



REPUBLIC OF KENYA



**Kimutai & another v Republic (Criminal Appeal E036 of 2021)  
[2023] KEHC 2433 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2433 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL E036 OF 2021  
RL KORIR, J  
MARCH 29, 2023**

**BETWEEN**

**FESTUS LANG'AT KIMUTAI ..... 1<sup>ST</sup> APPELLANT**

**GILBERT KIPKORIR RONO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Conviction and Sentence of Hon. L.  
Kiniale, Principal Magistrate at Bomet Principal Magistrate's Court in  
Criminal Case Sexual Offences No. E008 of 2020 on 22nd September 2021)*

**JUDGMENT**

1. The Appellants were charged with three counts of the offence of gang defilement contrary to section 10 of the *Sexual Offences Act* No 3 of 2006. Particulars of the first count in respect of Festus Lang'at were that on the 24<sup>th</sup> day of November 2020, at Kongasis Chepalungu sub-county within Bomet County in association with Gilbert Kipkorir Rono, Hillary Rotich and others not before court intentionally and unlawfully caused his penis to penetrate the vagina of NC a child aged 16 years.
2. Particulars of the second count were in respect of Gilbert Kipkorir Rono in that, on the 24<sup>th</sup> day of November 2020, at Kongasis Chepalungu sub-county within Bomet County in association with Festus Lang'at Kimutai, Hillary Rotich and others not before court intentionally and unlawfully caused his penis to penetrate the vagina of NC a child aged 16 years.
3. The particulars of the third count of gang defilement in respect of Hilary Kipkirui Rotich were that on the 24<sup>th</sup> day of November 2020, at Kongasis Chepalungu sub-county within Bomet County in association with Festus Lang'at Kimutai, Gilbert Kipkorir Rono and others not before court intentionally and unlawfully caused his penis to penetrate vagina of NC a child aged 16 years.



4. An alternative count of committing an indecent act contrary to section 11 (1) of the [Sexual Offences Act](#) No 3 of 2006 was also brought against each of them individually with the following particulars: Particulars of the charge against Festus Lang'at Kimutai were that on November 24, 2020 at at Kongasis Chepalungu sub-county within Bomet county intentionally and unlawfully touched the vagina of NC, a child aged 16 years.
5. Particulars of the alternative charge against Gilbert Kipkorir Rono were that on the November 24, 2020 at Kongasis Chepalungu sub-county within Bomet County intentionally and unlawfully touched the vagina of NC, a child aged 16 years.
6. Particulars of the alternative charge against Hilary Kipkirui Rotich were that on the November 24, 2020 at Kongasis Chepalungu sub-county within Bomet County intentionally and unlawfully touched the vagina of NC, a child aged 16 years.
7. The Appellants were arraigned before the trial court on November 30, 2020 as 1<sup>st</sup> and 2<sup>nd</sup> Accused respectively to take plea where they denied the 1<sup>st</sup> and 2<sup>nd</sup> counts respectively. On May 11, 2021, Prosecution Counsel made an application for consolidation of the case with Criminal Case No E011 of 2020 where the 3<sup>rd</sup> Accused had been charged separately in respect of the same incident. The trial court allowed the said Application and gave directions to have the matter proceed under Criminal Case No E008 of 2020 as the lead file.
8. The consolidated charge sheet which incorporated the charges as listed here above was then read afresh to the three Accused on May 12, 2021 where they all denied the main and the alternative charges. A plea of not guilty was entered on all the charges for each of the Accused and the case proceeded to full trial with the Prosecution calling 5 witnesses to prove their case.
9. At the conclusion of the Prosecution's case, the trial court vide Ruling dated August 11, 2021 found that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants had a case to answer and placed them on their defence. Section 211 of the [Criminal Procedure Code](#) was explained to them and each of them elected to give sworn statement and call three witnesses. At the same time, the trial court found that the 3<sup>rd</sup> Accused had no case to answer and acquitted him under section 210 of the [Criminal Procedure Code](#).
10. By judgment dated September 22, 2021, the two Appellants were convicted of the main two counts of the offence of gang defilement and each sentenced to serve 15 years imprisonment.
11. Being dissatisfied with the decision of the trial court, the Appellants filed the present Petition of Appeal through the firm of P. Sang & Company Advocates in which 13 grounds were raised as follows: -
  1. That the learned Trial Magistrate erred in law and in fact by disregarding the alibi defence fronted by the Appellants herein and shifting the burden of proof on the defence of alibi to the Appellants herein.
  2. That the learned trial magistrate erred in law and in fact by convicting the Appellants without considering their whole defence and not tendering any reasons as to why their defence was not considered.
  3. That the learned Trial Magistrate erred in law and in fact in convicting the Appellants, yet the Prosecution failed to prove the ingredients of gang rape offence to the required standard.
  4. That the learned trial magistrate erred in law and in fact by convicting the Appellants on the account of the Prosecution's evidence which was insufficient, speculative and fabricated and in failing to properly evaluate the evidence on Record.



