



**NMK v Republic (Criminal Appeal E171 of 2023)
[2025] KECA 1273 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1273 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E171 OF 2023
PO KIAGE, WK KORIR & JM NGUGI, JJA
JULY 11, 2025**

BETWEEN

NMK APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kiambu (L. N. Mutende, J.) dated 12th September, 2019 in HCCRA No. 1 of 2019)

JUDGMENT

1. On the night of 29th January 2017, S. W (PW1), a 12 year old girl was asleep in the family one-roomed house that was only partitioned by a drape when her father, the appellant, invaded her bed. He stuffed a T-shirt into her mouth and whispered in her ear that if she made any noise he would kill her. The appellant proceeded to remove PW1’s trouser and underwear as he squeezed her on the bed, then put his penis into her vagina. When he finished, he went back to his bed. It so happened that PW1 had undergone a similar ordeal previously on 6th August 2016, when her mother A.M.K (PW2) left her at home with the appellant. She had been washing her school uniform outside the house and when she entered the house, the appellant pulled her onto her bed. As he pulled her, he threatened that if she screamed, he would stab her with a knife. PW1 had seen the appellant hold a knife against her mother on several occasions when the duo fought. Upon the appellant pushing her onto the bed, he removed her dress and pantie. He also removed his trouser and innerwear and put his penis into her vagina. As he did so, he threatened her again that if she made noise or told anyone about the incident, he would stab her. A knife was on the table right next to the bed. PW1 never told anyone about that ordeal.
2. When the violation happened the second time, at first PW1 did not report to anyone. However, the next day, after school, PW2 called her and asked her to check what was on her bed. On checking, she found two of her panties, stained with blood. PW2 also asked her to remove the panty she was wearing and it was also found to have blood stains. Even then, she was unable to disclose what she had gone



through because the appellant appeared. However, the following day, after school, she found PW2 at home and told her what had transpired. They reported the matter to the police where they were given a P3 form and referred to Thika Level 5 hospital. Meanwhile, the appellant had disappeared from 31st January 2017 to 4th February 2017. On his return, PW2 alerted the police who went to the house and arrested him.

3. Dr. Hermes Gichane (PW3), of Thika Level 5 Hospital, testified on behalf of Juma, a clinical officer, who examined the minor and filled the P3 form. He explained that as per the P3 form, which he produced, PW1 was found to have severe genital injuries and psychological torture from threats. She felt pain in her inner thighs and had lacerations and swellings on the labia majora and minora. PW1 also had blood stains and a broken hymen, and she felt pain on urination. The injuries were assessed as grievous harm. George Maingi (PW4), a clinical officer at Thika Level 5 Hospital, produced the PRC form that was filled by Dr. Alvin. PW4 indicated that he had worked with Dr. Alvin for 3 years and was conversant with his signature and handwriting. The report revealed that PW1 had been defiled. No. 83626 Corp. Leah Mueni (PW5), the Investigating Officer, stated that she recorded statements from witnesses and charged the appellant upon his arrest. She produced in evidence a copy of the birth certificate of PW1, which she had received from PW2.
4. That, in summary, was the prosecution case as presented against the appellant who was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* (SOA). In the alternative, the appellant faced the charge of causing an indecent act contrary to section 6(a) of the SOA. In a ruling delivered on 26th February 2018, the trial Magistrate (G. Omodho, SRM, as she then was) found that the prosecution had established a prima facie case against the appellant and placed him on his defence under section 211 of the *Criminal Procedure Code*.
5. The appellant elected to give a sworn statement without calling witnesses. He denied defiling his daughter, PW1, and attributed his arrest to the hostility that existed between him and his wife, PW2, arising from his marrying a second wife. The appellant also claimed that on 29th January 2017, the material day, PW1 had returned home late at night at around 9pm and when he ‘punished her’ by slapping her twice, PW2, was upset. He later left for work for some days and when he returned, he was arrested by police officers.
6. At the end of the trial, the learned Magistrate found the appellant guilty of the offence of incest and sentenced him to 20 years imprisonment.
7. Aggrieved by that decision, the appellant filed an appeal before the High Court at Kiambu. The same was heard by Mutende, J. who, by a judgment dated and delivered on 12th September 2019, dismissed it in its entirety.
8. Still aggrieved, the appellant lodged the instant appeal, initially raising 5 grounds of appeal but later filing what he titled as, ‘supplementary grounds of appeal and brief submission,’ in which he raised 9 additional grounds and made submissions. In summary, the grounds are that the learned Judge erred by;
 1. Failing to observe that essential witnesses were not called.
 2. Failing to consider that no exhibit was produced in court.
 3. Failing to observe that investigations were not conducted as required by law.
 4. Failing to find that the trial Magistrate did not record essential details.
 5. Failing to consider whether the appellant knew that the victim was his daughter.



