**AKK v Republic (Criminal Appeal 55 of 2019)**
**[2025] KECA 1144 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1144 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CRIMINAL APPEAL 55 OF 2019**

**JM MATIVO, PM GACHOKA & WK KORIR, JJA**

**JUNE 20, 2025**

**BETWEEN**

**AKK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal against the judgment of the High Court at Nyahururu (R.P.V. Wendoh, J.) dated 21st March 2018 in HCCRA No. 149 of 2017)***

## JUDGMENT

1. The appellant, AKK, was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 1st June 2013 and 28th September 2015 at [particulars withheld] village in Nyandarua County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of L.W.K., his ten-year old daughter. Arising from the facts in the main count, the appellant faced an alternative charge of indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*, the particulars being that the appellant let his penis come into contact with the vagina of L.W.K. At the conclusion of the trial, the appellant was found guilty of the main charge and sentenced to life imprisonment. His appeal to the High Court was dismissed.

2. The appellant is now before us on a second appeal and seeks to overturn the judgment of the High Court on the grounds that the learned Judge failed to consider the existence of bad blood between him and the complainant's mother; that the elements of the offence were not proved; that the learned Judge erred in relying on section 124 of the *Evidence Act* despite the glaring contradictions in the evidence of the complainant; that a crucial witness was not called to testify; that the first appellate court did not properly discharge its mandate; and, that his defence was not considered.

3. The facts as accepted by both the trial court and the first appellate court were that L.W. (PW2) had been married to the appellant since 2013, but no longer lived with him after domestic disputes. When she exited her matrimonial home, she left behind L.W.K. (PW1) and her two siblings living with the appellant. L.W.K., who was born on 28th April 2005, was the firstborn. During this time, L.W.K. shared a bedroom ("kids' room") with her brother, M.K. One night, the appellant went into the kids' room and carried L.W.K. to his bed, removed her clothes and proceeded to defile her before returning her to the kids' room. During the defilement L.W.K. felt pain, but the appellant covered her mouth. L.W.K. testified that M.K. never knew of the incident as he was young and asleep. The defilement was repeated more than once.

4. According to L.W.K, there was a day when the appellant sent her for milk at about 7.00 pm and on her way back, she met him and he took her into the thicket and defiled her. Then came the day when the appellant again sent L.W.K. for milk, and she refused to go, leading to the appellant assaulting her with a stick on her hands and feet. She ran to her mother's shop for refuge and sought to stay with her. Apprehensive of what the appellant would do to her if he knew she harboured L.W.K., PW2 sent the child to her (PW2's) parents. After about 7 days, PW2 went for L.W.K. after she complained of abdominal pains. That night, when they went to sleep, L.W.K. started sleep-talking, urging someone to stop struggling with her and cease touching her dress. When interrogated by PW2, L.W.K. stated that she had immense stomach pain. PW2 then took L.W.K. to Ndaragwa Health Centre, where they were referred to Nyahururu District Hospital, where they were attended by Dr Karimi (PW4).

5. Upon examining L.W.K., PW4 noted bruises on the wrist, missing hymen due to vaginal penetration, bacteria in the urine, significant pus cells, microscopic blood and trauma. On 6th June 2015, PW2 reported the matter to the police. Corporal Paul Serem (PW3) who investigated the case recorded statements, issued a P3 form to the complainant and later arrested the appellant on 13th October 2015. On the day of the arrest, PW3 was in the company of police constables Opondo and Chacha, as well as PW2.

6. In his defence, the appellant alluded to a personal dispute between him and his wife, PW2. He also stated that the complainant was forced by PW2 to name him as the person who committed the offence.

7. When this appeal came up for hearing, the appellant was virtually present from Nyeri Maximum Prison, whereas the Senior Assistant Director of Public Prosecutions (SADPP), Mr. Omutelema appeared for the respondent.

8. In his submissions, the appellant contended that the first appellate court erred by failing to re-evaluate the evidence on record, resulting in the dismissal of the appeal without good reason. He cited Okeno vs. Republic [1972] E.A. 32 for the proposition that the first appellate court has a duty to re-evaluate the evidence before reaching its independent decision. The appellant submitted that the first appellate court failed in this duty as it did not conduct an independent re-evaluation of the evidence. It was also submitted by the appellant that the first appellate court failed to appreciate that the case against him was motivated by malice and vendetta stemming from love affairs and land issues, or disagreements between him and his wife. According to the appellant, the case involved mistrust, misinformation, and doubtful speculation. In this regard, the appellant urged us to adopt the rationale in Eliud Waweru vs. Republic [2019] eKLR where the Court allowed an appeal on the ground that the case was being used for extortion.

9. Turning to his assertion that the offence was not proved, the appellant, relying on John Mutahama vs. Republic [2016] eKLR to identify the elements of the offence of defilement, submitted that penetration and his identity were not satisfactorily proved. He argued that the medical evidence did not confirm penetration and that no DNA analysis was conducted. He relied on Mueke Mwangi vs.