5. That the learned Trial Magistrate erred in law and in fact in failing to appreciate that the Appellants had not been properly and sufficiently identified to warrant a conviction.
  6. That the learned Trial Magistrate erred in law and in fact by convicting the Appellants yet no identification parade was conducted to identify the perpetrators.
  7. That the learned Trial Magistrate erred in law and in fact in convicting the Appellants yet the Prosecution did not place them at the scene of the crime.
  8. That the learned Trial Magistrate erred in law and in fact in convicting the Appellants on the basis of unreliable, shallow, inconsistent and contradictory testimonies of the Prosecution's witnesses.
  9. That the learned Trial Magistrate erred in law and in fact by failing to take note that the conviction of the Appellants on the charge of gang defilement was against the weight of medical evidence adduced and that no specimen from the Accused persons was matched with the medical evidence found in the Complainant's specimen to confirm affinity.
  10. That the learned Trial Magistrate erred in law and in fact in failing to appreciate the fact that the police failed and/or neglected to investigate the circumstances surrounding the case and/or conducted biased investigations.
  11. That the learned Trial Magistrate erred in law and in fact in failing to consider that the Appellant's constitutional rights under Article 49 were violated as they were never informed of the reasons for their arrest nor allowed to record their statements.
  12. That the learned Trial Magistrate erred in law and in fact by issuing an excessive sentence as against the Appellants herein.
  13. That in whole, the findings and holding of the learned Trial Magistrate as contained in the Judgement dated September 22, 2021 are dangerous, erroneous, inconsiderate and unlawful, against the weight of evidence and untenable in law.
12. This Court issued directions on July 27, 2022 for the Appeal to be canvassed by way of written submissions.

### **Appellants' Submissions**

13. The Appellants' submissions are dated September 21, 2022 and filed on the same date. Counsel for the Appellants submitted on three main issues being: whether the conviction was against the weight of the evidence adduced, whether the Prosecution proved its case beyond reasonable doubt and whether the sentence was harsh and excessive.
14. Firstly, Counsel submitted that the trial court should have been led to order a DNA test to clarify the ingredient of penetration. That PW5 the medical officer's evidence was inconclusive of penetration since he could not explain what could have caused the trauma on the victim's genitalia. That the complainant was examined 36 hours after the incident and that there was no presence of spermatozoa. That the investigating officer admitted that an examination of the Appellants' samples would have helped their case. That the Prosecution evidence in this regard was hearsay.
15. Further, that the Prosecution witness PW5 hesitated and avoided answering questions on penetration and that this created doubt that ought to have made the conviction unsafe. To support this, Counsel cited the case of Nyeri Court of Appeal, *Michael Mugo Musyoka v Republic*, Criminal Appeal No 89 of 2013.



16. Secondly, Counsel submitted that the Prosecution failed to prove its case beyond reasonable doubt in respect of identification because the complainant stated that her eyes were covered and that the incident occurred during the night. Thus, she could not be able to identify the Appellant. Counsel submitted that the complainant stated that she could identify the 1<sup>st</sup> Appellant through his voice and that she did not see the 2<sup>nd</sup> Appellant on the said date. That the trial magistrate failed to consider the danger of relying on the evidence of recognition where the circumstances were difficult for positive identification. To this end, Counsel cited the Court of Appeal in Kisumu's decision in *Wamunga v Republic*, (1989) KLR, *Samwel Omaiyo Kasimiri v Republic* in Kisii High Court Criminal Appeal No 13 of 2014 and *Javan Anyanga v Republic*, Kakamega High Court Criminal Appeal No 6 of 2008.
17. On the issue of alibi evidence, Counsel submitted that the trial court erred in disregarding the Appellants' alibi defence and shifting the burden of proof to them. To this end, Counsel cited the case of *Stephen Gitwa Kimani v Republic*, Naivasha High Court Criminal Appeal No 33 of 2015.
18. On sentencing Counsel submitted that the Appellants had no prior record and were therefore entitled to some degree of mercy. That the trial magistrate did not consider their mitigation and that the Court should consider revising the sentence to a period of 5 years. It was Counsel's conclusion that the conviction was unsafe and should therefore be quashed.

