

KENYA / JUDGMENT

SMM v Republic [2026] KEHC 13445 (KLR)

[2026] KEHC 13445 (KLR)**COURT**

High Court

BEFORE

PN Gichohi

CASE / FILE NUMBER

Criminal Appeal E025 of 2024

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SMM v Republic (Criminal Appeal E025 of 2024) [2026] KEHC 13445 (KLR) (11 September 2026)
(Judgment) Neutral citation:

[2026] KEHC 13445 (KLR) Republic of Kenya In the High Court at Nakuru Criminal Appeal E025 of 2024 PN Gichohi, J September 11, 2026 Between SMM Appellant and Republic Respondent (Being an appeal from conviction and sentence in Nakuru MCSO E030 of 2021 by Hon. E. Soita (SRM) on 19th February 2024)

Judgment

1. The appellant, SMM, had been charged with the offence of incest contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the main charge were that on diverse dates between May 2018 and December 2021, at [Particulars Withheld] Area within Nakuru North Sub-County, Nakuru County, at unknown times, the appellant unlawfully and intentionally committed an act which caused penetration by inserting his male genital organ, namely his penis, into the female genital organ, namely the vagina of BW, aged 19 years, knowing her to be his daughter. 2. He also faced an alternative charge of indecent act with an adult contrary to Section 11 of the Sexual Offences Act. The particulars of the alternative charge were that on diverse dates between May 2018 and December 2021, at [Particulars Withheld] Area within Nakuru North Sub-County, Nakuru County, at unknown times, the appellant unlawfully and intentionally touched the vagina of B.W., aged 19 years, with his penis. 3. He pleaded not guilty to both the main and alternative charges and the prosecution called six witnesses in support of its case. The Prosecution case 4. BW (PW1), whose Birth Certificate indicated date of birth as 1 st May 2002, testified that the appellant was her stepfather and that she had lived with him for approximately 18 years, from the time she was a toddler. 5. She recalled that in 2018, while the appellant was taking her to school, he had sexual intercourse with her, an incident she did not disclose at the time because, according to her, he had threatened to kill her. She subsequently became pregnant and gave birth to D.M. on 30 th March 2019, as evidenced by his Birth Certificate. 6. PW1 further testified that she became pregnant again in May 2021 and subsequently gave birth to

HW, whose Notification of Birth records her date of birth as 8 th December 2021. She stated that after her mother beat her at night, she (PW1) went to the home of her uncle, PW2, because she was afraid to tell her mother what had happened and feared what the appellant might do to her. PW2 thereafter reported the matter to the police. PW1 was subsequently taken to hospital for examination and the Appellant was arrested and charged. 7. PW2, DK, testified that PW1 was his niece, being the daughter of his sister, and that the appellant was his brother-in-law. He stated that on the night of 10 th December 2021, while he was asleep, PW1 knocked at his door and, upon opening it, he found her crying and observed that she was pregnant. 8. When she was unable to immediately explain what had happened, PW2 spoke to her and she subsequently told him that the appellant, whom she referred to as her father, was responsible for the pregnancy. 9. PW2 then therefore contacted PW1's mother, who stated that she was unaware of the matter, and called his sister to his home. He further testified that PW1 told him that she had earlier been raped on her way to school. PW2 thereafter reported the matter to the police, following which PW1 was taken for medical examination. He stated that he had no grudge against the appellant. 10. PM (PW3) testified that she was a casual labourer and farmer, that PW1 was her first child, and that the appellant, SMM, was her husband. 11. She stated that they had lived together from December 2003 until 20 th December, 2021 and that PW1 was born on 1 st May 2002 while she was still living at her parental home. 12. On 10 th December 2021, PW3 noticed that PW1 was pregnant and asked her about it, but PW1 denied the pregnancy, resulting in a disagreement and a fight between them. At about 3.00 a.m. that night, PW1 went to the home of her uncle, PW2, and P was subsequently called there. 13. PW1 told her that she had been beaten because she was pregnant and confirmed that she was indeed pregnant. She also disclosed that she had previously become pregnant and, when asked who was responsible, she stated that she had been raped on her way to school. She told them that the first child, who was born on 30 th March 2019 at seven months, was the appellants. The second child was born in 28 th December 2021. 14. Upon learning of the allegations, the matter was reported to the police and she subsequently recorded her statement. She produced PW1's Birth Certificate (PEXH. 3) indicating PW1's date of birth as 1 st May, 2002. 15. Dr Katukoi Ruto (PW4) , a medical practitioner at Nakuru PGH, testified on behalf of Dr Thaiti, with whom he had worked for over six months. He testified that from the medical records, BW, aged 19 years, presented herself at the hospital while 32 weeks pregnant and reported having been defiled and raped by her stepfather since 2018. 16. PW1 was found to be clinically stable , without no table injuries including on the female genitalia. However, an old torn hymen was observed. HIV and syphilis tests were negative. The pregnancy was confirmed. The P3 Form (PEXH. 1), signed on 17 th December 2021, indicated the nature of the alleged offence as defilement and rape. The PRC Form (PEXH.2) dated 17 th December , 2021 was produced in Court. 17. Ms Salvine Cherut Katukoi (PW5), a Senior Government Analyst at the Government Chemist's Department in Kisumu and who had served for three testified that on 10 th June 2022, she received samples for DNA analysis comprising :- 1. A buccal swab of the appellant marked "A" . 2. A buccal swab of the complainant BW marked as "B". 3. A buccal swab of DM (child 1) marked as "C". 4. A buccal swab of HW (child 2)