Republic [2015] eKLR to urge that penetration can be caused by factors other than sexual intercourse. The appellant submitted that, based on the medical findings and the absence of evidence of sexual intercourse or penetration, the charge of incest was not proved, and he is entitled to benefit from such doubt in the prosecution's case.

10. Still hammering home his proposition that the charge was not proved, the appellant submitted that the prosecution's case was marred with contradictions in the evidence of PW2 and PW4 with respect to the nature of injuries suffered by the complainant as well as her age. The appellant further submitted that his conviction should not stand because the complainant's siblings were not called as witnesses. In this regard, he argued that although section 124 of the *Evidence Act* allowed for conviction without corroboration in sexual offences, it was not proper to rely on the uncorroborated evidence of the complainant to convict him.

11. Finally, on the issue of the sentence, the appellant argued that mandatory minimum sentences like the one under section 20(1) of the *Sexual Offences Act* undermine judicial discretion and should be reconsidered. He also urged that the Court should consider the period already served in prison and his desire for rehabilitation.

12. In opposition to the appeal, Mr. Omutelema rehashed the evidence on record and urged that all the elements of the offence were proved beyond reasonable doubt. Counsel submitted that the Court properly invoked section 124 of the *Evidence Act*, and that section 19 of the *Oaths and Statutory Declarations Act* was complied with before the evidence of the victim was received. Learned counsel referred to Karanja & Another vs. Republic [1990] eKLR to underscore the meaning and importance of corroboration and to submit that the evidence by the complainant was corroborated. Citing PNK vs. Republic [2022] KECA 553 (KLR), Mr. Omutelema urged us to defer to the concurrent findings of fact by the two courts below. Rejecting the appellant's claim that necessary witnesses were not called to testify, counsel submitted that the witnesses who were summoned sufficiently proved the case to the required standard. Finally, responding to the appeal against sentence, counsel submitted that considering the age of the complainant and the fact that the appellant was placed in a position of trust, life imprisonment remains the ideal sentence. In conclusion, Mr. Omutelema urged for the dismissal of the appeal.

13. We have reviewed the record and submissions of the parties in the context of our mandate on a second appeal. There is no gainsaying that under section 361(1) of the *Criminal Procedure Code*, ours is to consider only issues of law and approach with deference the concurrent findings of fact by the trial court and the first appellate court, unless the conclusions are not supported by the evidence. Additionally, the severity of a sentence is regarded as a matter of fact and is thus not within our remit.

14. In line with the foregoing, we determine this appeal by addressing the following issues: whether the first appellate court lived up to its mandate; whether the offence was proved; and, if the conviction is safe, whether a case has been made for our interference with the sentence.

15. The appellant's first ground of appeal was that the first appellate court did not re-evaluate the evidence as was required of it. He submitted that the learned Judge abdicated her duty as a first appellate court. Ordinarily, an appellant, on a first appeal, is entitled to a rehearing of his/her case. However, it must also be appreciated that there is no specific formula as to how that task is to be delivered. In this case, we have reviewed the judgment of the High Court, and we do not agree with the appellant's assertion. In the impugned judgment, the learned Judge correctly appreciated the duty bestowed upon her as a first appellate court. She then proceeded to rehash the evidence and conducted an analysis of the same before arriving at her independent conclusion. We are therefore not persuaded by the appellant that the learned Judge failed in her duty.

16. Turning to the argument that substance of the charge was not proved, we commence by reproducing section 20(1) of the *Sexual Offences Act* under which the appellant was charged. It states:

> " 20(1) 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 ingredients of the offence under section 20(1) of the *Sexual Offences Act* were summarized in MGK vs. Republic [2020] KECA 84 (KLR) as follows:

> " Therefore the ingredients that must be established for the offence of incest by a male person is, first, that the victim and the offender are related within the categories stated under section 20(1) of the *Sexual Offences Act*. Secondly, that the offender committed an act which caused penetration with the victim, and thirdly, the age of the victim must also be established for the proviso to apply."

18. To our mind, all the ingredients of the offence were established at the trial and affirmed on the first appeal to the High Court. Firstly, there was no contention regarding the relationship between the complainant and the appellant. Both the prosecution and the appellant agreed that the complainant was the appellant's biological daughter. The evidence to that effect has already been captured in this judgment, and we need not regurgitate it. Secondly, the complainant's age was established through the production of her birth certificate, her own oral evidence and that of her mother, PW2. It was proved that having been born on 28th April 2005, the complainant was about 10 years and 5 months as at 28th September 2015. She was therefore ten years old.

