



**ENL v Republic (Criminal Appeal 11 of 2020)  
[2022] KECA 736 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KECA 736 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 11 OF 2020  
RN NAMBUYE, AK MURGOR & S OLE KANTAI, JJA  
JULY 22, 2022**

**BETWEEN**

**ENL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Nairobi  
(Achode, J.) dated 20th June, 2012 in HC. CR.A. No. 442 of 2010)*

**JUDGMENT**

1. This is a second appeal from the Judgment of the High Court of Kenya at Nairobi where the appellant’s first appeal was dismissed in a Judgment delivered on 20<sup>th</sup> June, 2012 (Achode, J.). The appellant had been charged before the Chief Magistrate’s Court at Makadara Law Courts in Criminal Case No. 3941 of 2009 with the offence of incest by a male person contrary to Section 20 (1) of the [Sexual Offences Act](#) No. 3 of 2006 particulars being that on 16<sup>th</sup> September, 2009 at around 9.00 p.m. at the place named in the charge sheet he caused his penis to penetrate the vagina of ZAE (hereinafter “PW1”), a female person who he knew to be his daughter aged 14 years. He was convicted after a trial and sentenced to 25 years imprisonment and as we have already stated above, his first appeal was dismissed.
2. Our mandate on a second appeal like this one is limited by Section 361 (1) (a) [Criminal Procedure Code](#) to consider only issues of law, if any, and we are obligated in law to resist the temptation to consider matters of fact which the trial court considered and arrived at findings which the first appellate court re- evaluated – and dismissed the appellant’s first appeal. See this Court’s pronouncement in the case of *Stephen M’Trungi & Another v Republic* [1982- 88] 1 KAR 360 to the effect:

“Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with



the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

Our brief consideration of the facts will therefore be purely for establishing whether the two courts below carried out their mandate as was required of them in law.

2. PW1 who was found by the trial Magistrate to be intelligent and spoke with confidence testified that she was 14 years old and a pupil at a local school in Class 8. She lived with her mother, the appellant and a younger brother. Sometime in September, 2009 the appellant accused her of bad behavior – that he had received reports that she left the house at night and was seen in the company of boys. He disciplined her through caning. On 15<sup>th</sup> September, 2009 the appellant ordered that he and PW1 visit the Chief's office where he wanted to make a report about her indiscipline but they did not find the Chief. They were visiting the same office the next day in the evening but while enroute the appellant, after some discussions, informed her that he had forgiven her and they should go back home. He chose a different lonely route characterized by darkness and when she protested he claimed that he was the older of the two and she should not question his decision. Shortly thereafter, they came to a bushy area where there was tall grass. He grabbed her, carried her shoulder high, covered her mouth with a piece of cloth so that she could not cry out. She described in graphic detail how he pushed her to the ground, pulled up her skirt, tore off her biker and panty and proceeded to defile her. She passed out sometime during the ordeal due to pain and when she came to the appellant was standing at a short distance from where she lay on the ground and he then left. She went home and cried the rest of the night. The appellant escorted her and her brother the next day to school after he had ensured that her mother (PW4) did not meet her at all.
3. In school teacher MMM (PW3) noticed that PW1 was not acting normally. PW1 excused herself from class asking to speak to the teacher privately and informed her that she had been defiled by the appellant the previous night. PW3 engaged other teachers and a social worker and they took PW1 to Nairobi Women's Hospital where she was seen by Dr. Muhombe. In a report produced by Dr. Adan Ridhuan (PW5) it was reported that PW1 had been received by that hospital where she had revealed that she had been defiled by the appellant. On examination there was a thin ring of hymen left which had small fresh tears at 5 o'clock and 9 o'clock position. There were lacerations on the pineal body the area between the vaginal opening and the anus and there was presence of spermatozoa. The doctor confirmed that there was sexual assault, findings that were also confirmed by the police doctor Dr. Zephania Kamau (PW2).
4. PW1's mother (PW4) confirmed how the appellant had prevented her from seeing PW1 on the fateful night and the next morning.
5. The appellant was arrested and charged as per the evidence of the investigation's officer Margaret Maithya (PW6) of Industrial Area Police Station.
6. Put on his defence the appellant denied the offence in an unsworn statement stating that he had not been with PW1 alone at all.
7. As we have seen the appellant was convicted and his first appeal dismissed.
8. When the appeal came up for hearing before us on 22<sup>nd</sup> February, 2022 on a virtual platform the appellant appeared in person from Kitengela Prison while Miss Wang'ele, learned counsel, appeared for the office of the Director of Public Prosecutions. The appellant had not filed written submissions despite being required to do so through Hearing Notice served upon him. He told us that he was dissatisfied because he was jailed for 25 years. He asked us to help him, to interfere with sentence and let him to go home where he was the sole breadwinner of the family.



9. In opposing the appeal Miss Wang'ele submitted that severity of sentence is a matter of fact which our mandate does not allow us to deal with unless the sentence awarded is illegal.
10. The appellant was charged with incest it being alleged that he had defiled his daughter who was aged 14 years. The proviso to Section 20 of the *Sexual Offences Act* provides that where the female person defiled is under the age of 18 years the accused shall be sentenced to life imprisonment.
11. It was proved on the evidence that the appellant was PW1's step father (she had known him all along as her biological father until he was charged in court after defiling her). He was a step father to PW1 and was properly convicted under the provisions of the *Sexual Offences Act*. The prosecution proved on evidence that PW1 was 14 years old and both doctors established that PW1 was defiled by a person who she named as the appellant.
12. The law does not allow us to deal with the sentence awarded which was within the law.
13. This appeal has no merit and we accordingly dismiss it.
14. As Nambuye, JA has since retired from service as a Judge of this Court this Judgment is signed in accordance with rule 32(2) of the rules of this Court.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2022.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

