



REPUBLIC OF KENYA



**SMW v Republic (Criminal Appeal E009 of 2025)
[2026] KEHC 2710 (KLR) (19 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E009 OF 2025
WA OKWANY, J
FEBRUARY 19, 2026**

BETWEEN

SMW APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by Hon. Y. Barasa, (RM) in Naivasha CM's Court Criminal Case No. 57 of 2019 delivered on 21st February 2020)

JUDGMENT

1. The Appellant was charged with three counts, namely: -
 - iii. Resisting lawful arrest contrary to section 103(a) of the *National Police Service Act*, 2011.
 - ii. Malicious damage to property contrary to section 339(1) of the Penal Code; and
 - i) Incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006, with an alternative charge of indecent act with an adult contrary to section 11(a) of the same Act;
2. The particulars of the 1st count were that on 4th September 2019 at [Particulars Withheld] in Naivasha Sub-County at [Particulars Withheld], he caused his penis to penetrate the vagina of JWM (particulars withheld) whom, to his knowledge, was his mother.
3. On the 2nd and 3rd Count, it was alleged that on 6th September 2019, at the same village, he resisted arrest for the offence of incest by police officers and at the same time wilfully and maliciously damaged a G3 rifle belonging to the government of Kenya.
4. After a full trial in which the prosecution called a total of 5 witnesses, the Appellant was convicted on Count I (incest) and Count III (resisting arrest). He was, upon conviction, sentenced to serve twenty



- (20) years' imprisonment on Count I and five (5) years' imprisonment on Count III which sentences were to run concurrently. He was however acquitted on Count II.
5. Dissatisfied with both conviction and sentence, the Appellant filed the present appeal but later amended his grounds of appeal pursuant to section 350(2)(v) of the Criminal Procedure Code.
 6. The Appellant listed the following main grounds of appeal in the amended Petition of Appeal: -
 - a. That the learned trial magistrate erred in law and in fact by sentencing the Appellant term that is not only harsh but also excessive in light of the facts of the case.
 - b. That the learned trial magistrate erred in law and in fact by failing to find that the Appellant was not informed of his right to have an advocate assigned to him considering the gravity of the charges that he was facing.
 - c. That the learned trial magistrate erred in law and in fact by failing to find that the Appellant's defence was not considered as required by law.
 - d. That the learned trial magistrate erred in law and in fact by failing to find that the ingredients of the offences were not proved as required by law.
 7. The appeal was canvassed by way of written submissions which I have considered.
 8. This being a first appeal, the court is obligated to re-evaluate the entire evidence afresh with a view to arriving at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. (See *Okeno vs. Republic* [1972] E.A. 32)
 9. A summary of the evidence tendered before the trial court was as follows: -
 10. The Complainant (PW1) JWM (particulars withheld) narrated how the Appellant, who is her own biological son accosted her and raped her while threatening to kill her.
 11. PW2, No. 234450 PC James Mwangi, testified that on 6th September 2019 while on duty at Kinamba Police Post, he was instructed by Inspector Milka to arrest a suspect alleged to have raped his mother. PW2 proceeded to the suspect's place of work/residence at Gituamba near Kinamba Shopping Centre together with other officers and the complainant.
 12. They did not find the suspect at his house, but the complainant later spotted him by the roadside. The officers approached, introduced themselves, and attempted to arrest him. PW2 stated that the suspect became violent, resisted arrest, and assaulted the officers. In the course of the struggle, the suspect broke the butt stock of a G3 rifle serial number J53270. PW2 stated the rifle value was estimated between Kshs. 70,000–100,000.
 13. PW2 identified the exhibits including the G3 rifle (MFI 4(a)) and the broken butt stick (MFI 4(b)).
 14. PW3, No. 234738 PC Kennedy Irungu, testified that he was at Kinamba Police Post with other officers on the material day when the OCS, Inspector Milka Wamaitha, informed them of a suspect who had allegedly raped his mother and was supposed to be arrested.
 15. PW3 accompanied the complainant and other officers to the accused person's residence. Upon failing to find him at home, the complainant later saw the accused at Gituamba shopping centre, among boda boda operators. PW3 stated that when they approached and identified themselves, the accused refused to cooperate, resisted arrest, became violent, and fought them. With assistance from boda boda riders, they managed to arrest him.



16. PW3 confirmed that during the confrontation the accused broke the back/butt stick of the G3 rifle, and the person arrested is the accused in court.
17. PW4, No. 232607 PC Simon Kisilu, testified that he was instructed to arrest the accused. He proceeded, with PW2 and PW3, to the accused's location while armed with a G3 rifle.
18. PW4 stated that they initially did not find the accused, but as they were returning, the complainant spotted him and they alighted from the vehicle and identified themselves. The accused resisted arrest and a struggle ensued. PW4 stated that during the struggle, the rifle fell down and the accused stepped on it, breaking it and particularly breaking the back/butt stick. The accused was thereafter arrested and escorted to the station.
19. During cross-examination, PW4 maintained that the struggle occurred outside the motor vehicle and the gun fell down as the accused tried to grab it, after which it was stepped on.
20. PW5, Jane Wamboi Njoroge, a Clinical Officer at Naivasha Sub-County Hospital, testified that she had worked there for about 10 years. She produced medical documents relating to the complainant.
21. PW5 testified that the P3 form had been filled by her colleague Sylvester Mesa, and the post rape care (PRC) form was filled by another colleague (named in the record). PW5 stated that she was familiar with their handwriting and signatures.
22. PW5 testified that the complainant was 55 years old, and the P3 was filled on 6/9/2019, indicating a history of being raped on 4/9/2019 at around 9.00 pm, and that she was treated at Naivasha Sub-County Hospital. PW5 summarized the medical findings indicating genital injuries including lacerations, and the conclusion formed was that the complainant had been sexually abused.
23. PW5 produced the P3 Form as Exhibit 1 and the Post Rape Care Form as P-Exhibit 2
24. On cross-examination, PW5 stated that she was not the one who examined the complainant and clarified that the investigating officer could explain connection of the accused to the offence, but that the medical examination confirmed injuries consistent with sexual assault. The complainant gave a history of rape.
25. PW6, No. 47600 Sgt Edith Wanjiru, testified that she was attached to Kabati Patrol Base and was the investigating officer in the case. She received the report and recorded the complainant's statement.
26. PW6 stated that the complainant reported that her son (the accused) grabbed her, forced her into the house, threatened her using a weapon (jembe), and raped her for several hours. The complainant later managed to report the matter to police.
27. PW6 issued the complainant with a P3 form and directed her to hospital. After the complainant later returned, PW6 recorded her statement. PW6 testified that the complainant later spotted the accused, and PW6 informed Inspector Milka who organized officers to effect arrest.
28. PW6 stated that she was informed the accused resisted arrest and damaged a G3 rifle serial number J53270, which was produced in court as Exhibit 4(a) and the broken butt stick as Exhibit 4(b). She further stated that the firearm was forwarded to Nairobi for examination with an exhibit memo form, and she produced the Exhibit Memo Form – Exhibit 5(a), Report – Exhibit 5(b) and Clothing recovered (underpant) was produced as Exhibit 3
29. PW6 stated that upon receipt of medical evidence, she decided to charge the accused with incest, and also damage to the rifle.



30. On cross-examination, PW6 stated she did not personally witness the rape but relied on the complainant's report and medical confirmation.

The Appellant's Case

31. The Appellant challenged the conviction on the basis that the ingredients of the offence of incest were not proved beyond reasonable doubt, particularly penetration. He argued that the medical evidence did not corroborate the complainant's testimony, pointing to the absence of spermatozoa, discharge, blood stains or torn undergarments as indicated in the P3 form and Post Rape Care (PRC) forms.
32. The Appellant submitted that there were material inconsistencies between the P3 form and the PRC form as to authorship, dates and findings, which contradictions were not resolved in his favour.
33. On the charge of resisting arrest, the Appellant contended that the arresting persons did not properly identify themselves as police officers, were not shown to have been in uniform, and that he merely acted in self-defence against unknown persons.
34. On sentence, the Appellant argued that although section 20(1) of the *Sexual Offences Act* prescribes a lawful minimum sentence of ten years, the sentence of twenty years was harsh and excessive. He invoked Article 50(2)(p) of *the Constitution* and section 333(2) of the Criminal Procedure Code, urging the Court to reduce the sentence or impose a non-custodial sentence in light of his mitigation.

