LK v Republic (Criminal Appeal 79 of 2020)
[2025] KECA 2164 (KLR) (11 December 2025) (Judgment)

Neutral citation: [2025] KECA 2164 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 79 OF 2020

W KARANJA, K M'INOTI & A ALI-ARONI, JJA

DECEMBER 11, 2025

BETWEEN

LK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Kiarie, J.) dated 16th June 2016 in HCCR.A NO. 4 OF 2016)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Meru (Kiarie, J.) dated 16th June 2016 in which the first appellate court dismissed the appellant's (Lawrence Kaberia) appeal against conviction and sentence by the Chief Magistrates Court at Maua (the trial court). Before the trial court, the appellant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* (the Act), the particulars being that on 10th May 2015, at Nguyuyu Location, Igembe, Meru County, he touched with his penis the vagina of FM, his 7 year old daughter. In the alternative, he was charged with attempted defilement contrary to section 9(1) as read with section 9(2) of the same Act. The particulars of that offence were that on the same date and place as in the main count, he attempted to penetrate FM's vagina with his penis.

2. When the charges were read to the appellant on 25th May, 2015, he pleaded guilty. The case was adjourned to the next day, 26th May 2015 for the prosecution to present the facts and on that date the appellant informed the court that he was maintaining his plea of guilty. On 27th May 2015 the appellant once again pleaded guilty to the offence and the facts were presented. In addition, the prosecution produced the victim's treatment notes and what was described as a "post-rape care form."

3. When the prosecution presented the facts of the offence, the appellant accepted the facts. The record indicates that he did so in the Kiswahili language.

4. The appellant was convicted on his own plea of guilty and was treated as a first offender. In mitigation he pleaded for leniency, promising never to repeat the offence. The trial court sentenced him to life imprisonment, taking into account the fact that the victim of the offence was under 10 years of age.

5. The appellant was aggrieved and appealed to the High Court against both conviction and sentence. After considering the appeal, the High Court held that the appellant's plea was unequivocal; that the plea was properly taken; and that the appellant understood the charges against him. The High Court faulted the prosecution for charging the alternative count under section 9 of the Act rather than section 20, which caters for all incest offences. However, the court found that the omission was not fatal because the appellant was not convicted of the alternative offence and had not suffered any prejudice. As for the sentence, the High Court found it to be the lawfully prescribed sentence. Accordingly, the appellant's appeal was dismissed.

6. The appellant was further aggrieved and lodged the present appeal in which he faults the High Court for failing to find that his plea of guilty was not unequivocal; for failing to hold that life imprisonment was not mandatory for the offence for which he was convicted; and for failing to find that his conviction and sentence amounted to miscarriage of justice due to procedural irregularities.

7. Relying on his written submission dated 8th August 2025, the appellant submitted that the trial court did not explain to him the elements of the offence with which he was charged and the consequences of pleading guilty to the offence. He cited Adan v. Republic [1973] EA 445; Olel v. Republic [1989] KEHC 78 (KLR); and JKM v. Republic [2021] KEHC 9095 (KLR), on the proper procedure for taking a plea of guilty. He added that the record did not show that the charge and the facts were read to him in a language he understood, and that he accepted the facts. In his view, that was a violation of Article 50(2) (c) of the *Constitution*.

8. As regards the second ground of appeal, the appellant submitted that under section 20(1) of the Act, life imprisonment is not a mandatory sentence but the court has discretion to mete out a sentence of up to life imprisonment, if the victim is less than 18 years of age. He contended that was the import of the words "shall be liable" used in the section, and in support, he relied on the decision of this Court in MK v. Republic [2015] KECA 468 (KLR).

9. On the last ground of appeal, the appellant submitted that his constitutional right under Article 50(2) (h) of the *Constitution* was violated when the trial court failed to advise him that he was entitled to legal representation at the State's expense. He added that he faced a sentence of life imprisonment which was serious and that the right to a fair trial cannot be derogated from. In support of the submission he relied on the decision of the Supreme Court in Republic v Karisa Chengo & 2 Others [2017] eKLR. For the above reasons the appellant urged the Court to allow the appeal, quash the conviction and set aside the sentence.

10. The respondent, represented by Ms. Mengo, learned counsel, oppose the appeal on the basis of written submissions dated 13th August 2025. On the first ground of appeal, the respondent submitted that the charge was read to the appellant in a language he understood, which was Kiswahili, and he pleaded guilty. Further, that he accepted as correct the facts that were read to him and even presented his mitigation. It was contended that in the circumstances, the procedure in Adan v. Republic (supra) was fully followed.

11. As regards the third ground of appeal, the appellant complains of violation of his rights. On the second ground of appeal, the respondent submitted that sentencing is at the discretion of the trial court and that an appellate court will not interfere with the exercise of discretion in that regard unless it is shown that in passing the sentence, the trial court took into account irrelevant factors, or applied a wrong

principle, or that the sentence is so excessive as to lead to an inference of error of principle. In support of the submission the respondent relied on Shadrack Kipkoech Kogo v. Republic, Criminal Appeal No.253 of 2003 (Eldoret). In this appeal, it was contended that the sentence was commensurate with the offence and the Court should not interfere with the same.

