



REPUBLIC OF KENYA



**KENYA LAW**  
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**GRD v Republic (Criminal Appeal 90 of 2022)  
[2025] KECA 59 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 59 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 90 OF 2022  
SG KAIRU, LA ACHODE & GV ODUNGA, JJA  
JANUARY 24, 2025**

**BETWEEN**

**GRD ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Malindi  
(S.M Githinji J.) delivered on 20th April, 2022 in HCCRA No. 20 of 2021)*

**JUDGMENT**

1. GRD, the Appellant herein was charged with the offence of incest contrary to section 20(1) of the [Sexual Offences Act](#) (the Act) the particulars being that on diverse dates between the month of October 2017 and 29<sup>th</sup> August 2019 in Kilifi County within Coast Region, the appellant intentionally and unlawfully caused his male genital organ namely penis to penetrate the female genital organ namely vagina of KMG, a child aged 17 years whom to his knowledge was his daughter. In the alternative, the appellant faced a charge of indecent act with a child contrary to section 11(1) of the Act, particulars being that on the aforesaid period and place, the appellant intentionally and unlawfully caused his male genital organ namely penis to touch the female genital organ namely the vagina of KMG, a child aged 17 years.
2. The prosecution's case was that the complainant, who testified as PW1, was 18 years old having been born on 16<sup>th</sup> October 2002. Her age was proved by the age assessment report that indicated she was 17 years old. From the evidence it was contended that at the time of the incident in October 2017, the appellant had parted ways with her step-mother with whom the complainant had been staying. One night during that month, the appellant sneaked into the room where the complainant was sleeping with her siblings and surreptitiously had sex with the complainant after which he threatened her not to disclose to anyone what had taken place. The appellant repeated the same heinous act a week later and in the month of November 2017 the complainant missed her menstrual periods. When, in the



month of December, the appellant suspected her of being pregnant, he administered some pills on her as a result of which the complainant silently bled for 12 hours. On 12<sup>th</sup> December, 2017, on the complainant's visit to her home in Nyalani, her aunt, M, noticed that she was heavily bleeding and upon being taken for medical examination, she was found to be pregnant. Although her said aunt suspected the culprit of her pregnancy to be the appellant, the complainant declined to divulge the information reading the person responsible. During the same month of December, the complainant miscarried.

3. In January 2018, the appellant came home, chased away the complainant's aunt and continued having sex with the complainant and in December of that year, the complainant once again became pregnant. As had become the appellant's habit, he once again gave her some pills which resulted in another miscarriage. Thereafter, the appellant stopped having sex with the complainant till June 2019 when he resumed his actions. At one point the appellant found her in her friend, Harrison's home and accused her of being his wife. After that the appellant assaulted the complainant and warned her not to have sex with other boys so as not to transmit a disease to him.
4. In August 2019 during her visit to her aunt called F, PW2, the appellant disclosed to her how the appellant had been having sex with her. When in September 2019 the appellant went to PW2's place and demanded to leave with the complainant, the complainant declined and instead they reported the matter to the Chief's office, Pangani, from where they were referred to Bondora Police Post and then to Kaloleni Police Station where her statement was recorded. By the time of her testimony in court, the complainant was pregnant with the appellant's child.
5. PW2, FMR, the appellant's sister and the complainant's aunt testified that in 2017, she was informed by her sister, M, that she suspected that the appellant was defiling the complainant and that as a result, the complainant had miscarried. Attempts by PW2 to pursue the matter with the appellant at that time were not fruitful and she left the matter to rest. However, in August, 2019, M informed her that the complainant had once again miscarried and she suspected the appellant was the one behind the pregnancy. When PW2 went home, the complainant confirmed to her that the appellant was defiling her. As a result, the incident was reported to the Chief's office from where they were referred to Bondora Police Post and then to Kaloleni Police Station where the report was recorded.
6. PW4 Sgr. Hadija Kenga, the Investigating Officer told court that on 13<sup>th</sup> September 2019, PW1 and PW2 filed an incest report and she escorted PW1 to Mariakani Sub County Hospital. After conducting investigations into the matter, she decided to charge the appellant.
7. PW3 Mwangolo Chigulu, a clinician, examined the complainant on 17<sup>th</sup> September 2019 during which he found that the complainant's outer genitalia was normal with no bruises or lacerations but she had no hymen. However, the complainant had a whitish discharge and pus cells and tested positive for pregnancy.
8. In his sworn evidence, the appellant confirmed that the complainant, his daughter, was born on 12<sup>th</sup> October 2002. According to him, on 10<sup>th</sup> December 2017 he moved his family from Kwale to [Particulars Withheld] Village where he left his four children with his sister, M, and returned to Likoni. That same month the complainant fell ill and when asked by M, she disclosed that she was pregnant and that the culprit was her boyfriend who gave her some pills which caused her to miscarry. According to the appellant, the complainant had a habit of spending the nights away from their home.
9. In her judgement delivered on 28<sup>th</sup> September 2020, the learned trial magistrate (Hon. L.N Wasike) found the appellant guilty in respect of the principal charge, convicted and sentenced him to serve 20 years imprisonment.



