



REPUBLIC OF KENYA



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**Mwangi v Republic (Criminal Appeal E029 of 2023)  
[2025] KEHC 4261 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4261 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL E029 OF 2023  
AK NDUNG’U, J  
APRIL 4, 2025**

**BETWEEN**

**JAMES MAINA MWANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original Conviction and Sentence in Nyabururu CM  
Sexual Offences Case No E149 of 2019– C. Muhoro, SRM)*

**JUDGMENT**

1. The Appellant in this appeal, James Maina Mwangi was convicted after trial of defilement (count I) contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act*, No 3 of 2006 and rape (count II) contrary to section 3(1) (a)(b)(3) of the same Act. On 07/12/2023, he was sentenced to 20 years imprisonment in count I and 10 years imprisonment for count II. The sentences were ordered to run consecutively.
2. The particulars for count I were that on the 28/10/2019 at [Particulars Withheld] in Mochongoi division, Marigat sub-county within Baringo County intentionally and unlawfully caused penetrate the vagina of MT a child aged 13 years old. The particulars for count II were that on 21/10/2019 at the same location, intentionally and unlawfully caused his penis to penetrate the vagina of MCC without her consent.
3. Being dissatisfied, he appeals against the convictions and sentences vide a petition of appeal dated 19/12/2023 challenging the convictions and the sentences on the following grounds;
  - i. The learned magistrate erred convicting him against the weight of evidence on record.
  - ii. The learned magistrate erred by failing to appreciate that main ingredients of the charge had not been proven.



- iii. The learned magistrate erred by failing to find that the evidence by the prosecution did not support the charges against him.
  - iv. The learned magistrate erred by failing to find that the complainants' evidence was not corroborated by direct evidence of other prosecution's witnesses.
  - v. The learned magistrate erred by finding that the prosecution had proven its case whereas the prosecution failed to call material witnesses.
  - vi. The learned magistrate erred convicting when identification was not proved beyond reasonable doubt.
  - vii. The learned magistrate erred by failing to appreciate that identification parade did not meet the requisite threshold as provided by the law.
  - viii. The learned magistrate erred by considering the prosecution's evidence in total disregard to that of the defence.
  - ix. The learned magistrate erred convicting him when there were glaring contradictions in the prosecution's evidence.
  - x. That the conduct of the trial, judgment and conviction was oppressive and caused a serious miscarriage of justice.
  - xi. The trial magistrate erred receiving the evidence of the complainant without fully complying with section 19 of the *Oaths and Statutory Declarations Act*.
  - xii. The trial magistrate failed to consider that the Appellant was in custody since year 2019 when he was charged up to December 2023 while sentencing him.
  - xiii. That the conviction and the sentence was not founded on sound principles of the law, was oppressive and caused a miscarriage of justice and the sentence was manifestly harsh and excessive in the circumstances of this case.
4. The appeal was canvassed by way of written submissions.
5. Learned counsel for the Appellant argued that the complainants did not give the description of the alleged assailants for example the physical stature or other collateral features to prove positive identification. They did not state that he had a gap between his teeth despite the fact that they testified that he spoke to them. Further, none of them described the alleged tattoo on his hand. That PW5 testified that there were four people including the Appellant during the identification parade. Hence it was flawed. No documents as to how identification parade was conducted was ever tendered before the trial court. The Appellant testified that PW9 had stated that he was not the assailant and the witnesses had stated that the assailant who assaulted PW2 had long hair.
6. It is submitted that there are laid down procedures to identification of a suspect which ought to be followed to the letter and the identification in this case failed to follow the procedure set in Chapter 42 Paragraph 7(5) of The Police Standing Orders. Reliance was placed on the case of Reuben Lukuru v Republic (2019) eKLR among other cases to emphasis on the need to conduct a proper identification parade as provided in the Police Standing Orders. That the defective parade prejudiced the Appellant and violated his rights in that the minimum number of 8 was not met and the police officers were part of those lined up in the parade and three out of four people lined up in the parade were police officers and measures were not taken to prevent the Appellant from standing out from other persons lined up during the parade. The parade was also conducted by the investigating officer and no description had



been given to the police prior to conducting the parade. The report was also not produced. Therefore, relying on such evidence was a violation of the Appellant's his rights.

