



**Mutai & another v Republic (Criminal Appeal E003 of 2024)  
[2025] KEHC 1616 (KLR) (19 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1616 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E003 OF 2024  
RE ABURILI, J  
FEBRUARY 19, 2025**

**BETWEEN**

**ERICK MUTAI ..... 1<sup>ST</sup> APPELLANT**

**NEWTON KIMUTAI ALIAS KOREA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the judgment and sentence of Hon. A.K. Mokeross-SPM in Tamu SPM Sexual Offence Case No.E017 of 2022 delivered on 18th January 2024)*

**JUDGMENT**

1. This appeal arises from the judgment and sentence of Honourable A.K. Mokeross Senior Principal Magistrate at Tamu law Courts delivered on 18<sup>th</sup> January 2024 in Sexual Offence Case No.E017 of 2022 Republic vs. Erick Mutai & Newton Kimutai alias Korea.
2. The Appellants Erick Mutai and Newton Kimutai alias Korea were convicted of the offence of gang rape. They were charged under section 10 of the *Sexual Offences Act*. The particulars of the offence are that on 5<sup>th</sup> August, 2022 at around 10.30pm in Kipkelion West within Kericho County they intentionally and unlawfully caused their penis to penetrate the vagina of FC without her consent. The victim FC aged 28 years old.
3. The trial magistrate, Hon. A.K. Mokeross, SPM, after hearing the five prosecution witnesses and the testimony of the appellants in defence found the appellants guilty of the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006 and sentenced them to serve 15 years imprisonment.
4. Aggrieved by the said conviction and sentence the appellants filed grounds of appeal and supplementary grounds of appeal both against conviction and sentence as follows;



1. That , the trial magistrate erred in law and facts by not appreciating and enforcing Article 50(2) (g,h) for the appellants leading to an unfair trial process.
  2. That , the trial learned magistrate erred both in law and fact by meting a very harsh and excessive sentence not proportional to the circumstances of the case.
  3. That , the learned trial magistrate failed to evaluate the circumstances of the evidence adduced before it ending up in meting an erroneous sentence completely incommensurate and disproportionate the circumstances.
  4. That , the learned trial magistrate erred in both law and fact by failing to make findings that the ingredients forming Gang Rape under section 10 of the SOA No.3 of 2006 were not proved beyond reasonable doubt.
  5. That , the trial magistrate erred in both law and facts in meting a very excessive and overly punitive sentence on a case not proved beyond reasonable doubt.
  6. That , the learned trial magistrate acted on wrong principles by not considering the fatality of the prosecution exhibits and that the contradictions and inconsistencies could not warrant such a harsh penalty.
  7. That , the learned trial magistrate erred in both law and fact in not considering that the subject was based on fabricated stories, afterthought and framing appellant's on the case at hand which was just a cover but not the real crime as alleged.
  8. That , the trial Court erred in law and fact in not considering that the Court has discretion to exercise and impose a lesser term than this termed unconstitutional.
  9. That , the sentence meted is punitive, retributive and deterrent but goes against the other important aims and purposes of conviction and sentencing which include Rehabilitation.
  10. That , the trial learned magistrate erred both in law and fact by convicting and sentencing the, appellants by acting on wrong principles.
5. The 1<sup>st</sup> appellant also filed supplementary grounds of appeal as follows:
1. That , the trial court erred in law and in fact in not diligently considering the evidence of first report of the prosecution witnesses that absolve the appellant from any wrong doing.
  2. That , the trial court erred in law and in fact in not making a finding that penetration by the appellant was not proved beyond a reasonable doubt.
  3. That , the trial court erred in law and in fact in not appreciating the appellants alibi defence that overwhelmed the prosecution case.
  4. That , the sentence of 15 years jail imprisonment is manifestly excessive as per the circumstances of the case.
  5. That , the trial court erred in law and in fact in not making a finding that the appellant's sentence should run from his time of arrest pursuant to paragraph 5.1.21 spgs 2023.
6. The 2<sup>nd</sup> appellant also filed supplementary grounds of appeal as follows:
1. That , the trial court erred in law in relying on inconclusive evidence of penetration to convict the appellant.