12. The respondent did not address the appellant's third ground of appeal.

13. We have carefully considered this appeal, which by dint of section 361 (a) of the Criminal Procedure Code, is restricted to issues of law only. We are satisfied that the issues raised by the appellant are issues of law. We shall first consider ground one of the appeal, followed by ground number three, and conclude with ground two on sentence.

14. The first ground of appeal relates to whether the appellant's plea of guilty was unequivocal. It cannot be gainsaid that the trial court is obliged to strictly follow the procedure laid down for recording a plea of guilty. The reason for that is obviously to ensure that the plea of guilty is a genuine plea of guilty which has not been induced or procured through misrepresentation, undue influence or ignorance. The court must satisfy itself that the accused person who is pleading guilty understands the language of the court as well as the elements of the offence with which he is charged. The court must further satisfy itself that the facts presented by the prosecution disclose all the elements of the offence and that the accused person freely and voluntarily accepts those facts. The procedure for taking a plea of guilty was set out in Adan v. Republic (supra) and has been reiterated since.

15. In the present appeal, the record shows that the court proceedings were being interpreted into English/ Kiswahili/and Kimeru languages.

16. The record shows that the appellant pleaded guilty to the offence on three separate occasions, namely on 25th, 26th and 27th May 2015. When the facts, which clearly disclosed the offence of incest were read to the appellant, he accepted them and stated in Kiswahili language:

> " Facts are correct. I had carnal knowledge of my daughter FM aged 7 years. The facts are very correct."

17. Having carefully examined the record of the trial court as well as the judgment of the High Court, we are satisfied, like the first appellate court, that the appellant's plea of guilty was unequivocal; that the trial court followed the prescribed procedure for recording a plea of guilty, and that in the circumstances, there was no violation of the appellant's constitutional right to be informed of the offence with which he was charged in a language that he understands.

18. On the third ground of appeal, the appellant's complaint is that the trial court violated his constitutional right under Article 50(2)(h)of the *Constitution* by failing to inform him that he was entitled to legal representation at the expense of the State. The problem with this ground of appeal is that it was not raised in the High Court and that court did not address itself on the issue. In other words, this issue neither arises nor flows from the judgment of the High Court which is impugned in this appeal.

19. The appellant is precluded from raising in this Court a new issue that was not decided by the court from which the appeal arises, unless it is an issue on jurisdiction. It would be remiss for this Court to fault the first appellate court for an issue that was neither raised before it nor decided by it. This being an appeal that challenges the decision of the High Court, this Court cannot agree or disagree with the High Court on an issue that it neither considered nor decided.

20. The Supreme Court has reiterated in a number of decisions that this Court cannot determine an issue that is raised before it for the first time and was not decided by the court from which the judgment arises. If a party fails to raise an issue in the first appellate court, he is precluded from raising the issue for the first time in this Court or in the Supreme Court. In such instances it would be tantamount to the second appellate court exercising original rather than appellate jurisdiction, which is not its mandate. (See Republic v. Mwangi [2024] KESC 34 (KLR); Republic v. Manyeso [2025] KESC 16 (KLR) and Republic v. Ayako [2025] KESC 20 (KLR)).

21. The last issue relates to the sentence. Section 20(1) of the Act under which the appellant was charged, provides as follows:

> "20(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.

22. The issue in this ground of appeal is whether a person who commits incest with a female person of less than 18 years of age is mandatorily to be sentenced to life imprisonment. In Opoya v. Uganda [1967] EA 752, the former Court of Appeal for Eastern Africa interpreted the words "shall be liable on conviction" to suffer a prescribed sentence to mean that the words provide a maximum sentence only and that courts have a discretion to impose the maximum or a lesser sentence. That reasoning has been followed by this Court while interpreting section 20(1) of the *Sexual Offences Act*. Thus, for example, in MK v. Republic [2015] KECA 468 (KLR), the Court held as follows:

> "We are satisfied that the sentence stipulated in the proviso to section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

23. The above reasoning was followed by the High Court in GM v. Republic [2022] KEHC 14144 (KLR).

24. The trial court treated the proviso to section 20(1) of the Act as one creating a minimum sentence of life imprisonment. The court expressed itself as follows:

> "The offence is very serious and it carries a minimum penalty provided by law."

25. Unfortunately, the High Court did not correct the misdirection by the trial court, even though the appellant had challenged the sentence before it. Instead, it reinforced the misdirection in the following passage:

> "In the instant case the victim was a girl aged seven years. The sentence that was meted out was the only lawful sentence available. This therefore means that the appeal cannot stand. I accordingly dismiss it. The appellant will serve the sentence meted out by the learned trial magistrate." (Emphasis added].

26. The two courts below having misdirected themselves on the nature of the prescribed sentence, did not consider the appellant's mitigation and the fact that he was a first offender, which are relevant considerations in sentencing. Had the two courts appreciated the nature of the prescribed sentence and taken into account the appellant's mitigation, we are not sure they would have meted out the maximum sentence.

27. In the circumstances, we find no merit in the appellant's appeal against conviction and we hereby dismiss the same in its entirety. As regards the sentence, we find merit in the same and set aside the sentence of life imprisonment. In lieu thereof and taking into account the serious nature of the offence, the appellant is sentenced to thirty five (35) years imprisonment. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER, 2025.

W. KARANJA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

A. ALI-ARONI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR