Benjamin v Republic (Criminal Appeal E114 of 2021)
[2025] KEHC 11267 (KLR) (Crim) (29 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11267 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E114 OF 2021

AM MUTETI, J

JULY 29, 2025

BETWEEN

ARKETUM KIBET BENJAMIN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant Arektum Benjamin was tried and convicted for the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006.

2. The appellant together with one Julius Juma were charged that on the night of 14th and 15th August 2018 at Central Police Lines in Nairobi within Nairobi County, the two intentionally and unlawfully caused their respective penis to penetrate the vagina of D1 without her consent. D1 Testified as PW1.

3. The appellant was the 2nd accused in the Lower court and both accused persons were convicted of the offence of gang rape and sentenced to serve 7 years imprisonment.

4. The state through Peris B. Ogega principal prosecution counsel filed a notice of enhancement of sentence under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. The notice stated 12th May 2025 filed and served upon the appellant on the 15th of May 2025.

5. The sentence for gang rape under Section 10 of the sexual offences is a minimum of 15 years imprisonment and the court may in its discretion impose a life imprisonment.

6. The section reads;-

   10. Gang rape

> Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

The state has strongly argued that the case merits a reconsideration of the sentence arguing that the sentence of 7 years imposed by the trial court was an illegal sentence and this court has a duty to correct the error.

7. The appellant was duly informed of the option of withdrawing the appeal but he elected to pursue the appeal which is well within his right under the law.

8. The appellant challenged the decision of the learned Honorable magistrate on the following grounds:-

   i. That the Learned trial magistrate erred in law by sentencing the appellant to 7 Years imprisonment whereas there was no sufficient evidence to warrant the said conviction and sentencing

   ii. That the learned trial magistrate arid in law failed to take into consideration that the prosecution had failed to prove their case beyond reasonable doubt.

   iii. That the learned magistrate and in law and in fact in proceeding to convict the accused despite evidence in record pointing to an acquittal.

   iv. That the learned trial magistrate erred in law and in fact by relying on contradicting testimonies of the prosecution witnesses in finding the accused guilty.

   v. That the sentence is harsh, unwarranted an excessive in the circumstances

Analysis of the Evidence

9. The duty of this court as a first appellate court is well settled in the case of Okeno vs Republic (1972) E.A 32 where the court held:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

10. PW1 Inkumburwa Delphine the complainant testified that on 14th August 2018 she went to Eastleigh section of Nairobi to buy clothes and on her way back home at about 7:00pm while at the Kencom stage awaiting to board a matatu she was accosted by 4 men.

11. Two of them were in police uniform and the other two were in civilian wear. She testified that she saw the appellant who was in a maroonish suit.

12. The victim further informed the court that the 4 men demanded that she identifies herself and open the bag that she was carrying. She gave them her refugee ID No. 89XXX1 which had expired on 26th March 2017.

13. She went on to testify that she was forced into a small white car and taken to Central Police Station a place she has never been to before. The victim further narrated that she was taken into a small wooden room which she thought was a cell and Kshs.10,000 which she had was taken away from her.

14. According to her she was told to remain in the room to await the boss who would come and deal with her. 20 minutes later the two uniformed officers came they demanded that she removes her clothes which she refused. It is then that she says one of the officers slapped her and a small gun was opened and she was threatened with death.

15. She went on state that she got scared and she removed her clothes and they raped her. She stated:

> "*walinitomba wakasema ukiongea hapa tutakuua walianza mmoja mwingine kufuata. Mmoja alitumia condom, akaniambia nikiongea wataniua nikaona kweli wataniua kwa sababu* no one knows I was there.
>
> Time passed then later in the night the two accused persons who were not uniformed came back and they slept on me and " *wakanitomba*" the accused 1 is the one who began. Then accused 2 did the act. Accused 1 is the one who used a condom. Accused 1 and accused 2 each had sex with me in turns. When they finished. Accused 2 left and went away. Accused 1 remained behind. (emphasis mine)
>
> The next day as the day was breaking accused 1 left in the morning. Before he left, he took a phone and never talked and left.
>
> Later accused 2 came back she points at him positively identifying him came back and entered my cell while drunk and said he could return me to my country. I just requested " msamaha" he a then came and slept on me "*akanitomba tena*. Then he late fell asleep.
>
> It never knew the time but it was the next day. I then decided that I should run away while he was asleep. I took photographs from the phone which I picked then I sent the photos to my neighbours to let them know if I died who I was with. I was even scared when I managed to run away to report to the police when I managed to escape on 15th night, I did not have transport but approached woman to help me and she paid my ticket and I went home to my kids who slept hungry. I decided to go to the hospital first and passed my house. At the hospital they refused to give me medicine unless I gave them 1000/= only. I went back to my neighbor who I sent photos to and requested for help. My neighbor was able to see the numbers from the phone I called with and was able to get the names of the perpetuators. The nos. are 07XXXX0350 in the name of Julius Juma then 070XXXXX77 in the names Arketum Kibet Benjamin. I went back home untreated because I didn't have cash. I returned the following day and decided to report to the refugee offices called RAS - Refugee Affairs secretariat seeking assistance. They told me they first need to ensure I got medicine and be treated. They called the officer HIAS WHICH communicated with the hospital where I was that treated free of charge."