10. Aggrieved, the appellant lodged an appeal at Malindi High Court contending that; the learned trial magistrate erred in law and fact by not considering that there was no proper identification at the scene of crime; there was massive contradiction and discrepancies; and that his defence evidence was not considered.
11. The learned Judge (Githinji, J) on 20<sup>th</sup> April 2022, found that the age of the complainant, the fact of penetration and relationship between the appellant and the complainant were sufficiently proved. He confirmed the conviction and proceeded to enhance the appellant's sentence from 20 years imprisonment to life imprisonment.
12. Aggrieved by the High Court decision, the appellant has lodged an appeal in this Court contending that the learned Judge erred in law and fact: by failing to consider that the case was founded on a defective charge sheet as the prosecution did not corroborate the particulars in the charge sheet; by failing to consider that the entire case was wholly fabricated and orchestrated as it was full of grudge and misunderstanding between the appellant and the complainant's mother; by failing to consider that all the prosecution witnesses did not corroborate the complainant's evidence and that the complainant admitted to have been in relationship with Harrison which contradicted the entire evidence; by failing to consider that the prosecution failed to discharge its burden of proof beyond reasonable doubt contrary to sections 107(1) and 109 of the *Evidence Act*; by failing to consider that the medical evidence fell short of linking him to the offence charged particularly as regards the act of penetration; by failing to consider that there was no notice of enhancement of the sentence served upon him before sentencing him to life imprisonment to his prejudice.
13. We heard the appeal on the Court's virtual platform on 22<sup>nd</sup> July 2024 when the appellant appeared in person from Malindi Main Prison while Ms Mutua, learned Senior Principal Prosecution Counsel, appeared for the respondent. Both the appellant and Ms Mutua relied on their written submissions.
14. According to the appellant, there was doubt as to whether it was him who defiled the complainant since the evidence on record was not sufficient to support such a finding; that the complainant was in a relationship with Harrison, her boyfriend for over 6 months and that the village elder had written an agreement for them to stop the relationship; that the appellant was firmly against the said relationship; that PW1 and PW2's evidence cast doubt as to truthfulness of the complainant; that M who was a critical witness, was not availed for cross-examination; that the age of the injuries on the complainant was overlooked by PW3 hence there was no sufficient evidence to conclude that there was penetration; that it was unfair for the trial court to have overlooked the fact that the complainant was enjoying a relationship with Harrison and sentence the appellant to serve 20 years imprisonment; and that the appellant's right to fair trial was prejudiced when the sentence was enhanced by the first appellate court in violation of Articles 25(c) and 50(2) of the *Constitution*.
15. On the other hand, the respondent submitted that the evidence adduced in support of the charges against the appellant was cogent, consistent, corroborated and watertight; that the appellant who used to sneak at night on the complainant and defile her was her father and PW2's brother; that through the evidence of PW1 of how she was defiled and PW3, the clinical officer who at the time of examining PW1 found that PW1 was pregnant and had gonorrhoea, a sexually transmitted disease, penetration was proved; that PW1 was able to identify the appellant with whom they lived together; that the complainant was aged 15 years when the appellant first defiled her which continued until when she was 17 years of age; that the complainant's age was, during his defence confirmed by the appellant who stated that the complainant was born on 12<sup>th</sup> October 2002; that the prosecution's evidence was not a fabrication nor was it orchestrated by any grudge between the appellant and the complainant's mother since the appellant never raised the issue such; and that the two courts below adequately considered the



appellant's defence evidence and upon weighing the same against the overwhelming evidence against him correctly found that the same did not create any doubt in the court's mind.

