AJM v Republic (Criminal Appeal 130 of 2020)
[2026] KECA 244 (KLR) (13 February 2026) (Judgment)

Neutral citation: [2026] KECA 244 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 130 OF 2020

W KARANJA, K M'INOTI & PM GACHOKA, JJA

FEBRUARY 13, 2026

BETWEEN

AJM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Meru (A. Mabeya, J.) dated 2nd July 2020 in H.C.CR.C No. 205 of 2019)

JUDGMENT

1. The appellant, AJM, was charged, tried and convicted before the Principal Magistrate's Court at Nkubu for the offence of rape contrary to section 3(1)(a) and (b) as read with section 1(3) of the *Sexual Offences Act*.

2. The particulars were that on 24th June 2018 in Imenti South Sub-County, within Meru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of NK without her consent.

3. The appellant also faced an alternative charge of committing an indecent act with an adult contrary to Section 11A of the *Sexual Offences Act* No. 3 of 2006.

4. He pleaded not guilty on both the main and the alternative counts and the matter went to full trial with the prosecution calling six witnesses in support of their case. On his part, after being placed on his defence, the appellant gave an unsworn statement of defence and called no witnesses.

5. This being a second appeal, we bear in mind that our jurisdiction is circumscribed to deal with matters of law only. Nevertheless, in order to provide context to the appeal, we shall recapitulate the evidence adduced before the trial court, albeit briefly.

6. NK, who testified as PW1, told the Court that she was in Form 4 at [Particulars Withheld] Secondary School and was 18 years old. She stated that the appellant was known to her and was her cousin. She testified that her mother, LK, (PW6), had sent her to take pumpkins to the appellant's brother on the material date and time. While on the way, she met the appellant who asked her to go with him to his house to collect a blow dryer which she was supposed to take to her mother. She stated that she went with the appellant to his house but immediately on entering the house, the appellant locked the door.

7. She testified that she started screaming and struggled with the appellant but he managed to pull her to the bed, tore her skirt and under pant and tied her hands with his shirt and that he inserted his penis into her vagina. She screamed for help and the appellant's sister, by the name K heard the screams. According to NK, Kendi went and called her sister and they asked the appellant to release NK, which he did, but he had already raped her.

8. When NK got home, she reported the incident to her parents and the matter was reported to the police station. She was issued with a P3 Form and she went to the hospital where she was examined and P3 Form completed. The medical officer who examined her confirmed that NK was 17 years old at the time the P3 Form was completed. NK was found to have sustained a laceration and tender swelling on the forehead, her lower lip was swollen, there were bruises and swelling on the right thigh medial aspect, obvious bruises and lacerations over the external genitalia and the hymen was broken. According to the doctor, the injuries in question were highly suggestive of forceful penetrative sexual intercourse.

9. The appellant is said to have escaped from the area , but when he resurfaced he was arrested and, thereafter, charged with the offences in question.

10. In his defence, the appellant stated that the sub-chief went to his home on 24th January 2019 and arrested him and took him to Gaturi AP Post, he stated that when he asked why he had been arrested, the sub-chief told him that he had been sent by his aunt to arrest him because NK had said that he had raped her. He stated that it was the first time he heard the issue of rape. He was later charged with the offences, which he said he knew nothing about.

11. The trial court considered the evidence adduced by the prosecution, rejected the appellant defence and observed, that the appellant had not explained where he had been since 24th June 2018 when the rape incident allegedly happened until 24th January 2019 when he stated that he was arrested by the Assistant Chief.

12. In her judgment, the learned trial Magistrate (J. Irura, P.M.) considered the ingredients of the offence of rape and found that the prosecution had proved the main charge against the appellant beyond reasonable doubt. He was convicted and sentenced to serve 15 years imprisonment on the main count.

13. Being aggrieved with the said decision, the appellant moved to the High Court citing 5 grounds of appeal, to wit: that the learned trial magistrate erred in law and fact: by failing to find that the prosecution had not proved its case beyond reasonable doubt; by failing to note that there was need for D.N.A. test to prove the case;

> by in convicting the appellant on contradictory, inconsistent and uncorroborated evidence; by failing to note that the clinician had relied on a document from a private hospital; and that in meting out the mandatory sentence of 15 years which was contrary to Article 25(c) of *the Constitution*.

14. After considering the appeal, the learned Judge found that the appellant had forcefully had sexual intercourse with NK against her will, and that her evidence was corroborated by the medical evidence and the testimony of other witnesses. On the issue of D.N.A., the learned Judge found that there was

no requirement in law for D.N.A. test to be undertaken in order to prove rape and that in this case the evidence adduced by the prosecution was overwhelming and there was no need for D.N.A. testing; that the learned trial magistrate arrived at the correct finding that the offence of rape was proved to the required standard; and that the conviction was proper and was supported by the law and the evidence.

15. Regarding the alleged contradictions and discrepancies in the prosecution evidence, the learned Judge found that the evidence of the prosecution was consistent and corroborative and that the appellant did not point out which evidence was contradictory or inconsistent.

