



REPUBLIC OF KENYA



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**Rotich & 2 others v Republic (Criminal Appeal E040 of 2022)  
[2023] KEHC 17679 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17679 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL E040 OF 2022**

**RL KORIR, J**

**MAY 24, 2023**

**BETWEEN**

**GIDEON ROTICH ..... 1<sup>ST</sup> APPELLANT**

**ENOCK KIPKIRUI KORIR ..... 2<sup>ND</sup> APPELLANT**

**NOAH BETT LANGAT ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From Conviction and Sentence by Hon. K. Kibelion, PM in Bomet  
Principal Magistrate's Court Sexual Offences Case Number 045 of 2021)*

**JUDGMENT**

1. The Appellants were charged with offence of Gang Rape contrary to Section 10 of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the charge were that on the night of the 6<sup>th</sup> to 7<sup>th</sup> day of July 2021 in Sibaiyan Location within Bomet County, one after another intentionally and unlawfully caused their penises to penetrate the vagina of ZEC without her consent.
2. The Appellants faced an alternative charge of committing an indecent act with an adult contrary to Section 11(a) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the charge were that on the night of the 6<sup>th</sup> to 7<sup>th</sup> day of July 2021 in Sibaiyan Location within Bomet County, they intentionally touched the vagina of ZEC with their penises against her will.
3. The Appellants pleaded not guilty to both charges and the case went to full trial in which the prosecution called six (6) witnesses in support of its case.
4. At the close of the prosecution case, the trial court ruled that a *prima facie* case had been established against the Appellants and they were accordingly put on their defences. The 1<sup>st</sup> and 2<sup>nd</sup> Appellant gave



unsworn testimony while the 3<sup>rd</sup> Appellant tendered sworn testimony. The Appellants did a sworn not call any witnesses in aid of their defences.

5. At the conclusion of the trial, the Appellants were convicted on the main charge and were each sentenced to serve 15 years in prison by Hon. K. Kibelion (PM).
6. Being dissatisfied with the conviction and sentence, the Appellants appealed to this court and raised similar grounds which are reproduced verbatim as:-
  - i. That the learned trial Magistrate erred in law and in fact in convicting me on evidence which did not meet the required standard of proof in accordance with the law.
  - ii. That the learned trial Magistrate erred in law and in fact by relying on extrinsic evidence that was not adduced in court during the trial.
  - iii. That the learned trial Magistrate erred in law and in fact by depending on evidence which was based on the theory of conspiracy between me, the complainant (PW1) and PW2 that was not proved beyond reasonable doubt by the prosecuting witnesses.
  - iv. That the learned trial Magistrate erred in law and in fact by convicting me on charges that were not tallying and favourable.
  - v. That I wish to be present during the hearing of my appeal and I also request court proceedings.
7. As a first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court. This duty was succinctly stated by the Court of Appeal for Eastern Africa in *Pandya vs. Republic* (1957) EA 336 where it stated:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

### **The Prosecution’s Case.**

8. ZEC testified as PW1. She testified that she was a tea plucker and that on July 6, 2021 she had gone to Kapkoros Tea Factory. That while at the factory it rained and when the rain stopped at around 7 p.m., in the company of Weldon, they left the factory. It was her further testimony that as they approached the river, they were accosted by two people, the 2<sup>nd</sup> Accused (Enock and Eliud) who assaulted WKC (PW2).
9. It was PW1’s testimony that when PW2 escaped the assault, Enock (2<sup>nd</sup> Accused) took her to bush and asked her to remove her pant. That Eliud began raping her under the guard of the 2<sup>nd</sup> Accused who had a knife. It was PW1’s further testimony that when PW2 shouted for help, the 2<sup>nd</sup> Accused and Eliud took her deeper into the bushes where they threatened her with death and raped her in turns.



10. ZEC testified that she was taken to a house where they found the 3<sup>rd</sup> Accused (Noah). That the three, the 2<sup>nd</sup> Accused (Enock), 3<sup>rd</sup> Accused (Noah) and Eliud began raping her in turns. ZEC further testified that during the ordeal, the owner of the house, the 1<sup>st</sup> Accused (Gideon) arrived and he raped her too.
11. PW1 testified that she managed to escape when she was allowed to go for a short call. That she ran to a house from where she had seen lights and where she was received and allowed to spend the night. She further testified that on the following day, together with her son and daughter, they went to the village elder and assistant chief who took them to Kapkoros Police Station to report the matter. That they went to the house where she had been held hostage and the police found her clothes.
12. It was PW1's testimony that she had been raped by the four men (the 3 Appellants and Eliud) and that she knew them as they were her neighbours.
13. WKC (PW2) testified that on the material day, as they went home with PW1 and upon reaching the river, they were accosted by two people. He stated that he was slapped with a sword and he fell down and was then assaulted. He said that he recognized the 1<sup>st</sup> accused who was his neighbour. PW2 further testified that he managed to escape and after running for a short distance he heard PW1 pleading with them not to kill her. That he then screamed for help.
14. It was PW2's testimony that he woke up PW1's son and mobilized people in search of PW1. That they found PW1 at Kapkoros Police Station the next morning.
15. Amos Ngeno (PW3) testified that on 7<sup>th</sup> July 2021 at around 4 a.m., he was woken up by his wife who told him that there was someone knocking on the window. He testified that when he opened the door, he found PW1 in a petty coat. PW3 further testified that PW1 explained to him that she had been assaulted and raped.
16. It was PW3's testimony that the following morning, they went with the village elder and area chief to the home where PW1 had been held hostage.
17. JTC (PW4) testified that he was the Assistant Chief [Particulars withheld] and that on July 7, 2021, he was informed that PW1 had been ambushed at the river. That he interviewed PW1 who was in the company of her son and daughter and they took him to the house where she was raped. It was PW4's testimony that they found PW1's inner wear and a mat that had been spread on the floor.
18. No 23376 PCW Emmy Chepkirui (PW5) testified that she was the investigating officer. She testified that on July 7, 2021, PW1 came into the office and made a report about what had happened to her the previous night. That she booked the report in the O.B and escorted the victim to Kapkoros Health Centre where she was examined, treated and discharged. PW5 further stated that she later visited the scene together with the sub chief and found PW1's clothes inside the 1<sup>st</sup> Accused's house. That they also found soiled pant, a soiled sweater and a soiled skirt.
19. Philip Mutai (PW6) testified that he was the clinical officer at Kapkoros Health Centre. That he examined PW1 on July 7, 2021 and found that she had bruises and lacerations on the external genitalia and that her labia majora and minora were swollen. PW6 further testified that PW1 had a foul smelling discharge. That he confirmed that there was repeated penetration.
20. This court admitted the Appeal and directed parties to canvass the same through written to submissions.



### **The Defence /appellants' Case.**

21. Gideon Rotich, the 1<sup>st</sup> Accused/now 1<sup>st</sup> Appellant testified as DW1. He stated that he was a motor cycle rider and that on the material day, he was not at the scene of the alleged offence. That the house did not belong to him and that he did not take PW1 there. DW1 further testified that the house belonged to his brother who used it to sell alcohol.
22. It was DW1's further testimony that PW3 stated that he did not see him commit the offence and the investigating officer did not investigate the matter. That the clinical officer could not link him to the offence as his sperms were not found in PW1's vagina.
23. Enoch Kipkirui Korir, the 2<sup>nd</sup> Accused/now 2<sup>nd</sup> Appellant testified as DW2. He testified that he was arrested on October 5, 2021 and was informed that a case had been reported against him. That he did not commit the offence. He further testified that the complainant and PW2 stated that they did not see him committing the offence. That PW3 stated that he had a panga which was not produced in court and that the complainant said that she identified him yet she stated that he had covered his face with a cloth.
24. It was DW2's testimony that the clinical officer did not know him and that he could not link him to the offence as his sperms were not found in PW1's vagina. That the clinical officer could not tell if the bruises were as a result of sexual assault or sickness. It was DW2's further testimony that he was never examined hence he could not be linked to the offence.
25. Noah Bett, the 3<sup>rd</sup> Accused testified as DW3. He stated that the complainant stated that he was not among those who took her to the house and that he was not present when the offence occurred. That PW2 stated that he did not know him and further that PW3 stated that he did not find him in the house when the offence was committed.
26. DW3 further testified that the clinical officer could not link him to the offence as his sperms were not found in PW1's vagina.

### **The Defences'/appellant's Submissions.**

27. Gideon Rotich (DW1) submitted that PW1 had told the court that he was not at the river where she was attacked and raped. That PW1 also stated that he was not at the house where she was allegedly raped. It was DW1's further submission that PW1 failed to explain how she knew the owner of the house as the house belonged to his brother.
28. DW1 submitted that PW2 testified that he did not see or him at the river. That PW2 clearly told the court that he recognized the assailants yet he never mentioned him. DW1 further submitted that PW3 stated that he never found him in the house where the alleged offence was committed. That PW3 failed to mention the owner of the house.
29. It was DW1's submission that the village elder failed to testify in court yet he was the one who was supposed to inform the court about the owner of the house. That there was no immediate neighbour who testified as to the ownership of the house.
30. DW1 submitted that the clinical officer failed to conduct a medical examination on him and that the clinical officer could not tell if the discharge from the victim was a venereal disease or that she was raped.
31. It was DW2's submission that the sword that was allegedly used in assaulting PW2 was never presented in court. That PW2 failed to produce his treatment notes to show that he was assaulted. It was DW2's



- submission that PW2 failed to explain how he identified him yet PW2 had told the court that he wore a mask.
32. DW2 submitted that PW1's son who was a teacher failed to testify and that he and PW2 could not tell the names of the people they mobilized to search for PW1. That the person named Eliud was not in his memory and was not in court during the trial as alleged by PW2. DW2 further submitted that PW3 could not link him to the offence as he informed the court that he did not find him in the house. That PW3 alleged that he called a nyumba kumi officer who did not testify in court.
  33. It was DW2's submission that PW4 confirmed to the court that he did not find him at the scene and that the house which was used in the commission of the offence was not his. It was DW2's further submission that the clinical officer could not confirm whether the foul-smelling discharge from the victim was a result of sickness or a sexual assault. That no spermatozoa was found to link him to the offence.
  34. DW3 submitted that PW1 and PW2 testified that they never saw him in the river on the material day. That PW3 also testified that he did not see him raping the complainant. DW3 further submitted that PW3 and PW4 did not mention him in their testimonies.
  35. It was DW3's submission that PW6 could not tell whether PW1's bruises were as a result of sexual assault or a venereal disease. That PW6 only examined the complainant and did not examine him.

#### **The Prosecution's/respondent's Submissions.**

36. In submissions dated 17<sup>th</sup> February, 2023, the prosecution submitted that PW6 who was the clinical officer produced the P3 Form which indicated that there was bruising and lacerations on the genitalia of the victim. That PW6 confirmed that there was evidence of repeated forceful penetration.
37. It was the Prosecution's submissions that the victim did not consent to the sexual intercourse. That she was repeatedly raped while being threatened with a knife. It was the Prosecution's further submission that the victim broke down during her testimony, an indicator of severe emotional, mental and physical trauma occasioned to her by the Appellants. That there was no evidence presented by the Appellants to show that there was consent by the victim.
38. The Prosecution submitted that the victim recognised the Appellants having been in contact with them most of the material night. That the victim also testified that she knew the Appellants as her neighbours. The Prosecution further submitted that the victim and the Appellants had enough close contact including having a conversation with them.
39. With respect to the defence case, it was the Prosecution's submission that the Appellants gave mere denials of the offence and did not offer any witness to indicate that they were not the perpetrators of the offence. As regards sentence, It was the Prosecution's further submission that the sentence imposed by the trial court was legal and proper.
40. I have gone through and considered the trial court proceedings, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants' Petition of Appeal all filed on October 6, 2022 the 3<sup>rd</sup> Appellant's petition of appeal filed on September 29, 2022, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants written submissions filed on February 13, 2023, the Respondent's written submissions dated February 17, 2023 and I discern three issues for my determination as follows: -
  - i. Whether the Prosecution proved its case against the Appellants
  - ii. Whether the Defences places doubt on the prosecution case.
  - iii. Whether the Sentence passed was lawful and appropriate.



## Whether the Prosecution proved its case against the Appellants

41. Gang rape is defined under Section 10 of the *Sexual Offences Act* as: -

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 fifteen years but which may be enhanced to imprisonment for life.

42. The same Act defines gang as: -  
means two or more persons

43. Section 3 (1) of the *Sexual Offences Act* which provides: -

- (1) A person commits the offence termed rape if-
  - (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
  - (b) the other person does not consent to the penetration; or
  - (c) the consent is obtained by force or by means of threats or intimidation of any kind.

44. In this case, for the offence of gang rape to be established, the following elements must be demonstrated: -

- i. Whether PW1 was penetrated separately by more than one male organ.
- ii. Whether she consented to the penetration.
- iii. Whether the Appellants were positively identified.

45. With respect to the evidence of penetration, the general rule is that even without considering the presence of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape. This position was fortified by the holding of the case of *Martin Nyongesa Wanyonyi vs. Republic* Criminal Appeal No 661 Of 2010, (Eldoret), citing *Kassim Ali vs Republic* Criminal Appeal No 84 of 2005 (Mombasa) where the Court of Appeal stated that: -

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence.”

46. I understand the *Martin Nyongesa Wanyonyi* case (supra) to be stating the principle that medical evidence in support of a rape case was not mandatory and its absence was not fatal the present case, medical evidence was tendered and I therefore proceed to consider it.

47. Philip Mutai (PW6) who was the clinical officer testified that he examined PW1 on July 7, 2021 which was the day after the alleged ordeal. He stated that upon examination, he found that PW1 had bruises and lacerations on the external genital labia majora and minora which were swollen. That PW1 also had a foul smelling discharge. It was his opinion that there was repeated penetration. PW6 produced a P3 Form and a PRC form which were marked as P. Exh 1 and P. Exh 2 respectively.

48. PW1 testified that she was repeatedly raped by the Appellants on the material night at the river and in the 1<sup>st</sup> Accused's house. That she was raped by the 2<sup>nd</sup> Accused (Enock) and Eliud at the river before



being taken to a house where the 1<sup>st</sup> (Gideon) and 3<sup>rd</sup> Accused(Noah) joined in the raping ordeal. I am convinced by PW1's testimony and the medical evidence tendered by PW6 that there was repeated penetration. The evidence was convincing and was not shaken during cross examination. The cross examination merely challenged the witness(PW6) whether he had examined the Accused and whether he found their respective sperm in the complainant's vagina.

### **Lack of Consent**

49. Consent is defined in Section 42 of the *Sexual Offences Act* as: -

For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

50. I am guided by the case of Republic vs Oyier (1985) eKLR, where the Court of Appeal held as follows:-

“The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.”

51. I associate myself fully with the case of Peter Wanjala Wanyonyi vs Republic (2021) eKLR where Kimaru J. (as he then was held thus: -

“The burden of proof lies upon the prosecution to prove that the sexual intercourse was without the consent or against the will of the complainant. A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power, to act in a manner that she wants. Consent may be either expressed or implied depending upon the nature and circumstances of the case”.

52. PW1 testified that on the material day, they were ambushed while in the company of PW2 by the 2<sup>nd</sup> Appellant and Eliud. That PW2 was assaulted but he managed to escape. It is at that point that the 2<sup>nd</sup> Accused held PW1 by her hand and led her to the bush where he asked her to remove her pant and biker. It was her testimony that Eliud began raping her while the 2<sup>nd</sup> Accused who had a knife kept guard.

53. From the testimony of PW1, PW2 who had escaped screamed for help and that is when the 2<sup>nd</sup> Accused and Eliud dragged her deep into the bush while threatening to kill her. PW2 corroborated this when he stated that he heard them threatening PW1. The 2<sup>nd</sup> Accused and Eliud then proceeded to rape her. They then took her to the 1<sup>st</sup> Accused's house where the 1<sup>st</sup> Accused and 3<sup>rd</sup> Accused joined in the ordeal. PW1 then managed to escape after she was allowed to answer a call of nature.