The Respondent's Case

35. The Respondent opposed the appeal and submitted that the prosecution proved the offences to the required standard.
36. On the offence of incest, the Respondent submitted that the complainant (PW1) testified that the Appellant was her biological son, a fact that was not disputed, thereby proving the element of relationship.
37. On penetration, it was submitted that PW1 testified, in detail, on how the Appellant forcibly penetrated her. The Respondent noted that evidence on penetration was corroborated by medical evidence through PW5, a clinical officer from Naivasha County Hospital, who testified that the complainant's hymen was broken and that she had lacerations on her genitalia. The P3 form and PRC form were produced as exhibits and confirmed sexual assault.
38. Regarding resisting arrest, it was submitted that PW2, PW3 and PW4, who were all police officers, testified consistently that they identified themselves to the Appellant, attempted to arrest him, but he became violent and resisted arrest, necessitating assistance from boda boda riders. The Respondent submitted that this evidence was consistent and uncontroverted.
39. On the alleged violation of the right to legal representation, the Respondent submitted that the Appellant did not raise the issue during trial but instead competently cross-examined witnesses, and did not demonstrate that substantial injustice resulted from lack of state-funded counsel.
40. On sentence, the Respondent submitted that the sentences imposed were lawful and within statutory limits, noting that section 20(1) of the *Sexual Offences Act* provides for imprisonment of not less than ten years, while section 103(a) of the *National Police Service Act* allows imprisonment of up to ten years.



Issues for Determination

41. From the record of appeal and the rival submissions, I find that the following issues arise for determination:
- a. Whether the offences of incest and resisting lawful arrest were proved beyond reasonable doubt; c. Whether the Appellant's right to legal representation was violated; and d. Whether the sentence imposed was excessive and calls for interference.

Analysis and Determination

Offence of Incest

42. The offence of incest, under section 20(1) of the *Sexual Offences Act*, requires proof of: relationship, penetration or indecent act, and identification of the perpetrator. The Section stipulates 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:
daughtergranddaughtersistermotherneiceauntgrandmother commits the offence of incest.
- Penalty
The offender is liable to imprisonment for not less than 10 years.If the female person is under 18 years, and this is alleged and proved, the offender is liable to imprisonment for life, and consent is irrelevant.
43. On proof of relationship, the complainant testified that the Appellant was her biological son. PW1 knew the Appellant and the case was therefore one of recognition within a close family relationship. The Appellant's identity as the perpetrator of the offence was therefore not dependent on difficult visual identification conditions but on the complainant's recognition and account of the assault. On the record as presented, I find no misdirection on identification.
44. The complainant's evidence on identification was not challenged by the Appellant. I find no evidential basis upon which the trial court would have been required to doubt the relationship between the complainant and the Appellant.
45. I therefore find that the ingredients of relationship and identification of the Appellant as the perpetrator of the offence were proved to the required standard.
46. On penetration, the complainant testified as follows: -
"He got to his house. He told me I am now his wife not his mum. I told him I am his mother. I was standing near the door, he pulled me and raped me. He caught me by my blouse. He covered by mouth. He threatened to kill me. He pulled my clothes, my panty and he penetrated me. He inserted his penis in my vagina. He put his knees in the middle of my thighs."
47. The central contest raised by the Appellant concerned proof of penetration, including alleged gaps on the absence of spermatozoa, asserted inconsistencies between the P3 and PRC forms, and the argument that the prosecution ought to have conducted DNA testing on clothing.
48. I note that the complainant's account of the incident, as captured in the above extract of her testimony, was direct, consistent and compelling. She explained that on on the material night the Appellant overpowered her, removed her clothing, and penetrated her.



49. PW5 (clinical officer) testified that upon examining the complainant, he noted that the hymen was broken and that there were lacerations to the private parts. She formed the opinion that the complainant had been sexually abused. The P3 and PRC forms were produced as exhibits and the Respondent's position was that the medical evidence corroborated PW1 on penetration.
50. The Court of Appeal has repeatedly affirmed that medical evidence, while desirable where available, is not a legal pre-condition to sustaining a conviction in sexual offences where the court believes the complainant and records reasons, and that a court may convict on the victim's evidence alone. In *WO vs. Republic* (Criminal Appeal E017 of 2024) [2025] KECA 856 (KLR), the Court referred to the provisions of Section 124 of the of the [Evidence Act](#) and stated that; -
- “Indeed, under the proviso to Section 124 of the [Evidence Act](#), a trial court can convict for a sexual offence under the [Sexual Offences Act](#) on the evidence of a complainant alone without corroboration. In the case of *William Sowa Mbwanga vs Republic* [2016] eKLR, this Court stated as follows: The import of the proviso to section 124 of the [Evidence Act](#) is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in *George Kioji v Republic*, CR. APP. NO. 270 of 2012 (Nyeri): “Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the [Evidence Act](#), Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”
51. In the present case, I note that the trial court did not act solely on PW1's evidence as there was medical evidence consistent with sexual assault. My take is that the absence of spermatozoa or DNA evidence, in the circumstances of this case, was not decisive. What mattered was whether the totality of evidence proved penetration beyond reasonable doubt. I am satisfied, on the complainant's narrative and the medical findings, that penetration was proved. The complainant gave direct evidence of sexual penetration by the Appellant. Her testimony was corroborated by medical evidence from PW5, who confirmed genital injuries consistent with sexual assault. My finding is that the absence of spermatozoa or blood stains does not, of itself, negate penetration.
52. The principle that “penetration, however slight, is sufficient” to prove the penetration element in sexual offences has been firmly stated in Kenyan appellate jurisprudence, notably in *Erick Onyango Ondeng vs. Republic* (2014) eKLR the Court of Appeal held that the slightest penetration is sufficient and it is not necessary that the hymen be ruptured.
53. My finding is that the alleged inconsistencies, if any, between the P3 and PRC forms do not go to the root of the prosecution's case. The medical evidence taken as a whole corroborated the complainant's account.
54. The upshot is that the conviction on Count I was supported by evidence proving all the essential elements beyond reasonable doubt.