#### **The Prosecutions'/Respondent's Submissions**

19. The Respondent's submissions are dated October 18, 2022 and filed on the same date. They submitted on five issues being: the age of the victim, the act of causing penetration, identity of the appellants, defence case and sentencing.
20. Firstly, the Respondents submitted that the victim's birth certificate (P.Exh2) indicated that she was born on April 5, 2004 and was therefore 16 years old at the time of the offence. On an act of penetration, they submitted that the victim testified that she was raped by two people the whole night from 5 p.m. and PW5 the Clinical Officer found that her genital was swollen with tears on her vagina. That this evidence proved penetration.
21. On identification, the Respondents submitted that the 1<sup>st</sup> Appellant was well-known to the victim because they went to the same school while she knew the 2<sup>nd</sup> Appellant as a boda-boda rider whose mother's name was Vivian and that the said Vivian came to testify on behalf of the defense. Further, the Respondent submitted that the incident began at 5 p.m. when there was sufficient light to identify the perpetrators. Therefore, that this ingredient was properly established to the required standard.
22. On the Appellants' defence of alibi, the Respondents submitted that the same ought to have been raised at the first instance to enable the Prosecution to verify it. That the witnesses who were called to corroborate the alibi evidence gave contradictory evidence which was duly considered in the judgment of the trial court.
23. Lastly, on sentencing, the Respondents submitted that the sentence handed down was proper and fit under the circumstances especially because of the physical, mental and psychological trauma sustained by the victim.
24. This being a first appeal I am guided by the case of *Sumaria & Another v Allied Industrial Limited* [2007] 2 KLR, pg 1-9, at pg 8), where P.K Tunoi, E.O O'Kubasu & W.S Deverell JJA, observed as follows:-

“This being a first appeal we are obliged to consider the evidence, re-evaluate it and make our own conclusions, but as we do so, it must be remembered that we have neither seen nor heard



the witnesses - see *Peters v Sunday Post Ltd* [1958] EA 424, *Selle & Another v Associated Motor Board Co Ltd & Others* [1968] EA 123 and *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982] 1 KAR 278. In the last case Hancox JA (as he then was) put it thus, at pg 292 of the Report:- ‘A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding he did’. The first holding in that case is also relevant namely that:- ‘The Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if (a) it appears that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanour of material witness was inconsistent with evidence in the case generally.’”

### Issues for Determination

25. I have perused the trial Record, the Petition of Appeal dated September 21, 2022 and the rival submissions from the parties. The main issues for my consideration are:
- i. Whether the offence of gang defilement was proven against each of the Appellants to the required standard.
  - ii. Whether the sentence meted was correct, legal and just.

#### **i. Whether the Offence of Gang Defilement was proven against each of the Appellants to the required standard.**

26. Section 10 of the *Sexual Offences Act* No 3 of 2006 provides for the offence of gang defilement as follows:

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.

27. Riechi J in *Gerishon Simiyu Mumbwani & another v Republic* [2020] eKLR outlined the ingredients of the offence of gang rape. He stated thus:-

“Under Section 10 of the *Sexual Offences Act*, the ingredients of gang rape are: -

- a. rape or defilement under the Act;
- b. committed in association with others; or committed in the company of another or others;
- c. who commit the offence of rape or defilement with common intention. It is therefore clear that defilement which is committed in association with others or with common intention notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the section. It, therefore, matters not whether the offence was rape or defilement as long as the conditions under Section 10 are found to exist.”



28. It follows then that for the charge of gang defilement to stand, the offence of defilement must first be proven and then, the Prosecution must prove that it was committed alongside others or others with a similar intention. The legal burden of proof falls on the Prosecution. Viscount Sankey L.C in the case of H.L. (E)\* *Woolmington v DPP* [1935] A.C 462 pp. 481 stated the law on the legal burden of proof in criminal matters that:-

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

29. Thus, for the offence of defilement to be proven, the ingredients that must be established are age of the victim, penetration and positive identification of the perpetrator. (see *George Opondo Olunga v Republic* [2016] eKLR.)

### **Age of the Victim**

30. Courts are replete with decisions on the importance of proving the age of a victim in a defilement case. In the case of *Kaingu Kasomo v Republic*, Criminal Appeal No 504 of 2010, the Court of Appeal stated that:-

“Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim”.