16. As regards the sentence, the learned Judge found that there existed aggravating circumstances that warranted the stiff penalty that was imposed by the learned trial Magistrate, noting that the appellant violated NK whom he is related to. He accordingly dismissed the appeal in its entirety.

17. The appellant was once again dissatisfied with the decision and preferred a second appeal before us on the grounds that: the learned Judge erred in law and in fact by failing to note that the light used to identify the appellant was not analyzed; by making a partial evaluation while the evidence adduced was not enough to sustain conviction; by failing to note that the case was not proved beyond reasonable doubt; and by failing to consider the appellant's defence statement without giving a cogent reason of doing so, yet the same was remarkably comprehensive in casting doubt to the strength of the prosecution case.

18. We heard the appeal on the Court's virtual platform on 3rd September 2025 when the appellant appeared in person from Meru Prison while learned Principal Prosecution Counsel, Ms Winnie Mengo, appeared for the respondent. Both the appellant and Ms Mengo relied entirely on their written submissions dated 25th August 2025 and 6th August 2025 respectively.

19. In his submissions, the appellant contended that the complainant's allegations of rape were not supported by the medical report; that there were discrepancies in the documentary evidence produced before the trial court and that the enhancement of the sentence from the statutory minimum of ten (10) years to fifteen (15) years without explanation constituted a material error of law.

20. In opposing the appeal, the respondent submitted that the prosecution established through the evidence of the complainant that the appellant had sex with her through use of violence; that the complainant tore her underpants and skirt, stripped her naked and had sex with her; that her evidence demonstrated penetration and absence of consent; that the appellant was well known to the complainant as they were cousins and that it was, therefore, a case of recognition and not identification of a stranger. In support of her submissions, Ms. Mengo relied on the case of Anjononi & Others -vs- Republic [1980] KLR 59 in which this Court held that recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.

21. We were urged to dismiss the appeal both on the conviction and sentence.

22. We have considered the grounds of appeal raised by the appellant and the rival submissions made by both parties. As mentioned earlier, this is a second appeal, and our mandate is limited by section 361(1)(a) of the Criminal Procedure Code to consideration of issues of law only, unless it is demonstrated that the two courts below considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, they were plainly wrong in their decision. In that event, such omission or commission would be treated as matters

of law entitling this Court to interfere with the decision. This position was restated in in Karani vs. R. [2010] 1 KLR 73 that:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters, they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

23. We must also defer to the concurrent findings of fact by the 2 courts below. See this Court's decision in Njoroge -vs- Republic [1982] KLR 388 where the Court stated that:

> " On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence."

24. We are also guided by the decision in Adan Muraguri Mungara -vs- Republic [2010] KECA 131 (KLR) where it was held thus:

> "As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

25. We, therefore, cannot readily interfere with the concurrent findings of fact by the two courts below.

26. On the first issue raised by the appellant that the light used to him was not analyzed, we note that there was concurrence of the two courts below that the appellant was NK's cousin and they knew each other very well before. Theirs was not a case of visual identification but of recognition. It is trite that identification by recognition is more assuring than identification of a stranger as held by this Court in the case of Anjononi & 2 Others -vs- Republic (supra).

27. There is no doubt in our minds that as found by the two courts below, all the ingredients of the charge of rape were proved. The age of the victim was proved through the birth certificate that was produced in court as exhibit; penetration was proved and so was the identification of the assailant. The trial court's findings on these issues was confirmed by the first appellate court. We have no reason whatsoever to depart from those concurrent findings. The appellant's conviction was rock solid and firmly predicated on the evidence adduced and the law.

28. The last issue is that of sentence. Section 3(3) of the Sexual Offences Act No. 3 of 2006 provides that any person charged with the offence of rape shall be liable upon conviction to a sentence of 10 years which may be enhanced to life imprisonment.

29. The complaint raised against the sentence is that it was excessive, based on the fact that the minimum sentence prescribed under section 3(3) of the *Sexual Offences Act* is 10 years. Nothing else was raised in that regard. We have seen the notes on sentence by the learned trial magistrate. The prosecution treated the appellant as a first offender and the learned magistrate considered the mitigation tendered by the appellant before pronouncing sentence. In our view, the sentence meted out on the appellant

was lawful and well deserved. In any event, we reiterate that severity of sentence is a question of fact and by dint of section 361(1)(a), it is outside our remit.

30. The ruling on sentence put into consideration the mitigation of the appellant and was of the view that a deterrent sentence was appropriate. We find that the sentence meted to the appellant was lawful. We find no reason to disturb it.

31. The upshot of the foregoing is that the appellant's appeal is without merit and the same is hereby dismissed in its entirety. We, nonetheless, direct that the sentence be computed from the date of plea pursuant to section 333(2) of the Criminal Procedure Code.

DATED AND DELIVERED AT NYERI, THIS 13TH DAY OF FEBRUARY, 2026.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR