



REPUBLIC OF KENYA



**KENYA LAW**  
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**SKW v Republic (Criminal Appeal 49 of 2020)  
[2025] KECA 326 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 326 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 49 OF 2020  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
FEBRUARY 21, 2025**

**BETWEEN**

**SKW ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at  
Bungoma (Ali-Aroni, J.) dated 10th June 2019 in HCCRA No. 40 of 2017)*

**JUDGMENT**

1. The appellant, SKW, appeared before the Senior Principal Magistrate's Court at Webuye where he faced the charge of incest by a male person contrary to section 20(1) of the *Sexual Offences Act*. The particulars of the charge were that on 14<sup>th</sup> May, 2011 in Bungoma County, the appellant caused his penis to penetrate the vagina of A.W<sup>1</sup>. a female person who, to his knowledge, was his daughter.  
<sup>1</sup> Initials used to protect her identity
2. The appellant denied the charge, prompting the trial in which the prosecution called five (5) witnesses. The prosecution's case was that upon losing her mother, the complainant remained in Kakamega with her uncle SG and attended school at [Particulars Withheld]. On 13<sup>th</sup> February, 2011, the appellant, who is her biological father, went for her promising to take her to another school, which he did not. Instead, he had carnal knowledge of her several times as a result of which she conceived and gave birth. Both PW3, FN [F] and PW4, JOO[J], confirmed to the court that the complainant went to their houses, and informed them that the appellant had assaulted and impregnated her.
3. Francis Barchebo, a clinical officer from Kitale District Hospital attended to the complainant on 8<sup>th</sup> August, 2011. On physical examination, he noted the complainant was pregnant and the pregnancy test was positive.



4. PW5 Anne Wangechi Nderitu [Anne], the government analyst, conducted DNA tests on the appellant and the resultant baby, and confirmed that there was a 99.9% chance that the appellant was the biological father of the complainant's child.
5. The appellant gave a sworn statement in his defence and called 2 witnesses. He denied committing the offence and further denied that the complainant was his daughter. He asserted that the complainant had eloped from school with one LM for 2 weeks and was later chased away. The appellant maintained that LM was responsible for the complainant's pregnancy. He admitted blood samples being taken from him and the baby, but denied that the samples had been taken to Nairobi. He termed the D.N.A. report as fraud. Dr Wambasi Mutoro from Webuye District Hospital produced the hospital register confirming that specimens were collected from the appellant as well as A.A.W. and the child. Dr. Hesbon Kuturi the in charge of the laboratory at Webuye District Hospital confirmed that he drew the blood specimen from the appellant, the child and A.A.W and kept it in the fridge awaiting the investigation officer to take the same to the Government Chemist. In this case, the samples were to be analyzed in Nairobi, however, the appellant claimed that they were never taken to Nairobi. The samples were destroyed after 3 months as usual.
6. The learned trial magistrate, upon assessing and analyzing the evidence tendered before the court found the appellant guilty as charged, convicted him and sentenced him to life imprisonment.
7. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. The High Court after re-evaluating and analyzing the evidence on record, found as follows:

“As relates to the relationship between the complainant and the appellant the DNA results were silent and the trial court appeared to have believed the evidence of the Complainant, PW3 and PW4 about the Complainant's relationship to the accused and the age of the Complainant as the DNA analysis did not consider this relationship. The appellant argued that no samples were ever taken to the Government Chemist. He also cast doubt on the age assessment of the complainant by PW1. In order to ensure that justice arrived at and assuming that the Government Chemist may have inadvertently left out the crucial sampling of DNA between the appellant and the complainant, due to the time-lapse and in the interest of justice where the appellant a 75-year-old man denies having fathered the child. The complainant said to have been 17 years at the time and in form 2, this court ordered fresh DNA samples be taken from the complainant, the appellant and the complainant's child for purposes of analysis to ascertain whether the appellant has any relationship with the complainant and if he may have sired the complainant's child. The court also directed that proof of the complainant's age if any be produced.

Having analyzed the old and new evidence in court the charge of incest against the appellant cannot hold. It has been scientifically proven that AW is not his biological child. The appellant and A were not related by blood nor was there any other proof connecting them. The charge of incest cannot therefore be sustained.

However, the DNA of the child born by A the complainant is a clear testimony that intercourse took place. I am satisfied that from the testimony of the complainant and the birth certificate produced that she was 17 years of age at the time and by having sex with her the appellant committed the offence of defilement contrary to section 8[4] which provides for a maximum sentence of 15 years.

Consequently, the conviction of the offence of incest is quashed, and the life sentence is set aside. Instead, the appellant is convicted of the offence of defilement under Section



8[4] of the *Sexual Offences Act*. The offence carries a jail term of 15 years. The appellant is accordingly jailed for 15 years which time will run from the date of 1<sup>st</sup> conviction being 31<sup>st</sup> March 2017.”

8. Undeterred, the appellant has now filed this second appeal. The appellant filed a memorandum of appeal raising three (3) grounds that the 1<sup>st</sup> appellate court erred in law: by failing to find that the charge sheet was defective and could not support the charge of incest, in amending the charge sheet to defilement and in upholding the conviction and sentence yet crucial witnesses were never called.
9. At the plenary hearing of the appeal, the appellant appeared in person and urged the court to consider the current mitigating factors that he is suffering from diabetes and cancer and needed specialized care as per the annexed medical reports. On their part, the respondent was represented by Ms. Mwaniki, learned Prosecution Counsel, who relied on the written submissions that had been filed.
10. Ms. Mwaniki submitted that contrary to the appellant's assertion, Section 179 of the *Criminal Procedure Code* empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. In support of this proposition, reference is made to the case of Robert Mutunqi Muumbi vs. Republic [2015] eKLR, where it was held that an accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.
11. It is further submitted that by the appellant being charged with the offence of incest which is related to defilement, he knew that the prosecution had a duty to show that the appellant committed the offence of defilement to his victim. The first appellate court was, therefore, correct to convict the appellant with the lesser charge of defilement since the evidence tendered proved the charge of defilement.
12. This being a second appeal, under section 361(1)(a) of the *Criminal Procedure Code*, the mandate of this Court is limited to matters of law only. Further, this Court will not interfere with concurrent findings of facts by the two courts below, unless such findings were based on no evidence, or on misapprehension of the evidence, or that the courts below acted on wrong principles to arrive at the findings. See Chemogong vs. Republic [1984] KLR 611, Ogeto vs. Republic [2004] KLR 14, and Karingo vs Republic [1982] KLR 213 where this Court stated that:

“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 it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karasi s/o Karanja vs. R. [1956] 17 E.A.C.A 146)”
13. Having considered the record and the parties' submissions, the authorities cited and the law, the main issue for determination is whether the first appellate court erred in substituting the charge of incest for defilement as a minor and cognate offence.
14. The appellant is aggrieved by the substitution of the charge by the first appellate court, an issue that is considered to be a matter of law and hence open for this Court's analysis.



15. Section 179 of the *Criminal Procedure Code* cap 75 of the Laws of Kenya which the learned judge used to convict the appellant with offence of defilement contrary to section 8(1) as read with section 8(3) and not 20(1) of the *Sexual Offences Act* No 3 of 2006 provides thus:

“ 179. When offence proved is included in offence charged

1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

16. Under this provision, it is quite clear that in altering the finding in an appeal against conviction and substituting therefore a conviction for an offence other than that charged initially, the High Court in its appellate jurisdiction can only act within the above provision and the substituted conviction can only be for a minor and cognate offence to that charged. That action does not require the appellant being called upon to plead nor do the provisions of Section 214(1) come into play. As stated by this Court in *Kalu vs. Republic* [2008] 1KLR (1207):

“.....there was no law which would authorize a Judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the *Criminal Procedure Code* which are under the heading ‘convictions for offences other than those charged’ and beginning with Section 179 to Section 190, deal with situations in which a Court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus.....it is permissible to convict a person charged with murder under section 203 of the *Penal Code*, with manslaughter under Section 202 as read with Section 205 of the *Penal Code*. That is because the offence of manslaughter, for instance, is a minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available

on the record is that of manslaughter, it would be outrageous for a trial court to convert that charge into murder simply because the evidence on record proves murder.....”

17. The emphasis here therefore appears to be that before a court invokes the provisions of Section 179 of the *Criminal Procedure Code* to substitute the initial charge with another, the court must be satisfied first of all that the evidence tendered does not disclose or support the offence charged but instead proves the commission of a lesser offence of the same genus. In other words, the substituted offence must be both a minor and cognate offence to the one charged.
18. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. See *Robert Ndecho & Another vs. Rex* (1950- 51) EA 171.
19. The question we must grapple with is whether defilement is a minor and cognate offence to incest or the other way round or whether they are distinctly different offences? We say so because for instance,



in *LC vs. Republic* [2019] eKLR it was held that incest is a distinct offence and not a minor or cognate offence to defilement. The court in that case stated thus:

“It was legally impossible for the trial court to do so, because incest is not a minor and cognate offence to the offence of defilement. A court is only permitted to convict an accused person for a minor and cognate offence to the major offence charged, which is not the case in the instant appeal. See section 179 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. The offence of defilement is a distinct offence from that of incest. It is not a minor and cognate offence.”

