



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyakundi v Republic (Criminal Appeal 12 of 2020)  
[2025] KECA 1242 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1242 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 12 OF 2020  
JM MATIVO, PM GACHOKA & WK KORIR, JJA  
JULY 11, 2025**

**BETWEEN**

**FREDRICK NYAKUNDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nakuru  
(Prof. J. Ngugi, J.) dated 30th April 2020 in HCCRA No. 96 of 2017)*

**JUDGMENT**

1. The appellant, Fredrick Nyakundi, together with David Mbako, were charged with the offence of gang rape contrary to section 10 of the [Sexual Offences Act](#). The particulars of the offence were that on 20<sup>th</sup> February 2016 at [Particulars Withheld] in Njoro Sub-County within Nakuru County, they unlawfully and with common intention gang raped WK an adult aged 25 years. They also faced an alternative count of committing an indecent act with an adult contrary to section 11 (A) of the [Sexual Offences Act](#). The particulars of the offence were than on the same day and in the same place, the appellant and his co-accused person unlawfully and intentionally touched the vagina of MWK an adult aged 25 years with their penises.
2. When arraigned before the trial court, they pleaded not guilty to the charges. After a full trial, they were both convicted of the offence of gang rape. They were each sentenced to 10 years imprisonment. Aggrieved, both appealed before the Nakuru High Court in HCCA No. 96 of 2017.
3. On 27 January 2020, the respondent informed the High Court that they wished to serve a notice of sentence enhancement. It was subsequently confirmed on 27 February 2020 that the notice had been served, to which the appellant and his co-accused confirmed in affirmation. The first appellate court cautioned them on the dangers of proceeding with the appeal should the conviction be found safe. They confirmed they understood and expressed willingness to proceed with the appeal.



4. In his judgment dated 30<sup>th</sup> April 2020, Prof. J. Ngugi, J. (as he then was) found that the appeal filed on the conviction had no merit. The conviction was upheld. On sentence, the learned judge found that the prosecution's bid to enhance the sentence was successful. In the circumstances, and taking into account the aggravating circumstances, the sentence of the appellant and his co-accused was enhanced to 20 years imprisonment.
5. The appellant is aggrieved by those findings. He filed his undated notice of appeal lodged on 20<sup>th</sup> May 2020. He also filed his memorandum of appeal dated 20<sup>th</sup> May 2020 which raised fourteen grounds disputing the findings by the learned judge. We have taken the liberty to summarize those grounds as follows: That several Articles of *the Constitution* that guarantee the right to a fair trial were violated; that the Judge enhanced his sentence on a defective charge sheet contrary to section 214 of the *Criminal Procedure Code*; that the sentence was enhanced without due regard to procedure; that the evidence of the prosecution was marred by inconsistencies, inadequacies and contradictions and could not therefore sustain a conviction; that the prosecution failed to discharge the burden of proof to the required standard that he had committed the offence of gang rape; that his defence and written submissions were improperly rejected; and that the prosecution witnesses exonerated him from the offence. For those reasons, he prayed that his appeal be allowed, the conviction be quashed, and his sentence be set aside.
6. The appeal was heard on 28<sup>th</sup> April 2025 through the virtual platform. The appellant was present and represented himself while the respondent was represented by Mr. Omutelema, Senior Assistant Director of Public Prosecutions. The appeal was heard on the basis of the parties' written submissions that were orally highlighted.
7. In his written submissions dated 14<sup>th</sup> August 2024, the appellant submitted that the learned judge erred in enhancing his sentence when he lacked the jurisdiction to do so. He submitted that since they were illiterate and were not represented by an advocate, they suffered a miscarriage of justice. He urged this Court to reverse the sentence to 10 years imprisonment since there was no cross appeal.
8. Turning to the conviction, he contended that the ingredients of gang rape were not proved to the required standard because PW1's testimony was not corroborated by another witness. He raised issues with the medical evidence stating that it could not conclusively prove penetration beyond reasonable doubt.  
  
