



REPUBLIC OF KENYA



**KENYA LAW**  
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**KL v Republic (Criminal Appeal E093 of 2021)  
[2026] KECA 624 (KLR) (13 March 2026) (Judgment)**

Neutral citation: [2026] KECA 624 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL E093 OF 2021  
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA  
MARCH 13, 2026**

**BETWEEN**

**KL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kakamega  
(C. Kariuki, J.) dated 10th November, 2016 in HCCRA. No. 47 of 2011)*

**JUDGMENT**

1. The appellant, Kelvin Lunjanja, was charged with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*. The particulars of the charge alleged that 24<sup>th</sup> July, 2009, at xxxx Village, xxxx Location, within Kakamega South District, within Western Province, the appellant unlawfully and intentionally inserted his genital organ namely penis into the genital organ, namely vagina, of M.L., a girl aged 11 years, who to his knowledge, was his sister. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on the same date, and at the same place, the appellant unlawfully contacted his genital organ namely penis into the genital organ namely vagina of M.L., a girl aged 11 years. The appellant pleaded not guilty to the charges and his trial soon thereafter ensued.
2. The gist of the prosecution's case was that the appellant, who is the complainant's half-brother, defiled her on several occasions. The complainant (PW1), who testified through an intermediary, told the court that she was at home with the appellant when he took her to the bedroom, held her by the throat, and placed her on their mother's bed. He undressed her and proceeded to insert his penis in her vagina. The complainant stated that she tried to cry out but the appellant, who was holding her by her throat, threatened to kill her if she did. After the incident, she stated that she went to her Aunt Flora's (PW4) house, but that she was not able to tell her what the appellant had done to her, as she feared that the appellant might make good his threat of killing her. She later went to PW3's (TL) house and told her



- what the appellant had done to her. Later that day, she informed her mother that her brother had sexually assaulted her, but her mother did not believe her. Frustrated, the complainant went back to PW3's house and told her that her own mother did not believe her. She spent the night at PW3's house.
3. PW3 told the court that the complainant came to her house on 24<sup>th</sup> July, 2009 to play with her children. At about 4:00 p.m., she asked the complainant to go home as it was getting late, but the complainant refused. That was when the complainant informed her that the appellant had formed a habit of defiling her on her mother's bed, when their parents left the house in the morning in search of work. The complainant further told her that she was afraid, as the appellant had threatened to kill her if she told anyone. PW3 testified that she informed the complainant's mother, as well as the area Assistant Chief. The following day, she took the complainant to PW4's house, and told her what had transpired. PW4 called PW2, PL, and together they took the complainant to hospital, and further reported the matter at Isulu Police Post.
  4. PW6, Francis Wasike, who was a clinical officer based at Kakamega General Hospital at the time, told the court that he examined the complainant on 30<sup>th</sup> July, 2009. She was alleged to have been defiled on several occasions, the latest incident having occurred on 24<sup>th</sup> July, 2009, and had received treatment at Shihamba Dispensary. PW6 found that the complainant had injuries on both her thighs, which were approximately a week old. Her vulva was bruised and swollen, and her hymen had been ruptured.
  5. The investigating officer, PC Johnson Gichuhi (PW5), told the court that after the matter was reported to the police, the appellant went into hiding. He was arrested a month later at Musoli AP Camp. PW5 re-arrested him and charged him with the offence of incest. PW5 produced in evidence the complainant's P3 form and baptism card which indicated that she was born on 8<sup>th</sup> August, 1997, and was ten (10) years of age at the time of the offence.
  6. After close of the prosecution's case, the trial magistrate determined that the appellant had a case to answer. The appellant was placed on his defence. He elected to give unsworn evidence. He denied the charges. He testified that he was arrested on 20<sup>th</sup> August, 2009, at about 10.00 p.m. by members of the public.
  7. At the end of the trial, the learned magistrate found the appellant guilty as charged in the main charge, and sentenced him to serve life imprisonment. The appellant, aggrieved by this decision, filed an appeal before the High Court at Kakamega.
  8. In his petition of appeal, the appellant alleged gross violation of his constitutional right to a fair trial. He complained that the prosecution failed to disclose material evidence such as witness statements and documentary evidence in their possession. He averred that his arrest was linked to an alleged offence of assault, and not defilement. He faulted the trial court for failing to direct that samples be collected from the appellant for the purpose of forensic testing, including a DNA test, to ascertain that indeed the appellant committed the offence. He was aggrieved that his conviction by the trial court was based on the evidence of a single witness, who was a minor, and which evidence lacked corroboration. He took issue with the fact that the trial court rejected his alibi defence, which, according to the appellant, created doubt, as to the strength of the prosecution's case. The appellant faulted the trial court for failing to determine that the prosecution's evidence was marred by contradictions, and that the prosecution failed to avail crucial witnesses, being the complainant's parents, to establish its case.
  9. The learned Judge (C. Kariuki, J.) after re-evaluating the record of the trial court and the evidence tendered before it, saw no reason to disturb the conviction and sentence of the appellant by the trial court.



