JMM v Republic (Criminal Appeal E009 of 2024)
[2026] KEHC 2251 (KLR) (24 February 2026) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E009 OF 2024

CW MEOLI, J

FEBRUARY 24, 2026

BETWEEN

JMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from conviction and sentence in Ngong SPM's Sexual Offence Case No. E069 OF 2021, Simatwo RM)

JUDGMENT

1. The Appellant, JMM was charged in the main count with Incest contrary to Section 20(1) of the Sexual offences. The particulars being that on diverse dates between 17th July, 2021 and 22nd July, 2021 in Kajiado North sub-county, Kajiado, he intentionally and unlawfully caused his penis to penetrate the vagina of LW a child aged 11 years who was to his knowledge his daughter.

2. The Appellant faced an alternative charge of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The Appellant denied the offences and following a full trial, he was found guilty, convicted on the main count and sentenced to serve 20 years imprisonment. Aggrieved by the conviction and the sentence filed the instant appeal and through his written submissions introduced amended grounds of appeal as follows:

    a. That the trial court erred in convicting the Appellant for sexual offenses in the absence of credible evidence of penetration as required by law, thus resulting in miscarriage of justice.

    b. That the trial court erred in law by admitting evidence obtained involuntarily from the victim in sexual offenses of incest, contrary to the provisions of the *Evidence Act* and the constitutional safeguards against self- incrimination and coercion.

c. That the trial court erred in admitting a defective post – rape care form as evidence, given its incomplete documentation, failure to adhere to establish medical protocols and inconsistencies with the victim's testimony, thereby undermining the integrity of the prosecution's case and the fairness of the trial.

d. That the trial court erred in law and in fact by proceeding with the trial despite the prosecution's failure to disclose and provide the Appellant with the necessary documents and evidence thereby violating the Appellant's constitutional right to fair trial as guaranteed under Article 50(2)(j) of *the Constitution* of Kenya 2010.

e. That the trial court erred in law and fact by failing to conduct a proper voire dire examination of the child victim and further failing to provide reasons for believing the victim's testimony, thereby rendering the conviction unsafe.

f. That the trial court erred in law and fact by imposing a sentence of 20 years imprisonment for the offense of incest, which was harsh and excessive in light of the mitigating factors and circumstances of the case.

3. The Appeal was canvassed through written submissions. By his submissions dated 14th October, 2024, the Appellant submitted on the first ground that the prosecution failed to prove its case beyond reasonable doubt, and especially the ingredient of penetration. Asserting that no credible medical evidence was tendered and that the Post Rape Care (PRC) form produced at the trial did not indicate any physical signs of penetration such as lacerations or trauma. Here relying on the case of Mwaniki -vs- Republic [2012]eKLR.

4. Highlighting the complainant's testimony and behavior immediately after the alleged ordeal, following which the victim had allegedly bled from her vagina, he said it was put to doubt by her further evidence that she was able to join other children in play, early on the next day. Whereas PW2 did not testify to have seen any blood while serving the victim food. In addition, no evidence of blood or spermatozoa was in the clothes that were presented for forensic analysis, and he cited the case of Juma-vs- Republic [2014] eKLR to aid his case. Thus, he contended that there was reasonable doubt rendering the conviction unsafe, and he was in the circumstances entitled to acquittal as held in the case of Republic -vs- Karani [2017] eKLR.

5. The second ground attacks the complainant's evidence which the Appellant asserts had not been volunteered but was obtained involuntarily from the alleged victim, in violation of both the *Evidence Act* and *the Constitution*. He argued that the complainant, a vulnerable person caught up in fraught family dynamics, was subjected to leading and suggestive questioning while at the house of PW2 (Mama Makena), in the absence of professional support, or safeguards and that her statements were likely influenced by external pressure, undermining their credibility and reliability. He contended that the trial court's admission of such evidence without first conducting an inquiry into whether it was given voluntarily rendered the entire trial unfair and the conviction unsafe, as involuntarily obtained evidence violates the right to a fair trial guaranteed by Article 50(4) of *the Constitution*.

6. In support of the foregoing, the Appellant placed reliance on Joseph Mutiso Muthui v Republic [2019] eKLR, M K v Republic [2015] eKLR, Wamunga v Republic [1989] KLR 424, Harun Mutuma v Republic [2005] eKLR, and Joseph Odhiambo v Republic [2002] eKLR, in emphasizing the importance of safeguarding vulnerable witnesses, especially children, and ensuring that their evidence was voluntary and free from coercion. Asserting that failure to meet this standard, casts doubt on the reliability of the testimony and consequently weakened the prosecution case and occasioned a miscarriage of justice.

7. With regard to the 3rd ground, the Appellant contends that the trial Court erred in admitting a PRC form that was incomplete, lacked vital details such as the exact time of examination and a detailed description of injuries, hence defective and incapable of substantiating the charges against the Appellant. And was inconsistent the victim's evidence.

8. The Appellant also faulted PW4 for completing the P3 form five days after the alleged incident and relying largely on what the complainant told her, rather than conducting an independent medical examination. In addition, taking issue that the GVRC and PRC forms which were not produced by the maker and cited contradictions between the testimonies of PW4 and PW5 regarding the preparation of the form, as weakening its evidentiary value in terms of Section 65 of the *Evidence Act*.

9. He complained, in arguing the 4th ground that his constitutional right to a fair trial under Article 50(2)(j) of *the Constitution* of Kenya was violated as the trial commenced without him being supplied with key documents, including witness statements, forensic reports, and other relevant materials, despite a formal request and a court order directing that the same be provided. He asserted that under Section 137 of the Criminal Procedure Code the prosecution was duty-bound to disclose their evidence in advance to promote transparency and fairness in criminal proceedings, as affirmed in Republic v Ahmad Abolfathi Mohamed & Another [2018] eKLR and Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR.

10. The 5th ground attacks the voire dire examination of the child victim, whose testimony he asserted was crucial to the prosecution case. He complains that the trial court failed to conduct a proper examination by way of recorded questions and to make a determination whether the child understood the nature of an oath; was competent to give sworn evidence; her mental capacity ; and ability to give a truthful account as required under Section 19 of the *Oaths and Statutory Declarations Act* as read with Section 125 of the *Evidence Act*. And cited Johnson Muiruri v Republic (1983) KLR 447, for the proposition that failure to conduct a proper voir dire examination renders a child's evidence inadmissible unless corroborated.

11. In addition, he complained, no reasons were given for accepting the child's testimony which formed the basis of the conviction as emphasized in Kibangeny Arap Kolil v R (1959) EA 92. This omission, the Appellant contends, constituted a serious procedural flaw that violated the Appellant's right to a fair trial under Article 50 of *the Constitution*, thereby rendering the conviction unsafe.

12. The 6th ground of appeal relates to the sentence of 20 years imprisonment which the Appellant described as harsh and excessive in the circumstances of the case. And while acknowledging the gravity of the offence, contended that the court did not properly exercise its sentencing discretion in that it failed to assign adequate weight to relevant mitigating factors, and that Section 20(1) of the *Sexual Offences Act* prescribed a minimum sentence of 10 years to life imprisonment, depending on the facts of each case. In this instance, the absence of aggravating factors, his personal circumstances such as age, the fact that he was a remorseful first offender who had cooperated with the authorities throughout the investigation and trial.

13. Hence, he contended that the sentence imposed was disproportionate and this court ought to interfere with it and impose a more lenient and appropriate sentence. Here citing a raft of decisions including John Mutunga Kariuki v Republic [2017] eKLR, where in similar circumstances, the Court of Appeal reduced a 20-year sentence for incest to 15 years imprisonment.

14. Asserting that the statutory minimum sentence for incest was 10 years, and that he was aged 40 years at sentencing in 2022, he submitted that the sentence of 20 years was excessive and disproportionate. He argued that the objectives of sentencing as outlined in the Sentencing Policy Guidelines, would

not be served by such a lengthy term. He urged the court to interfere with the sentence and impose a more lenient and just sentence, commensurate with both the offence and the offender's individual circumstances.

15. The Respondents' submissions dated 4th June, 2025 appear to address the original grounds of appeal, rather than the amended grounds introduced by the Appellant via his written submissions. Opposing the appeal in its entirety, the Respondents maintained that the conviction and sentence were properly founded on cogent and credible evidence presented by the prosecution in proving the main charge beyond reasonable doubt.

16. Concerning penetration, the Respondent submitted that the complainant's testimony was corroborated by medical evidence from two clinical officers who produced the P3 and PRC and GVRC forms. In confirming that the complainant's hymen was broken with red marks, all which according to the experts was consistent with penetration. The Respondents reiterating the definition of penetration in Section 2 of the *Sexual Offences Act* to include partial or complete insertion of a genital organ into another person's genital organs. And the holding in Mohamed Bachero v Republic [2015] eKLR that even the slightest penetration is sufficient to establish the offence of defilement. Thus, asserting that, the trial court correctly found that penetration had been proved beyond reasonable doubt.

17. On the question of identification, the Respondent emphasized that the instant case did not involve a stranger but was based on recognition, the Appellant being undisputedly the complainant's father, thus eliminating the possibility of mistaken identity. And that recognition was more reliable than identification of a stranger, as held in Anjononi & Others v Republic [1980] eKLR. The Respondent also pointed out that the Appellant did not contest the victim's age during the trial.