marked as “D” . 18. The witness explained that a child inherits approximately half of his or her DNA profile from the biological mother and the other half from the biological father. 19. Upon analysis, she found that the appellant was the biological father of DM and HW, while BW was their biological mother, with the results showing a probability of more than 99.99% that the appellant was their biological father. 20. She clarified that the result expressed a probability of 99.99% rather than absolute certainty. The Government Analyst’s Report dated 16 th June, 2022 was produced as PEXH. 4. 21. PC Joseph Mathenge (PW6), who was the investigating officer, testified that on 19 th December 2021, he received information that B.W. had gone missing on 10 th December, 2021. He stated that her disappearance followed her mother’s discovery that she was pregnant and that, when questioned about the pregnancy, BW initially stated that it was for her uncle. She thereafter went to the home of PW2, whereupon the matter was reported to the police. 22. The officer testified that she was then pregnant with her second child and had previously given birth to DM on 30 th March 2019. He further stated that, although she initially told the police that she had become pregnant while at school, her statement disclosed that she had been having sexual intercourse with her father since July 2018. 23. It was his evidence that on 21 st December, 2021, the appellant presented himself at the police station and was subsequently taken to court. On 10 th June 2022, the relevant samples were taken to the Government Chemist in Kisumu for DNA analysis, the results of which established that the appellant was the biological father of the two children. The Defence case 24. In his unsworn statement, the appellant (DW1) stated that on 23 rd December, 2021, he returned from work at about 5.00 p.m. and arrived home at about 6.00 p.m. where he found his wife. He asked about BW’s whereabouts. 25. His wife and other persons went in search of her and later informed him that she was with one Muchira. He proceeded to the house and obtained Muchira’s telephone number. He knew him (Muchira) as was taking ladies and dumping them. 26. The appellant contacted the village elders and they came. The Appellant explained the circumstances to them. Muchira did not answer the call and could not be traced. 27. The Appellant further testified that on 10 th December 2021, while returning from work, he found his wife and children at home and was informed that BW was pregnant. He told his wife to wait until the following morning. At about 6.00 a.m., his wife found BW’s identification document outside the house and, upon checking her room, discovered that she was missing. She suspected that BW had left the home. 28. The appellant stated that, because of an earlier matter involving one Muchira, he suspected that person and advised that investigations be undertaken. He waited for about nine hours without knowing BW’s whereabouts. 29. It was his evidence that on 19 th December 2021, he went to the police station and reported that BW was missing, after which he returned home. He was later informed by the police officers that they had located BW. 30. He was arrested and taken to the police station, placed in the cells and required to record a statement. On 21 st December, 2021, he was charged with the offence before the court. He denied the allegations 31. Upon consideration of the evidence, the trial court convicted the appellant on 5 th February, 2024 for the offence charged and, on 19 th February 2024, sentenced him to life imprisonment. 32. Being dissatisfied with the conviction and sentence, the appellant lodged the present appeal vide his Memorandum of Appeal is dated 4 th April,