16. The victim further testified that she reported the matter to a UNHCR Protection officer after she realized that the lawyer, she had been in contact with was taking too long to have the matter reported to the police. It was after her report to the protection officer that she was taken to Central Police Station where she met a lawyer and some female police officers who talked to her badly telling her that those

men who had sexually assaulted her were her husbands. She maintained that she never knew the men before but she could recognize them because she had photos of one of them and that she had stayed with one of the men for a period long enough to enable her to easily identify him if she saw them.

17. She was later called to an identification parade where she was able to pick the 1st accused. Further PW1 testified that she was later called to the police station where she found the 2nd accused (Appellant) had been arrested and he was among those who raped her.

18. PW1 produced a PRC Form MFI-3 and P3 MFI-4. She also identified a photograph of the appellant who was facing upwards with his eyes closed in the photo.

19. Notably, in the bundle of photos produced PW1 was a selfie whereof the victim PW1 , the appellant and the 1st accused took on a bed together and the photo was marked MFI- 5 (K). in which the appellant

20. PW1 testified that she was traumatized by the incident and whenever she sees a police officer she feels like attacking him.

21. Upon cross-examination she maintained that the two uniformed police officers handed her over to the two accuse persons in this case and all of them claimed to be police officers.

22. Further, PW1 testified : "Accused 2 (appellant) when he finished raping me I took photos after they returned for the third time he raped me. When they fell asleep."

23. According, to PW1 she took photos as evidence just in case she was killed there since she was alone.

24. The prosecution also called PW2 who testified that he was attached at parliament police station but previously he stayed at Central Police Station Lines. According to him he was called by one Sergeant Bitok to Central Police Station and upon arrival Sergeant Bitok inquired from him whether he knew of the people who were living in the house he stayed before. The witness said that he was given which he called and was answered by Julius Juma the 1st accused in the lower court. That was when he learned from Sergeant Bitok that there was a report of a rape incident that had been made at the station. The witness as at the time of the report of the incident he had moved out of the house but confirmed that the 1st accused used to come and visit him in the same house.

25. PW3 was the parade officer who conducted the identification parade in which the appellant was positively identified by PW1 who confirmed that he was among the persons who had raped her. The witness produced the identification parade form as MFI-6 .

26. In his evidence he stated that the appellant expressed satisfaction in the manner at which the parade was conducted and that he did not protest at any stage of the parade. The witness was categorical that when PW1 identified the appellant she touched him and said "ni huyu".

27. PW4 conducted the parade in respect of the appellant's co-accused.

28. PW5 Sergeant Joel Bitok the officer in charge of Police quarters at Central Police Station testified that he was called by the Investigating Officer in this case and introduced to the complainant at the station who took him to the scene where she had reported the gang rape happened. That house was occupied by one Inspictor Kabucho who upon being summoned indicated that he lived in the same house with the appellant's co- accused. The scene was photographed and documented by Scenes of crime personnel.

29. PW6 was Peninah Agwenyi a clinical officer at MSF Trans. She testified that she examined PW1 in 16th August 2018 who complained that he had been sexually assaulted on 14th to 15th August 2018. She testified that the victim complained that she was gang raped by 4 men who raped her the whole night and only one of the men used protection.

30. According to her, during the examination, the vagina was white and had whitish foulsmelling discharge. The hymen had multiple old tears. She tested negative for HIV and pregnancy and a high vaginal swab was taken that had spermatozoa. A urinalysis also had spermatozoa. She put her on post-exposure prophylaxis, sexual transmitted infectious prophylaxis, emergency contraceptive pills, vaccine and booked her for counselling.

