



REPUBLIC OF KENYA



KENYA LAW
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**AMA v Republic (Criminal Appeal 059 of 2024)
[2025] KEHC 466 (KLR) (28 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 059 OF 2024
DR KAVEDZA, J
JANUARY 28, 2025**

BETWEEN

AMA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. W. Lopokoyit (S.R.M) on 8th July 2024 at Kibera Chief Magistrate's Court Sexual Offences Case No. E045 of 2023 Republic vs Andrew Martin Aseka)

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to twenty (20) years imprisonment. The particulars of the offence as per the charge sheet were that on 28th December 2022 at around 0800 hours at the [Particulars Withheld] area of [Particulars Withheld] within Nairobi county you intentionally and unlawfully caused his penis to penetrate the vagina of P.W. a child aged 13 years.
2. Aggrieved, he filed the present appeal, challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He complained that the trial court failed to consider his alibi defence. Finally, the sentence imposed was harsh and excessive.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration to that. (See *Okeno v Republic* [1972] EA 32).
4. The prosecution called six (6) witnesses in support of their case. The complainant P.W (name withheld), gave sworn evidence. The complainant testified that she lived with her stepfather, mother,



and sister. On 28th December 2022, she was washing dishes when her mother was away. Her step father the appellant herein holding a knife in his hand told her to come where he was. He then pushed her to the bed, undressed her, and threatened to kill her if she screamed. He covered her face with a pillow and inserted his penis in her vagina. She felt pain. After the incident, she did not tell her mother. On 18th March 2023, she reported the incident to Mama N who promised to help her. On 21st March 2023, she also told her teacher about the incident when the teacher inquired.

5. After the report was made, she did not go back home. She was taken to Nairobi Women's Hospital and later a Children's Protection centre. She identified the appellant as her step father and the person who defiled her.
6. PW2, the complainant's mother, testified that she lives with the appellant and her two children. She stated that she started living with the appellant in 2018 and that the complainant is 13 years old. She told the court that on 21st March 2023, the complainant did not return home from school. She later learned from the school that the appellant had defiled the complainant. She took her to Nairobi Women's Hospital for examination and treatment before reporting the incident to the police.
7. PW3, JN, also known as Mama N, testified that on 19th March 2023, she saw the complainant crying. When she asked what was wrong, the complainant revealed that her father had defiled her and threatened to kill her. PW3, together with Mama Jose, reported the matter to the complainant's school.
8. PW4, Nancy Odira, the complainant's teacher, testified that PW3 and another woman informed her that the complainant had been defiled by her stepfather. She then reported the matter to the head teacher.
9. At Nairobi Women's Hospital, the complainant was examined on 22nd March 2023 by Party Mbithi who was no longer at the institution and was not available to testify. His evidence was produced by John Njoroge a clinical officer. Upon examination, her hymen was broken, and had a yeast infection. She was at the hospital. It was his evidence that the injuries were consistent with penetration. He produced the P3 and PRC forms.
10. PW6, PC Rachael Kawira, the investigating officer highlighted the prosecution's case.
11. After the prosecution closed its case, the appellant was found to have a case to answer and was placed on his defence. In his sworn testimony, he stated that on the day in question, the complainant left home and spent the night at an unknown location. When she returned the following day, she was disciplined but did not reveal where she had been. The appellant claimed he was framed by his wife due to a marital dispute and denied committing the offence.
12. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. The critical ingredients for the offence of incest as defined in section 20 (1) of the Act are that; the victim and the accused fall within the prohibited degrees of consanguinity, the age of the complainant, proof of penetration, and positive identification of the perpetrator.
13. The first issue for consideration is the relationship between the victim and the perpetrator, and whether he was positively identified. In her testimony, PW1 stated that the appellant was her step father. The appellant himself did not dispute this evidence and admitted that the complainant was her step daughter.
14. On the age of the age of the complainant, the birth certificate produced by PW4 confirmed that the complainant was born on 26th September 2010. She was therefore 13 years old at the time of the commission of the alleged offence. She was below 18 years which is the age described in law in the offence of incest.



15. Regarding the appellant's culpability, the complainant testified that the appellant inserted something into her vagina. On the evidence of penetration, the complainant testified that the appellant inserted his penis into her vagina. The medical evidence tendered by the clinical officer was that the complainant's hymen was broken, consistent with penile penetration. In addition, this was a case of late presentation having been examined 3 months after the incident. Penetration was therefore proved beyond reasonable doubt.
16. Additionally, the appellant was in the complainant's company when the offence occurred. No plausible explanation was provided to counter or disprove the allegation that he was the perpetrator.
17. The chain of evidence, including the complainant's testimony and the medical findings, supports the conclusion that the appellant committed the offence. The appellant's failure to provide an alternative explanation further strengthens the prosecution's case against him. It is my finding that given the totality of the evidence, the medical evidence presented was sufficient to convict the appellant.
18. Having found that the appellant was positively identified, coupled with the finding that he was culpable for the offence committed against the complainant who is his step daughter, I hold that the prosecution proved its case against the appellant beyond reasonable doubt. I accordingly affirm the trial court's conviction.
19. On sentence, the appellant was sentenced to serve twenty (20) years imprisonment. During sentencing, the court considered the appellant's mitigation, that he was a first offender and the time spent in remand custody.
20. In this respect, the trial court did not err in imposing the sentence of 20 years imprisonment after considering the facts of the case. I therefore do not find any reason to interfere with the sentence. It is affirmed. The appeal is dismissed for lack of merit.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JANUARY 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Achode Court Assistant

