



**AM v Republic (Criminal Appeal E018 of 2023)
[2025] KEHC 4093 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E018 OF 2023**

**MW MUIGAI, J
MARCH 28, 2025**

BETWEEN

AM APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of Incest contrary to Section 20(1) of the Sexual Offences Act. The particulars leading to the charges read as follows :

On the 24th day of March 2021 in Machakos county the appellant intentionally touched the vagina of LC with his penis who was to his knowledge his daughter.

2. In the alternative, the prosecution preferred the charge of Indecent Act with a minor contrary to Section 11 of the Sexual Offences Act. The particulars read :

On the 24th day of March 2021 in Machakos county the appellant intentionally touched the vagina of LC a child aged 5 years old with his penis.

3. The appellant pleaded not guilty to both charges. The Court after trial convicted him on the alternative charge and sentenced him to 10 years imprisonment.

The Evidence of the Trial.

4. The prosecution called 5 witnesses in proof of the charge sheet. On 26/10/2021, LM testified in Court;

5. Pw1 was taken through voire dire examination. She gave unsworn evidence and stated that she was 5 years old and that she stayed with M and D at Kitengela village. She also stayed with her mother at



- Makutano ADC. That she relocated to Kitengela that year. She knew the appellant and that they used to live together in one house where he did bad things to her.
6. That one day her mother had gone to the market and she left her alone. She was sleeping in the house. She did not recall if anyone came in that day. The appellant even touched her private parts the day she was left by her mother asleep. That she was taken to hospital by Patricia who found her at home.
 7. The appellant did not have questions for her.
 8. Pw2, JN aged 16 years was also taken through voir dire examination. She also gave unsworn evidence on the matter. She stated that the complainant is her sister. That she was living at Kondo and was a student at [particulars withheld] Secondary school in Form 1. She was still at home in the year 2021, she stated that on 24/3/2021 she was at Kithimani market when her mother sent her to pick the minor PW1 and took her home. The next day she noticed that the child had difficulty in walking, she told her she had an irritation in her urine.
 9. This change of walking style persisted the next day and attracted attention from her friends. She bathed her that day and noticed blood with some white discharge that appeared to be pus. They went to collect firewood but the child could not walk. She informed a neighbor called Veronica Ndunge and they examined PW1 at the neighbor's house. The bleeding and the white substance was back.
 10. The neighbor called the headman, the child PW1 was interviewed and she refused to talk but later after she was told that she was being taken to hospital she revealed that her father had defiled her. The incident is alleged to have happened on 18/3/2021. They contributed money and they took PW1 to hospital at Matuu and to the Police Station.
 11. That the appellant was their step father and he used to stay at Kithimani in the house. PW2 found the appellant with her mother when she went to pick the minor. PW1 told the neighbour that she was promised mandazi before being laid on the bed. PW2 did not see P3 Form.
 12. She was cross examined, her further testimony was that she knew of the incident on 25th which was the following day after picking her. They reported the incident on 28/3/2021, the child spoke before everyone. She refused to tell her about it but disclosed it to the neighbour. They ferried her in a motorcycle and were picked to K's shop. K was her brother and he had shop was yards away from the appellant's house.
 13. Pw3, ANK the minor's mother stated that she had 9 children and some were married. The minor and pw2 are her children. The minor is her last born. She stayed in a plot at Kithimani. On 24/3/2021 she left her house at around 1400 hours and went to her home at Mwala. Her husband was in the house while the child was at her brother's house. She went to Mwala.
 14. L was with her sister in law in a shop at Kithimani market and she returned back at 1800 hours. She found her husband and he told her that Pw2 had visited and left, she went to pick the minor from her daughter in law's shop and they went home.
 15. On 28/3 2024, she left the child behind and went to get milk from a nearby shop. The father was present on 28/3/2021. She stated that she had asked Pw2 to take the child on 24/3/2021, she came at 1300 hours and her father was not at home. He was also not at home on 25/3/2021 but he was there on 28/3/2021. On 23/3/2021 she was with the Appellant. There was no date she left the Accused person with PW1 her daughter. Whenever she went to the market she left her daughter PW1 at her son's shop.
 16. On 28/3/2021, she saw a Cruiser that came for the Accused person at night Police Officers came with Headman and Jacinta. They picked the Accused person and left.



