



**BKG v Republic (Criminal Appeal E013 of 2022)  
[2026] KEHC 1069 (KLR) (20 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 1069 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E013 OF 2022  
DO CHEPKWONY, J  
JANUARY 20, 2026**

**BETWEEN**

**BKG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant was charged, tried, convicted, and sentenced to serve life imprisonment for the offence of Incest, contrary to Section 20(1) of the [Sexual Offences Act](#). The conviction and sentence form the subject of the present appeal.

The particulars of the offence were that:-

“On diverse dates between 8<sup>th</sup> October, 2019 and 20<sup>th</sup> May, 2020, at [Particulars Withheld] within Ruiru Sub-County in Kiambu County, the Appellant intentionally and unlawfully caused his penis to penetrate Vagina of I.K., a child aged nine (9) months, who to his knowledge was his biological daughter”.

2. Being dissatisfied with both the conviction and sentence, the Appellant lodged a Petition of Appeal dated 28<sup>th</sup> May, 2024 citing the following grounds which were later amended as follows:-
  - a. That, the learned trial Magistrate erred in law and facts in convicting the Appellant when the crucial ingredients of the offence were never established and the prosecution did not discharge their duty to prove the case beyond the reasonable doubt as required in law.
  - b. That, the learned trial Magistrate lost direction in evidence after being influenced by the whole set of prosecution witnesses’ testimonies without finding that they were not credible and their evidence was suspicious and full of impression and but not proof.



- c. That, the learned Magistrate erred in law and facts in convincing the Appellant yet the charge sheet was at variance with the facts of the case and that the charge sheet before the trial Court was incurably defective with at this stage is not curable under Section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya.
  - d. That, the learned Magistrate erred in both law and facts by failing to consider that PW1's evidence was coached and that there existed a grudge between the Appellant and PW1.
  - e. That, the learned Magistrate erred in law and facts by convicting and sentencing the Appellant to a harsh and excessive sentence in the circumstances of the case based on insubstantial evidence thereby contravening Article 27(1), 28 and 29 (d)(e)(f) of *the Constitution* purposively interpreted.
  - f. That, the learned Magistrate erred further in law and fact while rejecting the Appellant's alibi defence which same was not challenged by the prosecution side as per Section 212 of the Criminal Procedure Code (Cap 75) Laws of Kenya.
3. This being a first appeal, this Court is under a duty to re-evaluate and re-assess the entire evidence that was placed before the trial court and arrive at its own independent conclusions. This principle was set out in the case of *Odhiambo –vs- Republic (2008) KLR 565*, where the Court stated that:-
- “The court has a duty to ensure that it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny, re-assesses it, and reaches its own determination based on the evidence.”
4. A similar position was first taken in the case of *Okeno –vs- Republic (1972) EA 32*, where the Court held:-
- “An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of the 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 conclusions. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.”
5. In order to discharge this obligation, it is necessary to outline the evidence that was presented before the trial court. In this case, the prosecution called three (3) witnesses in support of its case, namely; PW1, SAM, PW2, No. 64221 Corporal Susan Manga Kamau, and PW3, Dr. Daniel Koome.
6. PW1, SAM, the mother of the complainant, testified that the child (victim) was nine (9) months old at the time of the alleged incident. She stated that she was married to the Appellant and that they lived together with the child as a family at the [Particulars Withheld] of Ruiru.
7. PW1 told the court that on the evening of 20<sup>th</sup> May, 2020, she was doing laundry while the child remained in the house with the Appellant. She stated that she had earlier attended to the child, changed her clothing, diapers, fed her, and left her in the Appellant's care as she went to hang clothes on the rooftop of their residence. That while upstairs, she realised that she had left behind some cloth pegs and returned to the house. And upon her return, she found the Appellant standing at the bedroom door, while the child was crying on the bed and was without a diaper. PW1 stated that she questioned the Appellant about this and he stated that he was in the process of changing the child's diapers. It



- was PW1's testimony that there was no other person in the house at the time and an argument arose between them, after which she took the child and stayed away, leaving the Appellant behind until the following morning. She further testified that upon examining the child, she observed redness and inflammation around the child's private area, which caused her concern.
8. PW1 told the court that she immediately took the child to Plainsview Hospital, where she was examined by medical personnel. She stated that she was informed that the examination had revealed that the child's hymen was broken and she was no longer a virgin. She was then advised to wait for assistance, and subsequently, PW2, Corporal Susan Manga Kamau, arrived and escorted them to Ruiru Police Station. According to PW1, the police had been contacted by the hospital and the child was also examined at Ruiru Sub-County Hospital, where a medical report was prepared confirming that her hymen was missing. PW1 stated that she was issued with a Medical Treatment Card, which was produced in evidence as a prosecution Exhibit PMF1.
  9. Further, PW1 testified that she was present during the medical examinations and later returned home, with advice from the police that she notifies them once she encounters the Appellant. That later she contacted a neighbour who was a Police Officer and this led to the Appellant's arrest. It was PW1's evidence that prior to this incident, they had lived peacefully as a family. She added that when the child was about three (3) months old, the Appellant would often insist on attending to the child during diaper changes, after which the child would appear uncomfortable and would keep on crying. And when she questioned him further, he would dismiss her concerns stating that he would not harm the child. PW1 maintained that she was truthful in her testimony and that she had no personal grudge against the Appellant.
  10. During cross-examination by the defence, PW1 stated that she informed the police that her concerns had begun when the child was about three (3) months old. She testified that on the material day, the Appellant was lightly dressed and she had left the child in his care without suspecting any wrongdoing. She stated that the child was crying when she returned. She denied fabricating the allegations and reiterated that the child's private area appeared inflamed although there was no bleeding. She further stated that there was no history of sexual abuse in her family and that the child had no discharge, infections, or visible injuries on other parts of her body.
  11. On re-examination, PW1 reiterated that she bore no grudge against the Appellant arising from alleged relationships with other women.
  12. PW2, No. 64221 Corporal Susan Manga Kamau, the investigating officer in the matter, testified that on 21<sup>st</sup> May, 2020 she was on duty at the police station when she received a call from the Officer Commanding Station (OCS). She was informed of a report received from Plainsview Hospital concerning a child who had allegedly been sexually abused and defiled by a parent. She stated that the call had been made by the hospital administrator due to the sensitive nature of the matter.
  13. PW2 told the court that she proceeded to Plainsview Hospital where she found PW1 in the company of the child. PW1 explained to her the circumstances that had led to the report, and more particularly, she explained that she had been washing clothes while the child remained in the house with the Appellant, who is her father. PW1 went on to inform her that she had gone upstairs to hang clothes and upon realising she had forgotten clothing pegs, she returned to the house and found the child crying. And later, she noticed signs of interference in the child's private area.
  14. PW2 went on to state that she escorted PW1 and the child to Ruiru Sub-County Hospital for further medical examination and treatment. She stated that at this hospital, a treatment card was issued, a Post Rape Care (PRC) Form duly filled, and a P3 Form was also completed. These documents were later produced in evidence as prosecution exhibits.