31. The age of a victim can be proven in several ways. This was restated by the High Court at Machakos in *Joseph Kieti Seet v R* [2014] Criminal Appeal No 91 of 2011, where the court cited the case of Francis Omuroni and held thus:-

“It is trite Law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -versus- Uganda, Court of Appeal Criminal Appeal No 2 of 2000, it was held thus:

‘In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense ....’”

32. The Prosecution in this case called the investigating officer PW4 who produced the victim’s birth certificate (P.Exh2). I have re-examined a copy of the said certificate and noted that the victim was born on April 5, 2004. She was 16 years old at the time of the offence and still a minor in law. This ingredient remained uncontroverted during the trial. I therefore find that the Prosecution proved the age of the victim to the required legal standard.



## Penetration

33. The next ingredient is penetration. Section 2 of the [Sexual Offences Act](#) defines penetration as: -

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

34. It follows then that penetration need not be complete. Any partial penetration will suffice in proving the offence of defilement. In this case, the Prosecution produced evidence of penetration firstly through the victim’s own testimony. She testified as follows: -

“...On the way, I met with both accused persons. I recognized Festus. I also met with Gilbert. It is Gilbert who grabbed me and pulled me into the bushes. He then removed my clothes. He then raped me. He removed my pant then raped me. They were two. Festus also joined. They were together. After Gilbert was done, Festus also raped me....”

35. From the victim’s description of her ordeal, it is clear that when she says she was raped, she meant that her assailants had forceful and unlawful sexual intercourse with her. Further, the fact that she was 16 years old leads this Court to believe that she understood what rape entailed and hence, it can be concluded that she was penetrated by her assailants.

36. It is an established principle in law that in sexual Offences case, the courts may convict an accused person based on the sole evidence of a victim as provided under section 124 of the [Evidence Act](#), in the absence of corroboration from other evidence, if it believes that the victim is telling the truth. So far, from her description of the incident and her demeanour as noted by the trial magistrate – “seems very shy and embarrassed” – this Court believes the victim’s evidence and is satisfied that she was telling the truth.

37. The Prosecution went further to corroborate the victim’s evidence through the medical evidence presented PW5 Kennedy Bett, the Clinical Officer. He testified that they were unable to conduct a high vaginal swab (HVS) as the victim’s vaginal canal was massively swollen and they would have occasioned her further trauma. He however made other findings on examination being that the victim’s labias were swollen and that there was a tear on her vaginal wall. It was his evidence that based on her history, they concluded that the same may have been occasioned by physical trauma on penetration. He produced the P3 Form (P.Exh1) and Treatment Notes (P.Exh3).

38. I have re-examined the P3 Form which was filled by PW5 upon examination of the victim. It indicated that there was swelling on both labia minora and majora including the clitoris with a tear on the side of the vagina. It also indicated that there was whitish vaginal discharge with blood stains. On urinalysis, there were numerous pus cells but no spermatozoa.

39. During cross-examination, PW5 testified that he could not ascertain whether the hymen was intact because the victim’s vaginal canal was massively swollen preventing them from examining her further or conducting a high vaginal swab. However, he asserted that there was no way the hymen could be intact if one had been defiled by more than 4 men. The trial magistrate noted that the Clinical Officer was evasive on concluding penetration.

40. I have analysed the above evidence and noted from the medical exam, that there was significant trauma on the victim’s genitalia. The fact that the clinical officer could not ascertain whether the victim’s hymen was intact is insignificant in light of the definition of penetration provided under section 2 of



the Act. The results from the medical examination clearly demonstrate that the victim was subjected to physical trauma on her genitalia.

41. The High Court at Kisumu in the case of *George Owiti Raya v Republic* [2013] eKLR, held that:-

“There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane...It matters not whether the complainant’s hymen was found to be intact, suffice it that there was evidence of partial penetration.”

42. Defence Counsel argued in their submissions that no DNA was conducted on the Appellants to link them to the offence, that there was no spermatozoa and that the clinical officer (PW5) did not expressly state that there was penetration which created reasonable doubt in the Prosecution’s case. It is the view of this Court that though the medical officer was evasive on directly pointing out penetration, this is not sufficient to dissuade this Court from concluding that the ingredient of penetration was adequately proven by the Prosecution as defined by the law and as explained by the above legal precedent. The medical evidence when considered alongside the victim’s testimony points towards proving that there was penetration. The Clinical Officer (PW5) was not candid when he shied away from the concluding that there was penetration when all his observations noted as noted on the P3 Form (P.Exh 1) and the Treatment Notes (P.Exh 3) pointed to penetration.