17. PW3 also testified that she did not see any injuries on the subject. She was the one who bathed her. She last cleaned her on 24/3/2021. She is the Appellant's daughter, and PW2's step father.
18. Pw4, Richard Mutinda was a clinical officer from Matuu Level 4 hospital. He testified that he had worked at Kithimani dispensary and that on 30/2/2021 he received a 5 year old baby who was alleged to have been defiled. The minor reported that her mother had left for work and her father took her to his bed undressed her and undressed himself. He inserted his penis on her vagina.
19. Medical examination by Pw4 revealed red abrasion on the vagina which was all round and 0.4 cm thick. There was no tear on the vaginal walls. The hymen was intact and there was pus like white yellow vaginal discharge. Urinalysis yielded pus cells without spermatozoa. Hepatitis B proved positive. The child was given HIV prophylaxis and was treated for UTI and Vaginitis.
20. He stated that the injuries were consistent with attempted defilement. He examined her on 29/3/2021 and the P3 form was filled the next day. He produced the treatment notes and the P3 form. He examined the appellant, urinalysis also showed pus cells, no injuries or abrasions were on the private parts and there was no inflammation.
21. Hepatitis B proved positive. He produced the appellant treatment notes and P3 as Exhibit 3 and 4.
22. He stated during cross examination that the minor did not have external injuries. The incident occurred on 24/3/2021 and the examination was on 29/3/2021.
23. Pw 5, No 96xxx PC Maureen Anyango from Yatta Police station stated that the case was brought to the station on 28/3/2021, she took the complainant to Matuu level 4 hospital for check up and then also arrested the appellant with the help of the complainant's sister.
24. She prepared witness statements in the case and also did age assessment which showed that the child was 7 years old. The appellant is the step father, the incident happened within Kithimani market in a rental house adjacent to Manyatta hotel. It belonged to the appellant and the complainant's mother.
25. The court delivered its ruling on 18/1/2022 and found that the prosecution had proved a prima facie case.
26. The appellant opted to give unsworn testimony in his defence. He confirmed that he resided in Kithimani. He stated that on 14/3/2021 he was sent to Ekalakala for work. It started from 15th until 21st March 2021, He returned back on 22nd March and worked until 27th March 2021.
27. That the police knocked at his door on 28/3/2021 at about 0800 hrs. They were with an old man, a land rover was parked outside the house and the minor and Veronica Ndunge were inside.
28. He was taken to Yatta Police station where he was locked up. He went to hospital on 29/3/2021. He did not know the reason for arrest. The lady the reason for arrest and stated that though they were separated that she was still pursuing him and that she had her debt. They were not treated on that day.
29. She confirmed the same reason for arrest on 30/3/2021. The lady also stated that she would never imagine that they would be separated and she would love to see him in prison even if he did nothing. He did not understand the stated debt.
30. He was brought to court on 30/3/2021 when he was charged.



The Judgment.

31. The court noted that PW3's evidence did not have probative value and that she attempted to absolve the appellant. Her credibility was doubted. The court found that incest was not proved and that the alternative offence had been proved.

The Sentence

32. The appellant had nothing to say in mitigation.
33. The court noted that he was not remorseful. The court noted the prevalence of the offence and opted for a deterrent sentence. The sentence was prescribed by statute as 10 years jail term.

The Appeal.

34. The appellant's Petition of Appeal was forwarded to this court on 27/7/2022 and 2/6/2023.
35. The Grounds of Appeal are listed as follows: -
1. That the evidence was overly contradictory had material discrepancies inconsistencies uncorroborated and inconclusive to attain a conviction.
 2. The accused was not accorded fair trial as stipulated under Article 50 (2) (a) (e) and (k) of the Constitution
 3. The Trial Magistrate failed to appreciate that the threshold of proof was overly wanting and below the standard of proof.
 4. The Trial Magistrate erred in law and fact in misapprehending the provisions of Section 124 of the Evidence Act.
 5. That the defense was thrashed without cogent reasons.

Respondent's Written Submissions.