2. That , the trial court erred in law and in fact in not diligently considering the evidence of 1<sup>st</sup> report of the prosecution witnesses alongside arrest after span of time that absolved the appellant from any wrong doing.
  3. That , the trial court erred in law and in fact in fact in not appreciating the appellant's alibi defence that overwhelmed the prosecution case.
  4. That , the trial court erred in law and in fact in not making a finding that the appellant's sentence should run from the date of arrest pursuant to section 333(2) CPC and 5 1.21 SPGs, 2023.
7. The appellants filed written submissions while the respondent's Prosecution Counsel only made oral submissions.

### **The Appellants' submissions**

8. The 1<sup>st</sup> appellant in his submissions argued that the trial court erred in law and in fact in not diligently considering the evidence of first report of prosecution witnesses that absolves him from any wrong doing. He submitted that it did not make sense that the neighbors did not arrest him when the complainant shouted yet he was her immediate neighbour neither did they inform his wife.
9. It was also submitted that no neighbour came to testify to corroborate the complainant's evidence and that neither were the names of those who attacked her given to Bethwell nor did she include the name of the appellant in her report to the authority.
10. The 1<sup>st</sup> appellant also submitted that it took a whole month for them to be arrested yet PW1 and PW2 had seen their immediate neighbour gang rape PW1 and also that a report was made on 6<sup>th</sup> August 2022. Further, that there was no explanation given hence a reasonable doubt and that the later naming and arresting of the appellant was an afterthought and later embellishments. He relied on the case of Terekali & Another vs. Rex [1952]EACA where the court observed that the truth will always come up in the first statement taken from a witness when recollection is very fresh and there had been no time for consultation with others.
11. The 1<sup>st</sup> appellant also relied on the case of Simiyu & Another vs. Republic[2005]1 KLR where the court emphasised on the need for a complainant to mention the names of the assailants who he/she said she previously knew. The court also held that there is no better mode of identification than a name and that if the name is not given to the police at the first opportunity, then giving the name subsequently is an afterthought of the evidence given and is not reliable.
12. The appellant also submitted that the trial court erred in law and fact in not making a finding that penetration by the appellant was not proved beyond a reasonable doubt. He urged that it was the evidence of the prosecution witness that he did not penetrate the complainant further that at the time the incident occurred, he was not at home and he could therefore not enable the penetration. He submitted that this position was corroborated by two witnesses.
13. It was also submitted that there is evidence that there was a dispute on land boundary with the complainant as evidenced at page 7 line 27-28 of the proceedings and hence the reason for framing him was so as to extort the sum of Kshs.21,000 from him.
14. The 1<sup>st</sup> appellant also submitted that the trial court erred in failing to appreciate his alibi defence that was overwhelming to the prosecution's case.



15. He also submitted that the 15 year jail term was manifestly excessive and referred to section 157(1) of the *Penal Code* which provides that any person who conspires with another to induce any woman or girl to have unlawful carnal knowledge is guilty of a felony and is liable to imprisonment for three years.
16. The 2<sup>nd</sup> appellant also filed written submissions and, in his submissions, the 2<sup>nd</sup> appellant submitted that the trial court erred in law in relying on inconclusive evidence of penetration to convict him as there was no DNA to directly link him to the penetration. Further that the epithelial cells did not appear due to injuries of penetration but due to injuries on the complainant's back which were bruises and mild fractures on the back.
17. The 2<sup>nd</sup> appellant relied on the case of Mwangi vs. Republic [1984] KLR 95 where the court held that spermatozoa in a woman's vagina is not conclusive proof of sexual intercourse nor is absence proof of the contrary.
18. The 2<sup>nd</sup> appellant also challenged PW1 and PW2's failure to mention the appellant's name to their rescuers and even to the police. Further, that the hazy arrest of the 2<sup>nd</sup> appellant after a span of 30 days creates doubt if PW1 and PW2 gave their report immediately or it was done after consultation.
19. It was also submitted that the trial court erred in law and in fact by not appreciating the appellant's alibi defence that overwhelmed the prosecution's case. The 2<sup>nd</sup> appellant further submitted that instead of claiming the alibi had been raised at a late stage the prosecution had a chance under section 309 of the Criminal Procedure Act to seek leave to adduce further evidence in rebuttal of his defence.
20. The 2<sup>nd</sup> appellant also submitted that the reason as to why the complainant wanted to frame him was because she desired to extort money from the appellants. It was his submission that he was either to pay Kshs.21,000 or be framed for rape.
21. He also submitted that the investigating officer failed to revisit the scene of crime to ascertain if the iron sheets had indeed been cut or if the complainant owned a D-light and other necessary inquiries.
22. It was also submitted that the trial court erred in law and in fact in not making a finding that the appellant's sentence should run from the date of arrest. He urged that his sentence started running from the date of arrest.