31. The witness produced the PRC Form as Exhibit No. 3, P3 Form as Exhibit 4 and a letter from MSF as Exhibit 8.

32. PW7 Corporal Wilfred Mwololo of DCI Central testified that he was called in by the DCI of Central to assist in the investigations which involved the appellant a KDF officer. The appellant was brought to the station and an ID parade done and was also taken for a DNA sampling at the government chemist. He confirmed that the appellant participated in the parade but he was not allowed to be present.

33. PW8 Corporal Loise Kurgon testified that the complainant presented to the two mobile numbers during the recording of her statement which she claimed the accused persons who raped her had called using her phone. One of the numbers turned to be one of the applent's co -accused Julius Juma. The witness explained that PW1 indicated to her that she had taken time before reporting the incident because she did not know where to go since the incident had Taken place at the police station and she was a refugee in this country.

34. Lastly, the prosecution called the government analyst one Emily Okworo who testified that upon analysis of the Exhibits presented to her, she only managed to generate DNA profile that matched the DNA of the 1st accused Julius Juma. The results were negative in regard to the appellant.

35. PW9 was Inspector Isaac Thyaka who produced 29 photographs taken by the complainant using her phone that he downloaded and printed. He also tendered a certificate in respect of the same and confirmed that the photos were not interfered with.

36. Notably, those photos included photo marked MFI-5 (k) showing a woman and a man sleeping and the lady awake. That is the photo earlier on referred to by PW1 as having been taken while in bed with the appellant.

37. The witness further confirmed that the photos were selfies taken by the complainant.

38. The trial court upon reviewing the evidence above concluded that the appellant had a case to answer and he was put to his defence.

39. In his defence, the apellant testified as DW3 he said that he worked with the Kenya Defence Forces as a Senior private at the Gilgil barracks. He went on to testify that while in Gilgil he got a call from Madisson insurance informing him that he had a cheque for his bonus which was ready for collection from Madisson Insurance branch Tom Mboya Street Nairobi. He stated that he called his cousin the 1st accused to go and pick the cheque and keep it with him until such time he would be able to go and collect. He later traveled to Nairobi and proceeded to Red Robin Restaurant where the 1st accused had told him he had left the cheque. He started drinking and while there he was joined by a lady whom he says he had earlier on met in 2018 and the lady requested him to buy her Del monte juice which he did as he continued drinking.

40. According to the appellant he picked a quarrel with the complainant and the bar man demanded that they clear their bill before leaving the bar but he continued drinking and at around 9a.m on 13th of August he was joined by the 1st accused with whom they went together with the bar man to cash the cheque so that they could settle the bill.

41. The appellant went on to state that he was able to cash the cheque, settled his bill and gave some one thousand Kenyan shillings to go and pay the lady whom he had left behind at the bar. According to him , he left Nairobi at around 2 p.m. on 13th August and got to Gilgil at 5.00p.m. He resumed duties and continued working until much later when he says he was arrested from his work station and brought to DOD where he was informed that there was a lady claiming he was involved in gang raping her. He denied any involvement of the alleged gang rape and maintained that on the night of 14th and 15th he was not anywhere near Nairobi Central Police Station. He insisted that he was on duty at the time.

42. He denied ever sleeping with the complainant or even going anywhere with her. He also denied ever sleeping at the police station.

43. In his defense he called DW4 Corporal Anna Obara who testified that according to the records the appellant was on duty beginning 13th August 2018 the entire week.

44. She however said upon cross examination that officers on duty do not sign anywhere when leaving the duty station and the document she produced as DMFI-1 did not bear a letter head from the DOD. The same was also not prepared by her. That put into serious doubt whether such document could be relied as an official record of the Department of defense.

45. DW4 went on state that the document was not stamped and that officers do not sign anywhere when leaving the barracks.

46. The evidence recorded above was analyzed by the trial magistrate who arrived at the conclusion that the appellant was guilty of the offence of gang rape and convicted him accordingly.

47. This court is not bound by the conclusions reached by the trial court but through its own analysis of the evidence is duty bound to draw its own conclusions whilst fully cognizant of the fact that unlike the trial court, this court did not have the advantage of hearing nor seeing the witness testify. See Okeno vs. Republic [1972] EA 32 where the Court of Appeal set out the duty of a first appellate court as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

47. The case against the appellant is one which rests on a number of considerations such as identification of the appellant as being one of the persons who were involved in the gang rape. The complainant in this matter had no difficulties in picking out the appellant in an identification parade after he was arrested. Notably, when the appellant was identified at the parade he made no comment on the same and neither did he raise any complaint as to why the complainant would have picked him.

