



**Republic v BNK (Sexual Offence E009 of 2024)  
[2025] KEMC 16 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEMC 16 (KLR)

**REPUBLIC OF KENYA  
IN THE MUTOMO LAW COURTS  
SEXUAL OFFENCE E009 OF 2024  
LK MWENDWA, PM  
JANUARY 30, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BNK ..... ACCUSED**

**JUDGMENT**

1. The Accused person herein was arraigned in court on 4th March, 2024 and charged with two counts of defilement contrary to S.8 (1) as read with 8(3) of the Sexual Offences Act (SOA) No. 3 of 2006. in the 1st Count and Defilement contrary to S. 8 (1) as read With 8(4) SOA in the 2nd Count, in the alternative the indecent act with a child contrary to section 11(1) SOA were preferred on each of the count.
2. On the 21st November,2024,the prosecution substituted the above charges with two counts both relating to the offence of incest contrary to S. 20(1) SOA.Alternative counts of indecent act vāth a child contrary to S.11 (I) SOA were preferred on each of the two counts.
3. The particulars of the offencs in the ISt Count are that on the 2nd day of March,at 2024 about 0020 hours at [Particulars withhld] Village,Maluma sub-location,Maluma location in Ikutha Sub-County within Kitui County,being a male person caused his penis to penetrate the vagina of DWN, a female person whom to his knowledge was his daughter, aged 15years. In the alternative count,the accused person is alleged to have, on the same time and place, committed an indecent act by causing his penis to intentionally and unlawfully touch the vagina of the aforesaid victim.
4. The particulars of the offence,as set out in the substituted charge Sheet, in the 2nd Count are that that on the 2nd day of March, 2024 at about 0020 hours at [Particulars withheld] Village,Maluma sub-location,Maluma location in Ikutha SubCounty within Kitui County, being a male person caused his penis to penetrate the vagina of EKN, a female person whom to his knowledge was his daughter,aged



- 17 years. In the alternative count, the accused person is alleged to have, on the same time and place, committed an indecent act by causing his penis to intentionally and unlawfully touch the vagina of the said victim.
5. On the 21st November, 2024, the accused person not guilty on each of the counts as well as the alternative counts. The matter proceeded for hearing wherein the prosecution called five witnesses; thus:
- i) EKN-PWI
  - ii) DWN-PW2
  - iii) DNM-PW3
  - iv) Benjamin Munyoki-PW4
  - v) No. 125078 PC Sheldon Madete-PW5
6. Upon close of the prosecution, vide my Ruling delivered on 28th November, 2024, I found that the prosecution had established a prima facie case against the accused person on each of the counts of the offence of incest. Thus; I placed the accused person on his defence. I dully explained the accused person of his rights under S.211 *Criminal Procedure Code* as to the manner in which he could defend himself as well as his right to remain silent under Article 50(2)(i) of *the Constitution* of Kenya. He opted to give sworn evidence and was the sole witness in his defence.

#### **Prosecution Case**

7. PM/1 is the victim in Count 2- aged 17yrs. She testified that the accused person who is her father defiled her on the 2nd march 2024. The incident is alleged to have occurred at the accused person's house. At this time, the victim's mother was away at work in [Particulars withheld] area.
8. PW1 went on to state that at the material time she was sleeping with her younger sister-DMN-PM/2. Her father (the accused Person) called her to the main house alleging that he wanted to treat her. It was around 2AM. She obliged.
9. Upon entering the main house, she found her father naked. He then undressed her, applied jelly oil in her vagina and proceeded to penetrate her vagina as well as anus using his penis. After the ordeal, the accused person threatened her not disclose what had happened. She further ordered her to call her younger sister P'N2. She obliged.
10. Come morning, PNMI disclosed to her mother- PW3- what had transpired. The mother then reported the incident at Kamutei Police Post and was later escalated to Ikutha Police Station. They were issued with a P3 form which was later filled- produced herein by PVV4 as PEx1.
11. PW2 is the alleged victim in Count I. she is aged 15 years and a daughter to the accused person. She told the court that she on 2/3/2024, she went to her father's house after she had been called by her elder sister- PW1. When she went in, and the accused person told her that he wanted to treat her. She enquired how. It is at this point that the accused person ordered her to remove her clothes. Then, he proceeded to insert his penis into her vagina.
12. PW3 is the mother of both victims. She stated that PNVI disclosed to her what their father had done. She immediately reported the matter at Kamutei Police Post. Further action was taken by Police from Ikutha Police Station in which the victims were examined and accused later arrested and charged. She produced birth certificates for PW1 and PW2 as PEx7 and Pex8 respectfully.