7. As to proof of penetration, Counsel submitted that there was evidence that PW2 was defiled while PW3 was raped. However, none of the witness knew the Appellant prior to the alleged offence and the identification took place through the faulty identification parade. Thus, the evidence failed to prove identification of the assailant. That from the evidence adduced by the prosecution and the Appellant's defence, it was clear that the Appellant was framed. That the trial court dismissed the Appellant's defence as a mere denial thus taking no due consideration of the said defence to the prejudice of his case. That the persons who arrested him were not called to testify to shed light on the grounds upon which they arrested him. That the evidence of the person who arrested him while not knowing him and not having found him during the commission of the offence was crucial in explaining how they were able to identify him and to corroborate complainants' evidence on identification.
8. Counsel adds that there were material contradictions that were never resolved in that while there was no description of the assailant recorded in the witness's statements, during cross examination, PW2 stated that she could identify the perpetrator by a tattoo and his face. PW3 stated that she was able to identify the perpetrator by his face, clothes and a tattoo yet on cross examination she stated to have seen the tattoo when he was asked to remove his jacket and that she had not seen the tattoo during the incident. Therefore, the witnesses were not truthful and were lying to fix him for the crimes he did not commit. As to sentence, she submitted that the trial court failed to consider the time the Appellant spent on remand during trial thus resulting to a manifestly harsh and excessive sentence. That it was a gross violation of justice to convict and proceeded to sentence without the prosecution proving its case beyond reasonable doubt.
9. From a reading of the submissions on record for the Respondent, it is noted that the facts captured therein do not relate to this particular appel. Efforts by the court to have this situation regularised bore no fruit.
10. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
11. The Supreme Court of India in *K. Anbazhagan vs. State of Karnataka and Others*, Criminal Appeal No. 637 of 2015 put it more succinctly as follows:-

“The appellate Court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,...The appellate Court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”



12. A suitable point of departure is the summary of the evidence adduced at the trial court which was as follows.
13. PW1 testified that on 26/10/2019, she was using a short cut through some bushes when she met the Appellant who was headed to the opposite direction. He was holding a stick and he had a marvin in his pocket. He then turned and started following her and passed her. He asked her whether there was any police officer who had passed by and he told her that he was a police officer looking for criminals. They continued to walk up to a place where there was a slope and he told her that if someone had a panga or knife, attack that person and if the person screams, that person should be killed. He took out the knife that was in his coat and he tried to attack her but she took off running while screaming for help back to Karandi and when they reached almost at the main road, he disappeared. That she was later called at the police station to identify him and she identified him immediately since she had clearly seen his face when they were walking together. That she did not report but others had reported that they had been chased by unknown person.
14. On cross examination, she maintained that it was the Appellant who wanted to attack her. That he was carrying a stick and a black marvin and had hair at that time. That she did not report because he disappeared.
15. PW2, the complainant in count I testified that on 28/10/2019, she was herding goats at a bush and at around noon, the Appellant passed by and then went back to where she was. He asked her to go with him but she refused. He hit her with a stick and dragged her to a bush where he told her to remove her trouser and when she refused, he removed it. He then tied her mouth with a bandage and inserted a stick in her vagina. He then removed his trouser and inserted his penis in her vagina and had sex with her and when he was done, he tied her on a tree using a rope and left. She struggled and managed to untie herself and slowly walked until she met people and told them what had happened. They requested that she take them to where the incident had happened and she took them there and they walked around but they did not find the Appellant. Her sister took her to Ngarua hospital but she was later taken to Nyahururu referral hospital where she was admitted. That the Appellant was later arrested and she was able to identify him since she had clearly seen his face and he had a tattoo on his left hand. She identified the clothes she was wearing on that particular day, the stick the Appellant used to beat her, the tape that was used to cover her mouth and the panga the Appellant had.
16. On cross examination she testified that he was wearing a shirt and a jacket and he removed his jacket but not shirt. That when he removed his jacket, she saw a tattoo on his hand and that she identified him through his face and the tattoo. He was also wearing gumboots. That she went to police station and she identified him and that she did not know him prior to the incident.
17. PW3 the complainant in count II testified that on 21/10/2019, she had gone to fetch firewood with her friend and suddenly someone appeared claiming that he was a police officer and asked them why they were fetching firewood on a holiday. He cut her rope into two and tied their hands and took them to a different bush. He asked whether they had money and he then asked them to lie down and they lied down facing up. He asked them to remove their inner wear but they refused. He removed a knife and removed her innerwear forcefully. He tied her friend's eyes with a sweater and he removed his trouser. He told her that if she tries anything he will kill her and that the knife had killed several people. That her friend managed to untie herself and she took off. She managed to throw the knife away but he raped her. She testified that he slept on top of her and inserted his private part in her private part. She managed to escape and took a stone and told him if she followed her, she was going to kill him. She ran and reported at home. That when he was arrested, she identified him since she had clearly seen his face and the clothes he was wearing. He also had scars and a tattoo on his hand.