48. The importance of his voluntary participation in the parade becomes even more clearer when the court weighs his defense against that of the prosecution evidence. In his defense, he attempted to introduce a narrative that he had an encounter with some lady in a bar in town the night of 12th August 2018 and

though he did not affirmatively identify the lady to be the complainant, the inference that this court draws from that limb of his defense is that he was attempting to lay a basis as to why the complainant may have identified him during the parade.

49. However, it is the view of this court that if the appellant wanted the court to belief that he was simply framed, nothing would have been easier for him than to say that during the identification parade and also raise it during the cross-examination of prosecution witnesses.

50. The appellant was also not able to explain how a photo of him ended up with the complainant if at all he never slept with her at any time or as alleged by the complainant. The appellant had no duty in law to prove anything but if at all he wished to have the court belief his evidence in defense, he ought to have explained that bit of the complainant having his photo in her phone if at all he was to get the benefit of the court believing that the whole case was a frame up,

51. The appellant under Section 107 of the *Evidence Act* the duty squarely lay on the appellant to explain the circumstances under which the complainant got his photo in her phone. The fact of their interaction was a matter well within his knowledge thus in the absence of any other explanation, the court would be inclined to believe the evidence of the complainant that the photo was taken the night of the ordeal.

52. The identification of the appellant was therefore established beyond a reasonable doubt as being one of the persons who gang raped the complainant. The duration that the complainant spent with the appellant and his accomplices was sufficient to favor positive identification. See R vs Turnbull 1977 Q.B 224.

53. As was held in Charles O. Maitanyi v Republic, {1988-92} 2 KAR 75 it is necessary to test the evidence of a single witness respecting to identification, and, absence of collaboration should be treated with great care. In Kariuki Njiru & 7 others v Republic Criminal Appeal no. 6 of 2001 (Unreported).the court held that evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. In this case this court has scrutinized the evidence of the complainant and there is no iota of doubt in this court's mind that the witness was coherent, believable and consistent in her testimony regarding identification of the appellant.

54. The identification happened in circumstances that would eliminate any possibility of mistake and the latter identification during the parade removed any possibility of doubt on the part of the complainant as to the identity of the man who participated in the gang rape.

55. The ingredient of identification having been satisfied the court now turns to the element of the number of offenders which is a key ingredient of the offense of gang rape. The complainant testified that she was accosted by four men in town, arrested and taken to central police station where she was raped over-night and this happened in turns. The appellant and his co-accused in the lower court were identified as being some of the men who arrested the victim and eventually gang raped her. The ingredient of being more than one was adequately proved thus offence of gang rape was established.

56. The victim had medical evidence to show that indeed she was raped. The evidence of Pw6 left no doubt that the victim was sexually assaulted as she had spermatozoa in her vagina and the only thing that the witness said he could not tell was whether the sexual intercourse was consensual or rape. The complainant clearly stated she was a victim of gang rape thus the ingredient of penetration without consent was equally established. The penetration from the totality of evidence was obtained by force, threats and intimidation. The lack of consent was adequately proved in this courts view.

57. Notably, the ingredients of gang rape are that the offence must have been committed in the company of others and the offence was committed with common intention. This court had due regard to the case of Republic vs Oyier (1985) KLR where it was held that lack of consent was an essential element of rape. As PW 1(sic) did not consent to having sex with the Appellant and one of his Co-Accused persons, the offence of gang rape was established.

58. The victim here did not consent to sexual intercourse with any of the members of the gang that included the appellant.

59. The incident happened at a police station of all places and involved persons who were supposed to have been protecting the public. Nothing could have been more intimidating to the complainant than that. The fact that she was a foreigner in the hands of the police and held in a police line by itself would have intimidated the victim so much that she would not have been able to resist any of the gang members as they went about gang raping her.

60. Police stations and their lines should ideally be places where anyone in distress can seek refuge but the appellant and his accomplices converted it into a sexual molestation center where they would utilize state provided facilities to commit such a heinous crime completely defiling the station and betraying the trust placed on our law enforcement agencies. It was a regrettable incident to say the least.

61. The complainant narrated vividly how the 1st and 2nd accused(appellant) had forcefully had sex with her and the threats they issued to him of repatriation to her home country. The complainant cannot be said to have had any difficulties in identifying the appellant and his accomplices.