54. Based on the evidence of the PW1, it was clear that there was no consent. The 2<sup>nd</sup> Accused stood guard with a knife while Eliud raped PW1. The 2<sup>nd</sup> Accused and Eliud then threatened PW1 with death and finally PW1 managed to escape. This chronology does not depict a person who had consented to sexual intercourse but rather one who was forced into it and left with no option other than endure it. It is therefore my finding that there was no consent from PW1. What existed was an aggressive and barbaric display of masculine strength visited upon a defenceless woman.



55. With respect to identifying the Appellants, it is evident from the record that with the exception of the victim (PW1), none of the other prosecution witnesses witnessed the rape. This was expected as few if any rapists attack their victims in broad daylight and in full view of the public. It is trite law however, that evidence of identification must be carefully scrutinized before a person can be convicted of an offence. The Court of Appeal sounded this caution in *Cleophas Otieno Wamunga vs Republic*, 1989 KLR 424, in the following words:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

56. It is also clear from the record that PW1 and PW2 were accosted at around 7 p.m. The Court of Appeal in the case of *Nzaro vs Republic* (1991) KAR 212

held that: -

“Identification/recognition at night must be absolutely watertight to justify conviction”.

57. Further, when dealing with recognition, the English case of *turnbull-and-another-etc-cca-9-jun-1976/ R vs Turnbull* (1977) QB 224 is useful in this regard: -

“If the quality (of identification evidence) is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution”.

58. With respect to the 1<sup>st</sup> Accused, PW1 testified that after being raped in the bushes by the 2<sup>nd</sup> Accused and Eliud, she was taken to a house which she later learnt belonged to the 1<sup>st</sup> Accused. It was her testimony that around 2 a.m., the 1<sup>st</sup> Accused came to the house and raped her too. It was PW1’s testimony that she knew the 1<sup>st</sup> Accused as he was her neighbour. When she was cross examined by the 1<sup>st</sup> Appellant/1<sup>st</sup> Accused, she stated that she was able to see him because one of the Accused had a torch which shone brightly. In the case of *John Kimotho Tumbo vs Republic* (2014) eKLR, the Court of Appeal held that: -

“.....In the case of *Maitanyi v Republic* 1986 KLR 198, this Court stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect.”

59. I have duly warned myself of the need for special caution in accepting the evidence of identification where the same occurred under unfavourable circumstances as in this case.



60. I have considered that the evidence of PW1 that the Accused had a torch which shone brightly. I am satisfied that the torch used by the Accused shone brightly to enable PW1 identify the 1<sup>st</sup> Accused.
61. Regarding the 2<sup>nd</sup> Accused, PW1 stated that she was attacked by the 2<sup>nd</sup> Accused and Eliud. She further stated that the 2<sup>nd</sup> Accused stood guard with a knife as Eliud raped her. It was PW1's testimony that she knew the 2<sup>nd</sup> Accused as her neighbour. When she was cross examined by the 2<sup>nd</sup> Accused, PW1 stated that it was too dark at the river but she recognized his voice. She went further and stated that she saw the 2<sup>nd</sup> Accused at the home where they took her and continued raping her. That there was a very bright light from the torch that the 2<sup>nd</sup> Accused took from PW2.
62. When WKC (PW2) was cross examined by the 2<sup>nd</sup> Accused, he stated he recognized the 2<sup>nd</sup> Accused as he had a bright torch which he beamed on him. He stated that he recognised the 2<sup>nd</sup> Accused out rightly despite having a mask on as he was his neighbour. PW2 further testified that it was the 2<sup>nd</sup> Accused who had a knife and who hit him. It is salient to note that both PW1 and PW2 knew the 2<sup>nd</sup> Accused as Arap Laal. He was known to them and they were familiar with his voice.
63. In the Case of *Vura Mwachi Rumbi vs Republic* (2016) eKLR, the Court of Appeal stated in respect of voice identification that: -

“In the case of *Choge v R* [1985] KLR 1, this Court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the appellant's voice and recognized it and that the conditions obtaining at the time the recognition made were such that there was no mistake in testifying to that which was said and who had said it.....”