### **The Respondent's submissions**

23. The respondent State was represented by Mr. Marete Principal Prosecution Counsel and in his oral submissions, he submitted that overwhelming evidence was adduced to prove gang rape. Further that there was no consent from the complainant.
24. He also submitted that there were independent witnesses and that spermatozoa was found in the complainant's vagina. Mr. Marete further submitted that PW1 testified that the appellants used force and threatened her as they raped her. He also urged that the sentence was lenient and requested the court to dismiss the appeal.

### **Analysis**

25. This being a first appeal, this court is obliged to reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it neither saw nor heard the witnesses as they testified. See *Okeno V Republic* [1972] EA 32.
26. The following issues flow for determination, arising from the grounds of appeal and the submissions:



1. Whether the Prosecution proved the offence of gang rape against the appellants and whether the proof was beyond reasonable doubt;
  2. Whether the sentence of 15 years imprisonment was manifestly excessive in the circumstances.
27. To resolve the above issues, evidence adduced in the trial court must be revisited.

### **Evidence before the trial court**

28. PW1 testified that on 5<sup>th</sup> August 2022 at around 10:30 pm, she was at her house asleep, when the accused persons cut a section of her iron sheet house and entered. It was her testimony that the D-light was still on. It was her testimony that they found her on the bed and took hold of her by the neck and they told her that Newton the 2<sup>nd</sup> accused wanted to have sex with her.
29. The 1<sup>st</sup> accused then removed her clothes and told her that she should accept to have sex with the 2<sup>nd</sup> accused after which he removed her biker and panty, and the 2<sup>nd</sup> accused had sex with her. PW1 testified that she had KShs.1050/- in her biker which they also took.
30. PW1 also testified that at the time, she was with her children in the house Cynthia who was six years old and Victor who was four years old. It was her testimony that they wanted to scream but the 1<sup>st</sup> accused told them that he would kill her and the children if they screamed.
31. It was also her testimony that the 1<sup>st</sup> accused had been her neighbour for many years. Further, that the lights were on in the house. She also testified that when the accused persons left her house, she shouted and the neighbors came out. The next day after reporting to the village elder and later on to the Chief who sent her to Muhoroni Police Station where she was issued with a letter to take to Fort-ternan hospital where she was treated and a P3 form filled. PW1 also testified that she also knew the 2<sup>nd</sup> accused person.
32. Upon cross examination, she testified that she had not gone to the 1<sup>st</sup> accused house on the material date and also that there was no land dispute neither did she ask for any money.
33. PW2 was PW1's daughter who was a minor and, in its *voire dire* examination, the court observed that although she was intelligent and capable of understanding questions put to her, she still was not capable of understanding the nature of an oath and therefore she was to give an unsworn testimony.
34. In her testimony, PW2 stated that on 5<sup>th</sup> August 2022 she was at home with her mother and that they were asleep and when she woke up she found that her mother was being beaten by Erick and Korea.
35. She testified that they beat her mother and that Erick removed her mother's clothes and did bad manners to her. Further that they also took money that belonged to her mother. PW2 testified that she knew Erick and that she used to see him in the village.
36. She also testified that their house was made of iron sheets, and that the accused persons cut the iron sheet walls and came into the house and that when they came in the lights were still on. She confirmed that she had seen Erick well that evening.
37. PW2 was recalled by the court on 17<sup>th</sup> April 2023 and on this date she also gave an unsworn testimony. She told the court that they were taught to tell the truth in Sunday school and that she would tell the court the truth.
38. She stated that she recalled that on the night of 5<sup>th</sup> August 2022 Erick Mutai and Newton Kimutai came to their house, and Erick took hold of her mother's neck and that he also took her money.