62. The offence of gang rape was adequately proved in all its ingredients.

63. The appellant offered the defense of alibi alleging that on the m,aterial day he was at work in Gilgil Barracks but other than his word there was nothing in form of records at work that could positively confirm that he was on duty.

    The witness he called (DW4) in his defense attempted to produce some hand written notes that were not made by her in a bid to show that the appellant was on duty all that week. However, the document did not bear the Department of Defence letter head or logo, the same was not duly stamped thus in this court's view was a mere sheet of paper that could not suffice to displace the prosecution evidence tendered through the complainant placing the appellant at the scene of crime.

64. The witness told the court that there was no record at the barracks that officers would sign whenever they left their work station. The evidence therefore was of no material assistance to the defense of the appellant. The court noted that the witness DW4 testified that the document she produced (known as parade state) did not bear any stamp to show that it originated from Gilgil barracks.

65. The court has carefully weighed the defense of alibi tendered by the appellant and his witness. The court finds that the defense was not capable of displacing the evidence of the complainant Pw1 who remained very consistent throughout her testimony even under intense cross-examination that she was raped by the appellant together with his co-accused in the lower court.

66. The incident of rape took long enough to the extent that the appellant as per the evidence of Pw1 found some time to sleep! That certainly favoured positive identification. In R vs Cherop Akinei and Another (1936) 3 EACA 124 and Chila vs. Rep (1967) E.A 722,723(CA) the courts held that a conviction on uncorroborated evidence may be had if the court or jury, as the case may be, is satisfied after duly warning itself of the dangers of convicting on uncorroborated evidence, the truth of the complainant's evidence."

67. This court is persuaded that the complainant PW1 was truthful in her evidence and considering the totality of the circumstances of the case, the case against the appellant was adequately proved beyond a reasonable doubt. See also Stephen Nguli Mulili vs Republic [2014] KECA 408 (KLR)

68. The appellant did not present any evidence that could even remotely suggest that the victim framed him up. The medical evidence though did not connect the appellant directly with the offence provided circumstantial basis for belief in the truth of the complainant's evidence given that the appellants co-accused in the lower court who raped the complainant together with the appellant had his DNA obtained from the beddings found at the scene where the rape incident happened.

69. The court also notes that the appellant and the co-accused were not strangers to each other and the presence of the DNA evidence connecting the appellants co-accused to the scene corroborated the complainant's evidence that she was gang raped at the scene and among the persons was the appellant and the co-accused.

70. The alibi defense by the appellant was brought up so late in the day rendering the same unbelievable. The defense was not raised throughout the cross-examination of the prosecution witnesses more so the complainant who testified that the appellant raped her more than once and she took photographs of him while asleep. In Eric Otieno Meda vs. Rep [2019] eKLR the Court of Appeal laid out the principles to guide the court in considering an alibi defense and among the principles is that an alibi defense needs to be raised at an early stage so as to allow it to be tested, especially during cross-examination of the trial. The position was also restated in R vs Sukha Singh s/o Wazir Singh $ Others [1939] 6 EACA 145.

71. The appellant thus denied the prosecution the opportunity to test the alibi thus the submission by counsel for the appellant that the document produced by DW4 was not displaced cannot stand. In any event this court has substantively dealt with that document elsewhere in this judgment and found that it added no value to the appellant's case.

72. The appellant did not address the issue of the photographs in his defense at all. Even though he was under no duty to say anything in defense, he was the only person who could in law state how his photographs ended up with the complainant. That was a matter within his special knowledge.

73. The appellant through counsel urged the court to find that the evidence of Pw1 was contradictory and as a result allow the appeal.

74. The court has scrutinized the evidence and there is absolutely no material contradiction noted in the evidence of the prosecution that could vitiate the trial.

75. The court therefore upon analyzing the evidence on record and the law finds that conviction against the appellant was safely arrived at and that this court has absolutely no reason to interfere with the same.

76. Turning on to the issue of sentence, the prosecution argued that the sentence of 7 years imposed by the trial court was an illegal sentence and that the same ought to be set aside and the proper sentence in law imposed.

77. The prosecution filed and served a notice of enhancement of sentence dated 9th May 2025. The document reads a cross appeal and was filed more than 3years after conviction and sentence of the appellant. The same was filed without leave as argued by the appellant's counsel. It follows therefore a cross appeal would not be entertained lawfully outside the period allowed for appeal if the leave of court is not sought before filing.