16. This being a second appeal, it is important to restate our jurisdiction in such matters. Section 361(1) of the Criminal Procedure Code provides that:

A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

- a. on a matter of fact, and severity of sentence is a matter of fact; or
- b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

17. This provision was applied in *Karani v R* [2010] 1 KLR 73 where it was held that:

“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.”

18. In matters where our jurisdiction is confined to matters of law only, this Court in the case of *Stephen M'Irungi & Another v Republic* [1982-88] 1 KAR 360 held that we have:

“loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law.”

19. In this appeal we are therefore bound, as was held in the decision in *Adan Muraguri Mungara v R CA Cr App No 347 of 2007*:

“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.”

20. The case of *Karingo vs. Republic* [1982] KLR 213, reinforced the position when the Court stated:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence.”

21. It must, however, be appreciated that at times, where the question involved is that of mixed fact and law, it is not easy to distinguish the two. The Supreme Court therefore clarified what constitutes “matters of law” in relation to this Court's jurisdiction as the second appellate court, in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* [2014] eKLR where the three elements of the phrase “matters of law” were identified thus:

- “(a) the technical element: involving the interpretation of a constitutional or statutory provision;



- b. the practical element: involving the application of the *Constitution* and the law to a set of facts or evidence on record; and
  - c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.”
- 22. Regarding this Court’s jurisdiction, Article 164(3) of the *Constitution* provides that:  
The Court of Appeal has jurisdiction to hear appeals from—
  - a. the High Court; and
  - b. any other court or tribunal as prescribed by an Act of Parliament.
- 23. As we have stated above, the appellant’s appeal to the High Court was based on the contention that; the learned trial magistrate erred in law and fact by not considering that there was no proper identification at the scene of crime; there was massive contradiction and discrepancies; and that his defence evidence was not considered. Some of the grounds being raised before us here were not raised before the first appellate court and therefore we have no benefit of knowing how that court would have dealt with them.
- 24. In our understanding, this Court can only determine questions where it is alleged that the High Court or any other court or tribunal whose decisions are challengeable before the Court (such as the Environment and Land Court and the Employment and Labour Relations Court), in arriving at its decision committed an appealable error. In other words, the Court cannot entertain any other appeal other than as provided in the above Article. As a general rule, where, therefore, an appellant challenges the decision made by a magistrate’s court which decision has not been the subject of an appeal before the High Court or a court from which an appeal lies to this Court, this Court would not be properly seized of such a challenge. In other words, for a ground to be taken before this Court, that ground ought to have been taken before the court from which an appeal lies to this Court. Unless that is done, and subject to what we state hereinbelow, a party will not be permitted to raise for the first time before this Court, a point which was never raised before the court below and which that court had no opportunity of pronouncing itself upon.
- 25. This Court has had occasion to consider the effect of raising an issue on appeal for the first time in, among other cases, Kenya Commercial Bank Ltd v James Osede [1982] eKLR where Hancox, JA (as he then was) had this to say:  

... that where the right of appeal is statutory, it is to be confined to points of law raised before and decided by the trial judge.”
- 26. The Court went on to observe:  

“It is not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal. In this instance, permitting an issue to be raised for the first time in reply to the appellant is improper, as the appellant had no fair notice of this issue. Such an issue should not be decided on appeal.”
- 27. Addressing himself to the prejudicial effect of new points of law or issues raised for the first time on appeal, Forbes, VP had this to say in Alwi A Saggaf v Abed A Algeredi 1961 EA 767 CA 610:  

“...these are assumptions which were never tested at the trial. The minds of the parties simply were not directed to this issue, which apparently, was raised by counsel for the respondent



for the first time in his reply at the end of the hearing of the first appeal. In the circumstances, it appears to me that the appellant had no fair notice of this issue, and that the court cannot be satisfied that the facts, if fully investigated, would have supported the new plea.

