairobi Women's Hospital. The P3 and PRC forms confirmed a torn hymen with no genital bruising noted, consistent with penile penetration. The multiple septic wounds, healed bruising and other injuries observed on the complainant's body further support her account of assault accompanying the sexual acts. Penetration was therefore established beyond reasonable doubt.

16. On positive identification and the appellant's culpability, PW1 was firm and unshaken in identifying the appellant, seated in the dock, as her father and the perpetrator. She knew him intimately as a member of her household. The offences occurred in their home environment where the appellant had access to and opportunity over the complainant. No suggestion of mistaken identity arose, and no plausible alternative perpetrator was advanced. The appellant's sworn defence amounted to a bare denial of the charges, with no credible explanation to account for the complainant's detailed testimony, the medical findings, or the disclosures made to PW2, PW4 and PW5.

17. The evidence as a whole, the consistent testimony of PW1, the corroborated accounts of PW2 and PW5, the unchallenged medical confirmation of a torn hymen and injuries consistent with assault, the investigative record of PW4, and the age assessment, forms a coherent chain that proves the commission of the offence by the appellant beyond reasonable doubt. The appellant's denial raises no reasonable doubt in count I.

18. In count II, the appellant was charged with child abuse contrary to section 22(1) as read with section 22(2) of the Children's Act No. 29 of 2022.

    Section 22 of the Children's Act No. 29 of 2022 provides:

    Section 22(1): "A child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour."

    Section 22(2): "Any person who subjects a child to abuse, neglect, harmful cultural practices, violence, inhuman treatment or punishment, or hazardous or exploitative labour commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years, or to a fine not exceeding five million shillings, or to both."

19. The offence is broadly framed so as to capture both positive acts and culpable omissions that expose a child to harm. Liability is therefore not confined to parents but extends to any person who mistreats a child or fails in a duty of protection. The prosecution must prove that the complainant was a child and that the accused's conduct amounted to abuse or harmful treatment within the meaning of the statute. The provision embodies a rights-based framework that prioritises the child's dignity, safety and best interests while attaching penal consequences to violations.

20. In the present case, the complainant was a child and therefore entitled to statutory protection. The medical evidence disclosed injuries consistent with physical assault and unlawful treatment. The appellant, being in a position of care, custody or control, owed a legal duty to safeguard the child's welfare. Instead, his conduct directly inflicted harm and exposed the child to both physical injury and emotional suffering. Those facts satisfy the statutory ingredients of abuse.

21. The prosecution proved the complainant's age, the appellant's responsibility over the child, the abusive conduct, and the resulting harm beyond reasonable doubt. The conviction on Count II is therefore properly founded and is affirmed.

22. As regards sentence, the appellant received life imprisonment on Count I and five years' imprisonment on Count II. The trial court considered the mitigation, including that he was a first offender and the period spent in remand custody.

23. The sentence imposed was lawful and proportionate to the gravity of the offence. I find no basis for appellate interference. The appeal is dismissed for lacking in of merit.

    Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF FEBRUARY 2026

D. KAVEDZA

JUDGE

In the presence of:

Appellant Absent

Mr. Kamau for the Respondent

Karimi Court Assistant.