19. As regards penetration, the appellant contended that the evidence of the medical officer was insufficient to prove penetration. He complained that no DNA analysis was done. A perusal of the record shows that the complainant was clear in her evidence that the sexual encounters occurred on more than one occasion. Some encounters happened when she was asleep in the house, while on another occasion, it was in a thicket when she came back from collecting milk. We note that at the end of her cross-examination, the following exchange transpired between the appellant and the complainant:

> " Accused: She is my first born. My own blood. I can't destroy her.
>
> PW1: You destroyed me. You are the one who did this to me. There are times I didn't go to school."

20. Even though we are not in a good position to give an opinion on the credibility or otherwise of the complainant, that portion of the record speaks volumes about the complainant's interactions with

the appellant. PW2 also confirmed the trauma that the complainant suffered, which led to her sleep talking. Additionally, the testimony of the doctor was as follows:

> " She was 12 years. She had no bruises/lacerations on genitalia externally. Hymen was missing. It had been broken sometime back. It was an old broken hymen due to vaginal penetration. We checked for HIV which was non - reactive. Urinalysis had bacteria. Vaginal swab had significant pus cells. Microscopic blood. No spermatozoa. I put her on treatment for STI she had trauma counseling. She was later for post natal exposure treatment. I signed on 8th October, 2015."

21. In our view, the evidence by the doctor corroborated the testimony of the complainant. The appellant's contention that penetration was not proved due to lack of DNA analysis does not hold any water. As has been held by this Court in several decisions, penetration can be proved without production of medical evidence. For instance, in the case of Dennis Osoro Obiri vs. Republic [2014] KECA 598 (KLR) referred to by the two courts below, it was held that medical evidence linking the appellant to the offence though welcomed, is not mandatory in offences under the *Sexual Offences Act*. Having said so, we must reaffirm that in this case, the medical evidence availed proved beyond reasonable doubt that there was penetration.

22. Regarding the identity of the appellant, the complainant was adamant that it was none other than the appellant who defiled her inside and outside the house. Although the appellant denied committing the offence, it cannot be said that there was mistaken identity on the part of the complainant.

23. The appellant also contended that the learned Judge improperly invoked section 124 of the *Evidence Act*. The Court in Dennis Osoro Obiri vs. Republic (supra) addressed the application of section 124 of the *Evidence Act* as follows:

> " The effect of the proviso, as we have already noted, is to enable the court to convict, in cases of sexual offences, on the evidence of the victim alone, if for reasons to be recorded, it believes that the victim is telling the truth. It is also important to bear in mind that prior to the above amendments, this Court in Mukungu Vs Republic (2002) EA 482, had expressed the opinion that the requirement for corroboration in sexual offences affecting adult women and girls was unconstitutional to the extent that the requirement was against them qua women or girls."

24. Upon review of the judgment of the High Court, we find no reference to section 124 of the *Evidence Act* by the learned Judge. As we have already pointed out, the evidence of the complainant in this case was corroborated by the medical evidence. However, the appellant could still have been convicted pursuant to the proviso to section 124 of the *Evidence Act* based on the solid evidence of the complainant.

25. Regarding the appellant's contention that the learned Judge did not consider the evidence of a grudge and bad blood between him and his wife, we wish to concur with the Court in Thomas Mwambu Wenyi vs. Republic [2017] KECA 756 (KLR) where it held that:

> " The moment the two courts below concurrently disbelieved the appellant on the allegation of existence of a grudge between him and the father of PW1 as a basis for the alleged fabrication of charges against him, a factual conclusion was arrived at which this Court is not at liberty to re-examine."

26. We must resist the appellant's invitation to interfere with the concurrent findings of fact by the two courts below. The appellant has not persuaded us that the conclusion by the two courts was erroneous

and not supported by evidence. Consequently, we uphold the concurrent findings of the two courts and find that the appellant's defence was properly rejected. His conviction is sound and his first appeal against conviction was properly dismissed.

27. Regarding the sentence, the appellant argued that the life imprisonment is harsh and excessive. Under section 361 of the *Criminal Procedure Code*, this Court can only entertain appeals on sentence where the sentence was enhanced by the High Court or where the subordinate court had no jurisdiction to impose the sentence. This appeal does not fall into any of the two exceptions. Further, in Republic vs. Ayako [2025] KESC 20 (KLR) and Republic vs. Manyeso [2025] KESC 16 (KLR), the Supreme Court affirmed the legality of the sentences under the Sexual Offences Act and reiterated the constitutionality of life imprisonment. The complainant having been a child, the trial court had the authority under section 20(1) of the *Sexual Offences Act* of passing the life sentence upon the appellant. We therefore find no merit in the appeal against sentence.

28. Consequently, we find this appeal devoid of merit and dismiss it in its entirety.

**DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE 2025.**

**J. MATIVO**

**.....**

**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb.**

**.....**

**JUDGE OF APPEAL**

**W. KORIR**

**.....**

**JUDGE OF APPEAL**

I certify that this is a True copy of the original

**DEPUTY REGISTRAR**