20. Added to this approach is the holding in *NAM vs. Republic (Criminal Appeal 3 of 2019)* [2020] KEHC 288 (KLR) (21 May 2020), where the High Court stated:

“I am alive to section 179 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, under which an accused person could be convicted of an offence other than that charged, so long as the facts disclose that other offence, and that offence is cognate or predicate to the offence charged. Incest, with respect to a minor, is, strictly speaking, a defilement, of the said minor. Yet, the language of section 20 of the *Sexual Offences Act* makes it a lesser offence to defilement. Under the *Sexual Offences Act*, defilement, as defined in section 8, is subject to mandatory sentences, incest, with respect to minors, is not subject to similar mandatory sentences, the sentences prescribed are largely discretionary save for the minimum penalty of ten years. So for all practical purposes incest is cognate to defilement. Under the circumstances, section 179 of the *Criminal Procedure Code* cannot be applied to it. I cannot, therefore, convert a conviction for incest into one of defilement.”

21. The two High Court decisions cited, certainly make jurisprudential sense; and what emerges then is that in the present case, incest is a minor and cognate offence of defilement, which the appellant was charged with. The elements of incest are ingrained or subsumed in the elements of the offence of defilement; indeed, the former attracts a comparatively lesser sentence than the latter. Can we then say that, the appellant was properly convicted for the offence of defilement under section 8[1][4] of the *Criminal Procedure Code* even though he was not charged with that offence and had not pleaded to it. It is apparent to us that the evidence presented created a totally separate offence, which required the appellant to plead to, and we are constrained to hold that the requirements of section 179 of the CPC were not satisfied.
22. To this extent, the learned judge fell in error by invoking the provisions of Section 179 of the *Criminal Procedure Code* and convicting the appellant with the offence of defilement contrary to Section 8(1) as read with Section 8(4) and not Section 20(1) that the appellant had been initially charged with, when it subsequently became apparent that the appellant and the complainant were not blood relatives. We must therefore quash the findings by the learned judge.
23. Where then does this place the matter, when all the evidence available confirms that there was a sexual encounter between the appellant and the complainant who knew and regarded him as a father, and which encounter resulted in conception? The only issue is whether a step-father and step-daughter were not within the prohibited degrees of consanguinity.

Section 22 of the *Sexual Offences Act* provides as follows:

In cases of the offence of incest, brother or sister includes half-brother and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a



mother includes a mother and an aunt of the first degree whether through lawful wedlock or not.

24. We recognize that the *Sexual Offences Act* does not give a definition of a half-father or step-father yet we pose this question- what is the difference between a “step-father” from a “half- brother”. Our understanding of the provision in Section 22 of the *Sexual Offences Act* is that a father who is not a biological father of a victim shares a half relationship with the victim through his wife, who is also the biological mother of the victim. He stands and occupies a parental position, and thus falls within the prohibited degrees of consanguinity.

We have no hesitation in concluding that a half - father is any person who assumes parental responsibility of a child by virtue of marrying such child’s mother through lawful wedlock or cohabitation as husband and wife without necessarily being lawfully joined in marriage, in which case such person and mother of such child would be presumed to be living as husband and wife. This would also include an adoptive father.

25. Indeed we echo and adopt the views expressed in the case of *M.K. v Republic* [2014] eKLR, where Majanja, J, cited with approval the case of *B.N.M. v Republic* [2011] eKLR that:-

“my own understanding is that ‘half father’ is a term which means exactly the same as ‘step-father’ – it means one who is not a biological father of the child. Therefore, by dint of this S 22(1) of the Act the appellant being a step-father of the complainant and one who stood in ‘loquo parentis’ can legally be charged and indeed convicted of the crime of incest with her.”

26. It is thus our finding that the trial court had arrived at the proper conclusion, and we revert to the conviction by the trial court on the offence of incest. We note that this would have made the appellant liable to a sentence of life imprisonment as had been imposed by the trial court. However, since the High Court had reduced his sentence to 15 years, and on 2<sup>nd</sup> appeal we did not warn him of the possibility of enhancement of the sentence, the sentence of 15 years imprisonment imposed by the High Court must remain. The upshot is that the appeal herein only succeeds in a minimal sense, we revert to the conviction in the trial court, and maintain the sentence of 15 years imposed by the High Court.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2025.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