10. The appellant is now before this Court, seeking to overturn the decision of the High Court essentially on the same grounds of appeal that did not favour with the first appellate Court.
11. The appeal was canvassed by way of written submissions. The appellant appeared in person. It was his submission that he was not accorded a fair trial, as his application to have the trial start afresh was denied by the trial court, and that he was not given a chance to recall the complainant for further cross-examination, through her intermediary. The appellant submitted that the two courts below failed to consider the circumstances surrounding this case, which in his view, fell short of establishing the prosecution's case against him to the required standard of proof beyond reasonable doubt. He opined that the complainant was not a credible witness, as she failed to inform PW3 of the alleged defilement immediately she got to PW3's house, but rather went to play with PW3's children until 4.00 p.m. that day. It was his submission that the medical evidence adduced by PW6 did not conclusively determine that the complainant was defiled. On sentence, the appellant was of the view that the mandatory life sentence meted by the trial court was harsh and excessive, and that it went against the provisions of Article 25(c) of *the Constitution*, due to its indeterminate nature. The appellant urged this Court to substitute the life sentence with a term sentence. He urged that he was arrested at the tender age of eighteen years old. He has been in custody for more than sixteen (16) years. The appellant invited us to allow his appeal as prayed.
12. In rebuttal, learned prosecution counsel, Ms. Busienei, submitted that the ingredients forming the offence of incest were sufficiently established by the prosecution. She stated that it was not contested that the appellant was the complainant's half-brother. It was her submission that the evidence by the complainant regarding penetration was corroborated by the medical evidence, which established that she suffered injuries on her thighs, that her vulva was injured and swollen, and that her hymen was ruptured. Ms. Busienei explained the fact that the complainant was a minor at the time of the offence was sufficiently established by her baptism card availed before the trial court, which established that she was born in 1997. It was her submission that the appellant is the complainant's brother, and was therefore well known to her, and that his identification was therefore watertight.  
  
She pointed out that the proviso to Section 124 of the *Evidence Act* entitles a court to convict an accused person in a criminal case involving a sexual offence, on the basis of the evidence of the victim, if the court is satisfied that the victim is telling the truth. On sentence, learned State counsel affirmed the constitutionality of the appellant's sentence. It cannot be challenged on a second appeal, when the same issue was not raised before the High Court in the first instance. She therefore urged us to dismiss the appeal in its entirety.
13. This is a second appeal. The mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of *Kaingo vs Republic* [1982] KLR 213, this Court stated thus:  
  
“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did (*Reuben Karoti S/O Karanja versus Republic* [1956 17EACA 146].”
14. We have carefully considered the record of appeal, and the rival submissions set out above, in light of this Court's mandate. In our opinion, the issues that arise for our determination can be summed up as follows:



- i. Whether the prosecution established its case against the appellant, beyond any reasonable doubt;
  - ii. Whether the appellant's constitutional right to a fair trial was violated;
  - iii. Whether the appellant's sentence is lawful.
15. On the first issue, it was the appellant's submission that the complainant was not a credible witness, and that the medical evidence was inconclusive on whether the complainant was indeed defiled. For the prosecution to establish the charge of incest against the appellant, it was required to establish the following: that the appellant was related to the complainant; that there was penetration; and in the case where the complainant is a minor, the age of the complainant; as well as proper identification of the appellant.
16. Section 20(1) of the *Sexual Offences Act* stipulates 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.”
17. The fact that the appellant is the complainant's half-brother was not contested. The complainant referred to the appellant as her brother, and stated that they lived in the same house. PW4, the complainant's aunt, told the court that the appellant and the complainant shared a mother, but were born of different fathers.
18. The age of the complainant was established by the prosecution beyond any reasonable doubt. The complainant testified that she was ten (10) years of age. Her baptism card, which was produced in evidence before the trial court, confirmed that she was born on 8<sup>th</sup> August, 1997. This meant that she was ten years old at the time of commission of the offence. This evidence was not challenged by the appellant. There was no doubt that the complainant was a child when the offence was committed.
19. With respect to penetration, it was the complainant's testimony that the appellant defiled her on several occasions, when her parents were not at home. On the last incident, which occurred on 24<sup>th</sup> July, 2009, the complainant told the court that the appellant took her to the bedroom, removed her clothes and pinched her on both thighs. He held her by her throat and placed her on her mother's bed, where he inserted his penis in her vagina. She stated that she bled from her vagina. It was her evidence that the appellant threatened to kill her if she told anyone about that incident. She stated that she went to PW3's house and informed her what the appellant had been doing to her. Later that day, she told her mother, but her mother did not believe her. Frustrated, she went back to PW3's house and told her that she was tired of the constant sexual abuse occasioned upon her by the appellant at their home. PW3, in her evidence, confirmed that the complainant confided in her that the appellant had formed a habit of defiling her when their parents were not at home. PW3 stated that she stayed with the complainant that night, and took her to PW4's house the following day, from where they reported the matter to authorities. She later took the complainant to hospital for medical examination.



20. PW6, who examined the complainant on 30<sup>th</sup> July, 2009, told the court that she had injuries on her thighs, and that her vulva was bruised and swollen. He further stated that her hymen was ruptured. PW6 estimated that the complainant's injuries were approximately a week old. He stated that she had earlier been treated at Shihamba Dispensary. We hold that the complainant's evidence of penetration was corroborated by the medical evidence adduced by PW6 beyond reasonable doubt.
21. The appellant's submission that the complainant was not a credible witness, since she failed to inform PW3 of the alleged defilement immediately she got to PW3's house is unfounded. The complainant, who was only ten years of age, testified that she was afraid of telling anyone about the incident, in light of the fact that the appellant had threatened to kill her if she did. The complainant opened up to PW3, after PW3 asked her to go home, she refused to go home as she was apprehensive that if she went back home, the appellant would sexually assault her again. The situation was made dire given the fact that her own mother did not believe her when she informed her what the appellant had been doing to her. We agree with the findings of the two courts below that the prosecution's case was consistent and cogent, and that the appellant's guilt was proved beyond any reasonable doubt. The appellant's defence constituted mere denial, which did not displace the overwhelming evidence adduced by the prosecution witnesses against him.
22. The appellant was aggrieved that his right to a fair trial as guaranteed by Article 50(2) of *the Constitution* was violated. It was his submission that the trial court improperly rejected his application to have the case start afresh, and that since he was unrepresented, he technically intended to have the complainant recalled for further cross-examination, which application ought to have been favourably considered by the trial court. A perusal of the trial court's record reveals that when the appellant applied for the case to start de novo, only the evidence of the complainant had been taken by the learned magistrate. The appellant urged that he wanted the case to start afresh, as he had not heard what the complainant said when she gave her testimony.
23. The trial court, noting that the complainant was treated as a vulnerable witness, and that she had to testify through an intermediary as she was terrified of the appellant, rejected the appellant's application for reasons that the appellant was availed with the witness statement prior to the hearing date, that he did not inform the court that he did not hear the complainant's testimony on the day she testified, and further, that he ably cross-examined the complainant when he was given an opportunity to do so.
24. We observed that the trial court asked the appellant whether he wished to cross-examine the complainant further, and noted that if he made an application to recall PW1 for further cross-examination, the said application would be allowed by the court. The appellant did not take up the chance to have the complainant recalled. He insisted that he wanted the case to start afresh. He cannot therefore now claim that he did not want the case to start afresh, but rather wanted the complainant to be recalled for further cross-examination, when the record clearly shows that he was given the chance to make an application to have the complainant recalled, which he failed to take up. This ground of appeal must therefore fail.
25. The appellant, in his written submissions, challenged the sentence imposed by the trial court, and affirmed by the first appellate court, for being unconstitutional, harsh and excessive in the circumstances. The appellant urged that the life sentence defied the provisions of Article 25(c) of *the Constitution*, due to its indeterminate nature. The learned prosecution counsel, on her part, urged that, the constitutionality of the appellant's sentence could not be canvassed before this Court as it did not form part of the appellant's arguments before the first appellate court.
26. The record shows that the appellant did not challenge the legality of his sentence in his first appeal before the High Court. The question of whether the sentence was unconstitutional, harsh and



