

KENYA / JUDGMENT

EJP v Republic [2026] KEHC 4096 (KLR)

[2026] KEHC 4096 (KLR)**COURT**

High Court

BEFORE

WM Kagendo.

CASE / FILE NUMBER

Criminal Appeal E006 of 2025

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EJP v Republic (Criminal Appeal E006 of 2025) [2026] KEHC 4096 (KLR) (19 March 2026)
(Judgment) Neutral citation:

[2026] KEHC 4096 (KLR) Republic of Kenya In the High Court at Mombasa Criminal Appeal E006 of 2025 WM Kagendo., J March 19, 2026 Between EJP Appellant and Republic Respondent

Judgment

1. The Appellant, EJP alias A, was charged with the offence of incest contrary to Section 20 (1) of the Sexual Offences Act . The particulars are that on the 11/12/2023 at [Particulars Withheld] area in Likoni sub-county within Mombasa County, he intentionally and unlawfully caused his penis to penetrate the vagina of MAE a child aged 7 years whom to his knowledge is his daughter. 2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act . The particulars were that on the 11/12/2023 at [Particulars Withheld] area in Likoni sub-county within Mombasa County, he intentionally and unlawfully touched the vagina of MAE a child aged 7 years with his penis. 3. The appellant was convicted on the main count and sentenced to serve 35 years' imprisonment. 4. The appellant was not satisfied with the judgement of the trial court and thus sought this appeal. 5. The appellants' grounds of appeal are summarized as follows; i. That the learned trial magistrate convicted and sentenced the appellant herein to manifestly excess and harsh sentence. ii. That the learned trial magistrate erred in law and fact by holding that, the offence of incest under section 20 (1) of the sexual offences act was proved but failed to note that the age of the victim was not proved and penetration was not proved against the appellant. iii. That the appellant's sworn defense was not given a fair objective and open-minded analysis. Prosecution's case 6. PW1 Victor Obande Were a clinical officer at Likoni sub-county Hospital told the court that he has a patient booklet from Likoni sub- county Hospital for MA (6years) female outpatient. Patient came on 11/12/2023. The person who escorted her said she had fever, she had difficulty in walking. She was examined the vagina was reddened with fresh vaginal cut wound. Hymen was broken. She was sent to laboratory for further analysis. She was given antibiotics, PEP, pain

killers. PW1 produced the treatment notes for MA dated 11/12/2023 as PEX-1. PRC form filled on 11/12/2023 produced as PEX-2. PW1 produced P3 form as PEX-3. 7. PW2 Omar Abila Ismael a children's officer in Likoni stated that on 11/12/2023 he received a call from police officer from Maji Safi. He informed him that a child had been brought at the station, alleging mistreatment by their father. He arranged for Likoni Aid Children's Centre to host them temporarily. The minors underwent counselling and the victim revealed that her father had been in the habit defiling her while her brother stated that their father frequently subjected them to unnecessary beatings. He subsequently opened a care and protection file and obtained court orders for the children to be placed in a children's home. 8. PW3 MAE the complainant told the court that she is 7 years old and lived with her brother and their father in a small room with a single bed, which they all shared. PW3 said that the appellant did to her "tabia mbaya huku mbele" (pointing at her genital area) at night while they were asleep. She reported the matter to her neighbor who then escorted her to the hospital and later to the police. 9. PW4 Asha Kassim attached at Shelly Beach police station performing gender duties. She said that on 11/12/2023 a woman emerged accompanied by two kids, siblings (boy and girl). The girl is the victim. The minor had already been examined at the hospital when the report was made. The report showed that she had been defiled. On 9/3/2024 pw4 recorded the minor's statement. PW4 said that the minor told pw4 that she lives with her father and they share a bed. PW4 produced birth certificate as PEX-4. Defence case 10. DWI EJP stated under oath that on 11/12/2023 his children disappeared from home after he had left them under the care of his neighbor known as Mama Mlezi. On 17/12/2023 he finally discovered that they were at a children's home. DW1 told the court that he had been in a romantic relationship with his neighbor, Mama Mlezi but they parted ways after he discovered that she had another man. She threatened him with dire consequences. He was shocked that his children disappeared only to be followed by allegations of incest. 11. In light of the above the issues for determination before this court are; - i. Whether the offence of incest was proved by the prosecution ii. Whether the appellants defence was credible iii. Whether the sentence was excessive in the circumstances.

Analysis and Determination

12. The duty of this court as a first appellate court is well settled in the case of *Okeno v Republic* [1972] EA 32 at 36 where the court held that: - "....an appellant on a first appeal is entitled to expect the Evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Rep* [1957] EA 336 and to the appellate court's own decision on the Evidence. The first appellate must itself weigh conflicting evidence and draw its own conclusions. (*Shentilal M. Ruwala v R* [1957] E.A 570. It is not the function of the first appellate court to merely scrutinize the Evidence to see if there was Some evidence to support lower court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses, See *Peters v Sunday* [1958] E.A 424."

