



**JK v Republic (Criminal Appeal E024 of 2024)
[2025] KEHC 6990 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6990 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL E024 OF 2024**

**TW OUYA, J
MAY 29, 2025**

BETWEEN

JK APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of the conviction and sentence of Hon. O.M. Wanyaga,
(Senior Resident Magistrate) in Thika Chief Magistrate's Court
Criminal Case No. SO E020 of 2021 delivered on 2nd February, 2024)*

JUDGMENT

Background

1. JK, the Appellant herein, was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*. The particulars of the Offence were that on diverse dates between November 2019 and 15th April 2021 in Juja subcounty within Kiambu county, being a male person caused his penis to penetrate the vagina of J.W.M a female juvenile aged 12 years who was to his knowledge his daughter.
2. In the alternative he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* in that he intentionally and unlawfully touched the buttocks and vagina of J.W.M a child aged 12 years with his penis.
3. The Appellant pleaded not guilty to both charges. Upon trial, he was convicted of incest and sentenced to 20 years imprisonment under Section 20(1) of the *Sexual Offences Act*. Aggrieved by both his conviction and sentence, he preferred the instant appeal.



Grounds of Appeal.

4. The Appellants grounds of appeal are contained in the undated Petition of appeal together with the Supporting affidavit dated 25th June 2024 as follows:
 - a. The trial magistrate erred in law and fact by failing to note that the supreme law of the land has been incurably violated by failure to promptly inform all the rights of an arrested person, disclose al intrinsic evidence and provide legal representation and aid;
 - b. The trial magistrate erred in law and facts by failing to note that the procedural law was breached in the manner the evidence of the minor was received without prior voir dire examination and a copy if the Birth Certificate which disqualified it as a mere photostat without verification yet it would have guided the trial against the Appellant to be procedural.
 - c. The trial magistrate erred in law and fact by failing to note that most of the evidence relied upon was inconclusive, inadmissible and illegally obtained contrary to the exclusionary rule of article 50 (4) of *the Constitution*.
 - d. The learned trial magistrate erred in law and fact by failing to consider the vibrant elements of the case, appreciating scrutiny which was not free from care and caution hence failure to deliberate the evidence objectively and dispassionately which gravely violated Section 107 of the *Evidence Act*.
 - e. The trial magistrate erred in law and facts by filing to note that incredible witnesses were relied upon contrary to Sections 144 and 150 of the CPC.
 - f. The trial magistrate erred in law and fact by failing to note that crucial witnesses were not availed for testimony and cross examination contrary to Section 146 (iv) of the *Evidence Act*.
 - g. The trial magistrate erred in law and in fact by disregarding his defence statement which was plausible, yet the same was remarkably comprehensive casting considerable doubt to the strength of the prosecution case and thus failed or fully violated the stipulation in Sections 169 (i), 212 and 309 of the CPC
 - h. The trial magistrate erred in law and facts by appreciating the fairness and constitutionalism as per Articles 27, 50 (2) (p) of *the Constitution* as read with Section 26 (2) of the *Penal Code*, yet the same objectives intended in the *Sexual Offences Act* and goes against the new developments in matters law.
5. The Respondent opposed the appeal on the basis that the conviction was safe as the prosecution proved all the ingredients of the offence of incest beyond reasonable doubt. The Respondent also filed a notice of enhancement of sentence dated 22nd November 2024 from twenty years to life imprisonment as envisaged by Section 20 (1) of the *Sexual Offences Act*.

Summary Of Evidence

6. The prosecution called a total of four witnesses; all the witnesses gave sworn evidence. Its case can be summarized as follows. PW1, JWM was the complainant in the case. She states that she was living in the house together with her mother (PW2) and the Appellant, who was her father.
7. According to PW1, at an unknown date in 2019, she came from the bathroom which was situated outside the main house and went into her parents' bedroom while tying a lessa to have a change of



- clothes. In the process, the Appellant inserted his finger into her vagina, while claiming that he did so by mistake.
8. Later in 2020, when schools were closed due to the Covid 19 pandemic, PW1 went to the parents' bedroom to have a change of clothes while the appellant was in the sitting room watching TV. The appellant followed PW1 into the bedroom while armed with a knife and undressed PW1. A struggle ensued and the Appellant cut PW1 on the left side of the face. He thereafter inserted his penis into her vagina and then put his sperms into PW1's mouth and forced her to swallow. Thereafter, the appellant repeatedly raped PW1 on several other occasions while armed with a knife.
 9. One day PW1 was home when the Appellant called and asked whether PW2 was home. He later came home and started raping PW1 as he had done in days past. PW2 suddenly came into the house and found the Appellant on top of PW1 raping her. PW2 inquired what was going on but the appellant did not stop, PW2 screamed. Mama Mary came into the house and removed the appellant from PW1. PW1 was escorted to Thika Level 5 hospital. PW1 identified the Appellant, virtually, as the person who had raped her. She says that she was born on 6th July 2008 as confirmed in her birth certificate.
 10. On cross examination she maintained that the appellant had raped her severally but she never reported for fear. Moreover, the appellant had threatened to kill her if she reported the incident to anyone. She denies colluding with PW2 to frame the Appellant.
 11. PW2 states that she was the mother to PW1. She stated that the appellant was the biological father of PW1. According to PW2, on 15th April 2021 at around 6.00am he woke up, undertook her chores and left the house to look for casual jobs. She later realized that she did not have her mobile phone. As a result, she went back home to find it before proceeding to work. Upon getting home, she saw the appellant's shoes outside the house. Upon getting into the house, she found the appellant and PW1 naked on her bed. She screamed. The appellant threw a blanket at her. A neighbour got into the house while a mob gathered. She pleaded with the mob not to hurt the appellant as he had a metal plate in the leg. The police were called and they went to Witeithie police station before proceeding to Thika level 5 hospital.
 12. On cross examination PW2 said that the appellant used to leave the house at 4.00am. She did not know the time that he came back to the house. She denies planning the incident to frame the Appellant. She concedes that she had fought with the Appellant in front of the Appellant's parents but it had nothing to do with PW1. PW2 stated that PW1 had alleged that the cut on her left face had been occasioned by an iron sheet.
 13. PW3 George Maingi, a clinical officer at Thika level 5 hospital stated that he filled PW1's P3 Form. He noted that PW1's hymen was broken and there was a smelly discharge from the vagina. There were epithelial cells when a High Vaginal Swab was undertaken. He produced the P3 Form as exhibit 4. He also produced a post rape care form that had been filled by her colleague Beatrice Maacha. On cross examination, he affirmed that PW1 visited hospital on 15th April 2021.
 14. PW4, Cpl Anastacia Wairimu investigated the case. She summed up the evidence of the prosecution witnesses. She is the one who issued the P3 Form to PW1. She emphasized that PW1 knew that it was the Appellant, her father who defiled her and she respectively identified him.
 15. At the conclusion of the prosecution case, the trial court ruled that the prosecution had established a prima facie case and accordingly put the Appellant on his defence. He gave an unsworn statement of defence. He stated that on 15th April he was home when he saw his neighbour's child on a motor cycle with three men. The neighbour's child said "Ndiyo huyu". The three men told him that they were police officers from Witeithie police station. That it was while at the police station that he learnt



that PW2 had claimed that the Appellant had defiled PW1. It is defence that the defilement claim was a ploy by PW2 to gain unfair advantage over him on account of the compensation that was due to him in the civil case that he was pursuing following a traffic accident. He denied committing the offence that he had been charged with.

16. The trial court took into account the submissions of the parties and in its determination relied on the testimony of the Complainant/victim herein PW1 finding her evidence believable. The trial court found that the evidence of PW1 was consistent and the same had been corroborated by her mother (PW2) who found her having sex with the appellant. The trial court further relied on the medical evidence from the PRC and P3 forms as produced by PW3. The court also noted that PW1 referred to the appellant as dad severally in her evidence. The court ruled out the possibility of the appellant being framed. The alleged grudge between the appellant and PW2 had no bearing on PW1. The court was also guided by PW1's birth certificate in ascertaining that PW 1, though slightly less than 12 years old as at 15th April 2021 was nevertheless a minor.
17. In sentencing the court determined that the Appellant was entitled to the lesser sentence since the particulars of the charge, stated that PW1 was 12 years old.