39. Further that Erick had told her mother that if she did not accept Newton, he would kill her. That Newton then did bad manners to her mother and that they left them at the house and ran to their grand parents' house.
40. PW2 also testified that they wanted to scream but Erick told them that he would kill them. Again, she confirmed that Erick was in court and she pointed at him. She also confirmed that Newton was also in court and also pointed at him.
41. PW2 also testified for a second time that on the fateful day, there were lights in the house, and that the lights were on. It was also her testimony that Erick lived near their house and that she knew him. She also confirmed that she knew Newton because he used to go to their home.
42. During cross examination by the accused persons on both occasions, PW2 testified that there was nobody sleeping with the mother on the said date and that no one was living with them other than Philemon who would live with them from time to time but was not in the home when the mother was attacked.
43. It was also her testimony that she had not been told what to say and further that the 2<sup>nd</sup> accused was referred to as Korea in their home and that is who she had seen on the day her mum was attacked. PW2 also testified that they went to their grandmother's place and left their mother and the two accused person's behind. Further that she only saw her mother the next day as they slept at their grandmother's place.
44. PW3 Jonathan N'geno testified that he was a village elder, at Tabobo village and that on 6<sup>th</sup> August 2022 at 6:00 a.m., he was called by BK who told him that some people had attacked his sister. He informed B that on the previous night his sister (PW1) had come to his place and told him that Erick Mutai and Newton had gone to her home and broken in and took Kshs. 1050/- and that they had also strangled her.
45. He testified that PW1 had screamed and the neighbors came to her aid. It was also his testimony that he had directed the complainant to report to the Chief. PW3 confirmed that he knew Erick Mutai and further stated that he had met him with B and they had told him that they wished to reconcile about this matter. He stated that he was not aware if they had reconciled as he did not follow up on the issue.
46. He further confirmed that he knew Newton was Erick's friend. PW3 was also recalled to testify on 23<sup>rd</sup> March 2023 and during his testimony he stated that PW1 had not told him that she had been raped but she had informed him that Erick Mutai and Newton Kimutai are the ones who got into her house. He also testified that there was a child in the house and that they had resolved the case. PW3 also testified that he told Betwell the complainant's brother and the complainant to go to his house.
47. Upon cross examination PW3 testified that when the 1<sup>st</sup> accused was in Kodiaga he called him and asked him to talk to the complainant and when he looked for the complainant she told him to look for B. It was his testimony that he did not pressure the issue of the reconciliation and also that Faith did not tell him to demand for any sum of money.
48. PW3 stated that when the accused met with complainant at home she said she wanted Kshs, 21,000/- which they did not agree to any sum being paid. He further stated that he was not aware of any efforts to reconcile.
49. PW4 Frankline Langat a clinical officer at Fort-ternan Sub County Hospital testified that he examined PW1 who had a torn inner pant, however the t-shirt and skirt were intact and there were no bloodstains on the clothes.