43. The Appellants argued through their Counsel that there was no mention of the presence of spermatozoa in the Medical Report. In addressing this, it cannot be gainsaid that in defilement cases, the presence or lack of spermatozoa is not necessary in proving penetration. In this case, the victim was examined on November 26, 2021 while the incident occurred on the evening of November 24, 2021 into the wee hours of the morning of 25<sup>th</sup> November. PW5 the clinical officer stated that the victim had taken a bath by the time she was presented for examination and that there was no semen.

44. The Court of Appeal in the case of *Mwangi v Republic* [1984] KLR 595 at 603, pronounced itself in a concise manner on this issue when it held thus: -

“The presence of spermatozoa alone in a woman’s vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape.”

45. It follows then that a medical examination does not have to reveal the presence of spermatozoa as this is not reason enough to negate penetration. This principle is based on the fact that in some instances, the sexual act is not completed and that what must be established to prove the offence is the ingredient of penetration. This was the determination of the Court of Appeal in the case of *Mark Oiruri Mose v Republic* [2013] eKLR as follows: -

“In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.” (emphasis added).



46. On the same breath, the lack of DNA test as raised by the Appellants' Counsel is also not a prerequisite in establishing the offence of defilement. This was settled by the Court of Appeal in the case of *Robert Mutungi Mumbi v Republic*, Criminal Appeal Number 52/2014 [2015] eKLR where it held thus: -

“Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.” (emphasis added).

47. Thus, the trial court was not bound to order that a DNA test be conducted to satisfy itself that the offence was adequately proven. What was necessary was that a determination of guilt or innocence be made from the evidence availed and this was not pegged on a DNA analysis since the same was not a mandatory requirement in cases related to sexual offences as the present case.

48. Lastly, Defence Counsel argued that the medical officer could not ascertain in his evidence whether the victim's hymen was or was not intact and therefore, this was enough to cast doubt as to whether she was penetrated or not. I have considered the principles in the case of *Erick Onyango Ondeng v Republic* (2014) eKLR where the Court of Appeal held as such on the aspect of penetration:

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

49. As already demonstrated by PW5's evidence, the victim could not be examined because of the massive swelling on her genitals. Thus, the medical officer was unable to determine whether her hymen was intact or not. In the circumstances of this case, I have considered whether the absence of evidence on the status of the hymen negates the aspect of penetration. In considering the evidence adduced in this regard in totality, I find that the inconclusive evidence on whether the hymen was intact or not does not shake the Prosecution's evidence in establishing penetration, as clearly defined by section 2 of the Act.

50. Based on the foregoing, the inconclusive evidence on the status of the hymen, the lack of a DNA test and absence of spermatozoa during the examination do not cast doubt on the Prosecution's case. I am satisfied that the ingredient of penetration was adequately proven and to the required standard.

### **Positive Identification of the perpetrator**

51. The third ingredient is positive identification of the perpetrator(s). The *Black's Law Dictionary* 10<sup>th</sup> Edition at page 862 defines identification as “To prove the identity of a person or thing.” In other words identification is the process of showing, proving or recognizing who or what somebody or something is.

52. For a conviction to ensue, the positive identification of the Accused must be proved beyond reasonable doubt. It must be clear to the trial court that the accused was linked to the commission of the offence.

53. Mativo J.(as he then was) in *Watuku v Republic* (Criminal Appeal 08 of 2020) [2022] KEHC 4 (KLR) held thus: -

“The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution.....Identification of a suspect in any



criminal offence is always a pivotal question and whenever it arises, the trial court has to satisfy itself, before convicting. The evidence must be such that threshold set by the rules and decided case law has been met. The evidence must leave no doubt that the suspect was positively identified.”