In his view, since the victim was an adult, she may have had previous consensual sexual intercourse thereby exonerating him from the offence.
9. The respondent opposed the appeal. It filed written submissions, a case digest and a list of authorities all dated 23<sup>rd</sup> April 2025. It submitted that all the ingredients of the offence of gang rape were proved beyond reasonable doubt. On sentence, it submitted that it served the appellant with a notice of enhancement of sentence to 15 years imprisonment. In the circumstances, the sentence given by the High Court was lawful. It prayed that the appeal be dismissed.
10. Section 361 (1) of the *Criminal Procedure Code* limits the jurisdiction of this Court sitting on a second appeal to matters of law only. This being a second appeal, it must be taken into account that the facts have been settled by the two courts below unless we reach the conclusion that the findings were not backed by evidence or are based on a misapprehension of the evidence or it is shown that the two courts demonstrably acted on wrong principles in making those findings or the conclusions are perverse [See



Augustine Mwenda Kiama vs. Republic [2006] KECA 236 (KLR)]. The Court in DVK vs. Republic [2023] KECA 930 (KLR) further held as follows:

“We must avoid the temptation of dealing with matters of fact. This mandate has received judicial pronouncements in many cases such as the case Michael Ngara Paul v Republic [2021] eKLR where this Court stated of that mandate:

“Being a second appeal our jurisdiction is limited by Section 361(1) (a) Criminal Procedure Code where we are to consider only issues of law if any are raised in the appeal but must not go into a consideration of facts which have been tried by the trial court and re-evaluated on first appeal unless we reach the conclusion that the findings were not backed by evidence or are based on a misapprehension of the evidence or it is shown that the two courts demonstrably acted on wrong principles in making those findings or the conclusions are perverse – Chemagong v Republic [1984] KLR 611.”

11. The prosecution called three witnesses in a bid to establish that the appellant committed the offence that he was charged with. The record before us shows that PW1 MW, the complainant, testified that on 6<sup>th</sup> February 2016, she was heading home at around 9:30 p.m. when she bumped into the appellant. She knew him very well. He beckoned her to go to him but she refused. The appellant, together with his co-accused then used a whip to assault the complainant. She was crying and could not scream. In the process, she fell down. Suddenly, a motorbike operator came to the scene. He then picked up the complainant, the appellant and his co-accused and they were all ferried to the appellant’s house. It was here that PW1 was gang raped. There was a lit candle in the house. PW1 tried to leave but was threatened with a panga.
12. The following day, PW1 left the appellant’s house and met her friend, W. She escorted her to the police station. She was then sent to the clinic where it was observed that she was bleeding. She was then given a P3 form and was informed that the appellant and his co-accused had been arrested. PW1 recalled that the appellant was known in the area as a habitual rapist. She had been warned about him. In fact, she ignored him when he called her for this very reason.
13. PW2 PC Rebecca Shuma testified that on 21<sup>st</sup> February 2016, the complainant came to Njoro Police Station to report that she had been raped by two persons known to her. She asked her to go to hospital where her P3 form was filled. She then conducted investigations, interrogated the witnesses and collected the evidence. Weeks later, the appellant and his co-accused were arrested and charged.
14. PW3 Jacob Chelimo, a clinician working at Njoro Hospital testified that on 22<sup>nd</sup> February 2016, the complainant went to their facility with a history of having been raped and assaulted by people known to her. He observed that she had pain in her thorax and abdomen, chest and upper limbs. She also had tenderness on her left arm, lower limbs and left thighs. The degree of injury was classified as harm. His conclusion was that she had been injured by a blunt object.
15. Observing her private parts, PW3 noted that her hymen was perforated. She had no injuries to her genitalia. There was also presence of pus cells and spermatozoa. He concluded that there was evidence of penetration. He produced the P3 form and the PRC (Post Care Rape) form that were adduced in evidence.
16. At the close of the prosecution’s case, the trial court found that the prosecution had established a prima facie case against the appellant and his co-accused. When placed on his defence, the appellant gave unsworn evidence. His testimony was that he was found at the stage and asked where his boss was. He was then arrested and taken to the police station. He was then charged with the present offence.



