

KENYA / JUDGMENT

COA; Republic (Respondent) [2026] KEHC 11200 (KLR)

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COURT

High Court

BEFORE

AM Hassan

CASE / FILE NUMBER

Criminal Appeal E005 of 2026

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COA; Republic (Respondent) (Criminal Appeal E005 of 2026) [2026] KEHC 11200 (KLR) (23 July 2026) (Judgment)

Neutral citation:

[2026] KEHC 11200 (KLR)

Republic of Kenya

In the High Court at Kisumu

Criminal Appeal E005 of 2026

AM Hassan, J

July 23, 2026

In the matter of

COA

Accused

and

The Republic

Respondent

(Being an Appeal from the Judgment by Hon. M Ochieng (SPM) on 18th December, 2025, in S.O.A No.54 of 2020)

Judgment

A. Introduction

1.This Appeal arises from the judgment by the Hon. M Ochieng SPM on 18th December, 2025 in S.O.A of 2020.

2.Vide a Charge Sheet dated 14th September, 2020, the Accused/Appellant herein was charged with the offence of Incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006, and in the Alternative Charge of committing an Indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The trial court heard the matter to conclusion after which the Appellant was convicted on the charge of Incest and was acquitted on the alternative charge under section 215 of the Criminal Procedure Code and sentenced to 20 years imprisonment.

3.The Appellant, being dissatisfied with the said judgement, appealed to this court on 29th January, 2026, and raised the following grounds of Appeal:-a.That the learned trial magistrate erred in law and facts by convicting the Appellant with inconsistent evidence theorizing conspiracy and fabrication against the Appellant because of marrying a second wife.b.That the learned trial magistrate erred in law and facts by convicting the Appellant and yet penetration was not proved beyond a reasonable doubt standard.c.That the learned trial magistrate erred in law by convicting the Appellant and yet the prosecution did not prove the discrepancies in birth certificate of the victim and date of occurrence of the offence that should have accumulated and tallied with the date of birth of the victim's child.d.That the learned trial magistrate erred in law and facts by convicting the appellant and yet the DNA results did not prove beyond reasonable doubts that the appellant was the father of the child given birth to.

4.The Appellant filed a record of appeal dated 21st April, 2026, and submissions dated 20th May, 2026. The Respondent on the other hand filed a Notice for Enhancement of Sentence dated 14th May, 2026, and its submissions.

B. Submission By Parties

Appellant's Submissions

5.The Appellant submitted that, notwithstanding the grounds of appeal set out in the Petition of Appeal, he urged the court to determine the appeal on the issues of the commencement date of the sentence and the need to accord him the least severe form of punishment permissible in law.

6.The Appellant contended that he was arrested on 11th September 2020, and remained in custody until 29th November 2020, when he was released upon approval of his bond terms. He further submitted that upon delivery of the judgment on 18th December 2025, the bond terms were cancelled and he was remanded in custody until 20th January 2026, when sentence was pronounced. According to the Appellant, the trial court took into account the period spent in custody and ordered that forty-seven (47) days be considered and deducted from the sentence imposed.

7.The Appellant further submitted that he spent close to five years attending court proceedings and endeavoring to prove his innocence, albeit unsuccessfully. He relied on Articles 22 and 27 of the Constitution of Kenya, 2010, as well as section 333(2) of the Criminal Procedure Code, and urged the court to consider the constitutional and statutory safeguards relating to fair treatment of accused persons.

8.The Appellant also invited the court to consider the equitable and humanitarian aspects of the case and urged that he be accorded a non-custodial sentence or such other lenient sentence as the court may deem just and appropriate in the circumstances.

Respondent's Submissions

9.The Respondent filed written submissions together with a Notice seeking enhancement of the sentence imposed upon the Appellant from twenty (20) years' imprisonment to life imprisonment.

10.On the first ground of appeal, namely whether the learned trial magistrate erred in law and fact by convicting the Appellant despite alleged inconsistencies, fabricated evidence, and discrepancies relating to the birth certificate produced in evidence, the Respondent referred to the complainant's birth certificate (Prosecution Exhibit 1), which confirmed that PW2, the complainant, was born on 22nd November 2003.

11.The Respondent submitted that although the complainant's birth certificate indicated her father as XXXXXXXX, thereby raising doubt as to whether the Appellant was her biological father, the evidence of PW4, a Government Analyst attached to the Government Chemist in Kisumu, resolved the issue. PW4 testified that he obtained DNA samples from the complainant, the Appellant, and Baby KO, and thereafter prepared a report dated 9th June 2021. The report established that the Appellant was the biological father of both the complainant and Baby KO.