64. PW1 stated that she knew the 2<sup>nd</sup> Accused before that material day and that she even knew his parent's home. Coupled with PW1's testimony about a bright light torch, it is my finding that that PW1 and PW2 were familiar with the 2<sup>nd</sup> Accused and that they positively identified him.
65. With respect to the 3<sup>rd</sup> Accused, PW1 testified that when she was brought to the house, they found the 3<sup>rd</sup> Accused inside the house. That the 3<sup>rd</sup> Accused thereafter joined his accomplices in raping PW1. PW1 stated that the 3<sup>rd</sup> Accused was her neighbour and also knew him as “Chiritet”. When she was cross examined by the 3<sup>rd</sup> Accused, she opined that she identified him using the bright lit torch. I am satisfied that the 3<sup>rd</sup> Accused was sufficiently identified. There was a bright light torch at the 1<sup>st</sup> Accused's home where all the Accused participated in raping PW1.
66. In supporting the identification of the Appellants, PW1 positively identified all of them in court. The Court of Appeal in the case of *Muiruri & 2 others vs Republic* [2002] 1 KLR 274, expressed itself as hereunder:-

“We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like *Abdulla bin Wendo v. Rep* (1953) 20 EACA 166, *Roria v. Republic* [1967] EA 583, and *Charles Maitanyi v. Republic* (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that



on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

67. From my analysis above on identification, it is my finding that all the Accused were positively identified and placed at the scene of the offence.
68. As earlier mentioned, no one witnessed the alleged offence. Section 124 of the [Evidence Act](#) states that: -  
Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person of it, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.
69. This court is empowered by the above section to convict an accused person solely on the evidence of the complainant. The above position was taken in *George Kioji vs. Republic (UR)* where the Court of Appeal expressed itself as: -  
“Indeed, under the proviso to section 124 of the [Evidence Act](#), Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”
70. I am inclined to believe the testimony of PW1 as she vividly recalled what the Accused had done to her. The trial court indicated that she broke down while testifying. She was cross examined and re-examined and she was able to answer the questions satisfactorily. This was an ordeal that took several hours and her only saving grace was that she was able to escape. I find PW1’s testimony, credible and believable.
71. The recovery of the Victims’ clothes in the house of the 1<sup>st</sup> Accused provides water tight circumstantial evidence that she was raped in that house. The Investigating Officer (PW5) PC Emmy Chepkirui testified that the village elder identified the house belonging to the 1<sup>st</sup> accused. She produced the complainant’s black skirt, pink pant and green/black sweater, Exhibits 3,4, and 5 respectively. Other than merely stating that it was his brother who used the house, the 1<sup>st</sup> Accused offered no explanation as to how and why PW1’s clothes were recovered in his house. The house was the destination where the 2<sup>nd</sup> Accused and one Enock who is still a suspect at large, dragged their victim and found the 3<sup>rd</sup> Accused waiting; and also, where the owner of house being the 1<sup>st</sup> Accused shortly joined them.
72. It is my finding therefore based on the evidence on record and aided by Section 124 of the [Evidence Act](#) that the Prosecution satisfied the ingredients of gang rape and proved its case beyond reasonable doubt.

#### **Whether the Defence places doubt on the Prosecution case.**

73. The 1<sup>st</sup> Appellant stated that he never took PW1 to the house and that the house was not his as it belonged to his brother who used it to sell alcohol. The 1<sup>st</sup> Appellant chose not to call any witness or tender any evidence to substantiate this claim. Furthermore, PW4 the Assistant Chief and PW5 the Investigating Officer testified that PW1 took them to the 1<sup>st</sup> Appellant’s home where she was raped. The 1<sup>st</sup> Appellant further stated that PW3 and PW4 stated that they did not see who committed the offence. This is negated by Section 124 of the [Evidence Act](#) which requires the sole believable testimony of the victim to convict.
74. The 2<sup>nd</sup> Appellant stated that PW2 admitted that he did not see him committing the offence. That PW3 alleged that he had a panga which was not produced in court. The 2<sup>nd</sup> Appellant opined that PW1 did not explain how he saw him yet he had covered his face with a cloth. In analysing the same against the prosecution’s evidence, it is evident that the 2<sup>nd</sup> Appellant is charged with the offence of gang rape