6. Failing to observe that the particulars of the offence were not properly framed.
 7. Failing to observe that a grudge existed in the case.
 8. Failing to observe that the appellant did not mitigate during trial.
 9. Failing to find that penile penetration was not proved to the requisite threshold.
 10. Failing to find that the age of the complainant was not adequately proved.
 11. Failing to find that the appellant was not properly identified as the perpetrator of the crime.
 12. Failing to find that the reasons given by the trial Magistrate were insufficient to justify invocation of section 124 of the *Evidence Act*.
 13. Failing to consider the appellant's defence which cogently rebutted the prosecution case.
9. When we heard the appeal, the appellant appeared in person while the learned Senior Assistant Director of Public Prosecutions, Mr. O. J. Omondi appeared for the Republic.
 10. The appellant relied on his filed written submissions and urged that should his appeal on conviction fail, then we should take into account the pre-trial period that he spent in remand.
 11. The tenor of the appellant's submissions is that the prosecution failed to prove its case against him beyond reasonable doubt. Citing section 150 of the *Criminal Procedure Code* and
 12. various decisions including John Kenga Vs. Republic Criminal Appeal No. 1126 of 1987, the appellant contends that the prosecution failed to call crucial witnesses to testify. The said witnesses are, the police officers who arrested him, the victim's friend by the name, Martha, and a neighbor known as Mama Jose. He questions why DNA was not conducted on the victim's blood- stained panties and why PW5, the investigating officer, did not give evidence on the same. Further, the appellant takes issue with the fact that the knife that he allegedly used to threaten the victim was not produced in court.
 13. The appellant faults PW5 for failing to visit the scene of crime in order to confirm the distance between the rooms in their house and, whether the victim's bed was near a window as she claimed. He contends that PW5 should have visited their home so as to search for the knife that he allegedly used to threaten the victim, and the blood-stained panties. It is urged that PW1 and PW2 were not credible witnesses. The trial Magistrate is faulted for failing to record essential details like the language in which the voir dire examination was conducted and for failing to indicate that she was actually conducting a voir dire.
 14. The appellant argues that it was not conclusively proved that he was the victim's father for reasons that, the victim did not mention or know her father's name, she only used the word, Dad, and did not assert that he was her father. It is contended that no document was produced to show that the appellant was the father of the victim and no marriage certificate exhibited to prove that he was married to the mother of the victim. Further, the appellant asserts that the charges on the charge sheet were wrongly framed and therefore defective. He argues that there was a grudge between him and PW2 that led to her implicating him.
 15. It is submitted that the appellant did not present his mitigation during trial. The appellant proceeds to offer his mitigation by stating that he is a first offender and he is remorseful. Citing the High Court decision in PHILIP MAINGI & 5 OTHERS Vs. DPP & Another, Petition No. 017 of 2021, he urges us to reduce the term sentence of 20 years imprisonment that was imposed.



16. In opposition to the appeal, Mr. O. J. Omondi briefly highlighted the written submissions by stating that, there were concurrent findings by the two courts below, and the evidence which the prosecution tendered sufficiently proved the charge of incest as
17. against the appellant. A birth certificate that proved the age of the victim and showed that the appellant was her biological father was adduced in evidence. The birth certificate indicated that the victim was born on 14th February 2005. Further, the testimony of the victim as corroborated by medical evidence established that there was penile penetration. Upon being examined in hospital on 1st February 2017, the victim was found to have a perforated hymen, as well as lacerations and swellings on the labia majora and minora. Her thighs were also painful on movement.
18. By way of the filed submissions, counsel gives a rejoinder on the question of identification by concurring with the finding of the learned Judge that identification in this case was by recognition. Submitting further on the question of identification, counsel draws our attention to the evidence of the victim where she stated that there was sufficient moonlight on the material night that permeated through the window near her bed and therefore she was able to see the appellant clearly. The appellant also kept whispering threats into her ear as he violated her and hence she was able to recognize him through his voice.
19. Concerning the alleged failure to call crucial witnesses, it is submitted that pursuant to section 143 of the Evidence Act, there is no particular number of witnesses, in the absence of any provision of law to the contrary, that is required in order to prove any fact. Counsel urges that in the circumstances, therefore, even the evidence of one witness is sufficient to prove a case against an accused person. Moreover, the prosecution has the sole duty and discretion to determine the kind of evidence it should produce to prove a case. In answer to the appellant's assertion that his defence was not considered, it is contended that the learned Judge evaluated all the evidence on record. Moreover, the case against the appellant was thoroughly investigated.
20. Counsel challenges the complaint concerning the framing of charges, insisting that the charges were properly drafted, the appellant understood what he was charged with and he pleaded to the same. Further, the appellant did not raise any issue with respect to the charges during trial or on first appeal. The appellant's reliance on the existence of a grudge between him and PW2 is dismissed for the reason that the evidence that was tendered placed him at the scene of crime. The claim that the appellant did not mitigate before sentencing is also rejected. Our attention is drawn to page 64 of the record, where the court noted that the appellant had nothing to say in mitigation despite having been given an opportunity to mitigate.
21. On sentencing, we are urged to consider the aggravating circumstances in the case including the fact that the appellant painfully defiled his own daughter aged 12 years and while doing so he stuffed her mouth with an old t-shirt to prevent her from screaming and seeking help, he repeatedly whispered threats of killing her into her ears and threatened to stab her if she disclosed the heinous act to third parties, and he sexually violated her at least twice in his own house. Ultimately, the respondent urges us to uphold the conviction and the sentence meted out and dismiss the appeal in entirety.
- 22' We have considered the record of appeal and the submissions made by the parties and have distilled the issues for determination to be whether the prosecution proved its case against the appellant beyond reasonable doubt, and whether the sentence meted out should be reduced. In determining those issues, we are aware of our role as a second appellate court, to restrict ourselves to consideration of questions



of law only by dint of Section 361(1)(a) of the Criminal Procedure Code. This was affirmed by the holding of this Court in DAvid Njoroge Macharia Vs. RePublic [2011] KECA 406 (KLR) thus;

“That being so only matters of law fall for consideration—see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings - see Chemagong v. R [1984] KLR 611.”

23. On whether the prosecution proved its case against the appellant beyond reasonable, we note that the two courts below were in agreement that the prosecution discharged its duty in establishing the offence of incest as against the appellant. The offence of incest and its punishment is prescribed under section 20(1) of the Sexual Offences Act as follows;

“(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.”

24. In determining whether the two courts below were right in their holding, the matters of law that we shall consider are the elements of the offence as stipulated in the above provision, and whether the prosecution proved them beyond reasonable doubt. The appellant challenges the decision of the learned Judge on grounds that the age of the victim was not adequately proved, it was not established whether he properly knew the victim as his daughter, he was not properly identified as the perpetrator of the offence and that penile penetration was not proved to the required standard.
25. On the age of the victim and her relationship with the appellant, we note that when PW1 testified on 10th April 2017, she stated that she was 12 years old. PW2, her mother, corroborated that fact and tendered in evidence her birth certificate. The certificate shows that the victim was born on 14th February 2005. The appellant is also indicated therein as the father. Notably, when the age of the victim was conveyed during trial and the birth certificate produced, the appellant never raised any objection. In his defence, he seemingly accepted paternity of the victim when he stated, ‘I never defiled my daughter. She is a bad girl who misbehaved.’ In view of the concurrent findings by the two courts below that the age of the victim and parenthood fell within the scope of section 20(1) of the SOA, we find no reason to deviate from that finding.
26. Next, the appellant disputes his identification as the perpetrator of the offence. According to the testimony of PW1, the 12-year-old minor, she was sexually assaulted twice by the appellant. The first time was on 6th August 2016 when her mother left her at home as she washed her school clothes. She explained that the appellant called her into the house, pulled her onto the bed, removed his clothing and hers, and inserted his penis into her vagina. The house was one roomed and only divided by a drape. As the appellant defiled her, he kept threatening her that if she made any noise or told anyone about the incident, he would stab or kill her. The second time the incident happened was on 29th January 2017 at around 2am in the night. The minor narrated that the appellant sneaked into her bed naked, pushed a cloth into her mouth and in a whisper cautioned her that if she made any noise he would kill her.



He defiled her and went back to his bed. In her narration, the minor was adamant that the appellant was the one who sexually violated her because she could recognize his voice through the whispers and he also said to her that he was the usual person. There was also some dim light from the moon that permeated through the window and that enabled her to see the appellant on that material night. The minor stated that after the ordeal, she saw the appellant go back to his bed.

27. We think, in view of the minor's testimony that she was defiled twice by the same person, her father, a person who was familiar to her, it is highly improbable that the appellant was mistakenly identified. The minor went ahead and described the arrangement of their house. It was a one roomed house that was partitioned by a drape. There was moonlight that shone through the room. Further, in his defence the appellant confirmed that he was present at the scene of crime on the fateful night. In the circumstances, we concur with the finding of the two courts below that identification of the appellant by the victim was by way of recognition and her evidence was unshaken.
28. The appellant further contends that penile penetration was not proved to the required standard. Section 2 of the SOA defines penetration to mean,

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
29. The victim explained the manner in which she was sexually assaulted, as outlined above. The P3 form that was filled upon the victim being medically examined, and which was tendered in evidence by PW3, corroborated her testimony by revealing the nature of injuries that she suffered. She was found to have lacerations and swellings on the labia majora and minora, her vagina was bruised and was tender, and her hymen was perforated. The P3 report classified the injuries as grievous harm. The Post Rape Care Form (PRC) that was filled at Thika Level 5 hospital, and produced in court by PW4 also confirmed that the minor had been defiled. That being the case, the appellant's complaint that penetration was not proved to the required standard comes to naught. In the result, we are of the considered view that the appellant's conviction was safe.
30. On sentencing, the appellant's plea is that we reduce the 20 year sentence that was imposed, considering that he did not mitigate during trial. In opposition, counsel for the respondent pointed out that the appellant was given a chance to mitigate but he failed to do so. Further, we were urged to consider the aggravating circumstances in the case such as the fact that the appellant painfully defiled his own daughter twice, and while doing so, he stuffed her mouth with a cloth to prevent her from screaming and seeking help. He also repeatedly whispered threats of killing her into her ears during the ordeal. A perusal of the record of proceedings before the trial court, on 14th June 2018, at page 40 indicates as follows, 'Accused in Mitigation – Nil'. On 2nd July 2018, when the court sentenced the appellant, the learned Magistrate stated, "The accused had nothing to say in mitigation." As submitted by the respondent's counsel, it would seem that the appellant did not say anything in mitigation despite having been given an opportunity to do so. However, even if he did, we note that pursuant to the proviso in section 20(1) of the SOA, the maximum prescribed sentence in the case of a victim who is below 18 years of age, is life imprisonment, but the trial court imposed a 20 year term, a patently lighter sentence, which the learned Judge upheld. Even so, we note the appellant's request that we should consider the pre-trial period that he spent in remand.
31. In the upshot, this appeal fails and is dismissed. We uphold the twenty (20) year imprisonment term which shall, however, run from 6th February 2017, the date when the appellant was remanded.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY, 2025.

P.O. KIAGE



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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