54. The evidence on Record in respect of identification is the sole testimony of the victim. She stated that she had gone to visit her grandmother on the material day and left her grandmother’s home at 5.00 p.m. for her home at which point she was accosted by the two Appellants. She stated that it was the 2<sup>nd</sup> Appellant who grabbed her and pulled her into the bushes and raped her when he was done, the 1<sup>st</sup> Appellant joined in. She testified that the incident took place from 5.00 p.m. until 5.00 a.m. in the morning. She further stated that she was able to recognize Festus (the 1<sup>st</sup> Appellant) by his voice because her eyes were covered during the incident.
55. On cross-examination, PW1 the victim gave evidence that seemed conflicting. She stated that she was not sure of the time but that she had recorded in her statement that the incident took place for 7 hours. She also stated that she could not see the Accused when they committed the act and that the incident occurred in the night. She also stated that she knew the two because she went to school with the 1<sup>st</sup> Appellant and had known the 2<sup>nd</sup> Appellant as a boda boda rider.
56. In this case, the evidence of identification is paramount because the entire case rests on it as the only link between the Appellants and the crime in question. Thus, this Court takes great precaution in considering the same, firstly because it was adduced through the testimony of only one Prosecution witness, the victim herself; and secondly because; the incident occurred late in the evening into the night where lighting conditions may have been unfavourable to identify the perpetrators.
57. In the case of *Wamunga v Republic* (1989) eKLR, the Court of Appeal reiterated the above position thus:-
- “It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”
58. Similarly, in Zambia, the Supreme Court in the case of *L. Chipulu v The People* [1986] Z.R. 73 (SC) cited with approval the decision of their Court of Appeal in the case of *Chimbini v The People* [1973] Z.R. 191] where it was held as follows regarding the evidence of a single identifying witness:-
- “It is always competent to convict on the evidence of a single witness if that evidence is clear and satisfactory in every respect; where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observation. Many factors must be taken into account, such as whether it was daytime or night time and, if the latter, the state of the light, the opportunity of the witness to observe the appellant, the circumstances in which the observation was alleged to have been made.....’ (emphasis added).
59. Thus, it is not enough for the court to be satisfied that a witness is honest or truthful, because even in such instances, mistakes of identification may be made. Instead, the court is called upon to consider other evidence that would lead to the conclusion that the evidence of identification by the victim alone was watertight.



60. The Court of Appeal of Uganda in *Okwang' Peter v Uganda*, Criminal Appeal No 104 of 1999 held as follows:-

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error.”

61. In the present case, the victim testified that she knew the Appellants. She stated that the 1<sup>st</sup> Appellant was well-known to her because they went to the same school while the 2<sup>nd</sup> Appellant was known to her as the son of Vivian, a boda boda rider. She testified that she only got to know the 2<sup>nd</sup> Appellant's name from the police.

62. It is clear to this Court that the Appellants were no strangers to the victim. She therefore not only identified them but recognized them. Even so, this Court is careful to test such evidence because there is a possibility of making a mistake when the evidence of identification is one of recognition. This was the caution issued by the Court of Appeal in *Toroke v Republic*[1987] KLR 204 where it was held thus:-

“It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So the error or mistake is still there whether it be a case of recognition or identification.”

63. Based on the foregoing, I turn to the Turnbull principles for further guidance. Lord Widgery CJ in *R. v Turnbull & Others* (1976) 3 ALL ER 549 stated thus:-

“Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? .....Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

64. It was the evidence of the victim that she met with the two Appellants at 5.00 p.m. on her way home from her grandmother's house. On re-exam, she stated that she saw Festus her school mate at 5.00 p.m. together with Gilbert (1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively). Even though she couldn't recall what time of the day it was, the victim stated that she was accosted by the two Appellants while there was still enough light.



65. It is my view based on the above that there was sufficient lighting at 5.00 p.m. which was the time when the victim had left her grandmother's house and met with the Appellants. Further, it is clear to this Court that the victim's ordeal lasted for several hours and this can be demonstrated by the extent of injuries she sustained on her genitalia. This period of time was sufficient to enable her recognize her assailants. The victim stated that even though her eyes were closed, she was able to recognize the 1<sup>st</sup> Appellant because she saw him in the company of the 2<sup>nd</sup> Appellant when she met with them on her way home. Further, she stated that during the ordeal, she recognized the 1<sup>st</sup> Appellant through his voice. As for the 2<sup>nd</sup> Appellant, the victim stated that she saw him with the 1<sup>st</sup> Appellant on her way home and that it was the 2<sup>nd</sup> Appellant who grabbed her and raped her in the bushes before the 1<sup>st</sup> Appellant joined in.
66. This evidence demonstrates that the victim was able to clearly see her assailants as the two Appellants when they met with her on her way home and before they commenced the heinous act. Further, the fact that she was raped with her eyes covered shortly after Gilbert the 2<sup>nd</sup> Appellant grabbed and pulled her into the bushes only means that he (the 2<sup>nd</sup> Appellant) was the one responsible for her traumatic ordeal. She stated that the 1<sup>st</sup> Appellant joined in the act after the 2<sup>nd</sup> Appellant was finished and at that point, she recognized his voice. Her recognition of the Appellants' faces when they met and of the 1<sup>st</sup> Appellant's voice was enough for her to identify them as the people responsible for the crime.
67. I find an anchor on the above position in the Court of Appeal case of *Douglas Muthanwa Ntoribi v Republic* (2014) eKLR where it was held as follows:
- “On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-
- ‘I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.
- The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”
68. On the same breath, there is the issue of how many people sexually assaulted the victim. In her examination-in-chief, the victim testified that two people raped her. On cross-examination, Defence Counsel pointed out that the witness statements indicated that the people who defiled her were four in number and the victim was unable to confirm the same. She reiterated that her eyes were ‘closed’ to mean covered during the ordeal but that she knew Festus and Gilbert (the Appellants) were the ones who raped her.
69. This evidence demonstrates to this Court that the victim was defiled by more than one person and the same remained uncontested by the defence. Further, the same evidence demonstrated that the two Appellants were amongst the victim's assailants.
70. Defence Counsel raised an issue that no identification parade was conducted to ascertain the identity of the persons responsible for the offence. In his submissions, he stated that this omission brought to question the identification of the Appellants. In addressing this, I am guided by the Court of Appeal's