12.On the second ground of appeal, namely whether the learned trial magistrate erred in law and fact by convicting the Appellant in the absence of evidence proving penetration, the Respondent submitted that the complainant gave direct and unequivocal testimony regarding the sexual acts complained of. Further, PW3, a Clinical Officer at Nyahera Sub-County Hospital, testified that she examined the complainant and completed the Post Rape Care (PRC) Form (Prosecution Exhibit 4) and Out-Patient Treatment Notes (Prosecution Exhibit 2), while the P3 Form (Prosecution Exhibit 3) was completed by her colleague, Seth Odero. The treatment notes indicated that at the time of examination, the complainant was approximately sixteen (16) weeks pregnant.

13.PW3 further testified that no abnormal physical findings were noted during the examination. The Respondent nevertheless maintained that the learned trial magistrate correctly found that the complainant's testimony, when considered alongside the medical and scientific evidence adduced, sufficiently proved that she had been defiled by the Appellant.

14. On the third ground of appeal, namely whether the learned trial magistrate erred in law and fact by convicting the Appellant despite the contention that the DNA results did not establish that he was the father of the child in question, the Respondent relied on the testimony of PW4, Polycap Lutta Kweya, a Government Analyst. PW4 testified that he obtained and analyzed DNA samples from the complainant, the Appellant, and Baby KO, and his findings conclusively established the biological relationship between the parties.

15. With regard to the legality of the sentence imposed, the Respondent relied on Section 20(1) of the Sexual Offences Act, No. 3 of 2006, and submitted that the sentence meted out by the trial court was lawful and in accordance with the provisions of the law.

C. Issues For Determination

16. Having considered the Petition of Appeal, the Record of Appeal, the Submissions by the Appellant and the Respondent, as well as the Notice for Enhancement of Sentence, the following issues arise for determination:-

- a. Whether the conviction of the Appellant for the offence of incest contrary to section 20(1) of the Sexual Offences Act was supported by the evidence on record.
- b. Whether the trial court complied with section 333(2) of the Criminal Procedure Code in sentencing the Appellant.
- c. Whether the sentence imposed by the trial court was lawful and whether there is any basis for this court to interfere with the same.
- d. Whether the Respondent has established sufficient grounds to warrant enhancement of the sentence imposed by the trial court.

D. Analysis Of The Issues For Determination

Whether the conviction of the Appellant for the offence of incest contrary to section 20(1) of the Sexual Offences Act was supported by the evidence on record

17. This being a first appeal, this court is obligated to reconsider and re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusions while bearing in mind that it neither saw nor heard the witnesses testify.

18. The duty of a first appellate court was set out in *Okeno v Republic* where the court stated that: “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence.”

19. The Appellant's grounds of appeal challenged the conviction on the basis of alleged inconsistencies in the prosecution evidence, lack of proof of penetration, discrepancies in the complainant's birth certificate and the DNA evidence. However, in his written submissions, the Appellant substantially departed from those grounds and instead concentrated on the issue of sentence and the period spent in custody.

20. Notwithstanding that departure, this court has independently re-evaluated the evidence on record.

21.The prosecution was required to prove the ingredients of the offence of incest under section 20(1) of the Sexual Offences Act, namely: The assailant is a relative of the victim, there was penetration or indecent act, there was positive identification of the perpetrator and proof of the age of the victim.

22.The complainant testified regarding the sexual acts committed against her. PW3, a Clinical Officer at Nyahera Sub-County Hospital, produced the treatment notes, PRC Form and P3 Form. The treatment records indicated that the complainant was approximately sixteen (16) weeks pregnant at the time of examination. The evidence of pregnancy, coupled with the complainant's testimony, constituted sufficient proof of penetration.

23.Further, PW4, Polycap Lutta Kweya, a Government Analyst attached to the Government Chemist, Kisumu, testified that he obtained DNA samples from the complainant, the Appellant and Baby KO. His report dated 9th June 2021 established that the Appellant was the biological father of both the complainant and Baby KO.

24.Although the Appellant questioned the particulars appearing on the complainant's birth certificate, the DNA evidence conclusively established the biological relationship between the Appellant and the complainant. The scientific evidence therefore removed any doubt regarding paternity and the prohibited relationship contemplated under section 20(1) of the Sexual Offences Act.

25.Having carefully perused the judgment and the entire record, this court finds that the learned trial magistrate properly analyzed the evidence and correctly identified and applied the ingredients of the offence. The conviction was founded on credible testimonial, medical and scientific evidence.

26.Accordingly, this court finds no merit in the grounds challenging conviction and upholds the finding of guilt entered by the trial court.

Whether the trial court complied with section 333(2) of the Criminal Procedure Code

27.The Appellant urged this court to consider the period he spent in custody before sentence was imposed.

28.Section 333(2) of the Criminal Procedure Code provides:“Subject to the provisions of section 38 of the Penal Code, every sentence shall be deemed to commence from and include the whole of the day of the date on which it was pronounced:Provided that where the person sentenced has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

29.The Court of Appeal in Ahamad Abolfathi Mohammed & Another v Republic emphasized that sentencing courts are obligated not merely to note the period spent in custody but to actually factor that period into the sentence imposed.