13. PW4 is a clinical officer, at the material time based, at Ikutha Level 4 Hospital. He testified for and on behalf of her colleague-Elizabeth Musau-who had examined the victims herein. The examinations were done on the 2nd March,2024.
14. As for EKN (PYVI)-her hymen was found to have been broken recently. She had a whitish vaginal discharge. Her vaginal swab showed presence of mild epithelial cells whereas pregnancy, syphilis and HIV tests were all negative. The victim was given antibiotics and post exposure medication for HIV infection. A dully filled P3 form (Pex1); Treatment notes (Pex2) and post rape care form (Pex3) were produced.
15. With regard to DMN (PW2) - the patient gave history of sex back in March,2023. She had gone for both long and short calls at the time of examination. Upon examination, she was found to have bruises on the vaginal entrance; her hymen was broken but not recently. Urinalysis revealed presence of pulse cells with blood whereas pregnancy, syphilis and HIV tests were all negative. The victim was given antibiotics and post exposure medication for HIV infection. A dully filled P3 form (Pex4); Treatment notes (Pex5) and post rape care form (Pex6) were produced.
16. PW5 is the investigating officer herein- at the material time attached at Ikutha Police Station undertaking general duties. Upon instruction by the officer in charge of the said station, he proceeded to Malima Police Post-where he found the accused person as well as the two victims and their mother. He picked them and escorted them to Ikutha police Station. Investigations ensued wherein he found that there was evidence to charge the accused person for offences herein.

**Defence case.**

17. The Accused person gave a sworn statement. He denied committing the offences herein and also alleged that the victims' mother had colluded with her daughters to fabricate him. At the same time, he alleged that he had committed the offence under the influence of alcohol and he intended to punish his daughters for doing their assignments.
18. I reproduce the pertinent part of his statement:
 

“I understand the charges-2 counts of incest against me. I heard what the witnesses stated against me. I now state as follows.

The children are mine. I did it because of drink. I wanted to punish the children for not doing their assignments. Their mother was not at home but when informed went to report to chief without confirming what had happened. I did not commit the offence. Their mother connived to fabricate me.”
19. Upon cross examination by Mr. Kimando, the Learned prosecution counsel, the accused person stated as follows:
 

“The victims herein are my daughters. I heard the prosecution case. I heard the doctor state that the victims were defiled. It is true that the victims stated that I defiled them. I don't know why they fabricated me. No prior issues (grudge) with my children”
20. Section 20(1) of the SOA deals with incest by males. It provides as follows:
 

“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."

21. The case of *MG v Republic* [2022/KEHC 14454 (KLR)] sets out the ingredients of the offence of incest as follows-

"Thus, the ingredients for the offence of incest are:

- (i) Proof that the offender is a relative of the victim
- (ii) Proof of penetration or indecent Act.
- (iii) Identification of the perpetrator.
- (iv) Proof of the age of the victim"

22. Similarly, in *MNV- vs- REPUBLIC* [2021 eKLR], the ingredients of the offence of incest were stated as follows:-

"Consequently, the ingredients for the said offence, that is, Incest, are:

- a. Knowledge that the person is a relative and,
- b. Penetration or Indecent Act

23. I now proceed to determine whether the prosecution has established the ingredients of the offence of incest. The first issue is that of the relation of the accused person to the victims. In this regard, the evidence of the prosecution herein-PWVI, PW2 and PW3-establishes that the accused person is the father of both victims. A fact that was admitted by the accused person upon cross examination by the prosecution counsel. Thus, I find and hold that ingredient of relationship of accused persons has been proved.