decision in *Peter Okee Omukaga & Another v Republic* Criminal Appeal No 274 and 275 of 2009 at Eldoret (unreported) where it was held:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, ..... made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. ....”

71. It was clear in this case that the Appellants were well-known to the victim and she recognized them from the moment they met and when the 2<sup>nd</sup> Appellant grabbed her. Therefore, there was no need for an identification parade. She had prior knowledge of the two assailants and would just have picked them out in an identification parade as they were familiar to her.
72. Turning to the defence of the Appellants, DW1 the 1<sup>st</sup> Appellant stated that he was at home on the material date while DW2, the 2<sup>nd</sup> Appellant stated that he was in Bomet working. Both Appellants called one witness each. DW3, Richard Kiplang’at Yegon who was the 1<sup>st</sup> Appellant’s father testified in support of his case and stated that they had supper with the 1<sup>st</sup> Appellant on the material day at around 8.00 p.m. Therefore, there was no way that he (the 1<sup>st</sup> Appellant) could have been present at the scene where the incident occurred from 5.00 p.m. and lasted for several hours. DW4, Vivian Kitur, the 2<sup>nd</sup> Appellant’s mother testified that on the said date, she was at home with her son taking supper at around 8.00 p.m.
73. The above testimonies entail alibi evidence. This Court must then consider whether this defence of alibi was well founded and whether it displaced the Prosecution case. The Court of Appeal in Kisumu in the case of *Erick Otieno Meda v Republic* [2019] eKLR gave following guidelines with respect to evaluating the defence of alibi:-

“The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that: -

- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
- (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
- (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.

(See *Mhlongu v S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014).”

74. It follows then that alibi evidence must be corroborated and must be introduced early enough for the Prosecution to investigate its veracity. More important is the fact that the burden of disproving the



defence of alibi vests on the Prosecution. The Court of Appeal clearly stated this in the case of Victor Mwendwa Mulinge v Republic [2014] eKLR as follows: -

“It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution.”

75. In the present case, the 1<sup>st</sup> Appellant stated that he was at home while the 2<sup>nd</sup> Appellant stated that he was at work in Bomet and not at home. His own (2<sup>nd</sup> Appellant’s) mother (DW4) stated that he was at home with her having supper. Clearly, these two accounts are contradictory and have neither challenged nor displaced the Prosecution’s evidence based on the whereabouts of the 2<sup>nd</sup> Appellant. Further, from the victim’s testimony, it was clear that though she did not know the 2<sup>nd</sup> Appellant’s name, she knew him previously as a boda boda rider and as the ‘son of Vivian’.
76. When the 2<sup>nd</sup> Appellant called DW4, she testified that she was called Vivian and was the mother of the 2<sup>nd</sup> Appellant. This lends credence to the victim’s testimony that she knew the 2<sup>nd</sup> Appellant as the son of Vivian.
77. In further consideration of the victim’s testimony, it is clear that her account of the events of material day ties the 1<sup>st</sup> Appellant to the said act because she stated that she saw him in the company of the 2<sup>nd</sup> Appellant who then grabbed her. As already demonstrated, she stated that the 1<sup>st</sup> Appellant joined in the crime when the 2<sup>nd</sup> Appellant was done and she recognized that it was him through his voice since her eyes were covered.
78. From my analysis of the alibi defence from the two Appellants, the evidence of the Prosecution in respect of tying the Appellants to the offence remains unshaken. Furthermore, the fact that alibi defence was raised only at the point of defence creates an impression in the mind of this Court that it was an afterthought.
79. In stating the above, I place reliance on the South African case of Ricky Ganda v The State, [2012] ZAFSHC 59, the Free State High Court, where Bloemfontein held thus: -

“The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt.”