17. In order to sustain a conviction for the offence of gang rape, the prosecution must establish the following crucial ingredients as set out in section 10 of the *Sexual Offences Act*: penetration, the aspect of penetration was committed by more than one person with common intention, the positive identification of the perpetrators; and absent of consent from the victim.
18. Starting with penetration, section 2 of the *Sexual Offences Act* defines penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. Both courts below confirmed that from the medical evidence of PW3, there was presence of spermatozoa and that the complainant's hymen was old and perforated. She was seen in hospital on 22<sup>nd</sup> February 2016 and according to the evidence, the offence took place on 21<sup>st</sup> February 2016. We are satisfied, just like the two courts below that penetration was proved to the required standard.
19. Turning to the other ingredients, PW1 was empathic that she knew the assailants very well. She had seen them around and when they found her on the fateful night, they began to assault her before they took her on a motorbike to the appellant's home. His house was well lit with a candle. They then took turns to sexually assault her.
20. As rightfully held by the first appellate court, this was a case of recognition rather than identification. PW1 had no mistaken identity of the assailants. She gave a vivid description of the transpirations that unfolded that night. We find that the witness was truthful and both courts found no fault in her unwavering testimony.
21. We therefore find that the conviction against the appellant was safe. The prosecution proved that penetration had been committed by the appellant and his co-accused person with common intent to rape the complainant who had no intention to sleep with the appellant. The appellant's defence was considered but did not cast any doubt on the evidence of the prosecution. It was therefore properly rejected. The appellant also complained that his constitutional rights were violated under Articles 19 (3) (a), 20 (1), (2) & (3), 21, 22 (1), 23, 24, 25, 27 (1) & (2), 28, 29, 47, 48, 49, 50 (1), 50 (2) (a), (b), (c), (h), (j), (k) & (p) and 50 (4) . However, we note that those grounds were not raised in the first appellate court and therefore, we cannot consider the issue at this stage. As oft stated by this Court, at the appellate stage, the main duty is to consider whether the judgment of the court below is sound in law or not.
22. In view of the foregoing, we find that the appeal on his conviction fails and is accordingly dismissed.
23. The appellant was sentenced by the trial court to 10 years imprisonment. His unrelenting desire to appeal before the High Court, however, turned against him. The prosecution filed a notice of enhancement of sentence stating that the trial magistrate's sentence was illegal.
24. Under section 10 of the *Sexual Offences Act*, convicted persons shall be sentenced to at least 15 years imprisonment that may be enhanced to life imprisonment. The appellant was warned about the consequences of proceeding with the appeal should the conviction be upheld. The High Court, having found that his appeal on conviction was unmerited, enhanced his sentence to 20 years imprisonment.
25. In *JJW vs. Republic* [2013] eKLR, this Court explained the duty of Court and the prosecution regarding the enhancement of sentences:

“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.”

26. In this case, the prosecution filed a notice of enhancement of the sentence. The same was served upon the appellant before the matter was heard on 27<sup>th</sup> February 2020. During those proceedings, the court went further to warn the appellant of the consequences of proceeding with his appeal should the conviction be sustained. After explaining to the appellant, he confirmed that he understood and proceeded to prosecute his appeal.
27. We find that the High Court properly discharged its mandate and properly enhanced the sentence to 20 years taking into account the aggravating factors. The complainant was severely beaten with a whip and suffered grievous bodily harm. Thereafter, she was gang raped and threatened with a panga should she raise an alarm. We think that the sentence passed by the High Court was commensurate to the crime. Accordingly, we find that the appeal on sentence lacks merit and it is hereby dismissed. In essence, the appellant’s appeal fails in its entirety.

**DATED AND DELIVERED AT NAKURU THIS 11<sup>TH</sup> DAY OF JULY 2025.**

**J. MATIVO**

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**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb.**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