Resisting Lawful Arrest

Section 103(a) of the *National Police Service Act* stipulates as follows: -

Any person who assaults, resists, or wilfully obstructs a police officer in the execution of the police officer's duties commits an offence.

55. PW2, PW3 and PW4 testified that they identified themselves as police officers, attempted to arrest the Appellant, but that he refused to cooperate and violently resisted arrest. The police officers were assisted by boda (motorcycle) riders to subdue the Appellant. I find that their evidence was consistent and was not rebutted by the Appellant.
56. The Appellant submitted that the arresting persons did not identify themselves or prove that they were police officers, and that he acted in self-defence.
57. I have considered the competing versions on the circumstances surrounding the arrest and I find that the trial court was entitled to accept the consistent account of the arresting officers. Most importantly, the Appellant did not tender any evidence to counter the police officers' testimony on the count of resisting arrest and I find that his claim, during submissions, that he acted in self defence as presented, did not dislodge the prosecution narrative that the officers were acting in due execution of duty. I therefore find that Count 111 was proved beyond reasonable doubt.

Right to legal representation

58. The Appellant complained that his right to legal representation was violated as he was not informed of the said right. The applicable constitutional standard is that state-funded counsel is required "if substantial injustice would otherwise result".
59. In the case of *David Njoroge Macharia vs. Republic* [2011] KECA 406 (KLR) the Court of Appeal underscored that the right is not in absolute terms and turns on whether substantial injustice would otherwise occur, noting examples such as complex issues, disability, or language difficulties.
60. In the present case, the Respondent's position was that the Appellant did not raise any inability to proceed, cross-examined all the prosecution witnesses and did not demonstrate complexity rising to the level of substantial injustice.
61. On the material placed before this Court, I am not persuaded that the threshold for state-funded counsel was established so as to vitiate the trial.

Sentence

62. The Appellant argued that the 20-year term on Count I was excessive and invoked Article 50(2)(p) on the least severe punishment.
63. The starting point is that sentencing is a discretionary exercise, and an appellate court only interferes with the sentence passed by the trial court on settled principles. In the case of *Wanjema vs. R.* [1971] E.A. 493 Trevelyan J held that : -

"An appellate court should not interfere with the discretion which a Trial Court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."



64. For Count I, Section 20(1) of the *Sexual Offences Act* prescribes imprisonment for a term of not less than ten (10) years. I find that the sentence of 20 years was therefore lawful. The trial court was also entitled to treat incest as grave, more so where the complainant was the Appellant's mother, as established in this case.
65. For Count III, Section 103(a) of the *National Police Service Act* provides for a penalty not exceeding ten (10) years or a fine or both. I find that a sentence of five (5) years was within the statutory range.
66. This court has not been shown that the trial court acted on a wrong principle, ignored relevant considerations, considered irrelevant matters, or imposed a manifestly excessive sentence. I find that the invitation to substitute a non-custodial sentence is not consistent with the gravity of the offences proved and the statutory framework. It is my finding that there is no basis for appellate interference with the trial court's exercise of discretion on sentence.
67. I find that the sentences were lawful, proportionate and justified by the circumstances of the offences. My above finding on sentence notwithstanding, I note that the Appellant spent a few months in remand custody while awaiting his trial which period the trial court did not consider and reduce from the final sentence period in line with the provisions of Section 333(2) of the Criminal Procedure Code (CPC).

Conclusion

68. In the final analysis, I find that the appeal lacks merit and I therefore dismiss it in its entirety save that the sentence period of 20 years and 5 years that were to run concurrently would begin to run from the date of the Appellant's arrest in line with the requirements of Section 333(2) of the CPC.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 19TH DAY OF FEBRUARY, 2026.

HON. W. A. OKWANY

JUDGE

19/02/2026

For Appellant Present

Mis Achieng for the state

Court Assistant Karani

File close