80. I have weighed the alibi defence in totality against the Prosecution evidence and I find that it is not cogent enough to weaken the Prosecution’s case or to cast doubt in the mind of the Court. It is my finding that the two Appellants were present at the scene of the crime and were properly identified by the victim as the persons who defiled her.
81. The last ingredient that must be established is that the offence must have been committed in association with or in the company of others or committed with people who shared a common intention.



82. The victim stated that the two Appellants defiled her and that the 1<sup>st</sup> Appellant joined in the criminal act after the 2<sup>nd</sup> Appellant who had grabbed her was finished. It also became apparent from the testimony of PW4 the investigating officer and PW5 the clinical officer that the victim was defiled by more than one person. No evidence was adduced in rebuttal and it is my finding that the Prosecution adequately demonstrated that the Appellants acted in a joint enterprise in defiling the victim whether they were alone or in the company of others who were not before the Court.
83. In the premise, I find that the Prosecution evidence tendered before the Court was cogent enough to sustain the charge of gang defilement and I hereby uphold the conviction.

**ii. Whether the sentence meted was correct, legal and just.**

84. The Appellants in this case were each sentenced to serve 15 years imprisonment for the said offence. It is an established principle that an appellate court should be reluctant to interfere with the sentence of a trial court unless it is satisfied that there was some mistake or that the trial court misdirected itself during sentencing or where the said sentence is excess or illegal. This was clearly espoused by the Court of Appeal for Eastern Africa in *Ogalo s/o Owour* (1954) 21 EACA. 270, where it was held that an appellate Court will only alter a sentence imposed by the trial Court if it is evident that it has acted on principle or overlooked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case. (See also *R v Mohamedali Jamal* [1948] 15, EACA 126.)
85. The objectives of sentencing are set out in the [Judiciary Sentencing Guidelines 2016](#). They are set out at paragraph 4.1. at page 15 as follows: -

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”

86. The Supreme Court of India in the case of *Alister Anthony Pereira v State of Maharashtra* at paragraph 70-71 [R v AEM](#) (200) outlined the purposes of sentence as follows: -

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence



commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

87. Thus, sentence imposed must be commensurate with the offence committed. On the same breath, courts are called upon to consider mitigating factors at sentencing. (see the Supreme Court case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR [SC Petition No 15 &16 of 2015]).
88. In this case, the only mitigation offered in respect of the Appellants was that they were young and still going to school. The Prosecution stated that although they were first offenders, they were adults and should be sentenced as such.
89. I have considered this alongside the circumstances of the victim and the gravity of the offence. I have once again reviewed the extent of injuries and the fact that that act of defilement was committed by more than one person. These are clearly aggravating factors.
90. The law provides a minimum sentence 15 years for the offence of gang defilement. Such sentence may also be enhanced to life imprisonment. It is the view of the Court in light of the aggravating circumstances, that the sentence meted out by the trial court was not only fair and just but lenient and considerate. I agree with the decision of Dulu J in the case of *Republic v Simon Wambugu Kimani & 20 others* [2015] eKLR where he stated at paras. 27-28 thus: -
- “ 27. Sentencing is the discretion of the trial court, which should be exercised fairly and within the law and jurisdiction of the particular court – See *Karuki v Republic* (1970) EA 230. The exercise of that discretion is based on facts and circumstances that are availed to the trial court, by the prosecution in their address as well as the defence in mitigation.
28. A superior court will not interfere with that exercise of that discretion merely because it might have somewhat passed a different sentence. It must be shown that the trial court acted upon some wrong principle or overlooked some relevant facts when sentencing – see *Macharia v Republic* (2003) KLR 115 and *Ogalo S/O Owuor v R* (1945) EACA270.”
91. It is my finding that the sentence imposed by the trial court was legal and just and I see no reason to interfere with it.
92. In the end, it is my finding that this appeal lacks merit and is dismissed. I uphold the conviction and sentence.

**JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29<sup>TH</sup> DAY OF MARCH, 2023.**

.....



**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of the Appellant, Ms. Boiyon holding brief for Mr. Njeru for the State, Mr. Mugumya for the Appellant and Siele (Court Assistant)