excessive is being raised by the appellant for the first instance in this second appeal. No opinion was formed by the first appellate court relating to the said question. This issue is therefore improperly before us. This Court in *AT v Republic (Criminal Appeal 63 of 2022) [2023] KECA 1393 (KLR) (24 November 2023) (Judgment)* observed as follows:

“The reason why this Court shies away from interfering with decisions of the trial court or the first appellate court on matters not raised before the said courts is that this Court deals with the appellant’s grievances based on allegations of errors of omission or commission committed by the said courts. Where the issues being raised are not matters which were placed before the lower courts and therefore the said courts did not address their minds to them, it would be improper to interfere with their decisions when they had no chance of dealing with the same and no finding was made in respect thereof.”

27. That being said, Section 20 (1) of the *Sexual Offences Act* provides that if the charge of incest is proved, and the victim is found to be under the age of eighteen years, the accused person shall be liable to imprisonment for life.
28. In the instant case, the complainant was ten (10) years old at the time the offence was committed, and therefore the appellant was liable to life imprisonment upon conviction.
29. The Supreme Court in the case of *R vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC 34 (KLR) (12th July 2024) (Judgment)*, highlighted the courts’ obligation not to interfere with mandatory minimum sentences prescribed under the *Sexual Offences Act*. The apex Court noted that the minimum sentences imposed by under the *Sexual Offences Act* are lawful, and remained lawful, as long as the said penalty sections remained valid.
30. We are therefore satisfied that the sentence meted upon the appellant was not harsh or excessive, looking at the circumstances of the case. The appellant, despite being the complainant’s older brother, chose to violate her, and take advantage of her innocence, by sexually assaulting her on several occasions, and additionally threatening to end her life if she disclosed to anyone about the abuse. Had the complainant not confided in PW3, who initiated the process of reporting the matter to the authorities, who knows for how long the appellant would have continued to sexually abuse the complainant, given the fact that her parents were unwilling to hold the appellant accountable. We are satisfied that the sentence imposed was lawful, appropriate and justified in the circumstances.
31. In the premises, we are satisfied that the first appellate Court addressed itself correctly on the law and properly carried out its duty of fresh review and re-evaluation of the evidence placed before it. The appeal before us has no merit. We hereby dismiss the appeal, on both conviction and sentence.

**DATED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF MARCH, 2026.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**H.A. OMONDI**

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**JUDGE OF APPEAL**

**L. KIMARU**



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**JUDGE OF APPEAL**

I certify that this is a true copy of original.

**DEPUTY REGISTRAR**