50. He further testified that PW1 was calm and had no swellings on face, head or neck and neither was she intoxicated. It was also his testimony that PW1 had no injuries on the throat or abdomen and that her upper limbs had no bruises.
51. However, PW4 testified that PW1 had a bruise and mild fractures on the lower back. A P3 form dated 8<sup>th</sup> August 2022 had been filled two days after the incident. PW4 further testified that he gave pain killers and post exposure prophylaxis and also ordered high vaginal swab which showed numerous epithelial cells and spermatozoa. According to him, the findings showed successful penetration in the last 72 hours.
52. In cross examination, PW4 testified that he could not tell who had sex with the complainant and further, that they did not preserve the sperms and also that they did not test to confirm if the sperms belonged to the 2<sup>nd</sup> accused person.
53. PW5 P.C. Everline Chepngeno, testified that she was attached at Girimori Police Station and that on 6<sup>th</sup> August 2022 at about 1600 hours, a rape case report was made at the Police station by a Kipsigis female adult and the same was recorded in the OB and she was instructed to carry out the investigations.
54. It was her testimony that the complainant had said that on the material night, she was asleep and she felt a cold hand on her neck and when she woke up she saw the accused persons who ordered her to remove clothes and when the complainant did not co-operate, they forcefully undressed her and Newton forcefully had sex with her.
55. PW5 testified that she issued a P3 form and also recorded statements by witnesses and eventually with the help of her colleague, they arrested the accused and prepared the current charges against them.
56. PW5 was cross examined and it was her testimony that she looked at the P3 form and it showed that there was a report of sperm. She also stated that she did not know if the child lied and also that she did not visit the scene because it was during the general election and she was busy.
57. It was also her testimony that no photos were taken of the complainant's house and that if she took a bribe, the 2<sup>nd</sup> accused ought to have produced evidence of the same.
58. Placed on their defence, the 1<sup>st</sup> accused Eric Mutai alias Kipyegon testified as DW1 and stated that the charges against him were false because on the said date when the offence occurred, he had gone to Kapsabet to get his maize. He also confirmed that the complainant was his neighbour and that he could not do anything to her. There was no cross examination.
59. The 2<sup>nd</sup> accused Newton Kimutai alias Korea testified as DW2 and stated that on the day the offence was committed, he was not at home as he had gone to watch a football match in Salgaa. He also testified that he did not know why the complainant decided to frame him and that even the neighbors were still surprised, and yet he never differed with the complainant.
60. In cross examination, DW2 testified that at the time he was with Henry Kogo and that he knew the complainant well as she had been married by his brother. He further testified that he did not rape the complainant.
61. DW3 Erick Cheruiyot Bett testified that on 5<sup>th</sup> August 2022 he had gone with Erick to fetch his wife and that they did not return on that day and as such he was surprised when Erick was arrested.
62. In cross examination, he testified that they had gone to Chepkumon and that they had left at 9:00 am and it was only the two of them. He further testified that the 1<sup>st</sup> accused's wife was called Mercy and that they slept at her house.



63. DW3 also testified that he knew the complainant F.C. and that she was like a mother to the 1<sup>st</sup> accused. Further, that village elders had once tried to resolve the case. He also testified that he did not have evidence to show the court that Erick Mutai was away on that day
64. DW4 Henry Kogo testified that he knew the 2<sup>nd</sup> accused and that on 5<sup>th</sup> August 2022 he was with him as Salgaa watching football. He testified that they left at 11:00 pm and went home and they arrived at his home at 11:30 p.m. It was his testimony that he was surprised by the charges because the time the offence was alleged to have occurred, did not make sense.
65. Upon cross examination by counsel for the respondent, he testified that he was with the 2<sup>nd</sup> accused from 7:00 p.m. to 11:00 p.m. and that they parted ways with the accused when they got to his house. He also testified that he was with Gideon and the accused and that he was not aware of what had happened after he left the 2<sup>nd</sup> accused. He also testified that the complainant is like a sister to the 1<sup>st</sup> accused.
66. DW5 Silas Kipyegon Ngetich testified that he knew the 2<sup>nd</sup> accused and that on 5<sup>th</sup> August 2022 together with the 2<sup>nd</sup> accused they proceeded to Salgaa to watch a football match after which they left at 11:00 p.m. and went to the 2<sup>nd</sup> accused's home. He also testified that the complainant had a boyfriend who was a drunkard.
67. DW5 upon cross-examination testified that they parted ways later with the 2<sup>nd</sup> accused person and that he did not hear the complainant scream. It was also his testimony that the complainant drunk alcohol. Further, that he was not aware of any issue between the complainant and the 2<sup>nd</sup> accused person and that the complainant lied. It was also his testimony that he did not go home with Newton.
68. DW6 testified that the 1<sup>st</sup> accused was her husband and that on 5<sup>th</sup> August 2022 he was in Nandi and that he slept at home and the next day they were together.
69. During cross examination, DW6 testified that she had been married to the 1<sup>st</sup> accused for four years and that on 5<sup>th</sup> August 2022, the 1<sup>st</sup> accused and Erick who she said was her husband's friend travelled by matatu and boda boda. Further that she had not been told what to say but was only testifying so that her husband was not jailed.

