



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYANDARUA
CRIMINAL APPEAL NO. E025 OF 2025

JOSEPH KAIRU WACHEKE..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in S. O. Case No. 31 of 2020 of Senior Principal Magistrate's Court at Engineer by Hon. E. Wanjala– Principal Magistrate)

JUDGMENT

1. Joseph Kairu Wacheke, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence were that on the diverse dates between the year 2020 and March 2024, at Mutonyora-Magumu location, of South Kinangop sub-county in Nyandarua County, being a male person, caused his penis to penetrate the vagina of J.W.N, a female child aged fifteen years, who was, to his knowledge, his cousin.
3. The appellant was sentenced to 20 years' imprisonment. He has appealed against both conviction and sentence. He raised the following grounds of appeal:
 - a) The learned trial magistrate erred in law and fact in convicting the appellant, yet failed to appreciate that the medical evidence did not connect the appellant to the offence.
 - b) The learned trial magistrate erred in law and fact in convicting the appellant based on evidence which was otherwise contradictory and uncorroborated.
 - c) The learned trial magistrate erred in law and fact in convicting the appellant, yet failed to appreciate that it was not conclusively proven whether or not it was the appellant who penetrated the complainant.
 - d) The learned trial magistrate erred in law and fact in convicting the appellant, but failed to note that the age of the complainant was proved.

- e) The learned trial magistrate and in law and fact to have found that the appellant's defence created a reasonable doubt as to oust the prosecution's case.
- 4. The state did not submit any grounds of opposition.
- 5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of **Okeno vs Republic [1972] E. A 32** to guide my decision-making process.
- 6. Section 20 (1) of the Sexual Offences Act provides:

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.

- 7. The elements of incest as outlined in this section are as follows:
 - a) The accused must be male;
 - b) The victim must be female;
 - c) She must be his daughter, granddaughter, sister, mother, niece, aunt, or grandmother;
 - d) He must be aware of the relationship; and
 - e) There must be penetration.
- 8. J.W.N, (PW1) and (PW2), her mother testified that the appellant is a cousin of the complainant. The relationship was established, and the appellant is male.
- 9. The complainant is a female, born on August 8, 2009. She was 11 years old at the time of the offence and 15 years old when she testified in court. She was under 15 years old when the offence occurred.
- 10. J.W.N. (PW1) testified that when she was in grade four, the appellant started to defile her. He used to visit their home every home when her parents were away. Should he find her parents at home, he would greet them and did not stay. These defilements continued, and she developed incontinence of urine.

11. E.N. (PW2) is the complainant's mother. Her evidence was that the complainant developed incontinence of urine when she was in class 4. She, however, did nothing for she had no money. When her teachers intervened, she learned that the appellant had defiled her on several occasions.
12. Dr. Patrick Wakahiu (PW3) testified that the complainant was unable to control her urine and faeces, with her hymen torn and bearing old tags, indicating vaginal penetration. He filled out her P3 form. Meanwhile, Dr. John Maweno Mlughu (PW4) examined her and stated that she had a recurrent fistula history spanning six years.
13. Joseph Kairu Wacheke, the appellant, denied having been involved in the offence. He contended that he was framed up.
14. The proviso to section 124 of the Evidence Act states:

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.

15. The medical evidence confirms the complainant's claim of being defiled, resulting in her experiencing urinary and faecal incontinence.
16. Although the appellant argued that he might have been framed because of an incident in 2020 involving the complainant's mother, he did not mention this during cross-examination. The trial magistrate correctly dismissed this as an afterthought.
17. I find that the prosecution proved to the necessary standards that the appellant defiled the complainant.
18. The proviso to section 20 of the Sexual Offences Act states:

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.

19. 9. The imposed sentence was suitable, and I see no reason to interfere with it.
20. The appeal has no merit, and the same is dismissed.

Delivered and signed at Nyandarua, this 22nd day of January 2026

KIARIE WAWERU KIARIE

JUDGE