



REPUBLIC OF KENYA



KENYA LAW
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**EOO v Republic (Criminal Appeal E015 of 2023)
[2025] KEHC 271 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E015 OF 2023
WM MUSYOKA, J
JANUARY 24, 2025**

BETWEEN

EOO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence by Hon. EA Nyaloti, Chief Magistrate, CM, in Busia CMCSOC No. 45 of 2018, of 10th May 2023)

JUDGMENT

1. The appellant, EOO, had been charged before the primary court, of the offence of incest, contrary to section 20(1) of the Sexual Offences Act, Cap 16A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the Sexual Offences Act. The particulars of the charge were that on 12th December 2018, at [Particulars Withheld] Village, Bukhayo West Location, within Busia County, he caused his penis to penetrate the vagina of CK, a female person, who, to his knowledge, was his niece. The appellant denied the charges, and a trial ensued, where 5 witnesses testified.
2. PW1 was the minor victim. She testified that the appellant, her uncle, came to her grandmother's house, where she was sleeping with other minors, and defiled her. She became pregnant thereafter. PW2 was one of the other minors who were sleeping in the same room, when the appellant came, and defiled PW1. He reported to their grandmother. PW3 was the mother of PW1. The defilement was reported to her, and PW1 informed her that she was pregnant. She took PW1 to hospital and later reported to the police. PW3 stated that the appellant was her stepbrother. PW4 was the clinical officer who confirmed PW1 was pregnant. PW5 was the arresting and investigating officer, who produced, among other documents, a deoxyribonucleic acid (DNA) report, on the paternity of the child that PW1 eventually delivered.



3. The appellant was put on his defence, vide a ruling that was delivered on 9th August 2021. He made a sworn statement. He stated that he had a relationship with PW1 on 25th December 2018. She gave him a false name, and he knew her as an adult. He denied being related to PW1.
4. Judgment, written by Mrs. L. Ambasi, Chief Magistrate, was delivered on 10th May 2023, by Hon. Nyaloti, CM. The appellant was found guilty, and was sentenced to 50 years imprisonment, on even date.
5. The appellant was aggrieved, and brought the instant appeal, essentially around sentence being harsh; and the age of PW1 not being considered.
6. Directions were given on 6th May 2024, for canvassing of the appeal by way of written submissions. The written submissions on record were filed by the appellant.
7. The said written submissions are only on sentence. The appellant asserts that he was denied the benefit of the least harsh sentence. He cites Jason Odongo Aola vs. Republic Homa Bay HCCRA No. E059 of 2023.
8. The offence charged was not defilement, but incest, which is defined in section 20(1) of the Sexual Offences Act. Defilement is also covered or subsumed in incest, where the victim of the offence is a minor. The penalty for defilement of a minor, by a close relative, in the context of incest, is very stiff, a maximum of life imprisonment.
9. Why would the law prescribe such a stiff penalty? To prevent abuse of minors within the family setting. This is a zone where children should expect nurture and protection within the warm and friendly environment or sanctuary provided by their parents, and other close relatives. Unfortunately, and sadly, sexual abuse often happens within this zone. It is the worst form of abuse of trust. It is a zone which enables the perpetrators to get away with it, as they often get succour and protection from other family members, in a code of silence, designed to protect family honour. Therefore, where defilement happens within the family setting, committed by close relatives of the minor victim, and it is brought out in proceedings such as these, it must be dealt with without any form of sympathy to the perpetrators, by way of heavy penalties, for deterrence purposes.
10. It should be pointed out that incest overlaps with defilement, where minors are involved. The perpetrator would essentially have committed 2 offences. He would have had sexual connection within forbidden relationships and defiled a minor. The penalty for incest, where a minor is involved, would be stiffer, to punish the offender for both the incest and the defilement.
11. The victim of the defilement and incest herein was just 14 years old, and a schoolchild still in primary school. The appellant made her pregnant, putting her in the family way, with the consequence that her studies were disrupted, and a possibility that her schooling permanently came to a premature end. He pushed her into motherhood and parenthood well ahead of her time. Having a child outside wedlock is still a source of social stigma, and it invariably diminishes the chances of the girl finding a husband later in life. The life of PW1 was pretty messed up in numerous ways. The appellant is an uncle to PW1, and what he did to her was a breach of trust. He deserves what he got.
12. The maximum sentence for incest, where the victim is a minor, is life imprisonment. However, in *Julius Kitsao Manyeso vs. Republic* [2023] eKLR (Nyamweya, Lesiit & Odunga, JJA) life imprisonment, whether prescribed as a mandatory or as a permissive sentence, was declared unconstitutional. In *Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018* (Okwengu, Omondi & J. Ngugi, JJA), it was declared that a sentence of life imprisonment should translate to 30 years. The imposition of the sentence of 50 years was, no doubt, exercise of the discretion given under section 20 of the Sexual



Offences Act. However, since life imprisonment has been translated to a definite sentence, in *Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)*, and capped at 30 years, there should be no room now for exercise of discretion to impose a sentence above 30 years.

13. In view of *Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)*, I hereby review the sentence imposed and reduce it to 30 years imprisonment.
14. I note that the appellant was arrested on 29th March 2019 and was arraigned on 1st April 2019. He was not admitted to bond; hence he remained in remand throughout. Judgment was pronounced on 10th May 2023, the appellant was sentenced the same day. The period that he spent in custody, between arraignment and sentencing, shall be reckoned in calculation of the time that he shall ultimately serve in prison.
15. The appeal herein is disposed of in those terms. Orders accordingly.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 24TH DAY OF JANUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Mr. Elvis Odhiambo Ogutu, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

