



REPUBLIC OF KENYA



KENYA LAW
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**EKB v Republic (Criminal Appeal E041 of 2023)
[2026] KEHC 2630 (KLR) (2 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 2630 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E041 OF 2023
JR KARANJA, J
MARCH 2, 2026**

BETWEEN

EKB APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No. S.O. E025 of 2023 at Chief Magistrates Court at Kericho by the Hon. F. Nekesa, Senior Resident Magistrate then, delivered on the 22nd day of December 2023)

JUDGMENT

1. The Appellant, EKB, was charged with incest, Contrary to Section 20[1] of the *Sexual Offences Act*, in that on diverse dates between 4th October 2022 to 23rd February 2023 at [Particulars Withheld], Bureti within Kericho County being a father to I.C. engaged in Sexual Intercourse with the child, aged thirteen [13] years at the time.
2. There was an Alternative Count of Committing an Indecent Act with the said child Contrary to Section 11[1] of the Sexual Offence Act.
After pleading not guilty to both Courts, the Appellant was tried and convicted on the main count. A sentence of forty [40] years imprisonment was imposed upon him by the trial court.
3. Being aggrieved with the conviction and sentence the Appellant preferred the grounds of appeal set out in the petition of appeal.
As regards conviction, grounds three [3] and four [4] are the most relevant while grounds one [1] is the most relevant with regard to the sentence.
4. At the hearing of the appeal, the Appellant appeared in person while the Learned Prosecution Counsel, Mr. Kimaru, appeared for the State/ Respondent and opposed the appeal.



Basically, the duty of this court was to reconsider the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. [Okeno Vs. Republic [1972] KLR 32].

5. In that regard, the case for the prosecution was that the Complainant child, IC [PW1] was at the material time a primary School pupil aged twelve [12] years living with her father, the Appellant, and her mother, MC [PW2].
6. On 4th October 2022, the Complainant was at school when she was sent home to go get some money. She found the Appellant at home. Her mother had gone to pick tea. The Appellant sent her to the shop for some errands and when she returned home he called her into the bedroom where he defiled her while she was still in her school uniform.
7. Thereafter, the Appellant gave her [Complainant] some money and directed her to take it to the school and keep some for herself. He warned her against reporting the incident to anyone. Her mother returned home at lunch time, but she did not report the incident to her.
8. After a period of about five months on the 23rd February 2023, when her mother had gone to the river the Complainant was again defiled by the Appellant inside their house on a seat and much later on the 23rd April 2023 she proceeded to her grandmother's home in Narok where she was enrolled in a new school, but realized two weeks thereafter that she was expectant. She was then suspended from school.
9. The Complainant reported to the Auntie, CC [PW3] that she was expectant. The aunt proceeded to her school as her parent/ guardian for the closing day and learnt from the school's head teacher that the Complainant was expectant. She [PW3] took the Complainant to a local dispensary for examination and it was confirmed that she was pregnant. She [PW3] then reported the matter to the Complainant's mother [PW2].
10. In the meantime, C [PW3] interrogated and learnt from the Complainant that it was her father who defiled and warned her not to report to her mother [PW2]. She [PW3] conveyed the information to the Complainant's mother and later took the Complainant to the mother at Roret.
11. After collecting the Complainant from her aunt, the Complainant's mother [PW2] questioned the complainant and heard from her that she was defiled by the Appellant. She [PW2] then took her to Roret Police Station where the necessary report was made, before they were referred to Roret Sub-County hospital where Dr. Kirui Collins Mutai [PW4] examined the Complainant and compiled the necessary P3 form [P. Exhibit 3].
12. PC Lorna Nafula [PW5], investigated the case and gathered from the Complainant that the Appellant was her step-father and had since the year 2022 been in a habit of defiling her. The officer effected the arrest of the Appellant and after completing the investigation preferred the present offence.
13. The defence case was a denial and a contention that on the material dates of the alleged offences [i.e. 4th December 2022 and 23rd February 2023] he was not at home, but at his place of work. He stated that on 25th April 2023 police officers arrived at his home and arrested him on allegation that he had defiled the child complainant. He was later charged in court with the present charge.
14. The trial court after having considered the entire evidence concluded that the prosecution had proved its case against the Accused/ Appellant beyond reasonable doubt. The offence of incest falls under Section 20 [1] of the [Sexual Offences Act](#) which 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 ten years;

Provides that, if it is alleged in the information or charge and proved that the female person was 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.”

15. In this case, it was incumbent upon the prosecution to provide sufficient and credible evidence to establish Firstly, that the Child Complainant [PW1] was indeed sexually assaulted in the manner of being defiled. That, an act causing penetration was committed against her. Secondly, that the Appellant was the complainant’s father and Thirdly, that the offender was none other than the Appellant/ Accused.

16. Towards that end, the Complainant’s evidence as corroborated by medical evidence from the good doctor [PW4] established and proved without any particular dispute that the Complainant was sexually assaulted and this resulted in her pregnancy at a later stage. Whether this was a case of defilement or any other form of sexual assault depended on the age of the Complainant at the material time. As per the particulars of the charge, the age was placed at thirteen [13] years. The Complainant stated that she was twelve [12] years old and relied on the birth certificate [P. Exhibit 1].

17. The certificate [P. Exhibit 1] indicated that the Complainant was both on 10th July 2010, thereby placing her approximate age as at the time of the offence at twelve [12] years.

The age factor is vital as an ingredient of the offence of defilement and also for purpose of sentencing in relation to the offence of incest in terms of the proviso to Section 20[1] of the *Sexual Offences Act*.

18. The fact that the Complainant was defiled was indeed established and proved by the prosecution through the evidence of the Complainant and the doctor [PW4]. There was no doubt that an act of penetration was committed against the Complainant.

As to whether the Appellant was at the material time the father of the Complainant, the evidence purportedly establishing the fact was that of the Complainant and her mother [PW2] coupled with the documentary evidence in the form of the birth certificate [P. Exhibit 1].

19. There was no scientific evidence by way of DNA analysis to establish paternity in this case. The evidence by the Complainant and her mother pointed to the fact that they lived with and were taken care of by the Appellant at the material time. They implied that the Appellant was treated as and considered to be the husband of the Complainant’s mother, hence the father of the Complainant. As it were, the Appellant was treated as a half father or step father of the Complainant yet the birth certificate implied that he was the biological father of the Complainant.

20. Under Section 22 of the Sexual Offence Act, the term “father” includes a half father, a description which could be extended to mean or include a step-father.

In order to determine whether the Appellant was the father of the Complainant within the meaning of the provision of the *Sexual Offences Act* mentioned hereinabove, his relationship with the Complainant was of most importance than his relationship with the mother of the Complainant for purposes of the offence of incest.

21. More so, where it is shown, as in this case, that the Appellant was not the biological father of the Complainant as implied in the birth certificate [P. Exhibit 1] which therefore is an irrelevant or false document in establishing paternity. The fact that the certificate was obtained on 24th October 2022, a few days after the occurrence of the first episode of the offence on 4th October 2022, rendered it a



suspect document obtained with an ulterior motive with the intention of justifying the charge of incest against the Appellant and to “fix” him for reasons only known to the Complainants mother [PW2].

22. Be that as it may, the evidence by the Complainant, [PW1] along with that of her mother [PW2] and aunt [PW3] was sufficient and credible enough in showing that the Appellant treated and cared for the Complainant as his own blood daughter. His relationship with the Complainant was treatable and held out by all and sundry as that of father and daughter. He therefore fell within the meaning of Section 22 of the Sexual Offence Act. In any event, he did not in his defence expressly deny the fact.

23. This court agrees and would have no reason to disagree with the trial court’s finding that the Appellant played the role of a half or step father in the life of the Complainant.

It would appear that that role together with the Appellant’s parental relationship with the Complainant came to an end when the Complainant’s mother [PW2] was chased away together with the Complainant from the Appellant’s home after it was reported to the police that the Appellant had sexually assaulted the Complainant.

24. A half or step father assumes parental responsibility of a child by virtue of marrying such child’s mother or where the mother of such child and such half or step father cohabit as husband and wife without necessarily being lawfully joined in marriage in which case they will be presumed to be living as husband and wife with the child being treated as their daughter or son. Indeed, like the Kiswahili saying “alie na Mama ndio Baba”. i.e. the one with the mother is the father.

For all intents and purposes the Appellant was treated and regarded as the Complainant’s father as at the material time of the offence.

25. On whether the Appellant was positively identified as the person who defiled the Complainant on two occasions, the sole evidence in that regard was that of the Complainant. [PW7] as there was nobody at the scene to witness the two criminal episodes even though they allegedly occurred during daytime in the Appellant’s house.

In the absence of any independent evidence to corroborate the Complainant’s evidence against the Appellant it became a matter of the Complainant’s word against that of the Appellant.

26. The conviction of the Appellant by the trial court was largely based on the credibility of the evidence of the Complainant. In that regard, the trial court being alive to the provisions of Section 124 of the Evidence Act found that the Complainant told the truth.

The provision of the law herein about mentioned provides 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.”

27. Generally, an Appellate court accords high respect to a trial court’s findings based on the credibility of witnesses because the trial court had the advantage of observing their demeanour first hand. It would be difficult to interfere with such findings unless the trial court’s assessment of the evidence was plainly wrong or clearly erroneous or that the trial court failed to provide sufficient reasons for its findings on credibility.

28. In this case, it is evidently clear from the text of the trial court’s judgment that no clear or sufficient reasons were given by the trial court as to why the Complainants evidence was found believable and



safe to rely on to convict the Appellant in the background of the Appellant's defence if alibi which was clearly not displaced or disproved by any evidence from the prosecution.

29. The Appellant raised alibis with respect to the allegations made against himself. It was the duty of the prosecution to avail sufficient and credible evidence to disprove or displace the alibis, but this was not done in this case, thereby implying that the Appellant was maliciously implicated for an offence he did not commit. This therefore meant that the Complainant Contrary to what the trial court found did not tell the truth in court.

30. The possibility that the Appellant was framed was not too remote with the culprit being the complainant's mother [PW2] who most likely than not misused the Complainant to "sanitize" the frame up by giving false evidence in court.

It was not for the Appellant to prove his alibi but rather the prosecution to disprove it. He said that he was at his work place on the material dates, but the prosecution led no evidence to disprove the fact.

The Complainant's evidence was insufficient and lacking in credibility as to disprove the fact.

31. The burden of proof rests entirely on the prosecution to prove guilt beyond any reasonable doubt and if an alibi defence creates a reasonable doubt, then the accused person cannot be convicted especially if there is no other evidence to sufficiently and credibly support the charge against the Accused in the absence of the alibi defence or the alibi being disproved.

32. For all the reasons foregoing, it is the finding of this court, unlike that of the trial court, that the prosecution evidence on the identification of the offender was insufficient and unreliable for a safe and proper conviction of the Appellant. The Appellant could not be said, contrary to what the Complainant stated, that he was the person who offended the Complainant. His conviction by the trial court was erroneous and is hereby quashed and the sentence set aside.

33. In sum, the appeal is allowed. The Appellant be set at liberty forthwith unless otherwise lawfully held.

Ordered accordingly.

DATED AND DELIVERED THIS 2ND DAY OF MARCH, 2026

HON. J. R. KARANJAH,

JUDGE

