



REPUBLIC OF KENYA



KENYA LAW
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**GK v Republic (Criminal Appeal E071 of 2024)
[2025] KEHC 11736 (KLR) (1 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E071 OF 2024
SM GITHINJI, J
AUGUST 1, 2025**

BETWEEN

GK APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. GK was charged in the Lower Court with the offence of Incest contrary to Section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of this offence are that on the 26th day of October, 2018 at [Particulars Withheld] Village, Kanunu Location, Igembe South Sub-County within Meru County, the Appellant herein caused his penis to penetrate the vagina of PW a child aged 11 years, who is his daughter.
3. 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](#) no. 3 of 2006.
4. The particulars hereof being that on the 26th day of October, 2018 at [Particulars Withheld] Village, Kanuni Location in Igembe Sub-county within Meru County, the Appellant intentionally caused his penis to get into contact with the genital organs (vagina) of P.W. a child aged 11 years.
5. The Prosecution case is that the Appellant herein and Pw-2 are a husband and wife. The two met when the victim (pw-1) was aged 7 years and have other children together. They had their matrimonial home at [Particulars Withheld] Village, Kanuni Location in Igembe Sub-county within Meru County.
6. The victim in her voire-dire told the court that she was aged 15 years. However, in her evidence she did not tell of her age but stated she was born on 15th October, 2006. The mother in her evidence said she was born in 2006. The Appellant and his wife (Pw-2) had a blissful marriage till 26th October, 2018 when the incident in this case allegedly happened.



7. On Friday, the 26th October, 2018 the Appellant and Pw-2 went for casual jobs. The victim who had been sent away from school for lack of school fees was left at home. The mother left her with Ksh.60 for lunch. Later in the day, the Appellant returned home alone. He told the victim that he did not manage to get a casual job. He went into the house, on bed. The Ksh. 60 was placed on the bed. When the victim went for the amount, he held her hand and pulled her in bed. He removed her skirt and pants. She tried to scream of which made him cover her mouth. He as well increased the radio volume to disguise any noise. She alleged the Appellant did bad things to her. Luckily at about 1.00p.m. Pw-2 returned home for lunch. To her surprise, she found the Appellant in the bed with the victim. The appellant was pushing Pw-1 away, and Pw-1 was holding her pant. She was crying. Appellant was pulling his trousers on. Pw-1(the victim) left heading to the kitchen. The mother followed her. She did not disclose what had happened. The mother returned to the bedroom and found the appellant pretending to be asleep. In anger, she took a panga and demanded to know from him what had happened. The Appellant pleaded with her for forgiveness, urging her not to scream. She screamed, attracting neighbours among them the Sub-Area In-charge. They opened the door. The Sub-Area In-charge interrogated the Appellant who said the wife found him in bed with the victim (Pw-1). He was then held and taken to the chief. Thereafter, they all went to Maua Police Station where the case was reported.
8. They were referred to Nyambene Sub-county Hospital. When the victim was interrogated she revealed that the mother appeared before she was defiled (penetrated). Pw-3 examined her and found that she was okay. The genitalia was normal. The hymen was absent, but not freshly torn. She had no vaginal discharge. She opined that it was a case of attempted defilement and thus filled the P-3 form.
9. PW-4 investigated the matter. Upon re-arrest of the Appellant he kept praying for forgiveness. After completion of investigations he was charged with the offences carried in the charge sheet. The appellant was placed on his defence and opted to remain mute.
10. The trial court evaluated the evidence and found that the preferred charges were not established by the prosecution, given that there was no evidence in support of element of penetration. Under Section 180 of the Criminal Procedure Code, the court found that the offence of Attempted defilement of a child had been established beyond reasonable doubt and convicted him of the same. He was sentenced to serve 10years imprisonment.
11. Dissatisfied with the said conviction and sentence he appealed to this court on the grounds that: -
 - a. The medical evidence did not link him to the offence.
 - b. Prosecution did not prove their case beyond reasonable doubt.
 - c. The court did not evaluate the grudge between him and his wife (Pw-2)
 - d. Essential witnesses were not called by the prosecution.
12. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
13. Section 20(1) of the *Sexual Offences Act* states 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.



14. Where the victim is under the age of eighteen years, the accused person shall be liable to imprisonment for life.

Section 22(1) of the *Sexual Offences Act* is to the effect that in cases of the offence 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 mother includes a half-mother and an aunt of the first degree whether through a lawful wedlock or not.

15. Considering the foregoing provisions of law, the prosecution was bound to prove that: -

- a. The Appellant was a father to the victim.
- b. He committed an indecent act or an act which caused penetration with her.
- c. The victim was a child.
- d. The Appellant was properly identified or recognized as the real culprit.

16. “indecent Act” is defined under Section 2 of the *Sexual offences Act* as: -

“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.

17. Given the foregoing definition, it’s clear that for the offence of incest, there could either be penetration or an indecent act, where penetration is not necessary or an ingredient. The trial court was wrong when it held penetration as an essential ingredient for the offence of incest.

18. The evidence of Pw-1 and Pw-2 on what the Appellant did reveals clearly that it amounts to an indecent act, and would have been rightly convicted for the offence in count 1.

19. Was he a father to the victim? The evidence is clear that he was not the biological father but the law does not require only of that. He had married the victim’s mother when Pw-1 was 7 years old. The evidence place her age at 11 years as at the time of offence, which means the Appellant and Pw-2 had been in marriage for 4 years. They had other young children together as we are told they later reconciled in the interest of the younger children. Pw-2 said she has 6 children. The Appellant does not deny that he was married to Pw-2 and was a father to the victim. The relation required for the offence under Sections 20(1) and 22(1) of the *Sexual Offences Act*, include half father of which the Appellant no doubt was.

20. I now move to the age of the victim. As was rightly put by the trial Magistrate, for the offence of incest, age of the victim matters only in regard to sentencing for if a child, the accused should be imprisoned for life. In this case, the Prosecution therefore only needed establish that Pw-1 was under 18 years old. Pw-1 said she was born on 15th October, 2006. If she was right, offence having been allegedly committed on 26th October, 2018, she was 11 years old. The mother simply said she was born in the year 2006. The voire dire shows she disclosed she was 15 years old, while the P-3 indicate her age as 11 years. There is no disclosure that she could have been 18 years old. The evidence is firm that in all respects she was a child under 18 years old, which suffices for the offence of incest.



21. The last ingredient is whether he was properly identified or recognized as the culprit. The incident happened during the day. The Appellant was a father to the victim and was well known to her. The mother caught him red-handed and was arrested right at the scene. He could not have been in anyway mistaken for the real culprit.
22. The entire evidence weighs down to the fact that the first count had been established by the Prosecution beyond reasonable doubt and had the Lower court found so, the Appellant would have been entitled to Imprisonment for Life. I can only say he was lucky that the court did not find so, and so convicted him of a leaner charge of attempted incest which earned him only 10 years imprisonment.
23. I don't wish to say more rather than that the appeal lacks merit and is hereby dismissed.

DATED AND DELIVERED AT MERU THIS 1ST AUGUST, 2025.

S.M. GITHINJI

JUDGE

Appearances: -

Appellant Present in Isiolo Prison.

Ms. Adhi for the Prosecution.