2025 raising the following seven grounds:- 1. That the learned trial magistrate erred in law in finding that the appellant committed the offence of incest contrary to section 20 (1) of the Sexual Offences Act and the alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act . 2. That the learned trial magistrate erred in law and in fact in sentencing the appellant to life imprisonment without considering his age and health. 3. That the learned trial magistrate erred in fact in sentencing the appellant to an indeterminate life sentence, which the appellant contended amounted to inhuman treatment and violated his right to dignity under Article 28 of the Constitution of Kenya, 2010. 4. That the learned trial magistrate erred in sentencing the appellant to life imprisonment without considering the jurisprudence on mandatory life sentences, including the decision of the Supreme Court in *Muruatetu v Republic* (2015). 5. That the learned trial magistrate failed to consider the principle in international law that all prisoners, including those serving life sentences, should be afforded the possibility of rehabilitation and the prospect of release if rehabilitation is achieved. 6. That the learned trial magistrate erred in law and in fact in failing to consider that the appellant was not represented, despite the appellant contending that legal representation was his constitutional right. 7. That the learned trial magistrate erred in law and in fact in imposing a harsh, excessive, inhuman, degrading, arbitrary and demeaning sentence, which the appellant contended amounted to psychological torture, without considering the victim's age. 33. Through the firm of Maina J.N. & Company Advocates, the Appellant filed his submissions 20 th June 2025. He submitting that the sentence imposed upon him was harsh, inhumane, and violated his right to dignity under Article 28 of the Constitution . 34. The appellant submitted that the proviso to Section 20 (1), which prescribes life imprisonment where the female person is under eighteen years, denied judicial officers legitimate sentencing discretion, was unconstitutional and unfair, and infringed the principle of equality and the right to a fair trial. 35. He argued that the trial court ought to have considered his individual circumstances, including his age, health and the period already spent in custody. He relied on Articles 27 and 50 (2) (p) and (q) of the Constitution for the propositions that he was entitled to the benefit of the less severe of the prescribed punishments and to the right of appeal or review. 36. The appellant submitted that sentencing should be individualized, taking into account the offender's personal circumstances and the Sentencing Policy Guidelines, 2016. He argued that imprisonment serves purposes including punishment, deterrence, rehabilitation and protection of the public, and that a sentence extending for the remainder of a person's life may be disproportionate where rehabilitation has been achieved. He therefore urged the Court to exercise its sentencing discretion, review and set aside the sentence, and order his release. 37. Despite having been given an opportunity to file written submissions, the respondent did not file any .

Analysis and determination

38. From the record of appeal, grounds of appeal and submissions, the following issues arise for determination:- 1. Whether the prosecution proved the relationship required for the offence under Section 20 (1) of the Sexual Offences Act . 2. Whether the prosecution proved beyond reasonable doubt the offence of incest contrary to Section 20 (1) of the Sexual Offences Act . 3. Whether the appellant's right to a fair trial, including the right to legal representation, was violated. 4. Whether the sentence of life imprisonment was lawful, appropriate and proportionate in the circumstances of the case. 39. As a first appellate court, this Court is required to reconsider and re-evaluate the evidence on record and draw its own conclusions, while bearing in mind that the court neither saw nor heard the witnesses testify. 40. In indeed, the Court of Appeal in *Okeno v Republic* [1972] EA 32, stated 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 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions, making allowance for the fact that the trial court had the advantage of seeing and hearing the witnesses. 41. The first question is whether the prosecution proved the relationship required for the offence under Section 20 (1) of the Sexual Offences Act . B.W. testified that the appellant was her stepfather and that she had lived with him from childhood. 42. PW3, her mother, confirmed that the appellant was her husband. The evidence therefore establishes that the appellant was not BW's biological father but was married to her mother and had assumed a parental role in her life. 43. Section 22(1) of the Sexual Offences Act provides that, for purposes of the offence of incest, a father includes a half-father. The expression is not defined in the Act. In *SKW v Republic* [2025] KECA 326 (KLR), the Court of Appeal recognised that the relationship contemplated by Section 22(1) extends to a person who assumes parental responsibility for a child through the child's mother by marriage or cohabitation. 44. The evidence in this case establishes that the appellant was married to B.W.'s mother and lived with BW from childhood in a parental capacity. This Court is therefore satisfied that the relationship proved by the prosecution falls within the relationship contemplated by section 20 (1), read with section 22 (1), of the Sexual Offences Act . 45. The second question is whether the prosecution proved that the appellant caused penetration during the period stated in the charge, namely between May 2018 and December 2021. 46. BW's Birth Certificate (PEXH.3) , shows that she was born on 1 st May 2002. She was therefore 16 years, 10 months and 29 days old when DM was born on 30 th March 2019, and 19 years, 7 months and 27 days old when HW was born on 28 th December, 2021. Both births occurred within the period particularised in the charge. 47. PW5's DNA analysis established that the appellant was the biological father of both children and BW their biological mother, with a probability of more than 99.99%. PW4 further testified that on 17 th December 2021 BW was 32 weeks pregnant, placing the pregnancy resulting in HW's birth at approximately May 2021, within the charged period. 48. The DNA and medical evidence therefore established that sexual intercourse between the appellant and BW resulting in the pregnancy occurred within the period particularised in the charge. I