24. The second issue is proof of penetration. S. 2 SOA defines Penetration and genital organs as follows:

"Penetration ' means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

'Genital organs 'includes the whole or part of male or female genital organs and for purposes of this Act includes the anus; "

25. Penetration can be proved by direct or circumstantial evidence. It is usually the victim's own evidence and corroborated by medical or other evidence; as was held in *Wachira v Republic* (Criminal Appeal E0240f2023) [2024]KEHC5972 (KLR) (?4Mar2024)(Judgment); thus:

"Unlike other crimes where invariably eye witness evidence is available, it is seldom that eye witness accounts would be available in a sexual offence as the act will always be perpetrated in secrecy away from the public eye. That explains why the evidence to be relied upon more often than not will be the evidence of the victim corroborated by medical evidence (where available) and circumstantial evidence"

26. Both victims stated that their father penetrated each of them, separately, at their main house. The accused person was at the time alleged to treat them through sexual intercourse. Though he had



implored upon them to maintain silence over the ordeal, PNMI disclosed what had happened to their mother PW3. Upon examination, which was carried on the same day, it emerged that each of the victims had been penetrated as evidenced in their treatment notes, PRC forms as well as the P3 forms.

27. Pursuant to S.124 *Evidence Act* the court requires evidence of victim of criminal offense to be corroborated in order for the prosecution to secure a conviction. However, for sexual offences the court can convict based on an uncorroborated evidence of an alleged victim provided the court is convinced the victim is telling the truth. The said section is couched as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him”

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.”

28. In regard to whether I am satisfied that the alleged victim herein was telling the truth, I have taken into account where the incest is alleged to have occurred and the circumstances and the environment under which the incident allegedly occurred. I note that each of the victims was steadfast and firm in the manner in which they narrated the ordeal.

29. The Accused person did not challenge the testimonies of his daughters. But would later allege in his defence that he had been fabricated. I wonder why someone who had been fabricated would fail to test the veracity and credibility of allegations against him through the toll of cross-examination. Well, the accused person has a right to remain silent under Article 50 (2) (d) of *the Constitution* of Kenya. But the accused having not laid any basis for fabrication, this court finds that such remains a mere allegation and passes for an afterthought as it was mentioned in the tail end of these proceedings. Apparently, the accused person is clutching at straws.

30. I am convinced that the victims herein were telling the truth. Their testimonies as to penetration were both corroborated by the evidence of PW4. I thus find that penetration has been proved.

31. As regards proof of the element of age, Rule 4 of Sexual offences Rules of the Court 2014 provides:

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptisms card or similar document’

32. PW3 produced copies birth certificates for PW1 and PW2 as Pex7 and Pex8 respectfully. As per the said certificates, both victims are under age: PNVI is aged 17yrs whereas PW2 is aged 15years. The prosecution has thus proved this element.

33. Finally is the question of positive identification of the accused person to link him as the perpetrator herein. In determining this issue, I have considered the environment and the circumstances under which the offenses are alleged to have occurred. The incident is alleged to have occurred at around 2.00 AM. It is not clear whether there was ample Light for the victims to identify the perpetrator; thus the prosecution has opted to rely on identification by recognition.



34. In *Musau- vs- Republic* [2008] eKLRt the Court of Appeal stated as follows with regard to identification by recognition:-

“we do agree that for evidence of recognition to be relied upon, the witness claiming to recognise the suspect must establish the circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for some time is a relative, a friend or somebody within the vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for long time but must be for such time that the witness in serving the suspect at the time of the offence can recall very well having seen him before the incident in question:

35. I take note that the victims herein are daughters of the accused person; further that they live in the same homestead and that there was a communication between each of the victims before the incident- in that the accused person talked to each of his daughters, alleging that he wanted to treat them through sexual intercourse. The victims had ample time to recognise the accused person who their father. I rule out any possibility that the victims could have misidentified or failed to recognise their father's voice.

**Disposition.**

36. I conclude that the prosecution has proved beyond reasonable doubt all the ingredients of the offence of incest by male contrary to S.20 (1) SOA on both counts. I hereby find the accused guilty on each of the two counts and hereby convict him under S.215 *Criminal Procedure Code*. Upon conviction of the accused person as aforesaid, I make no finding in the alternative counts of committing an indecent act with a child contrary to S.11 (1) SOA.

37. It is so ordered.

**DATED, SIGNED & DELIVERED AT MUTOMO, THIS 30<sup>TH</sup> DAY OF JANUARY, 2025.**

**L.K.MWENDWA**

**PRINCIPAL MAGISTRATE**