15. Further, PW2 testified that she continued with investigations and subsequently arrested the Appellant, who was confirmed to be the biological father of the child. She produced the child's birth certificate as an exhibit to establish the parental relationship. She further stated that her investigations did not reveal any pre-existing grudge or dispute between PW1 and the Appellant which would have motivated false allegation between them.
16. During cross-examination, PW2 stated that the Appellant cooperated during his arrest, which was effected at his residence after the medical report had been completed. She confirmed that she was summoned to Plainsview Hospital and that she was present when the child underwent medical examination and when the medical records were prepared. She denied any allegations that she threatened, intimidated, or harassed the Appellant during the investigation process.
17. PW3, Dr. Daniel Koome, a Medical Officer, testified on behalf of Dr. Nginya Keziah, who had since been transferred. He produced the medical report prepared by Dr. Keziah. According to this report, the child had been examined and found to have a history consistent with sexual assault, had no prior medical conditions, and had no visible injuries on other parts of the body. Upon examination of the genital area, the report noted inflammation of the clitoris area, a broken hymen, and the presence of whitish discharge, with no active bleeding observed. These findings were documented in both the Post Rape Care (PRC) and the P3 Form and were classified as being consistent with vaginal penetration.
18. PW3 testified that it is not medically normal for a child of nine (9) months to present with inflammation of the clitoris or whitish discharge. He stated that such findings are indicative of trauma resulting from contact or interference with the genital area.
19. On cross-examination, PW3 stated that he had three (3) years of professional medical experience. He explained that a child's behaviour may vary and that a child may be irritable or calm depending on the circumstances and timing. He confirmed that although there was no bleeding, the inflammation noted was significant and that pain is not always continuously expressed. He explained that pain, calmness, and distress are temporary states, whereas trauma refers to injury sustained as a result of harmful contact.
20. PW3 clarified that the indication of "rape" on the P3 form may have been an error, as the medical classification differs from the legal categorisation of defilement involving a minor.
21. PW3 testified that a child of nine (9) months has identifiable genital anatomy and that medical examination is limited to clinical findings without determining the identity of the offender. He stated that the injuries observed could not have resulted from sporting activity, accidental injury, or fungal infection. He denied any suggestion that the medical records were fabricated, stating that the child was properly examined and treated at the hospital and that the medical documentation corroborated the clinical findings. He further stated that the child was placed on antibiotics and Post-Exposure Prophylaxis (PEP) as part of the standard medical response.
22. Upon the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case against the Appellant and accordingly ruled that the Appellant had a case to answer. The Appellant was therefore placed on his defence and he opted to give sworn statement in defence and call two witnesses.
23. The Appellant testified as DW1 and in his evidence, he denied the charge in its entirety. He stated that on the material day he was at home when his wife (PW1) requested him to remain with the child so that she could wash clothes. He went on to state that PW1 would periodically check on them and after she finished washing, she went upstairs to hang the clothes on the rooftop. According to him, PW1 returned to the house to collect clothes pegs approximately three minutes later and found that



- he had taken the child to the bedroom in order to change her clothes into a romper. He stated that the bedroom door was open and that PW1 immediately began examining the child's private parts, at which time the child was still wearing a diaper and trousers, as he had only removed the sweater. He testified that the child was calm at the time.
24. The Appellant also testified that PW1 began threatening him and this led into an argument between them. He stated that the argument caused the child to cry, but once the argument subsided, the child calmed down. According to him, PW1 then left them in the house and returned to the rooftop to continue hanging clothes.
  25. He told court that when PW1 later returned, she found them in a good mood. He stated that PW1 prepared supper while still visibly upset, after which he proceeded with his night shift duties, as he was working from home due to the COVID-19 restrictions in place at the time. He stated that the following morning, they woke up normally and PW1 informed him that she intended to go to the hospital due to a stomach upset but declined his offer that he accompanies her. He further stated that PW1 had previously accused him of having an affair with his Human Resource Manager. And during this period, a neighbour caused a commotion and came to inquire about the dispute.
  26. Further, the Appellant testified that PW1 later left for the hospital and returned at about 6.00 p.m. and upon inquiring why she had taken that long, PW1 informed him that she had reported him to the police. He stated that he contacted their neighbour, Christine, to confirm whether a report had indeed been made, and indeed she confirmed. That shortly thereafter, Police Officers arrived and arrested him. According to the Appellant, he fully co-operated during the arrest and was therefore not handcuffed. He further stated that while at the Police Station, PW2 remarked that he looked like a criminal. He testified that he remained in police custody for five (5) days because PW1 initially refused to attend court to testify, until the Officer Commanding Station sought time to trace her, having sensed improper dealings between PW1 and the investigating officer. He also stated that PW1 was later arrested, whereby the child was taken to a children's home, and this is when PW1 gave her testimony under pressure so that the child could be released back to her.
  27. It is the Appellant's contention that the P3 Form was defective and inconsistent, as in one section, it indicated that the child was jovial. He maintained that his relationship with PW1 had been strained and that the charges against him were fabricated with the intention of harming him. He thus prayed for an acquittal.
  28. During cross-examination, the Appellant reiterated that the child was not undressed as that he had only removed the sweater while changing her clothes. He stated that he was the family's breadwinner and that he was employed by DCO Ltd, although he had no documentary proof that he was working on the material day. He confirmed that the child was his biological daughter having been born on 5<sup>th</sup> August, 2019, although he did not possess her Birth Certificate. He further confirmed that at the time of the alleged incident, the child was about nine (9) months old and that he was living with PW1 then.
  29. He further stated that although the doctor testified that the child had been defiled, he had never met the doctor prior to the court proceedings and had no personal grudge against her. He nonetheless suggested that the doctor could have acted in cohort with PW1. He also stated that PW2 told him that he looked like someone capable of committing such an offence. However, the accused acknowledged that PW2 was not present during his arrest and that she had indicated she was informed of the matter by Plainsview Hospital. He stated that he had no grudge against PW2.
  30. DW2, James Gichuki Muchiri, testified that he knew the Appellant as his neighbour and that he was present on the day the Appellant was arrested. He stated that as he was leaving for work when he heard a commotion from the Appellant's residence and being an immediate neighbour, he went to find out