accordingly find this element proved beyond reasonable doubt. 49. The third issue concerns the appellant's right to a fair trial, particularly the right to legal representation. Article 50(2) (h) of the Constitution guarantees an accused person the right to choose and be represented by an advocate and, where substantial injustice would otherwise result, to have an advocate assigned by the State at State expense. The right to State-funded representation is not automatic in every criminal trial. 50. The question is whether, in the circumstances of the case, failure to provide counsel resulted in substantial injustice. This has considered the trial court's record. The appellant participated in the proceedings, cross-examined the prosecution witnesses, was placed on his defence after the trial court found that a prima facie case had been established, and elected to give sworn evidence. He was thus afforded an opportunity to challenge the prosecution evidence and to present his defence. 51. There is no indication on the record that the appellant requested State-funded legal representation and that the request was declined. Neither does the record demonstrate that the absence of counsel occasioned substantial injustice or prejudiced the conduct of his defence. 52. Consequently, this Court finds that the appellant's right to a fair trial, including his right to legal representation under Article 50 (2) (h), was not violated. 53. The fourth issue is whether the sentence of life imprisonment was lawful, appropriate and proportionate in the circumstances of the case. Section 20 (1) of the Sexual Offences Act No. 3 of 2006 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 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." [Emphasis added]. 54. In *TIL v Republic* [2025] KECA 41 (KLR), the Court of Appeal held that the word "liable" does not make life imprisonment mandatory. The Court similarly considered the sentencing discretion under the provision in *SKG v Republic* [2023] KECA 1547 (KLR). 55. This Court has considered the circumstances of the offence and the mitigation advanced on behalf of the appellant. The offending was aggravated by the appellant's relationship with BW as her stepfather and the parental position he occupied in her life from childhood. He abused the trust inherent in that relationship. 56. The offending was also prolonged and resulted in two pregnancies and the birth of two children. The DNA evidence established that the appellant was the biological father of both children with a probability exceeding 99.99%. 57. This Court has further considered the appellant's age, health and prospects of rehabilitation, as well as the sentencing principles in *Francis Karioki Muruatetu & another v Republic & 5 others* [2016] eKLR, *Momanyi v Republic* [2023] KECA 1254 (KLR), *Kilwake v Republic* [2019] KECA 5 (KLR) and *R v Bieber* [2009] 1 WLR 223. 58. Having weighed the mitigating circumstances against the gravity of the offence and the compelling aggravating factors, this Court is satisfied that the circumstances warranted the maximum sentence. 59. A lesser sentence would not adequately reflect the seriousness of the offence or meet the objectives of punishment and deterrence. 60. Consequently, this

Court finds that the sentence of life imprisonment was lawful, appropriate and proportionate in the circumstances. 61. In conclusion, the appeal dismissed. The conviction is upheld and the sentence of life imprisonment affirmed. DATED AND SIGNED AT NAIROBI THIS 11 TH DAY OF SEPTEMBER , 2026. PATRICIA GICHOH JUDGE DELIVERED AT NAKURU THIS 14 TH DAY OF SEPTEMBER, 2026. DR. JOSEPH SERGON JUDGE

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