18. The Respondent asserted that any discrepancies or contradictions there might be in the prosecution evidence, were not fundamental and were curable under Section 382 of the Criminal Procedure Code, which provides that errors or irregularities that do not occasion a miscarriage of justice are not fatal.

19. In conclusion, the Respondent argued that the conviction was supported by credible corroborative evidence. And describing the complainant's testimony as consistent with medical evidence confirming penetration, and recognition of the Appellant beyond doubt. Whereas the Appellant's unsworn defence carried little weight. Defending the trial court's findings, the Respondent stated that the trial court applied the law correctly and reached a just conclusion. The Respondent therefore prayed that the appeal be dismissed in its entirety, the conviction upheld, and the sentence affirmed.

Analysis and Determination

20. This being a first appeal, the court is guided by the timeless principles expressed in Okeno -vs- Republic (1972) E.A 32:- ,

> "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 finding and conclusion; 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 Vs. Sunday Post (1958) EA. 424."

See also Pandya v R {1957} EA 336; Ruwalla v R (1957) EA 570.

21. Similarly in David Njuguna Wairimu v. Republic [2010] eKLR the Court of Appeal observed that:

> ''The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.''

22. A precis of the evidence before the trial court was as follows. In the material period, L.W (PW1), a girl aged 11 years was living alone with her father the Appellant in a rental premises, surrounded by other similar units, at Mericho Matasia shopping centre. Maureen Cherotich Arusei (Mama Makena) (PW2)) and Margaret Wangari Marigu (Mama Abby (PW3)) were among their immediate neighbours. It appears that PW1's mother had long separated from the Appellant and abandoned the home as PW2 stated that for the 9years she lived in that plot, the Appellant lived alone with PW1 and the witness had never seen the mother to PW2 .

23. From the prosecution evidence, the Appellant had on several occasions had sexual encounters with PW1 as narrated to several witnesses, resting with the episode happening between 17th and 22nd July, 2021, when the Appellant allegedly came home drunk. PW1 was watching television after cooking and having supper. The Appellant started fondling PW1's private parts asking to have sex with her which she resisted. Eventually forcing her to his bedroom where after compelling her to undress, he also undressed and after ordering her on his bed proceeded to penetrate her repeatedly before falling asleep, when PW1 crept out.

24. On the next day, the child did not disclose the occurrences to anyone, joining other children in play, but when the Appellant came home in the evening, he demanded a flash disk which was apparently missing from the house. It appears that on the following day which would be Saturday the 24th July, 2021, PW1 left the house and did not return so that on Sunday the 25th July, 2021 the Appellant made inquiries with PW2 as to whether PW1 had spent the previous night in her house.

25. Therefore, when PW2 next saw the minor on Monday (26th July 2021) playing with other children, she called her and communicated to her about the Appellant's search for her, urging her to go back home. However, the child was reluctant to go back home, which got PW2 concerned, and questioning why. Eventually PW1 revealed to PW2 about the incidents of defilement, whereupon the witness, with PW3 took matters in their hands and escorted the minor to Nairobi Women's Hospital Rongai where she was examined and thereafter made a report to Sgt Peter Sagala (PW7) of Matasia Police Post. The Appellant was subsequently arrested and charged.

26. Upon being placed on his defence, the Appellant made an unsworn statement to the effect that the complainant was his daughter whom he had been raising alone. He denied the accusations against him, which he claimed to have emanated from the hair salon where he had sent PW1 and that he was arrested from his home on the night of 26.07.2021.

27. There was no dispute concerning the father/daughter relationship between the Appellant and the minor complainant respectively, and that in the material period the two lived alone in rental premises

in a plot with several rental units at Matasia shopping centre. It is not in dispute that the Appellant was arrested on 26.07.2021.

28. Having considered the material canvassed on this appeal and the record of proceedings of the lower court, the court is of the view that the grounds of appeal can be condensed into broad contested issues, namely, whether the prosecution evidence proved offence of incest contrary to Section 20(1) of the *Sexual Offences Act* beyond reasonable doubt and whether the sentence meted out was harsh and excessive.

29. But first, the court proposes to deal with two legal points raised by the Appellant in grounds 4 and five, namely, whether his right to a fair trial under Article 50(2) (j) was violated due to the prosecution failure to make disclosures of their evidence in advance , and whether the trial court conducted a proper voir dire examination of the complainant, PW1 before receiving her evidence.

30. On the first point, it cannot be gainsaid that indeed the Appellant was entitled to receive the prosecution evidence in advance to facilitate his preparation for the trial. The court having perused the record of the lower court noted that on 19.01.2022, the Appellant made a request to be furnished with the prosecution evidence, and an order was consequently made by the court , and although the case was subsequently mentioned on 21.01.2022 before the trial commenced on 26.01.2022, the Appellant did not raise any complaint to the effect that he had not been supplied as ordered by the court, with the prosecution evidence. Nor on subsequent sessions, including the 7th February 2022 when he requested adjournment due to an illness, which adjournment was granted.

