



**Nchoe v Republic (Criminal Appeal 6 of 2020) [2025] KECA 1211 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1211 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAKURU**  
**CRIMINAL APPEAL 6 OF 2020**  
**JM MATIVO, PM GACHOKA & GV ODUNGA, JJA**

**JULY 4, 2025**

**BETWEEN**

**OLOSHOURA OLE NCHOE ..... APPELLANT**

**AND**

**REPULIC ..... RESPONDENT**

*(An appeal from the judgement of the High Court of Kenya at Narok (J. M. Bwonwongá, J) delivered on 25th September 2019 in High Court Criminal Appeal No 119 of 2017 Original Narok CM Criminal Case No. 149 of 2015)*

**JUDGMENT**

1. This second appeal was lodged by the appellant against the judgement delivered on 25<sup>th</sup> September 2019 by the High Court at Narok (Bwonwongá, J) in Narok High Court Criminal Appeal No 119 of 2017 which arose from the judgement of the Chief Magistrate's Court at Narok in Criminal Case No. 149 of 2015. The appellant was charged with three counts. The first count was that of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The second count was attempted rape contrary to section 4 of the Sexual Offences Act. The 3<sup>rd</sup> count was malicious damage to property contrary to section 339(1) of the Penal Code. All the offences were said to have been committed on 23<sup>rd</sup> January 2015 jointly with others before court. It was alleged that the appellant, armed with a Maasai club robbed RK of 4 mobile phones and cash and used actual violence against her; that he attempted to cause his penis to penetrate the vagina of RK without her consent; and that he damaged 2 doors, windowpanes and electric wires. After hearing, the learned trial magistrate found the appellant guilty in counts 1 and 3 but acquitted him of the charge in count 2. He was sentenced to death in respect of count 1 and sentenced to 3 years in respect of count 3.
2. The case against the appellant was that on 23<sup>rd</sup> January 2015 at 12.24 a.m. PW2, RKK, was sleeping in her house when she was awoken by the incessant loud barking of her dog. She got up, sat on the bed and heard the sound of a person landing on the ground. Suspecting that the person had scaled her low stone wall, she lit up the solar bedroom light and tried to call her neighbours but failed to get



them as their phones were switched off. In the meantime, the intruder, who according to her was the appellant, jumped on the roof and interfered with the solar panel as a result of which the lights started dimming. She then called her husband, who was away and alerted him about the ongoings and the husband advised her to raise alarm by screaming which she did. The appellant then came down from the roof, picked stones and smashed the windows where she was while threatening to shoot her with a gun forcing her to dash to another room while still screaming. The same thing happened when she went to a third room. She took her children and hid them in her bathroom. The appellant then broke the front security light.

3. At this point the appellant was trying to break down the kitchen door threatening to kill her and the children for raising alarm. When the appellant was almost succeeding, she told him to enter and take whatever he wanted but spare their lives. Upon gaining entry, the appellant hit her with a metal bar on the leg and she fell. The appellant demanded for money and dragged her to the bedroom where she gave him her purse from which the appellant took Kshs 5,000. He also took PW2's two phones and demanded for other valuables. Frustrated that he was unable to get what he demanded, he took PW2 to the bedroom with an intention of raping her but she pleaded with the appellant not to do so since her children were in the room. As a result, the appellant pulled her out of the bedroom to the kitchen where he left his Maasai shuka and the metal bar on the table and dragged her to the veranda and ordered her to strip. As he went to smash the security light, PW2 ran and locked the kitchen door and together with her children locked herself in another bedroom. Without the metal bar, the appellant was unable to open the door despite attempts to do so.
4. Suddenly, PW2 heard the sound of 4 motorcycles and the appellant fled. The motorcyclists turned out to be her neighbours who were later joined by the police. Upon arrival, the police took the shuka and metal bar and her torn T- shirt. She was told to go to the police station to report the incident which she did the following day at Narok police station in which she described the appellant. The appellant had been in the house for between 45 minutes and one hour. She then went to the hospital where she was treated and the P3 form filled in.
5. A week later PW2 was called to the police station for identification parade from which she picked out the appellant.
6. In cross examination, PW2 explained that the electric lights were on during the attack and that she gave a full description of the appellant. She recalled that the appellant had a scar on his face and held her by the neck as they went round the house.
7. It was her evidence that he noted blood spots in the kitchen area and the veranda which she suspected the appellant sustained from a broken window. The police, according to her, took the blood samples for analysis before she was permitted to clean the place after the police took photographs of the scene.
8. PW2 was treated at Narok County Referral Hospital on 23<sup>rd</sup> January 2015 by PW5. On examination it was confirmed that she had a torn T-shirt with swollen feet and bruises on her left knee and was limping. The approximate age of the injury was 11 hours and the probable weapon used was a blunt object. PW2 disclosed that she was assaulted by a person who was known to her but did not name the assailant.
9. PW4 testified on behalf of Cpl Henry Kiboma, the scene of crimes officer who visited the scene on 23<sup>rd</sup> January 2015 and took 8 photographs which were processed and exhibited in court. PW1, a government analyst from the Government Chemist analysed the DNA from the blood samples of the appellant and compared it with the blood samples from the scene and concluded that the samples belonged to the appellant.