In my view, accordingly, the learned judge ought not to have allowed this issue to be raised, or to have decided the appeal on it.”

28. In the same vein, this Court in *Sudi Mnalo Mweke v Republic* [2023] KECA 1527 (KLR) associated itself with the holding by the predecessor to this Court in *Alwi Abdulrehman Saggaf v Abed Ali Algeredi* [1961] EA 767 where, it laid down the guiding principle that the course of taking on appeal a point of law which has not been argued in the court below ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.

29. We share the Court’s view and the sound justification for that holding, namely that:

“The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.

It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject of argument and decision in the county court.”

30. We need not overemphasise the general principle that trial by instalments militates against the discretionary powers of this Court in the administration of justice (see *Alfayo Gombe Okello v. Republic* [2010] eKLR). That this principle continues to hold sway was aptly demonstrated in *Wachira v Ndanjeru* [1987] KLR 252 where this Court spoke to the bar, with Platt, JA. observing that:

“...the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case.”

31. Expounding on the remit of this Court in dealing with points of law raised before it for the first time, this Court in *Julia Kaburia v Manene Kabeere & Others* Civil Appeal No. 340 OF 2002 (UR) held that:

“The circumstances in which a court can allow a new point not raised in the lower court to be canvassed on appeal are that the court has discretion to allow a new point to be argued on appeal and whether the court will allow the new point to be argued depend on the circumstances of each case. The Court of Appeal will, however not allow a new point to be raised for the first time on appeal unless the evidence establishes beyond doubt that the



facts if fully investigated would have supported the plea of the party seeking to raise the new issue.”

32. There are however instances where the Court may, even on a second appeal take up a legal point not taken in the first appellate court. Such instances, are however, not commonplace. One such instance is where it is alleged that the first appellate court failed to undertake a duty imposed on it by law. It is trite that the first appellate court is enjoined to re-evaluate the evidence presented before the trial court and to make its own conclusions. Therefore, the failure by the first appellate court to undertake that duty, a duty imposed by the law, elevates the otherwise factual matters to a matter of law. This Court therefore held in *Jonas Akuno O’kubasu v Republic* [2000] eKLR that:

It is correct that on first appeal the appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles.”

33. The second exception to the aforesaid rule is where the ground relates to a point taken up for the first time by the first appellate court itself when such a point was not raised before the trial court.

34. We have considered the grounds raised before us and we find that the issues for our determination are:

1. Whether the charge sheet was defective.
2. Whether on the evidence as presented and in convicting the appellant, the two courts below properly addressed themselves to the need to prove the appellant’s guilt beyond reasonable doubt.
3. Whether the learned Judge erred in enhancing the appellant’s sentence

35. On the first issue, that ground was not raised either before the trial court or before the first appellate court. It is too late to raise at this stage of the proceedings.

36. On the second point, the appellant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* which reads:

- 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.

37. Addressing itself to the ingredients of the offence of incest, this Court at Nakuru in *MGK v Republic* [2020] eKLR held that:

- “ 11. ... the ingredients that must be established for the offence of incest by a male person is, first, that the victim and the offender are related within the



categories stated under section 20(1) of the *Sexual Offences Act*. Secondly, that the offender committed an act which caused penetration with the victim, and thirdly, the age of the victim must also be established for the proviso to apply.”

38. It was common ground that the complainant was the appellant’s biological daughter, and we need not say more on this score. Secondly, there was evidence both oral and medical confirming penetration of the complainant’s genital organ resulting into her pregnancy more than once. In effect, the act of penetration was proved. The age of the complainant was also proved and there are concurrent findings of fact by the two courts below on that issue.

39. Was it the appellant who committed the act of penetration?

Being the father to the complainant, there was no issue of mistaken identity. The issue of Harrison was introduced to create an impression that the complainant might have been penetrated by him. In this case however, due to the threats made to the complainant, she endured the pain for a very long time without disclosing that it was the appellant who was responsible for her predicament. Just like the learned Judge, we see no reason why the complainant would have not disclosed that it was Harrison who was responsible for her pregnancy and why she made such serious allegations against the appellant, her own father, in order to shield the said Harrison. The appellant, in his evidence, alluded to bad blood between him and the complainant’s mother as having played a part in his being framed but it is clear from the evidence that the sexual escapades of the appellant were not raised by the complainant’s mother but were first discovered by the appellant’s own sisters. The fact that his sister, M, did not testify in our view did not weaken the prosecution’s case in light of the evidence of PW2. We are not satisfied that M’s evidence would have added anything to the evidence of PW2 and as was held in *Keter v Republic* [2007] 1EA135:

“The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

40. Having considered the evidence adduced, like the two courts below, we find that the ingredients of the offence of incest were proved against the appellant.