what was happening. He testified that the Appellant and PW1 often quarrelled loudly and on that particular day, PW1 was shouting while claiming the Appellant had ruined her life. He then left for work.

31. On cross-examination, DW2 stated that although he was aware of the offence the Appellant had been charged with, he did not live with the couple and had no knowledge of what transpired inside their house, as he was merely a neighbour.
32. Upon conclusion of the trial, the trial court found that the prosecution had proved the principal charge of incest as against the Appellant, beyond reasonable doubt. Consequently, the court found the Appellant guilty and sentenced him to serve a life imprisonment, citing the grave nature of the offence and the tender age of the child, who was nine (9) months old as the aggravating factors.
33. Aggrieved by both the conviction and sentence, the Appellant lodged the present appeal.
34. On 17<sup>th</sup> September, 2024, the appeal was admitted for hearing and the parties were directed to canvass the same by way of written submissions whereby the Appellant filed his on 3<sup>rd</sup> March, 2025. In his submissions, the Appellant argued that the essential ingredients of the offence were not proved, and that the trial court was unduly influenced by the prosecution's evidence that it and failed to properly evaluate his defence. He also submitted that the court did not adequately consider the existing dispute between him and PW1. He further contended that the trial court improperly rejected his alibi defence, which he argues was not challenged by the prosecution as required under Section 212 of the Criminal Procedure Code. The Appellant has gone on to submit that the sentence imposed against him was harsh and excessive contrary to the provision of Articles 27(1), 28 and 29(d),(e) and (f) of *the Constitution*. He thus seeks to have both the conviction and sentence set aside.
35. The Respondent's counsel, M/S Ndeda opted to submit orally and opposed the appeal arguing that the prosecution had proved all the ingredients of the offence of Incest against the Appellant as required by law. M/S Ndeda went on to point out that the offence of Incest is of serious nature repugnant to morality and also goes on to betray trust between the parties. She however agreed that the sentence of life imprisonment is harsh and urged the court to consider a more favourable sentence.

### **Analysis and Determination**

36. Having carefully considered the entire record of the trial court, the Petition of Appeal, I have carefully read through, analysed and evaluated the entire record of the trial Court, and the submissions made by the Appellant, and find that the main issues for determination are:-
  - a. Whether the conviction was supported by the evidence on record; and,
  - b. Whether the sentence imposed was lawful and justified.
37. The offence of incest is created under Section 20(1) of the *Sexual Offences Act*, which 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 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.”