### **Determination**

70. Having considered the foregoing, the question is whether the elements of the charge of gang rape have been established and proven, as mandated by law, beyond a reasonable doubt.
71. Section 10 of the *Sexual Offences Act* defines gang rape as follows:

“ 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.”
72. The key ingredients of the offence of gang rape as seen in the above section include:
  - a) Proof of rape or defilement;
  - b) Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per



se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

Therefore, was the offence of rape committed?

73. Section 3 of the Act defines ‘rape’ as follows:

- “(1) A person commits the offence termed rape if –
- (a) he or she intentionally and unlawfully commits an act which cause 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.
- (2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.”

74. Section 2 of the Act defines ‘penetration’ as:

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

75. The appellants have argued that the prosecution did not discharge the burden of proving the offence of gang rape against them. PW1’s testimony was that the appellants broke into her mabati home on 5<sup>th</sup> August 2022 and the 2<sup>nd</sup> appellant with the aid of the 1<sup>st</sup> appellant raped her.
76. This evidence by the complainant was corroborated by the testimony of PW2 C.C. the complainant’s daughter who testified that she saw the appellants beating her mother and the 1<sup>st</sup> accused removing her mother’s clothes and raping her. PW1 and PW2 were both able to identify both appellants as they testified that the D-light was on when the appellants were raping PW1.
77. PW1 on 6<sup>th</sup> august 2022 reported the incident to the police but prior to that she had informed a village elder in the area and she had also informed the Chief who advised her to report to the police. This report was corroborated by PW3 and PW5.
78. PW4 a Clinical Officer at Fort-ternan Sub County Hospital examined the complainant on 8<sup>th</sup> August 2022 and confirmed that lab tests showed epithelial cells and spermatozoa. He further confirmed that the findings showed successful penetration in the last 72 hours.
79. PW5 a police officer at Girimori Station too confirmed that PW1 reported to them at 1600hrs on 6<sup>th</sup> August 2022 and that she had been raped and the same was recorded in the occurrence book.
80. From the evidence by the prosecution witnesses, the appellants and defence witnesses, it is undoubted that the appellants were persons well known to the complainant and her daughter, PW2. The 1<sup>st</sup> appellant even testified that the complainant was married to his brother.
81. In my humble view, although the appellants denied being with the complainant the night when the complainant was raped, their defence of alibi weighed against the evidence of PW1 and PW2 cannot be believed and there was no indication that the complainant could have framed the appellants with such an offence. The evidence was corroborated even by the appellants themselves that they had never