36. The appeal was canvassed through written submissions. The court issued directions on, the appellant had not complied.
37. The prosecution submits that Pw1's evidence disclosed the offence of indecent Act, her evidence was corroborated by Pw2 and Pw4. Her child was also assessed at 7 years old and an assessment report was produced.
38. The appellant was positively identified by pw2 who stated that he was their step father. The complainant's mother also confirmed that the appellant was the complainant's father. It is submitted that Pw1's evidence was corroborated by Pw2 that the child had difficulty in walking and that she had blood and white discharge which appeared as pus. Pw1 disclosed to them that she had been defiled by her father. Pw2 stated that Pw3 and the appellant were present when she picked the child from the house.
39. The child was 7 years and did not have reason to frame him. Her evidence was also corroborated by Pw4.
40. On whether the case was riddled inconsistencies, the prosecution submit that pw3's evidence was inconsistent. That she stated that on 24/3/2021 she had left the appellant in the house and the child was at her brother's house.



41. She states that she left the child at Kithimani market with her sister in law and that she found the appellant at home when she returned. She stated that Pw3 also said that pw2 came for the child on 24/3/2021, the appellant was absent on that day thus contradicting her earlier testimony.
42. These inconsistencies were aimed at assisting the appellant and should not be resolved in the appellant's favour.
43. The case of Richard Munene Vs Republic (2018) eKLR, the contradictions and inconsistencies in evidence go to discredit the witness as being unreliable and must be resolved in favour of the accused. Inconsistencies are substantial if they go to the main issue in question and create doubt in the mind of the trial court.
44. The Appellant filed written submissions and alleged that they were uploaded on CTS only. On checking CTS Machakos there were no submissions uploaded by the Appellant.

Analysis and Determination.

45. The duty of the first appeal court was highlighted in the case of Nguru v. Republic KLR [1953] KLR 412.
46. The court has considered the prosecution's evidence and the appellant's defense above in the Trial Court's record and written submissions. The appellant's grounds of appeal have also been taken into account and submissions filed in contest.
47. The issues for determination are framed as follows:-
 1. Whether the charges were proved beyond reasonable doubt
 2. Whether the contradictions affected charges.
 3. The credibility of the defence case.
 4. The propriety of the sentence.
48. The provisions of Section 20 (1) of Sexual Offences Act provide for the offence of Incest. The prosecution must prove the main elements of the offence settled as :- Relationship and knowledge thereof and penetration.
49. Section 2 of the Sexual Offences Act defined penetration as partial or complete penetration. This requires penetration of the genitalia. Section 2 of the Sexual Offences Act defines the word "Penetration" as follows:-

"Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."
50. The particulars of the charges were not amended at the close of the prosecution's case. The prosecution claimed that the appellant intentionally touched the vagina of LC with his penis who was to his knowledge his daughter.
51. The minor testified that her mother left her alone sleeping. The accused did bad things to her and even touched her private parts. That they used to live together in the same house when this happened. She also confirmed that she was taken to hospital by Patricia.



52. Medical examination was done on 29/3/2021 and the injuries were said to be 6 days old. The complainant had reddened abrasion which was described as circumvaginal redness. No tears were noted on the vaginal wall. The hymen was also intact. White yellow discharge was also proved.
53. Pw4 explained the medical evidence and added that the minor tested positive to Hepatitis B. This was also noted on the appellant's urinalysis which showed pus cells. Pw4's findings were that there was attempted defilement.
54. The burden of proof must be beyond reasonable doubt and the court must not rely on speculation. It is trite that unsworn evidence must be corroborated and that the court exercises caution before convicting a suspect on uncorroborated evidence. Pw1 & Pw2 gave unsworn evidence although Pw2 cross examined by the Appellant.
55. That notwithstanding, I find that the victim's testimony was corroborated by medical evidence. The evidence comprised of abrasions reddening of the vagina (circumvaginal redness), Hepatitis B vaginitis and urinary track infection. The prosecution's case proved that the appellant had made physical contact of the minor's vagina using his penile organ. This caused abrasion and serious damage as explained by Pw2 and Pw4.
56. The evidence of PW1 of her ordeal that the Appellant touched her private parts was corroborated by PW4 the Clinical Officer who conducted physical examination of PW1 and ran tests that revealed the findings in the treatment notes and P3 Form were consistent with attempted penetration.
57. However, on the evidence adduced and on record the Trial Court legally found the Appellant guilty of lesser offence of committing indecent act with a child contrary to Section 11 (1) of Sexual Offences Act. Section 179 of Criminal Procedure Act provides;
- When offence proved is included in offence charged
1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
 2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.
58. "indecent act" is defined under the Sexual Offences Act to mean ... an unlawful intentional act which causes-
- (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
 - (b) Exposure or display of any pornographic material to any person against his or her will."
59. Section 11 of the Act provides that :-
- 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:
60. On age, Pw3 did not testify on the minor's age, her date of birth was also not part of the evidence. However, the court carried out voire dire examination and the child stated that she was in class 2. The