- and therefore the panga and its production is immaterial. Further, PW1 testified that she saw the 2<sup>nd</sup> Appellant in the 1<sup>st</sup> Appellants house where there was a bright torch.
75. The 3<sup>rd</sup> Appellant stated that PW1 testified that he was not among those who took her to the house. That PW2 testified that he did not know him. The 3<sup>rd</sup> Appellant further stated that PW3 did not find him in the house where the offence was committed.
76. The Appellants' common defence was that they could not be linked to the offence because no sperms were found in PW1's vagina. The *Sexual Offences Act* defines penetration to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. This then means that to sustain a charge of rape, one does not have to ejaculate, a mere insertion is enough to sustain a rape charge as it is considered penetration.
77. Clarity on the above issue was given by the Court of Appeal in the case of *Mark Ouiruri vs Republic* (2013) eKLR, when it expressed itself thus:-
- “.....In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the 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 the penetration need not be deep inside the girl's organ....”
78. Similarly, in the case of *Benjamin Mwangi & another vs Republic* (1984) eKLR, the Court of Appeal rendered itself as follows: -
- “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.”
79. It is salient to note that none of the Appellant called any witness to aid their defences. Their defences as they are, are mere denials and they have not shaken the prosecution's evidence at all.
80. Flowing from the above, I am satisfied that there was nothing on the defence case to cast doubt on the Prosecution' case. It is my firm finding that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused, now Appellants were properly convicted. I uphold the conviction.

### **Whether the Sentence was lawful**

81. The Appellants prayed that their convictions be quashed, their sentences set aside and that they be set at liberty.
82. In *Bernard Kimani Gacheru vs Republic* (2002) eKLR, the Court of Appeal stated that:-
- “It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. 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 the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not



sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist”.

83. The trial court upon conviction, sentenced the Appellants to 15 years in jail. In mitigation, the 1<sup>st</sup> Appellant submitted that he had learnt a lot in prison and that he came from a humble background. The 2<sup>nd</sup> Appellant submitted in court that he wanted to appeal the sentence only and not the conviction. The 3<sup>rd</sup> Appellant submitted that he had been in prison for long and he did not know why he was there.
84. Mr. Njeru, the learned prosecution counsel submitted that the offence was aggravated and that the Appellants did not deserve the mercy of the court. That the 15 year sentence was too lenient. It was his submission that the Appellants raped the victim for 10 hours and therefore he prayed for an enhancement of the sentence in accordance to Section 3 of the [Sexual Offences Act](#)
85. Section 10 of the [Sexual Offences Act](#) states that:-
- 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 fifteen years but which may be enhanced to imprisonment for life.
86. I must respectfully disagree with the sentence passed by the trial court which I find to be lenient. The heinous act committed by the Appellants deserved a stiffer sentence. As it has already been demonstrated, the Appellants took turns in raping the victim and it was not a one-time ordeal. They raped her in the river while threatening her life and then took her to the house where they continued with their devilish act. The ordeal took place from 7 p.m. to 2 a.m. They treated the victim like their play toy, violating and stripping her of human dignity. The offence was aggravated and deserved a more deterrent sentence. I find that there was no proportionality in the sentence. (See [Thomas Mwambu Wenyi vs Republic](#) (2017) eKLR.
87. The Respondent urged this court to enhance the sentence in view of the aggravated nature of the offences. This court however cannot do so. This is because the prosecution had neither filed a cross-appeal nor notice of enhancement of sentence. In [MGK v Republic](#), Criminal Appeal No 51 of 2009 (2020) eKLR the Court of Appeal sitting in Nakuru citing its decision in [JJW v Republic](#) (2013) eKLR held as follows: -

“It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354(3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on



sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.”

88. Guided as above, I can therefore only affirm the sentence in the present Appeal.

89. The Appellants respective appeals have no merit and are therefore dismissed in entirety. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants shall serve the 15 years’ imprisonment term imposed by the trial court. The sentence shall run from the date of sentence in the trial court. Each Appellant has 14 days right of Appeal to the Court of Appeal.

Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 24<sup>TH</sup> DAY OF MAY, 2023.**

.....

**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of the Appellants, Mr. Waweru holding brief Mr. Njeru for the State and Siele (Court Assistant)