31. The record further shows that he fully participated in the trial, cross-examining PW1, 2 ,4, 5 and 7, and when placed on his defence, made his own statement. Nowhere during these sessions did he again raise the question regarding the disclosures by the prosecution. Having raised the matter once before the trial, he would have raised it again if the initial court order was not complied with, and not waited until the appeal to do so. In the considered view of this court, the only reason he did not, must be that he had already been supplied with the prosecution evidence. Nothing turns on that aspect, therefore.

32. Turning now to the second legal objection touching on the propriety of the voir dire examination of PW1 prior to receipt of her testimony, there is no doubt that PW1 who was aged 11 years at the time of testifying was a child of tender years. The Appellant has attacked the conduct of the voir dire examination of PW1 which was not in the form of question and answer. The court understood the Appellant's complaint to be that the trial court failed to conduct a proper examination by way of recorded questions and to make a determination whether the child understood the nature of an oath; was competent to give sworn evidence; her mental capacity; and ability to give a truthful account as required under Section 19 of the *Oaths and Statutory Declarations Act* as read with Section 125 of the Evidence.

33. Section 125 (1) of the *Evidence Act* which provides for the competency of witnesses generally states that "All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause".

34. While Section 151 of the Criminal Procedure Code (CPC) requires that every witness in a criminal case shall be examined on oath, Section 19(1) of the Oaths and Statutory Declaration Act makes an exception as follows:

    1. Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be

received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

35. It cannot be disputed that the question whether a voire dire was properly conducted, or at all could potentially, impact upon an accused's right to a fair trial. However, whether failure to conduct a voire dire examination or to conduct it properly, or in a certain format is fatal to the prosecution case, as was the result in Karimi Vs. R (2016) KECA 812 KLR will depend on the unique circumstances of the case under consideration, and especially whether the accused person was thereby prejudiced.

36. In Thomas Mwambu Wenyi (2017) KECA 520 KLR the Court of Appeal considered a second appeal in respect of a trial whose proceedings did not contain a record of the questions asked during voire dire examination but merely reflected words to the effect "that upon examination of the minor I do accept her affirmed" and later in the judgment the trial court stating that "It is no doubt the two children were talking the truth." The Court of Appeal expressed its view as follows:-

> "It is not disputed that the questions put to the minors by the court and their responses thereto were not reflected on the record. When confronted with a similar complaint, the learned first appellate court Judge set out the provisions of Section 19 of the oaths and Statutory Declaration Act Cap 15 Laws of Kenya, enshrining the voir dire principle. He then drew inspiration from the case of Fransisio Matovu versus Republic [1961] E.A 260."

37. In that case, the Court of Appeal for Eastern Africa held inter alia that:

> " A judge, when confronted with a child of tender years called to give evidence, should himself question the child to ascertain whether he or she understands the nature of an oath, and if the judge does not allow the child to be sworn, he should record whether, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of telling the truth".

38. Resuming on the theme above, the Court of Appeal in Thomas Mwambu Wenyi's case (supra) proceeded to discuss the case of DWM versus Republic [2016] eKLR; Patrick Kathurima versus Republic Nyeri CRA 137 of 2014 and ; Mohamed versus Republic [2005] 2KLR 138 before stating that:-

> ''In Patrick Kathurima versus Republic Nyeri CRA 137 of 2014 this Court after reviewing case law on the subject observed observed thus:-
>
> "It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina versus Campell (Times) December 20,1982 and Republic versus Lalkhan [1981] 73 CA190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."

39. In the case of Maripett Loonkomok v R (2016) KECA 520 (KLR) the Court of Appeal grappled with the effect of failure by the trial court to administer any voir dire examination in respect of a minor complainant who was found to be aged about 11 years at the time of the offence. The Court stated that it was firmly ''settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what

has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014".

40. The Court also stated that it was equally settled that pursuant to the provisions of Sections 208 and 302 of the Criminal Procedure Code, a witness who did not give evidence on oath may be subjected to cross-examination , and cited Nicholas Mutua Wambua and another v Msa Criminal Appeal No.373 of 2006.

41. From the foregoing, it is evident that a trial court presented with a proposed minor witness is required to conduct a voir dire examination pursuant to Section 19(1) of the Oaths and Statutory Declaration Act to satisfy itself whether the minor understood the nature of the oath hence give sworn evidence, and if not, her unsworn evidence could be received if in the opinion of the court, she was possessed of sufficient intelligence and understood the duty to of speaking the truth. In this case, the record of proceedings during the voir dire examination in the lower court was as follows:

> " VOIRE DIRE
>
> L.W . I am 11years old. I go to school and I am in class 5. My school is called I. Primary School . Its in K.; dreams children home. I live in M. I used to live with my father but I left and I now stay at D. Children's home. I go to Apostolic church in M. We use good news bible. We are told to say the truth. A person who doesn't tell the truth will go to hell."