78. However, the court must ask itself this question, in the absence of a cross appeal, would the appellate court be entitled to enhance an illegal sentence where that is drawn to the attention of the court? The view of this court is that where an appellant appeals against both conviction and sentence, he opens the window for the court to look at the sentence and impose the correct sentence in law.

79. The court under Section 354 (3) .....

> Powers of High Court
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> (1) At the hearing of the appeal the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the court.
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> (2) The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.
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> (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—
>
> (a) in an appeal from a conviction— (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
>
> (ii) alter the finding, maintaining the sentence, or,
>
> (iii) with or without altering the finding, reduce or increase the sentence; or with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;
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> (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;
>
> (bb) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as High Court may think fit;
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> (c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other

order in relation to the matter, including an order as to costs, as the High Court may think fit;

(d) in an appeal from any other order, alter or reverse the order, and in any case may make any amendment or any consequential or incidental order that may appear just and proper.

(4) Subject to subsection (5), an appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, at the hearing of the appeal: Provided that where the appeal is on some ground involving a question of law alone, he shall not be entitled to be present except with the leave of the High Court.

(5) The right of an appellant who is in custody to be present at the hearing of the appeal shall be subject to his paying all expenses incidental to his transfer to and from the place where the court sits for the determination of the appeal: Provided that the court may direct that the appellant be brought before the court in a case where in the opinion of the court his presence is advisable for the due determination of the appeal, in which case the expenses shall be defrayed out of moneys provided by Parliament.

(6) Nothing in subsection (1) shall empower the High Court to impose a greater sentence than might have been imposed by the court which tried the case.

(7) Repealed by Act No. of 1969, Sch. [*Act No. 22 of 1959*, s. 35, *Act No. 13 of 1967*, First Sch., *Act No. 10 of 1969*, First Sch., *Act No. 5 of 2003*, s. 95.]

80. The prosecution in this matter appears not to have been sure whether to pursue a cross appeal or to simply move the court by way of a notice of enhancement of sentence. A notice of intention to enhance sentence was filed on 20th May 2025 and served upon the appellant. The matter was thus raised at the hearing of the appeal and the appellant's counsel decided to proceed with the appeal notwithstanding the notice.

81. The court is however inclined to proceed with the issue of sentence on the strength of notice of enhancement of sentence which has no timelines for filing.

82. The court took it that the appellant was not bothered about the consequences of his insistence on the appeal on sentence despite the warning given to him vide the notice of enhancement.

83. The court's duty under Article 159 of *the Constitution* is to do justice in accordance with the law. The appellant having elected to pursue the appeal on both conviction and sentence, he invited the court to look at Section 10 of the *Sexual Offences Act* No. 3 of 2006 and determine the appropriate sentence in line with the law.

84. The section provides a minimum sentence of 15 years and a maximum of life imprisonment. The minimum sentences under the Act have been held by the Supreme Court in Petition No. 018 of 2023 Republic Vs Joshua Gichuki Mwangi to be Constitutional and should be imposed in appropriate cases. The jurisdiction of this court to deal with the sentence having been triggered by the appellant vide his appeal, this court cannot shun its responsibility under the law to correct the apparent injudicious exercise of discretion by the trial court in sentencing the appellant and as a consequence set aside the sentence of 7 years and substitute it therefore with a period of 20 years imprisonment.

85. 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.

86. The appellant in this case was appropriately warned and he proceeded to pursue the appeal. He must bear the consequences as the law must be applied correctly and no injustice would be countenanced on account of a technicality. The cross appeal was made without leave thus the court has opted to disregard that and rely on the notice of enhancement of sentence which was duly served upon the appellant and during the hearing of the appeal he confirmed the same.

87. In the end the appeal on conviction is dismissed and the appeal on sentence succeeds to the extent that the illegal sentence of 7 years imprisonment is set aside and substituted therefore with a prison term of 20 years.

88. The sentence is informed by the fact that the appellant was an officer entrusted with the security of this country as a Kenya Defense Forces officer, he decided to abuse his position and committed an offence within the police lines a place where all go to seek help against criminals thus defiling the police station.

89. Our security personnel once they become part of the criminal gangs in society, all those tasked with law enforcement including the courts must rise up and respond firmly to deter others from such conduct.

90. I say no more.

91. The 20 years imprisonment shall be computed from the time he committed to prison on 15th April 2021.

92. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 29TH DAY OF JULY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Ndungu for Appellant

Ms Njoroge for the Respondent