30.The record reveals that the Appellant was arrested on 14th September 2020 and remained in custody until 29th September 2020 when he was released on bond, a period of approximately fifteen (15) days.

31.Following his conviction on 18th December 2025, his bond terms were cancelled and he remained in custody until 20th January 2026 when sentence was pronounced, a further period of approximately thirty-two (32) days.

32.The total period spent in custody prior to sentence therefore amounted to forty-seven (47) days. A perusal of the sentencing proceedings demonstrates that the learned trial magistrate expressly considered and credited the Appellant with the said forty-seven (47) days spent in custody before pronouncing sentence.

33.Consequently, this court finds that the trial court fully complied with the provisions of section 333(2) of the Criminal Procedure Code. The Appellant's complaint on this issue is therefore without merit.

Whether the sentence imposed by the trial court was lawful and whether there is any basis for this court to interfere with it

34.The Appellant was convicted under section 20(1) of the Sexual Offences Act, No. 3 of 2006 which provides that if the victim is found to be a minor (below the age of 18 years), the accused to be sentenced to life imprisonment.

35.The complainant's birth certificate established that she was born on 22nd November 2003 and was therefore below the age of eighteen years at the time of the commission of the offence.

36.However, sentencing is a judicial function that requires consideration of all relevant circumstances of the case, including mitigation. The record reveals that before sentence was imposed, the learned trial magistrate considered the Appellant's mitigation and the circumstances surrounding the offence.

37.The principles upon which an appellate court may interfere with sentence are well settled. In *Bernard Kimani Gacheru v Republic* (Criminal Appeal 188 of 2000) KECA 94 (KLR), the Court of Appeal held that "On appeal, 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."

38.Having considered the record, this court is satisfied that the learned trial magistrate properly exercised his discretion after taking into account the relevant mitigating factors and the circumstances of the case. This court therefore finds no basis for interfering with the sentence imposed.

Whether the Respondent has established sufficient grounds to warrant enhancement of the sentence imposed by the trial court

39.The Respondent filed a Notice for Enhancement of Sentence dated 14th May 2026 seeking enhancement of the sentence from twenty (20) years imprisonment to life imprisonment pursuant to section 20(1) of the Sexual Offences Act.

40.While it is true that section 20(1) of the Sexual Offences Act provides for life imprisonment where the complainant is below the age of eighteen years, the issue before this court is whether enhancement of sentence is appropriate in the circumstances of this appeal.

41.The power of an appellate court to enhance a sentence is well recognized. However, such power must be exercised judiciously and in accordance with the rules of natural justice and the constitutional guarantee of a fair hearing under Article 50 of the Constitution.

42.In JJW v Republic (2013) eKLR the Court of Appeal emphasized that where enhancement of sentence is contemplated, an appellant must be given adequate notice and an opportunity to address the court on the proposed enhancement. The court held as follows; “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.”

43.This court has carefully considered the record. Although the Respondent filed a Notice for Enhancement of Sentence, there is no evidence on record demonstrating that the said notice was served upon the Appellant. Consequently, there is nothing to show that the Appellant was afforded an opportunity to respond to the proposed enhancement, address the court on sentencing principles, or advance any mitigation relevant to the question of enhancement.

44.The court further notes that the learned trial magistrate considered the mitigation tendered by the Appellant before imposing sentence. In the absence of proof that the Notice for Enhancement of Sentence was served upon the Appellant and that he was afforded an opportunity to be heard thereon, it would be contrary to the dictates of procedural fairness and natural justice to enhance the sentence at the appellate stage.

45.Accordingly, this court is not persuaded that the Respondent has established sufficient grounds to warrant enhancement of the sentence imposed by the trial court.

Disposition

46.The appeal lacks merit and is hereby dismissed. The court finds that the prosecution proved the offence of incest beyond reasonable doubt through the cogent and consistent evidence of the complainant, which was corroborated by the medical and DNA evidence. The court further finds that there were no inconsistencies in the prosecution’s case.

47.On Sentence, although the Respondent urged the court to enhance the sentence to life imprisonment, no notice of enhancement of sentence was served upon the Appellant. Sentencing, and more particularly enhancement of sentence, is a critical aspect of the criminal process that should not be taken lightly, as it directly affects an accused person's liberty. An

appellant must therefore be afforded adequate notice and an opportunity to address the court on the question of enhancement before such an order can be made. In the circumstances, the court declines to interfere with the sentence imposed by the trial court.

48. Accordingly, the conviction and sentence of twenty (20) years' imprisonment imposed by the trial court are hereby upheld. It is so ordered.

SIGNED BY/FOR: HON. JUSTICE ABDI M. HASSANKISUMU HIGH COURT
HIGH COURT
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