38. From the foregoing statutory provision, it is now settled that for the offence of incest under Section 20(1) of the *Sexual Offences Act* to be proved beyond reasonable doubt, the prosecution must establish the following essential ingredients:
- a. That there was penetration or an indecent act within the meaning of Section 2 of the *Sexual Offences Act*;
  - b. That the complainant was a female person and, where applicable, that she was under the age of eighteen years;
  - c. That the accused person is a male person who committed the act;
  - d. That the accused person stood in a prohibited degree of consanguinity to the complainant, in this case, that he was the biological father; and,
  - e. That the accused person was positively identified as the perpetrator of the act, and that such identification met the threshold of proof beyond reasonable doubt.
39. It is required of the prosecution that these ingredients must be proved conjunctively hence failure to prove any one of them is fatal to the prosecution case. This position has been reiterated in numerous decisions of the superior courts, including in the case of *Nicholas Mutua Wambua –vs- Republic* [2019] eKLR and *JOO –vs- Republic* [2015] eKLR.

### **Proof of Penetration**

40. Penetration, however slight, is defined under Section 2 of the *Sexual Offences Act* as “the partial or complete insertion of the genital organs of a person into the genital organs of another person.” The law is also clear that penetration may be proved through medical evidence, the testimony of the complainant, or both.
41. In the present case, it was evidenced that the complainant was a child of nine (9) months and was therefore incapable of giving direct testimony. The prosecution relied entirely on medical evidence that was adduced through PW3. The medical report indicated that upon examination the following day, the child’s (victim’s) hymen was broken, was inflamed around the clitoris, and there was whitish discharge noted. PW3 opined that these findings were consistent with penetration.
42. This Court is alive to the settled principle that medical evidence is not a mandatory prove of penetration, but where it is tendered, it must be evaluated with circumspection. In the case of *Kassim Ali –vs- Republic* [2006] eKLR, the Court of Appeal held that “penetration can be proved by credible evidence even in the absence of medical findings”. Conversely, where medical evidence is the primary basis of proof, it must be cogent, consistent, and free from material doubt.
43. While PW3’s testimony establishes that the victim’s hymen was broken, this Court has established the need to consider the surrounding circumstances of the alleged incident. PW1 testified that she examined the child immediately after the alleged incident, and notably, she observed no bleeding or visible injuries apart from alleged redness and the inflamed vagina. In this court’s view, it is worth noting that the absence of blood, tears, or immediate discharge at the time of first inspection, coupled with the fact that the missing hymen and discharge which were only observed the following day, introduce an element of uncertainty that cannot be ignored, especially given the extreme tender age of the victim.



This must therefore be evaluated alongside the totality of the evidence on record, and where a doubt arises as to the timing or cause of injuries, such doubt ought to be resolved in favour of the accused.

44. Therefore, this Court finds that while penetration may have been established through the medical report, the evidence that were adduced by the prosecution three witnesses leaves lingering questions as to how and when it was inflicted.

### **Age of the Complainant**

45. The age of the complainant was not in dispute as PW1, PW2 and even the Appellant in his defence testified that the child was nine (9) months old at the material time. The child's birth certificate was produced to confirm this fact. Therefore, the victim's age was proved beyond reasonable doubt.

### **Prohibited Relationship**

46. It was equally not contested that the Appellant was the biological father of the complainant, which fact was admitted by the Appellant in his defence and corroborated by documentary evidence. The element of consanguinity was therefore conclusively established.

### **Identification of the Perpetrator**

47. The crux of this appeal turns on whether it was proved beyond reasonable doubt that the Appellant was the person who committed the alleged act. In the present case, it will be appreciated that none of the prosecution's witnesses testified that they saw the Appellant commit the act of penetration on the victim. PW1 who is wife to the Appellant and mother to the victim and lived in the same house did not witness any sexual act between the Appellant and victim. Her evidence was that she found the Appellant standing at the bedroom door and the child was crying while lying on the bed, allegedly without a diaper. She further stated that the Appellant's shorts were at the level of his thighs. In this Court's view, this observation, without more, does not amount to direct evidence of witnessing the Appellant engaged in the act of penetration. It was her evidence that after changing the child, she left to go and hang the clothes. That she returned to collect the pegs after about two minutes. This period is too brief and question becomes, is it possible for someone to have penetrated the victim and be found at the door of the room?
48. PW1 candidly admitted that upon her immediate inspection of the child, she saw there was no bleeding, save to say that the child was crying. However, crying for an infant is not uncommon, so that without any cogent corroboration, crying alone cannot be sufficient proof of sexual assault.
49. This Court having carefully analysed and evaluated the prosecution's evidence against the Appellant finds that the Appellant was arrested on account of suspicion and hence the prosecution's case basically rested entirely on circumstantial evidence. The principals governing circumstantial evidence as reiterated by the Court of Appeal in the case of *Abanga alias Onyango –vs- Republic* [1990]eKLR, are as follows:-
- a. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
  - b. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and,
  - c. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no other person.



50. In *Abanga alias Onyango –vs- Republic* (supra), the Court went further to caution that where there exists a co-existing circumstance which weakens or destroys the inference of guilt, the accused is entitled to an acquittal. This principle has consistently been reaffirmed in later decisions, including cases such as *Musili Tulo –vs- Republic* [2014]eKLR and *Republic –vs- Kipkering arap Koske & Another* (1949) 16 EACA 135.
51. In applying the above principles to the facts of this case, subject of this Appeal, this Court finds that the circumstantial evidence that was presented by the prosecution and ultimately relied upon by the trial Court in finding the Appellant guilty, convicted and sentenced for the offence of Incest does not meet the requisite legal threshold that was set down in *Abanga alias Onyango –vs- Republic* (Supra). The mere fact that the Appellant was alone with the child, for a brief period, was found standing at the bedroom door with his shorts towered to his thighs, and on being checked by PW1, victim’s vagina was reddish and inflamed, does not irresistibly point to his guilt.
52. PW1’s testimony that the Appellant’s shorts were at the level of his thighs without any other corroborative evidence of a sexual act, or proof through DNA test cannot be elevated to proof of penetration. In the case of *Paul Etole & Another –vs- Republic* [2001] eKLR, the Court of Appeal warned against drawing adverse inferences from equivocal conduct that is capable of innocent explanation. It will be noted that in cross-examining PW1, the Appellant brought out the fact of having been dressed in sagging shorts, which is a commonly observed fashion among the young male population in society.
53. Moreover, PW1 testified that she immediately inspected the child after the alleged incident and observed no bleeding. This is a material aspect of the evidence. While the absence of bleeding does not, in all cases, negate penetration, in the context of a nine-month-old infant, such absence raises legitimate doubt. This court’s view is that where the complainant is of such tender age, the medical findings ought to have been closely interrogated, particularly where the alleged act is said to have occurred shortly before examination.
54. As for the Medical Report that was produced, although it confirms that the victim’s hymen was broken, the findings did not establish the identity of the perpetrator. Infact, in cross examination, PW3 candidly admitted that medical examination can only confirm injury but not who caused it. This position was also affirmed in the case of *PMK –vs- Republic* [2017] eKLR, where the Court held that “medical evidence, however strong, cannot by itself link an accused person to the offence without additional evidence connecting him to the act”.
55. Of particular concern to this Court is the absence of forensic evidence. PW3 testified that whitish discharge was observed in her examination of the victim the following day. As earlier observed by this Court, the victim’s age was that there needed to have been further interrogation of such findings by the Medical Expert to conclusively determine that the victim had been penetrated. However, there was no explanation was given as to why no DNA analysis was undertaken to establish whether the Appellant’s DNA was present in the child’s genital area. In offences of this gravity, where the accused is readily identifiable and available, forensic testing would have provided objective corroboration to the other evidence. While failure to conduct DNA analysis is not per se fatal to a prosecution case, its absence becomes significant where, as in the case herein, the case hinges entirely on circumstantial evidence. This point was underscored in the case of *BNM –vs- Republic* [2020] eKLR, where the Court held “that the absence of available forensic evidence may raise doubt where the prosecution case is otherwise tenuous”.
56. The prosecution also relied heavily on the fact that the Appellant was the only adult present with the child at the material time. However, this fact alone does not complete the chain of circumstances