- differed with the complainant. There was also no possibility of mistaken identity as PW1 and PW2 knew the appellants and also that on the night of the offence, the room was well lit.
82. The trial court correctly noted that the issue of (alibi) was not raised in advance to allow the investigating team test it out and confirm with certainty that the appellants were indeed not at the scene on the material night.
83. I have no reason to find that the alibis were considered and found to be an afterthought and if not, the same would have been brought up earlier in the proceedings.
84. There is also some contradictions in the alibis for example, the 1<sup>st</sup> accused person claims that he had gone to Kapsabet to pick maize but DW3 testifies that they had gone to pick the 1<sup>st</sup> accused's wife.
85. In light of the above I am satisfied that the appellants gang raped the complainant. There was no evidence of consent to have sex with the appellants who broke into the complainant's house at night and even threatened to kill her if she screamed, with her children.
86. Accordingly, I find and hold that the evidence adduced by the prosecution proved the charge of gang rape. I uphold the appellants conviction.
87. The second issue is whether the sentence of fifteen years imprisonment was manifestly excessive as to warrant interference by this court. The circumstances under which an appellate court interferes with sentence meted out by a trial court were set out by the predecessor of the Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, when pronounced itself on this issue as follows:-
- “The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
88. The Court of Appeal further in *Bernard Kimani Gacheru v Republic* [2002] eKLR restated that:
- “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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.”
89. In the instant case, the appellants were charged under section 10 of the Sexual Offence [Act No. 3 of 2006](#). The section which I have reproduced above in this judgment provides for prima facie a mandatory minimum sentence of 15 years imprisonment where the offender is convicted of gang rape and leaves no room for the trial Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances. The section deprives the trial court of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances, and this is applicable to all sexual offences.
90. That sentence is lawful, as was held by the Supreme Court in the recent case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment). I find no reason to interfere with the same, the Supreme Court having detailed the reasons for finding that the Francis Karioko Muruatetu & Another



v Republic [2017] eKLR, Petition No. 15 and 16 of 2015 case was only applicable to murder cases under section 204 of the *Penal Code* on the unconstitutionality of death sentence.

91. I would say no more than being bound by the decision of the Supreme Court on this issue of mandatory minimum sentences in sexual offences since there is no petition placed before me to determine the unconstitutionality of the sentence and the section under which the penalty is provided.
92. The appellants also challenged the trial court's judgment on grounds that the trial magistrate erred in failing to appreciate and enforcing Article 50(2)(g,h) of *the Constitution*.
93. I have examined the proceedings and I note that on 5<sup>th</sup> September 2022 the appellants were informed by the court on their right to legal representation of their own choice and were encouraged to exercise it. They were also informed that they were also entitled to apply to the Legal Aid Board for assistance should they desire.
94. This court in the case of *Opiyo v Republic* [2024] KEHC 7732 (KLR) observed as follows;

“However, it has been held that the right to legal representation is qualified and subject to the substantial injustice test. Thus, not everyone, is entitled to an Advocate at State expense, with each case being considered on its own merit. In *Charles Maina Gitonga v Republic* [2018] eKLR, it was stated that legal representation at State expense is not an inherent right available to an accused person under Article 50 of *the Constitution*, adding that, under section 36(3) of the *Legal Aid Act*, an accused person has to first demonstrate that he was unable to meet the expenses of trial.”
95. I note that the appellants in their supplementary grounds of appeal state that the trial court erred in not finding that their sentences should run from the date of arrest.
96. Ideally, the correct position is that sentence begins to run from the date when the accused persons are arrested. I however note that in the instant case the appellants were arrested on 4<sup>th</sup> September 2022 and 5<sup>th</sup> November 2022 respectively and the 1<sup>st</sup> appellant was released on bond on 28<sup>th</sup> September 2022 while the 2<sup>nd</sup> appellant was released on 8<sup>th</sup> November 2022.
97. In the circumstances, I find no reason for this court to interfere with the trial court's sentence however, in accordance with Section 333(2) of the *Criminal Procedure Code*, I order that the sentence imposed shall take into account the period spent in custody from date of arrest on 4<sup>th</sup> and 5<sup>th</sup> November 2022 respectively until the accused persons were released on bond on 28<sup>th</sup> September 2022 and 8<sup>th</sup> November 2022 respectively.
98. In the end, I find the appeal against conviction devoid of merit. I dismiss it. The appeal against sentence succeeds only to the extent that the 15 years imprisonment to be calculated from the date of arrest of the appellants before being released on bond as stated above.
99. I so order.
100. This file is closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2025**

**R.E. ABURILI**

**JUDGE**