42. It is also evident from the foregoing record that the trial court must have asked appropriate questions which were answered by the minor during examination, although the questions were themselves not recorded. While the question-and-answer format may be the ideal, there is no prescribed format for the conduct of voire dire examination of a minor witness. The trial court which interviewed the minor and had the opportunity to observe her as she spoke was evidently satisfied that the child understood the meaning of the oath, was possessed of sufficient intelligence, understood the duty of telling the truth, to justify the reception of her sworn evidence .

43. Despite the absence of an express determination after the examination being recorded by the trial court, the reception of the minor's sworn evidence indicates that the trial court in conducting the examination was alive to the requirements of Section 19(1) of the Oaths and Statutory Declaration Act. And indeed, in the course of its judgment the trial court stated: '' In my voir dire examination, I was satisfied that the minor understood the necessity of telling the truth. The minor thereafter gave sworn evidence..."

44. The voire dire examination may not have been perfect and on the facts of this case, it is not dissimilar to the situation in Thomas Mwambu Wenyi's case (supra) where the trial court merely stated that "that upon examination of the minor I do accept her affirmed" and in the judgment held: "It is no doubt the two children were talking the truth." Or the case of Loonkomok Maripett (supra) where no voire dire examination was conducted at all. Neither trial was found vitiated by the lack of or for the imperfect voire dire examination and both convictions were upheld by the Court of Appeal.

45. Thus, in the court's considered view, the mere fact that in this case, the trial court did not record the questions put to the minor, without more, does not vitiate the trial, and the Appellant has not demonstrated how he was prejudiced by the manner in which the voire dire examination was conducted. Issues touching on the credibility of the minor's evidence raised by the Appellant in support of this ground belong to the substance of her evidence and not the procedure by which the trial court satisfied itself of the requirements in Section 19(1) of the Oaths and Statutory Declaration Act.

46. Reviewing all the foregoing, this court is satisfied that although the ideal format of question and answer was not followed in this case, the trial court complied with the requirement to conduct the voire dire

examination and that the process was not irregular merely because of the format adopted and the trial is not thereby vitiated. (See Patrick Kathurima versus Republic Nyeri CRA 137 of 2014). The 5th ground of appeal must therefore fail.

47. Turning now to the question whether the charge preferred against the Appellant was proved beyond reasonable doubt, Section 20(1) of the *Sexual Offences Act* provides as follows;

> ''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 10 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.''

48. There was no dispute that PW1 was the daughter of the Appellant and living with him alone at the material time, thus he was well known to her. As regards her age, Sgt Peter Sagala (PW7) the investigating officer produced the minor's birth certificate (P.Exh 4) which showed her date of birth as 16.03.2010 and the Appellant as her father. This evidence was not in dispute. The contested issue in this case was penetration.

49. The key events in this case relate to the week of 17th -26th July, 2021 (Saturday to Monday). Although PW1 did not state the specific date of assault, piecing together the narratives of the key witnesses, the alleged material incident, if it happened, occurred around the 22nd July 2021. PW1 having stated that she was 11 years old at the material time and that the Appellant was her father, proceeded to narrate that on the material date, at about 8pm, she was at home alone with the Appellant who was intoxicated, after the two had supper that she had cooked.

50. As she made to go to her bedroom to sleep, the Appellant held her ''like a child '' and touched her private parts and asked if they could go to bed and have sex. Despite her resistance, he forced her into the Appellant's bedroom where he made her removed her clothes (her trousers and underwear) before the Appellant removed his trousers and underwear and ordered her to lie on the bed and the had sex with her. Further explaining that, he inserted his penis inside her vagina (mahali pa kukojoa) and had sex with her repeatedly.

51. Stating that she experienced pain and discomfort and bled in her private parts, she eventually left the room after the Appellant fell asleep. And while she did not report immediately to anyone, she eventually confided in a neighbor Mama Makena (PW2), who assisted her to go to hospital and thereafter report to the police. Under cross-examination the minor denied that she was asleep and maintained that she had made dinner and was watching TV when the incident started. Further, that she was telling the truth and not what anyone told her.

52. The evidence of PW1 was supported by the testimony of PW2 who stated that PW1 disclosed to her that the Appellant had been having sex with her and for that reason did not want to return to his house. Concerned PW2 had contacted her friend PW3 and together they arranged for the child to be taken to Nairobi Women's hospital for examination before reporting to police at Matasia Police Post.

53. On this appeal, the Appellant has assailed this evidence, stating that it was obtained through coercion and pressure applied upon the minor by PW2. However, looking closely at the surrounding evidence

of PW 1 and PW2, this contention is no more than conjecture. First, PW1 denied during cross-examination that her evidence was from what others told her.

54. Second, after describing her physical pain during the continuous penetration by the Appellant on the material night, she stated: '' I felt pain in my heart and that is when I felt like I did not want to stay there'', and it appears that the Appellant's demand on the following night regarding a flash disk broke the camel's back, as when PW1 left the house on the next day 24th July,2021 she did not return home for the night. Thus, on Sunday 25th July, her father approached PW2 asking whether PW1 spent the night in her house. According to PW1 when on Monday she was going to play with a friend, PW2 called her and informed her that her father was looking for her before feeding her, having confirmed she had not eaten. She stated that at first she was reluctant at first to confide in PW2 at the time, but eventually revealed to her the material events when pointedly asked whether her father had had sex with her.

55. PW2 herself confirmed this narration stating that after informing PW1 that her father had been looking for her, she expressed fear in returning home, and after having breakfast in the witness' home, hung around until after lunch when the witness once more asked her to go home '' so that the father could (find her on return) at her at home.'' This witness further stated:

> '' I have lived there (as neighbours with PW1's father) for 9 years and she (PW1) was living with her father. I have never seen her mother. She was afraid to go home and it got me concerned. I started asking her if she was a Christian and asked if something was bothering her, but she said no. In the process of talking, she started crying and I wanted to know why. I asked her if her father was not giving her food and if she was being beaten by the father. She said she was being given food but was beaten if she made mistakes. I asked her if the father had ever asked her for sex and she started crying. She was seated next to me and I decided to hold her. She told me the father had been asking her to remove her clothes when he comes drunk and has been having sex with her ...''

56. During cross-examination the witness stated inter alia that she was not (before this) interested in knowing whether the Appellant slept with his daughter although they were neighbours but was told by the daughter about it. She denied coaching PW1 to falsely accuse him. Pausing here, the witness was not a person exercising any public or other authority and her testimony was merely what PW1 allegedly told her, which PW1 repeated before the court at the trial. Hence, it is difficult to see how Article 50 (4) of *the Constitution* as has been invoked by the Applicant applied in the context of this case.

57. Here was a young girl living alone with her father, whose mother had never been seen in the home, who had run away from home and stayed away for at least two days and was scared to return. Any reasonable person would question why, and PW2 as a good neighbour, herself a mature woman with her own children could perceive that something was not right. Armed with knowledge of PW1's personal circumstances, showing her empathy and using common sense elimination of likely reasons for the Complainant's reluctance to return home, PW2 was able to elicit information which the minor had obviously kept secret.

58. Therefore PW2's leading question to PW1 concerning sexual relations with the Appellant must be understood in that context, and the fact that incidents of sexual abuse of minors by strangers and relatives have acquired public notoriety, both in urban and rural settings. Besides PW1 was, subsequent to this conversation examined by duly trained clinical officers to whom similar statements as made to PW2, and even worse assertions were made by PW1 against the Appellant, as disclosed in P.Exh. 1 (a) and (b).

59. Indeed, given her circumstances, PW1 was a vulnerable person. But to require as proposed by the Appellant, that PW2 ought to have engaged a psychologist before or while engaging PW2 appears an exaggerated standard. Few sexual offences would be detected by or reported to civilians, including parents and significant others, or even police if Article 50(4) of *the Constitution* were read as imposing such an onerous requirement.

60. That PW1 took several days before revealing this matter upon being questioned by PW2 is in the circumstances of this case not so much evidence of her inconsistency as alleged by the Appellant, but of the minor being conflicted by her loyalty to her father and the knowledge of the material events. It is not unusual for victims of abuse especially minors, to want to cover up the shame and self-blame for abuse by keeping it secret. From the evidence on record, neither PW1 nor PW2 had anything to gain by making such grave and false accusations against the Appellant. Besides, at the time she testified, PW1 was living in a children's home and not under the care of or control of PW2. In court, the minor stood firm on her testimony and was not shaken during cross-examination.

61. The sexual assault involved not a stranger, acquaintance, or distant person but the father of the victim, hence an aggravated sense of trauma and guilt. No less than the Court of Appeal while commenting on the use of euphemisms by minor witnesses in describing sexual acts had this to say in Muganga Chilejo Saha v Republic [2017] eKLR:

> " Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room."

62. Equally, the fact that the minor complainant was on the day after the assault admittedly able to play with other children is not inconsistent with her assertions of sexual assault. On the available evidence, this incident was not the first and even if it was, PW1 in her fear and trauma continued to act normally while hiding her secret from others, until PW2 was able to gain her confidence. The trial court stated in its judgment concerning PW1 that based on her testimony and demeanour, it had no reason to doubt her testimony stating correctly, that not any and every discrepancy and inconsistency is fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused.

63. In Mwangi v Republic [2021] KECA 345 (KLR) the Court of Appeal held that : "

> " On the alleged failure of the first appellate court to address inconsistencies, glaring gaps and extenuating gaps, the position in law and which we fully adopt is as was stated, inter alia by the court in Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993,that:
>
> "In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences..."

64. The oral testimony of PW1 and PW2 was materially corroborated by medical evidence through the clinical officer John Njuguna (PW5) from Nairobi Women's Hospital Rongai who produced the PRC and GVRC forms (PExh. 1 (a) and 1(b) dated 26.07.2021 and by the P3 form (P.Exh.2) produced by a clinical officer at Ngong sub-county Hospital Evelyne Muthoni (PW4) who examined PW1 on 27th July,2021 .

65. As documented in the exhibited medical reports, upon examination of PW1, it was noted that her hymen was torn and marked with redness while there was inflammation in the vagina and a whitish

discharge, all indicative of recent penile penetration. Section 2 of the *Sexual Offences Act* defines penetration as "the partial or complete insertion of a genital organ into the genital organs of another person"' as affirmed by the Court of Appeal in Mohamed Bachero v Republic [2015] eKLR.

66. This court having perused the PRC and GVRC forms (P.Exh. 1 (a) and 1 (b) found that, contrary to assertions by the Appellant on this appeal, both were fully completed, while PW4 clearly explained in her testimony that her findings were made after examining PW1. Moreover, under section 77 of the *Evidence Act*, the PRC and GVRC forms were properly produced, and no objection thereto was made by the Appellant at the time. PW4 and PW5 including the maker of the P.Exh. 1 (a) and 1 (b) were independent medical experts whose only role was to examine PW1 and render their expert opinions, hence would have no reason to collude with PW1 and PW2 in implicating her father as implied by the Appellant on this appeal.

67. In the face of this solid evidence by the prosecution, the Appellant's defence which consisted of a mere denial was totally displaced and was properly dismissed. Like the trial court, this court upon its own evaluation of the evidence finds that the prosecution evidence proved penetration beyond any reasonable doubt, and that the conviction was properly founded. In the circumstances, the grounds challenging the conviction are without merit and must fail.

68. By virtue of the age of the complainant, and pursuant to the proviso to section 20(1) of the *Sexual Offences Act*, the Appellant was liable to a sentence of life imprisonment but the trial court relying on MK v Republic (2015) eKLR sentenced him to 20 years imprisonment. Before this court, the Appellant has argued that the sentence went against the principles of sentencing and was harsh and excessive. He complained that the trial court did not consider mitigating factors in his favour.

69. Section 20(1) of the *Sexual Offences Act* provides that, "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 10 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.'

70. For the purposes of this case, the offence of incest with a child aged below 18 years is technically analogous to defilement contrary to Section 8(1) as read with Section 8 (2) or 8(3) of the *Sexual Offences Act* , save that the former involves a victim within the prohibited range of kinship, namely, daughter, granddaughter, sister, mother niece, aunt or grandmother. This case would fall within the offence of defilement contrary to Section 8(1) as read with section 8 (2) which attracts a mandatory life sentence, and ex facie, it would be an absurdity to read the proviso to Section 20(1) as envisaging a lighter sentence where the victim of incest is aged below 11 years.

71. The facts in SS v Republic (2021)KECA 450 (KLR) compare well to those of the instant case. SS, the Appellant had been tried, convicted and sentenced to life imprisonment for the offence of incest by a male contrary to Section 20(1) of the *Sexual Offences Act*. The particulars were that on diverse dates between September and October, 2009 at Malindi District, within the former Coast Province, the appellant had carnal knowledge of the complainant, DS, a girl aged 15 ½ years whom he knew to be his daughter and who was under his care as a parent. The appellant being dissatisfied with the decision, appealed to the High Court of Kenya at Malindi, which upheld the conviction and sentence by the trial court and dismissed the appeal.

72. SS then filed an appeal against conviction and sentence to the Court of Appeal. In its judgment delivered on 9th July 2021, the Court of Appeal dismissed the appeal against conviction but interfered with the life sentence citing the decision of the Supreme Court in Francis Karioko Muruatetu & another v Republic [2017] (Muruatetu I) . The Court stated as follows :

''On sentence, the appellant contends that the mandatory life sentence meted out on him is harsh and unconstitutional. This Court in Christopher Ochieng v Republic [2018] eKLR considered the legality of minimum mandatory sentences under the *Sexual Offences Act* and relying on the Supreme Court decision in Francis Karioko Muruatetu & another v Republic [2017] eKLR stated:

> " In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ..... Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."

73. The Court of Appeal then concluded in the case of SS as follows:

> ''In the instant appeal, and guided by the Supreme Court decision in Francis Karioko Muruatetu & another v Republic (supra) and persuaded by the decision of this Court in Christopher Ochieng v Republic (supra) in relation to sentencing, we are convinced and satisfied that the life imprisonment meted upon the appellant by the trial Court and upheld by High Court cannot stand. We are therefore inclined to interfere with the sentence as we hereby do. We accordingly set aside the life imprisonment meted upon the appellant. As regards an appropriate sentence we should impose, we have considered the mitigation proffered by the appellant on record. The sentence that commends itself to us is 30 years' imprisonment effective from 10th September, 2010 when the trial court imposed the life sentence. To that extent only, the appeal succeeds. The appeal on conviction is hereby dismissed.
>
> Orders accordingly."

74. First, from the above portion of the Court of Appeal judgment, there was no doubt in the court's mind that the sentence prescribed in section 20(1) of the *Sexual Offences Act* where the victim was under the age of eighteen years was a mandatory life imprisonment. And second, the only justification for the Court of Appeal interfering with the mandatory sentence was the Supreme court decision in Francis Karioko Muruatetu (Muruatetu I), as subsequently applied in its own decision in Christopher Ochieng v Republic [2018] eKLR .

75. The rationale in Muruatetu I (supra) has hitherto been applied in many cases involving offences under the *Sexual Offences Act*. Including Christopher Ochieng Vs. Republic (2018) eKLR (supra) and Manyeso V. Republic CRA No. 12 of 2021 (2023) KECA 827 (KLR); and Evans Nyamari Ayako v Republic Criminal Appeal No. 22 of 2018. However, subsequently, the Supreme Court in Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2021) eKLR (Muruatetu II) expressly stated that the dicta in Muruatetu I only applied to murder cases.

76. The Supreme Court has more recently further pronounced itself in Republic Vs. Mwangi and Others Petition No: E018 OF 2023 (2024) KESC 34 (KLR) as follows, regarding minimum or mandatory sentences prescribed under section 8 of the *Sexual Offences Act*:

> " In any case, the sentence imposed by the trial court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with the sentence."

77. Further, in its judgment on an appeal filed by the DPP in respect of the decision of the Court of Appeal in Evans Nyamari Ayako v Republic (supra), namely, Republic Versus Evans Nyamari Ayako Petition No: E002 of 2024 , the Supreme Court in its judgment delivered on 11th April 2024 stated that:

> "
>
> "(51) In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso Vs. Republic case where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate life sentence.
>
> In Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the Penal Code. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence."

78. As explained in Muruatetu II above, and whose dicta was applicable as of August 2022 when the Appellant herein was sentenced, the decision in the Muruatetu I and decisions in the Court of Appeal such as Christopher Ochieng Vs. Republic (2018) eKLR, cannot be applied in sentencing an offender convicted for offences under the *Sexual Offences Act*, which carry mandatory sentences. Thus, the lawful sentence for the offence of Incest contrary to Section 20 (1) of the *Sexual Offences Act* where the victim is aged below 18 years, such as LW the victim herein, is mandatory life imprisonment. The sentence prescribed in the proviso thereto is not discretionary.

79. As stated by the Court of Appeal in Stephen Nguli Mulili v Republic (2014) KECA 408 (KLR) while upholding the enhancement by the High Court , of a sentence of ten years awarded for an offence under section 8(3) of the *Sexual Offences Act*, to the minimum sentence of 15 years, the High Court is empowered under Section 354(3) (a) (ii) of the Criminal Procedure Code to enhance an erroneous sentence passed by the lower court under the *Sexual Offences Act*. The Court stated that the Act removed discretion in respect of minimum and mandatory sentences, especially where the victims were minors.

80. Based on the proviso to section 20 (1) of the *Sexual Offences Act* and flowing from the foregoing recent decisions of the Supreme Court thereon, the lawful sentence for the offence for which the Appellant was convicted is mandatory life imprisonment. The trial court had no discretion to award a different sentence. Neither does this court have the power to reduce the sentence awarded by the trial court as sought by the Appellant on this appeal. The sentence of 20 years imprisonment is itself erroneous and made without jurisdiction.

81. Accordingly, the court hereby sets aside the unlawful sentence of 20 years imprisonment and substitutes therefor the lawful mandatory sentence of life imprisonment. In the result, the appeal is found to be without merit and is hereby dismissed. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 24TH DAY OF FEBRUARY 2026.

C. MEOLI

JUDGE

In the presence of:

For the State: Ms. Kivali

Appellant: Present

C/A: Lepatei