41. As regards the enhancement of the appellant’s sentence, the learned Judge expressed himself as hereunder:

“Section 20(1) of the SOA provides that the minimum sentence for the offence of incest is 10 years imprisonment, while the maximum sentence is life imprisonment where the victim is aged below eighteen years. The appellant was sentenced to 20 years imprisonment. I have perused the trial court’s reasoning on sentencing. I do find that the section is couched in mandatory terms in regards to the sentence where the victim is a child. The accused person in such a case is liable to imprisonment for life...I am obliged to correct the error and enhance the sentence of 20 years imprisonment in place, with that of life imprisonment, in total compliance with the law. The bottom line is that the conviction is upheld, and sentence enhanced to life imprisonment.”

42. With due respect to the learned Judge, he committed two grave errors. The first error was that he misapprehended the wording of section 20(1) of the Act in holding that where the victim of incest



is a child the mandatory sentence is life sentence. We have set out section 20(1) of the Act and at the material part it states 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...”

43. The predecessor of the court (as per Sir Clement DeLestang V.P) in *Opoya v Uganda* [1967] EA 752 at page 754 expressed itself thus:

It seems to us beyond argument that the words “shall be liable to” do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it.”

44. The learned Judge in holding that “the section is couched in mandatory terms in regards to the sentence where the victim is a child” fell into error.

45. Apart from that nowhere in the proceedings was the learned Judge addressed on the enhancement the sentence and the appellant who obviously stood prejudiced by that enhancement was never afforded an opportunity to be heard before the enhancement. Although severity of the sentence is considered as an issue of fact, it was appreciated by the Supreme Court in its recent decision in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) that;

...we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court.”

46. We therefore have the jurisdiction to interrogate the sentence where the same has been enhanced by the High Court.

47. In *JJW v Republic*, Cr. App. No 11 of 2011, (UR) this Court held that notwithstanding the fact that section 354(3) of the Criminal Procedure Code empowers the High Court to enhance or alter the nature of the sentence imposed by the trial court, in the absence of an appeal against sentence, the court must warn the appellant before it enhances the sentence. The Court stated:

“It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his



appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

48. And in *Samwel Mbugua Kihwanga v Republic*, Cr. App. No. 239 of 2011 (UR), the Court explained that although the practice of warning the appellant before enhancing the sentence was not a requirement of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice of the consequences that would befall him depending on the outcome of the appeal.
49. In *Katana Kitsao Nzingo v Republic Mombasa Criminal Appeal No. 200 of 2003 (UR)* this Court decreed the enhancement of the sentence in the following terms:

It is now standard practice that an appellant who appeals against a judgement in a capital offence, such as an appellant must be provided with legal representation. The appellant herein found himself in an awkward situation. He was appealing against his conviction on a charge of theft from person contrary to section 279(a) of the Penal Code on which he had been sentenced to five years imprisonment with five strokes of the cane. He pleaded for leniency before the superior court. The State did not ask for enhancement of the sentence, but like a thunderbolt from the sky, the appellant was hit by an order which did not only dismiss his appeal but handed him a death sentence. The worst that he expected was dismissal of his appeal. But he got a shock of his life when he was sentenced to death. Before the appeal commenced in the superior court, nobody warned the appellant that he was taking a risk by proceeding with his appeal."

50. In view of the foregoing, while we dismiss the appellant's appeal on conviction, we set aside the life sentence imposed upon him by the High Court and reinstate the sentence of 20 years imposed by the trial court. We note that the appellant was arrested on 14<sup>th</sup> September 2019 and was in custody throughout the period of his trial. Pursuant to section 333(2) of the Criminal Procedure Code, the said 20 years will run from the said date of his arrest.
51. Judgement accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY, 2025.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