Respondent's submissions.

18. The Learned State Counsel, Ms. Robinah Akoth relied on written submissions dated 22nd November 2024. She urged that the prosecution proved all the ingredients of the offence as required by law beyond reasonable doubt. She further pointed out that the testimony of PW1 was corroborated by both PW2 and the medical evidence on record produced by PW3.
19. The Respondent further stated that the evidence tendered in Court was not in any way discredited by the defence during cross examination. Therefore, the conviction was proper. Accordingly, the Respondent urged the Honourable court to dismiss the appeal for lack of merit, uphold the conviction and enhance the twenty years sentence to life imprisonment.

Analysis and determination.

20. This being the first appellate court, its duty is to reconsider and reevaluate the evidence adduced before the trial and make its own conclusions. It should however give regard to the fact that it has neither seen nor heard the witnesses. See: *Kisumu Criminal Appeal 28 of 2009 David Njuguna Wairimu V – Republic* [2010] e KLR where the court of appeal stated:

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

21. I have considered the evidence adduced before the trial court, the grounds of appeal and the respective rival submissions. The main issue that commends itself for consideration is whether the offence of incest was proved.



22. The offence of incest is defined in Section 20(1) of the *Sexual Offences Act* as:

“(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 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.”

23. Thus, the ingredients for the offence of incest are:

- a. Proof that the offender is a relative of the victim.
- b. Proof of penetration or indecent Act.
- c. Identification of the perpetrator.
- d. Proof of the age of the victim.

24. On the first ingredient, to understand whether indeed the degree of consanguinity contemplated under Section 20 of the *Sexual Offences Act* was established, reference is made to Section 22 of the Act which provides that:

“22(1) In cases of the offences of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not ...”

25. Further, sub-section (3) reads:

“22(3) A accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.”

26. In this case, the complainant testified that the Appellant was her father with her mother (PW2) testifying that he was her biological father. Therefore, there is no controversy that the relationship between the appellant and PW1 met the threshold for relationships covered with the law against incest. In her evidence the complainant continually stated that it is her dad, whom she positively identified in court virtually raped her on several occasions while threatening her with a knife on diverse dates between 2019 and 15th April 2021.

27. On proof of penetration or indecent act, the evidence of PW1 was that the Appellant had carnal knowledge of her, implying there was penetration. Section 2 of the *Sexual Offences Act* defines penetration as;

“the partial or complete insertion of the genital organs of a person into the genital organs of another person”.



28. PW1 testified that the Appellant defiled her on several occasions by inserting his penis into her vagina and then pouring his sperm in her mouth and compelling her to swallow it. She did not speak to anyone about the sexual abuse until on 15th April 2021 when PW2 caught them red handed in the act when the abuse came to light. The matter was immediately reported to Witeithie police station and PW1 was subsequently escorted to Thika level 5 hospital for treatment. PW3 who filled the P3 Form, testified that upon examination the hymen was broken and it produced a smelly white discharge. A high vaginal swab noted the presence of epithelial cells. PW3 stated that PW1 maintained that she had been defiled on several occasions by a person well known to her. PW3 was emphatic that PW1 went to hospital on 15th April 2021.
29. The Appellant alleges that the evidence relied on to convict him was inconclusive, inadmissible and illegally obtained. However, the appellant has not demonstrated the manner in which the evidence was illegally obtained. In any case, the conviction was based on the corroborated evidence of PW1, whom the court believed to be telling the truth, and the testimony of PW2, who stated that she caught the appellant in the act. The trial court found the suggestion that the case was a ploy to frame the appellant to be incredible as the same was not evident from the proceedings.
30. Furthermore, it is almost obvious that sexual assault cases especially those involving minors are committed in exclusion of eye witnesses. That is why the law came to the aid of these vulnerable victims by dint of the proviso to Section 124 of the *Evidence Act*. The same reads:
- “Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth” (emphasis added).
31. The proviso stipulates that a court can convict an accused person in a sexual assault case where the minor is the victim solely on the victim’s evidence as long as the court believes that the minor is speaking the truth. The learned trial magistrate did believe the evidence of the minor. This court too, has no reason to doubt that she told the truth. In any case, the trial court saw the scar on PW1’s left face that was allegedly caused by the appellant. Also, the evidence of PW2 who was an eye witness together with the medical evidence capped it that she was indeed sexually assaulted.
32. Nevertheless, I am guided by the holding in Nyeri Criminal Appeal No. 270 of 2012 George Kioji Versus Republic the court expressed itself thus on proof of commission of a sexual offence:
- “Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”
33. I need not therefore emphasize that the Appellant’s identification was by way of recognition. He was a person well known to PW1 and besides, her biological father.
34. The age of a victim in a case of incest is paramount in view of the sentence as prescribed under Section 20(1) of the *Sexual Offences Act*. According to the birth certificate produced in court as P Exhibit 1,