proceedings read that she was female aged 5 years. Age assessment was done on 13/10/2021 which revealed that she was 7 years old. Edwin Nyambogo Onsongo –Vs- Republic (2016) eKLR the Court of Appeal held that: -

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.”” we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

61. The minor did not indicate the date of the offence, the P3 form indicates that the offence occurred on 24/3/2021 which tallies with the particulars of the charges. The P3 form traced the injuries to 6 days from the examination on 29/3/2021.
62. The evidence on the date of the offence was also corroborated by PW2 who had gone to pick the minor on 24th at 1400 hrs. She noticed the child had difficulty in walking for two subsequent days. She also managed to see blood and white discharge on the 2nd day.
63. The prosecution case was proved beyond doubt that the appellant committed an indecent Act with a minor.
64. The appellants ground of appeal on age of the victim is dismissed.
65. Further ground that the court misapprehended Section 124 of the *Evidence Act* was misconceived. The court did not rely on the victim’s sole testimony to convict the appellant. The case was peculiar in that it relied on unsworn evidence of two minors which was corroborated by medical evidence.
66. On whether the contradictions affected the prosecution’s case. I note that the trial court impugned Pw3’s evidence on account that the witness was absolving the appellant. The relationship with the appellant as husband and wife was also found to be a ground for absolving the appellant.
67. The prosecution did not make an application to expunge the evidence or declare PW3 as a hostile witness. This means that the evidence was still on record and the court had discretion to use it to determine conviction. The Trial Court had the unique opportunity to see and hear evidence from witnesses assess their demeanour and test veracity of evidence through cross examination conducted during the trial. In the absence of any cogent or tangible evidence or issue to cast doubt on conduct of Trial, this Court that did not see or hear the evidence directly from the witnesses concurs with the assessment of witnesses and probative value of their evidence.
68. These differences in testimonies of witnesses cannot be considered to contradictions and inconsistencies, each witness gave evidence as to what each saw or said or heard, the Trial Court evaluated the evidence in the Judgment of 3/2/2022 and found the evidence of PW3 had no probative value [at page 6]
69. The contradictions were noted when PW3 stated at page 22 line 7 and page 23 line 4 that the appellant was not left with the child and that he was not at home on 24/3/2021. That the child had gone to her brother’s place on 24/3/2021 when she had gone to Mwala. She also said she left the child at her sister in law’s place at Kithimani.
70. The case of Twehangane Alfred –Vs- Uganda Cr. Appeal No. 139 of 2001(2003) UGCA-6 the court held that With regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily



lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”.

71. I find that the position of Pw3 as mother of the victim and wife of the appellant placed her at cross road and her contradictions in her evidence cannot be reconciled in the appellant’s favour. As observed by the Trial Court in the judgment Pg 6, Pw3 attempted to absolve the Appellant of any wrong doing and put her credibility into doubt.
72. Further, despite the contradictions, Pw3 also testified that she left the appellant at the house on 24/3/2021. That she came back that day. That she had also sent Pw2 to pick the child on 24/3/2021 at 1300 hrs.
73. Pw2 testified that she was sent to pick the child on 24/3/2021. She also stated at various instances at page 20 and 21 of the proceedings that “that she found the accused person with her mother...that she found the subject with the mother and the accused.. that her intention was to take the child home..”
74. This Court finds against the evidence adduced by Pw1 and corroborated by an independent expert witness PW4 Clinical Officer, the findings upon examination and tests lends credence to Pw1’s version than the Appellant’s Defense.
75. On whether the defence was credible. Contrary to the appellant’s grounds of appeal, he trial court considered the appellant’s defence page 7 of the judgement. That he told court that he was away at Ekalakala between 14th and 27th. Particularly that he was away on 22/3/2021 and he came back on 27/3/2021.
76. The appellant gave unsworn evidence. The nature of this testimony makes it lack probative value In the case of Amber May v Republic [1979]eKLR, the court of appeal reviewed English law on the subject and held as follows on the accused unsworn evidence :

“What is said in such a statement is not to be altogether brushed aside; but its potential value is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proved facts and the inferences to be drawn from them in a different light. In as much as it may thus influence the jury’s decision, they should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and that tested by cross-examination has less cogency and weight than sworn evidence.”

77. The court concluded that :

“From all this we are satisfied that an unsworn statement is not evidence as that expression is generally understood. It has no probative value, but should be taken into consideration in relation to the whole of the evidence.”

78. With regard to the Appellant’s defense which was based on denial of the offence and /or vendetta by the lady due to a breakup with the lady and debt owing to the lady. The Appellant raised these issues for the 1st time during Defense and did not cross examine the particular lady on the said claims. The allegations more so in unsworn statement amounted to an after thought and did not cast doubt on the Prosecution case.



79. The appellant also settled for alibi defense. The appellant had legal burden of proof to place material before court under Section 107 of the Evidence Act.

80. In Kiarie -Vs- Republic {1984} KLR The Court of Appeal held at page 3 that :

“ An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate’s finding on the alibi because the finding was not supported by any reasons.”

81. The time of bringing the defence also influences the mind of the court, the appellant further failed to raise the defence at inception of the case and potentially casts doubt on the credibility of his case.

82. In the case of Karanja -Vs- Republic [1983] eKLR the court of appeal held at page 3 that:-

“ Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in R v Ahmed Bin Abdul Hafid (1934) 1 EACA 76, and with those of the former Court of Criminal Appeal in R v Little boy, [1934] 2 KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought.”

83. I find that the prosecution case remained intact throughout the trial. That the appellant was placed on the scene by Pw2 whose evidence was corroborated by Pw 3 to the extent that Pw3 (his wife) was with him on 24/3/2021. Pw3 came back from her journey and found him at home. The Pw3 also testified that she was with him on 23/3/2021.

84. Further, the fact that Veronica framed the charges against him did not shake the prosecution’s evidence. The lady identified to have accompanied them to the hospital was called Veronica . Pw2 stated that she was a neighbour who assisted her and the child.

Sentence

85. On sentence, Section 11 of the Sexual Offences Act provides for imprisonment which is a custodial sentence. Sentencing process is the discretion of the trial court and it cannot be interfered unless the appellant proves that : The sentence was harsh and excessive, the wrong principle was applied or that irrelevant factors were considered.

86. The appellant was not remorseful and failed to mitigate or persuade the court to consider any circumstances he wanted the Trial Court to take into account for a lesser sentence. That notwithstanding, the court could not mete out a lesser sentence in the circumstances as Section 11 (1) of Sexual Offences Act minimum sentence.

87. The Judiciary Sentencing Policy Guidelines 2016 & 2023 are also elaborate on principles and objectives of sentencing.

88. In the case of NOO v Republic [2019] eKLR Mativo J as he then was held at paragraph 9 that :- “ Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the



nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances The court referred to the case of Alister Anthony Pareira –Vs-State of Maharashtra {2012}2 S.C.C 648 Para 69.

89. Section 333 (2)of the *Criminal Procedure Code* provides that.

(2) Subject to the provisions of section 38 of the *Penal Code* every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

90. The appellatant did not raise bail and was remanded through out the trial after arrest on 29/3/2021. He was sentenced on 3/2/2022 but the court failed to make provisions for the period spent.

91. The appeal on conviction is dismissed. The trial court's judgment on conviction and sentence is upheld. The computation of sentence shall take into account 1 year he was in custody during trial upto conviction and sentence, sentence shall run from the date of arrest.

**JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS HIGH COURT
VIRTUALLY/PHYSICALLY ON 28/3/2025**

M.W.MUIGAI

JUDGE