18. On cross examination, she testified that the attack was during the day and her younger sister escaped before he got hold of them. That she had not seen the tattoo when they were struggling but saw it when he was arrested. That he was told to remove his sweater and she saw marks on his hand. That she identified him since she had seen his face. That he did not have any marks on his face and that she described his face, looks and what he was wearing to the police. That she did not know who caused his arrest but she heard that a boy had followed him and caused him to be arrested.
19. On re-examination, she testified that when her younger sister saw the accused from a distance, she took off and she did not witness anything. That she did not see the mark on his hand during the incidence but saw it later. That a boy who he had followed to that bush got him arrested.
20. PW4 testified that she was fetching firewood at Kimoriot forest when she saw the Appellant passing by. She said hi and he responded and asked her whether she had seen people passing by with firewood. He asked her to hide her axe since there were so many police officers. That before she got home, she heard screams and a boy informed her that there was a girl who had been attacked by someone pretending to be a police officer. Many people were running towards the forest and she followed them and they saw a girl coming from the forest and she informed them that she had been raped. They went to the scene where she was attacked and they took the girl to Karandi. That she had not seen any other man in the forest on that day.
21. On cross examination, she testified that she met him on that day in the forest and that she had lived in that area and had never heard of any such incidences. That she had seen him in the forest shortly before the rape. That she had seen his face but she did not see any marks on his face.
22. PW5, the investigating officer testified that on 23/10/2019, PW3 and her mother reported that PW3 had been defiled by unknown person at the forest. On 29/10/2019, Chelegat reported that her sister had been defiled while at Ol Arabel forest. On 25/11/2019, he was informed that someone was arrested by members of the public and they wanted to burn him. They went to the scene and they found the Appellant sitting down at Laikipia forest and they took him to the station. He had a panga, Pexhibit 4. That they conducted identification parade and they called the complainants who identified him as the person who had defiled them. That they identified him by his physical appearance, voice and tattoo on his arm. That they confirmed that he had a tattoo. That a stick had been inserted PW2's vagina which he produced as pexhibit1, the cell tape that was used to tie the girls mouth as pechibit3, PW2 clothes as Pexhibit 2(a)-(d) and the rope as Pexhibit5.
23. On cross examination, he testified that the first report was made on 23/10/2019 and the second one on 29/10/2019 and he asked the complainant and she said that the person had a tattoo and physically described him. They took him to the station and the complainants identified him during identification parade. That he did not know how he was arrested but was contacted to go and rescue him. During the identification parade, he was told to remove his jacket and they saw the tattoo and that they found him at the forest and members of public had arrested him. That there were four people on the parade. The panga was confiscated by members of public and the stick was brought and the girl confirmed that he had a stick.
24. On re-examination, he testified that the chief called him of a suspect who was being assaulted by members of the public. He was told that he was a rape suspect. The parade had four people, three police officers in casual clothes and the Appellant. He had a tattoo and he was arrested at the forest.
25. PW6 was PW3 mother. She testified that her two daughters and a neighbour went to fetch firewood in Laikipia forest. Her daughter Leah went home panting and informed her that PW3 and Dorcas had been apprehended by a person who said he was a forest ranger but he did not look like a ranger.