PW1 was born on 6th July 2008. She was therefore two months shy of twelve years as at 15th April 2021 when the appellant was caught having carnal knowledge of her.

35. The other ground of appeal raised by the Appellant was that the prosecution did not call all relevant witnesses. Specifically, Mama Mary who allegedly saved PW1 from the Appellant or any other witness who was part of the mob that had gathered outside the appellant's home before the police came.
36. It is now settled law that there is no particular number of witnesses that the prosecution is required to call to prove any fact. (See; Section 143 of the *Evidence Act*). What is paramount is that the prosecution calls such number of witnesses as would be sufficient to establish their case. The prosecution discharged this burden as their case ably ousted the Appellant's defence.
37. In Nairobi High Court Criminal Case 67 of 2012 Republic Vs Cliff Macharia Njeru [2017] eKLR the court said:

“The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. It is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favorable to the prosecution or not.”

38. The same reasoning was echoed by the Court of Appeal in Mombasa Criminal Appeal 44 of 2016 Sahali Omar V Republic [2017] eKLR thus:

“Section 143 of *Evidence Act* provides that: -

‘No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.’”

The principle used to determine the consequences of failure to call witnesses was succinctly stated in *Bukenya & Others v Uganda* [1972] EA 549; where the Court held that: -

“(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

39. The unsworn defence of the Appellant was that the defilement allegations were framed up by PW2 to gain unfair advantage over him in the compensation case that he had been pursuing following a traffic accident. He clearly stayed away from addressing the issues raised in the prosecution case. My take is that this defence did not at all rebut the strong case advanced by the prosecution against him.
40. I then conclude that the prosecution proved its case beyond all reasonable doubt. The conviction of the Appellant was based on cogent evidence adduced by the prosecution and I uphold it.
41. On sentence, Section 20(1) of the *Sexual Offences Act* provides that:

“(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 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.”

42. This provision is couched in mandatory terms such that a trial court cannot exercise discretion by deviating from the sentence provided. The learned trial magistrate rendered an illegal sentence by imposing a twenty-year jail term. He should have imposed the mandatory life imprisonment.

43. The Supreme Court in *Republic versus Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* (Petition No. E018 of 2023) [2024] KESC 34 (KLR) while addressing the concept of judicial discretion in sentencing stated thus:

“66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed”

44. This court, under Section 354 (3)(a) and (b) of the *Criminal Procedure Code* is mandated to correct an illegality meted in sentencing. The same provides as under as regards powers of the High Court in an appeal:

“(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-

- (a) in an appeal from a conviction-
 - (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
 - (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
 - (iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;
- (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;”



45. The supreme court in the Muruatetu directions stated thus:

- “ 10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision’s expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it.
11. ... We therefore reiterate that, this court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.”
14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution.

46. In the end, I uphold the conviction. I set aside the 20-year jail term and substitute it with an order that the Appellant shall serve life imprisonment.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 29TH MAY, 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....(In person) JK

For RespondentMs Torosi

Court Assistant..... Doreen