10. The identification parade was conducted by PW3 on 30<sup>th</sup> January 2015 on the request of the OCS, Narok police station. The parade comprised of 8 members of heights and general appearance as the appellant, to whom the nature and purpose of the parade was explained and agreed to take part therein. The appellant's rights were explained to him and he stood between members number 4 and 5. PW4 then called PW2 and informed her that there could be or could not be the suspect in the parade and if he was there, PW2 could touch him. PW2 went straight and picked out the appellant by touching him. The appellant had no problem with the parade and only complained that he had been in the cells for long and signed the form.
11. PW6, on 28<sup>th</sup> January 2015, was in his police quarters at Narok when he was informed by his colleague that two wanted suspects had been spotted around Olpopong area. In company of another colleague, the trio proceeded to the area where they met a police informer who had sighted the suspect in a changáa den. Inside the house they found people drinking the illicit alcohol and while other people escaped, they apprehended two men whose description they had been given by the informer, one of whom was the appellant. PW7, took over the investigations from the previous investigating officer and as a result, his evidence did not reveal much.
12. Upon being placed on his defence, the appellant, in his unsworn statement, stated that on 28<sup>th</sup> January 2015 he left his house in the morning and went to town for his activities which he finished at 4pm. On his way back home, he passed by the chang'aa den where he found two ladies and was served. Shortly at 6.30pm police officers arrived and he, together with one Nyangumi were arrested and taken to the police station. According to him, he was booked for the same offence which Nyangumi faced before escaping from custody. The following day Nyangumi was charged with the said offence while he was left in cells for 6 days. On the 6<sup>th</sup> day, he was arraigned in court and charged with an offence he had nothing to do with. According to him, PW2 had seen her before the identification parade was conducted. It was his evidence that he was charged with the offence because he declined to give the investigating officer money.
13. Aggrieved with the decision of the learned magistrate,, the appellant lodged an appeal to the High Court complaining: that the learned trial magistrate erred both in law and in fact by basing his conviction on the evidence of visual identification that was not free from the possibilities of error; that the learned magistrate erred in law and in fact by basing his conviction on the evidence of identification parade which was flawed and had no evidential value; that the learned trial magistrate erred in law and in fact by convicting him on the evidence of PW1 but failed to note that the evidence was not obtained lawfully and was doctored to fix him; and that the learned trial magistrate erred in law in failing to give the reasons as to whether his defence was accepted or not.
14. After hearing the appeal, the learned Judge found the appeal against conviction unmerited and dismissed it but allowed the appeal against the sentence, substituting the death sentence with life sentence.
15. Still dissatisfied with the judgement of the High Court, the appellant is challenging that decision. When the appeal was called out for plenary hearing on 26<sup>th</sup> March 2025, learned counsel, Mr Owuor, appeared for the appellant while learned Assistant Senior Director of Public Prosecution, Mr Omutelema, appeared for the respondent. Both counsels filed their written submissions which they adopted in their entirety.
16. From the submissions filed by Mr Owuor, it is clear that save for grounds challenging the sentence, all the other grounds which had been identified by the appellant in his memorandum filed by himself were dropped. We must say that the decision to do so must have been informed by the fact that some



of the grounds raised by the appellant were not raised before the High Court and obviously were not properly taken before this Court for the first time.

17. It was submitted on behalf of the appellant: that the imposition of the life imprisonment was unjust and manifestly excessive considering the circumstances of the case such as the nature of the injury sustained which was classified as harm; that death and life sentences should be reserved for the highest and most heinous levels of robbery with violence; that the learned Judge should have considered the fact that the appellant only used threats and reliance was placed on the case of *Swaley Muhaya Lubanga v Republic* [2021] eKLR where the court took into account the fact that no fatal or serious injuries were sustained and opined that a term of imprisonment rather than a death sentence was more appropriate; that this Court in *Jackson Wanyoike Njuguna & Ano v R* [2019] eKLR substituted a death sentence with 15 years' imprisonment in a robbery with violence conviction where the victim was grievously injured; and that that this Court should revise the sentence in the circumstances taking into consideration the number of years the appellant had spent in custody.
18. Opposing the appeal, the respondent submitted: that, based on the cases of *Benard Kimani Gacheru v Republic* [2002] eKLR, and *John Muendo Musau v Republic* [2013] eKLR, sentencing is a matter of discretion whose exercise must depend on the facts of each case hence the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle; that the trial Court sentenced the appellant to death in count 1 which sentence was set aside by the 1<sup>st</sup> appellate court and a sentence of life imprisonment imposed; that the sentence in this case cannot be said to be manifestly harsh and excessive since the statutory maximum punishment is death; that there were aggravating circumstances justifying the imposition of the sentence; the learned Judge exercised his discretion judiciously, acted on the right principles and considered all material factors; that in any case, the learned Judge was right in observing that the appellant never appealed against the sentence; that since in this case, the High Court did not enhance the sentence, an appeal does not lie against this sentence; and that the appeal should be dismissed in its entirety.
19. We have considered the above submissions.
20. 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.
21. By dint of that section, the jurisdiction of this Court on a second appeal is confined to matters of law. Section 361 (1)
  - (b) of the Code bars us from entertaining appeals against sentence unless the subordinate court had no jurisdiction to pass the sentence or the sentence was enhanced by the first appellate court. None of these factors apply to this appeal since the sentence was reduced on the first appellate court and it is not contended that the trial court had no jurisdiction to pass the sentence. This position was recently restated by the Supreme Court in *Republic v Mwangi*;



Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) thus:

“the Respondent’s appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal’s jurisdiction.”

22. Whereas, the Supreme Court has held that in murder cases, courts have discretion to hand down a sentence other than death, the same Court is yet to make a determination as regards the other offences where the death sentence is, prima facie, mandatory. Until then, the Apex Court has held that such sentences must be imposed. As unpalatable as the circumstances may seem, we are bound by the opinion of the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (supra) where the Court, while alluding to trends in other jurisdictions, held that:

“(62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.”

23. Accordingly, we have to down our tools.

24. The appeal is in those premises dismissed.

**DATED AND DELIVERED AT NAKURU THIS 4<sup>TH</sup> DAY OF JULY, 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**

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**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

