



REPUBLIC OF KENYA



KENYA LAW
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**Yegon v Republic (Criminal Appeal E015 of 2022)
[2025] KECA 857 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KECA 857 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL E015 OF 2022
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA
MAY 14, 2025**

BETWEEN

BENARD KIBET YEGON APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kericho
(A Ongeri J.) delivered on 18th March, 2022 in HCCRA No. 35 of 2019)*

JUDGMENT

1. Benard Kibet Yegon, the appellant herein was charged with and convicted of the offence of gang rape contrary to section 10 of the *Sexual Offences Act* (the Act) in Kericho SO Case No. 44 of 2019. Upon his conviction and sentence to 10 years imprisonment, he appealed to the High Court at Kericho in Criminal Appeal No. 35 of 2019.
2. On 18th March, 2022, the learned Judge (Ongeri, J) dismissed the appeal on both conviction and sentence and proceeded to, suo moto, enhance the sentence from 10 years to 15 years.
3. The appellant, dissatisfied with the said decision appealed to this Court and when the matter came up for plenary hearing before us on 14th May 2025, he informed us that he was only contesting the sentence.
4. Learned Counsel, Mr Omutelema, for the respondent conceded, and rightly so in our view, that the enhancement of the sentence by the learned Judge was improper in light of the fact that there was no notice of enhancement by the prosecution and the appellant was not cautioned before his sentence was enhanced.



5. We have perused the record and we are unable to find, in the proceedings, any indication that the learned Judge was addressed on the enhancement of the sentence. The appellant, who obviously stood prejudiced by that enhancement, was never afforded an opportunity to be heard before the decision.

Although we are sitting as a second appellate court and severity of the sentence is considered as an issue of fact, it was appreciated by the Supreme Court in its 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.”

6. We therefore have the jurisdiction to interrogate the sentence where the same has been enhanced by the High Court.
7. 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.”

8. 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.
9. In *Katana Kitsao Nzingo v Republic Mombasa Criminal Appeal No. 200 of 2003 (UR)* this Court decried 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.”

10. In view of the foregoing, find that the learned Judge erred in, suo moto, enhancing the sentence imposed on the appellant by the trial court. Consequently, we set aside the 15 years sentence imposed upon the appellant by the High Court and reinstate the sentence of 10 years imposed by the trial court.

11. Judgement accordingly.

DATED AND DELIVERED AT NAKURU THIS 14TH DAY OF MAY 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCI Arb.

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.