- i. Whether the offence of incest was proved by the prosecution 13. Section 20(1) of the Sexual Offences Act provides inter alia: - “ 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 and proved 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.” 14. From the above, for the offence of incest to suffice, the prosecution must prove beyond reasonable doubt; - the relationship between the accused and the victim, the indecent act and proof of age. 15. In this case the appellant testified that the victim is his daughter and he had raised her since she was 2 years. Section 22 of the Sexual Offences Act , sets out the persons with whom having sex with will amount to incest. These are brother, sister, half-brother, half-sister, adoptive brother and sister, father, half father, uncle of first degree, mother and half mother and an aunt of the first degree. No doubt the appellant was PW1’s father. Therefore, the two having sex was incestuous. 16. Was there sexual intercourse between the appellant and PW1? It is instructive to note that the offence of incest is committed by proof of either penetration or an indecent act in terms of Section 20(1) of the Sexual Offences Act . Instantly, the minor stated that they lived in small room and shared a bed with her father and brother. One night her father defiled her. 17. This evidence is corroborated by the evidence of PW1 who produced the PRC and P3 form. The PRC form on record shows that the minor was examined on 11/12/2023. The incident occurred on 10/12/2023. The form shows that the minor’s vagina was reddened with a fresh vaginal cut wound and a broken hymen. This evidence was not shaken during cross-examination. I find that the testimony of the complainant was credible and I have no reason to doubt its authenticity as to what transpired between the appellant and his daughter. 18. On proof of age, the prosecution produced a birth certificate which shows that the minor was born on 20/1/2017 making it 6 years old at the time of the incident. 19. In light of the above I find that the prosecution proved beyond reasonable doubt the charge of incest against the appellant. ii. Whether the appellants defence was credible 20. The accused in his defense stated that the charges against were fabricated by Mama Mlezi. He said that they were in a romantic relationship with Mama Mlezi but he ended it after he realized that she had another man. She threatened him with dire consequences. This issue was never raised during cross-examination. It arose during defense hearing thus it was an afterthought. In light of this, I find that the appellant’s defense did not hold water against the prosecution’s case. iii. Whether the sentence was excessive in the circumstances 21. The appellant was sentenced to 35 years’ imprisonment. The minimum sentence that can be imposed upon conviction for the offence of incest under the Act is 10 years but the same can attract a life sentence. Section 20 (1) of the act provides; - “ Provided that, if it is alleged in the information or charge and proved 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.” 22. I note that the age of the victim was 6 years at the time of the offence and the mandatory minimum sentence is imprisonment for life. In the recent decision of *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) the Supreme Court considered the constitutionality of the minimum offence under the Sexual Offences Act and categorically and emphatically held that the same are constitutional and the courts must impose the same unless and until they are declared unconstitutional. 23. In the case of *Charles & Another vs Republic* (Criminal Appeal 38 of 2019) [2024] (Judgment) [2024] KECA 1902 (KLR) the Court of Appeal ceded to the binding nature of the decisions of the Supreme Court and stated: “ (35) We will now come to the final issue: sentence. The appellants complain against the mandatory nature of the minimum sentence terming it unconstitutional for not permitting individualized mitigation. In the circumstances of the case, they both complain that the minimum sentence was harsh and excessive since they were both of extreme youth; first offenders; and were remorseful. Additionally, they showed great capacity for reform and rehabilitation. 36. All these extenuating factors are true. It is also true that our jurisprudence had taken a turn to impugning the constitutionality of the minimum sentences prescribed in the Sexual Offences Act . Unfortunately for the appellants, that jurisprudential trajectory was halted by the recent decision by the Supreme Court in *Republic vs Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024). In that case, the Supreme Court held that the mandatory minimum sentences in the Sexual Offences Act are not unconstitutional; and that trial courts have no discretion to go below the minimum statutory minimum sentences in sexual offences. 37. The Supreme Court held: “56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances. 57. In the *Murutetu* case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the Sexual Offences Act , and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.” 38. This decision is binding on us under the doctrine of stare decisis. In the present case, the appellants were convicted under

Section 8(2) of the Sexual Offences Act . The statutory minimum sentence under that subsection is twenty (20) years imprisonment. That was the sentence imposed on the appellants. Given the Supreme Court's binding precedent, we cannot interfere with that sentence whatever our views on the extenuating circumstances.” 24. In light of the above, the decisions of the Court of Appeal and the Supreme Court are binding on this court. The appellant was sentenced to serve 35 years' imprisonment which is below the minimum mandatory sentence. I would have enhanced the sentence but I note the Appellant was not notified. Let him count himself lucky. 25. The appeal lacks merit and the same is dismissed. 26. It is so ordered. DATED SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MARCH 2026. WENDY KAGENDO JUDGE In the presence The Appellant in person Mr Ngiri For The State Bebora Court Assistant Signed by/for: HON. LADY JUSTICE WENDY MICHENI

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