required under the Abanga alias Onyango case (supra). There was no evidence excluding the possibility that the injury, if any or at all could have occurred at a different time or under different circumstances. Indeed, PW1 herself testified that she had harboured suspicions from when the child was three months old, yet there is no evidence that a report was made at that time. This temporal gap weakens the prosecution narrative. Further, it will be appreciated that the Appellant in his cross examination of PW1, through to his defence raised the issue of their relationship having been strained and claim of infidelity whereby PW1 suspected the Appellant to be involved in illicit relationships with other women. He testified that this would make their quarrel and this is what caused the child to cry. This was corroborated by DW2, who said he was their immediate neighbour. This evidence was not displaced and it goes on to further heighten the weakness in the prosecution's case. This Court has been left wondering if this case is not a perfect case of 'hell has no fury tile a woman scorned'.

57. In the case of Republic –vs- Johnson Onyango Odongo [2019] eKLR, the Court held that where circumstantial evidence leaves open more than one reasonable hypothesis, one of which is consistent with the innocence of the accused, the court must adopt that hypothesis and acquit. In the present case, the possibility that the injury may have occurred outside the narrow window alleged by PW1 was not conclusively excluded.
58. This Court is also mindful of further defence put forward by the Appellant. While the burden of proof never shifts to the accused, his explanation that he was in the process of changing the child's clothes was plausible as today, it is uncommon to find fathers doing this. This was not adequately displaced by the prosecution. The trial court, with respect, appears to have discounted this explanation on the basis of suspicion rather than evidential contradiction. In the case of Okethi Okale & Others –vs- Republic [1965] EA 555, the Court held that “an accused person's defence must be considered against the prosecution evidence as a whole and rejected only where it is demonstrably false”.
59. Ultimately, this Court finds that the circumstantial evidence relied upon by the prosecution did not form a complete and unbroken chain pointing irresistibly to the guilt of the Appellant. The conviction was therefore founded on suspicion and inference rather than proof beyond reasonable doubt.
60. As stated in the case of Mary Wanjiku Gichira --vs- Republic [2016] eKLR, courts must guard against the natural revulsion that accompanies allegations of sexual offences from overshadowing the fundamental requirement of proof.
61. In light of the foregoing analysis, this Court finds that while the prosecution established and proved the age of the complainant (victim) and the prohibited relationship between the Appellant and the (victim)child, it failed to prove that the Appellant committed the alleged act of penetration of the victim (child) beyond reasonable doubt. Taken as a whole, the evidence on record raises reasonable doubt as to the Appellant's guilt. That doubt must, in accordance with the law, be resolved in favour of the Appellant. It is therefore this Court's finding that the trial court erred in law and in fact in finding the Appellant guilty and proceeding to convict and sentence him for the offence of Incest on the basis of circumstantial evidence that did not meet the established legal threshold.
62. Consequently, this Court finds the appeal meritorious and proceeds to allow the same with the following orders issuing:-
  - a. The Appellant's conviction for the offence of Incest contrary to Section 20(1) of the [Sexual Offences Act](#) is hereby quashed; and,
  - b. The sentence of life imprisonment meted against him be and is hereby set aside.
  - c. The Appellant, Benson Koome Gakii, shall forthwith be set at liberty unless otherwise lawfully held.



It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 20<sup>TH</sup> DAY  
OF JANUARY , 2026.**

**D. O. CHEPKWONY**

**JUDGE**