With Leah and Leketo, a neighbour, they went to the forest but they did not find the girls. They heard screams and they kept calling Mercy who continued screaming. They followed the voice and they found PW3 on the ground and had been tied with a rope. There were two pangas and ropes and their inner wears were also there. She was shaking and crying and she had her clothes on. Dorcas had taken off and they found her on the road. Leketo and the officers went to the forest to look for the man and she took PW3 to the hospital where she was treated and thereafter reported the matter when PW2 who lived on the other side of the forest was also raped. That after PW2 was raped, he went back to the forest and he wanted to rape another girl but the girl ran away. The girl who was with her brother had seen his face as well as her brother. The brother hunted for the man and they were informed. They laid ambush and he was arrested and taken to police station where the complainants, Dorcas and a Turkana lady identified him.

26. On cross examination, she testified that PW3 informed her that the man had a gap in his teeth and a tattoo which was confirmed by Dorcas. That the girls had told the police as much and if the description was not captured, it was an error on the part of the person who was recording the statements. That she took the girl to hospital before she made a report. Leketo was not a witness and she did not know why the police did not record Leah's statement. That PW3 and Dorcas were present when he was arrested.
27. PW7 was the clinician who examined PW3 and filled the PRC form. She testified that she confirmed that there was penetration and that her hymen was freshly broken. There was some discharge, she had injuries on her left leg and outer genitalia and the lab results revealed that there was presence of spermatozoa and the urine test revealed that there was presence of sperms. She filled the PRC form which she produced as Pexhibit9.
28. On cross examination, she testified that she examined her on 21/09/2019 and that she filled the PRC form and not the P3 form. That she said that she did not know the perpetrator and that she said the perpetrator was about 24 years old. They first attended to her and then she reported to the police. She did not establish whose semen was noted. That her name and signature appeared on the PRC form and it was in October and not September. The PRC form did not have a stamp which is not a must and she could not connect him to the rape. On re-examination, she testified that the correct date ought to have been 21/10/2019 but she indicated 21/09/2019 by mistake.
29. PW8 a clinical officer testified that she had a P3 form which she filled on 28/10/2019 and which she produced as pexhibit8. That she copied the contents from the PRC form. That the victim's clothes were intact with no blood stains. She had injuries on her genitalia, the hymen was broken, there were blood stains in her vagina and there was mucus discharge that had blood traces. On cross examination, she testified that she did not indicate her licence number since it had expired and she had not picked the new one. That the one who had examined the victim was off duty.
30. PW9 Dorcas Jerotich testified that she accompanied PW3 and Leah to the forest to fetch firewood. They saw a person who claimed to be a KFS officer and he instructed them to tie themselves with ropes. He tied them and took them inside the forest. PW3's sister took off when she saw the person. He instructed them to sleep face down and he asked for money. They asked him to take them home but he said he wanted one shot each. He instructed them to remove their inner wear a struggle ensued but he subdued them. She informed him that she was HIV positive and so he started with PW3 and he covered her face with a sweater. That he started raping PW3 and she could hear PW3 crying saying she was in pain but he called her stupid and instructed her to open her legs. That as he was raping PW3, she managed to escape and ran home and alerted people. She testified that she saw the man clearly and he had a tattoo on his arm and a gap in his upper teeth. She identified the Appellant in court. That she was called and she identified him. She was also called at the police station and confirmed that it was him. She recognised his voice and when he was arrested, she asked him to speak and he spoke and she confirmed.



31. On cross examination, she testified that the incident was on 21/10/2019 around 11:00am. He was not wearing a mask and she informed the police about the tattoo and the gap on his teeth and she could not tell why this was not recorded. That she even told people that she could recognise him because of the tattoo and the gap on his teeth. He had a panga and a knife and they could not scream for they feared for their lives. That she did not say that he had long hair. That they accompanied him to the police station and confirmed that he was the one and that he was telling the police to forgive him and let him go. On re-examination, she maintained that she gave the description to the police and she identified him.
32. PW10, PC Murima only produced PW2's birth certificate as Pexhibit10 which indicated that she was born on 04/08/2007.
33. PW11, a clinical officer testified that PW2 was admitted in hospital on 28/10/2019 and discharged on 30/10/2019. She complained of perineal tear which is between the vagina and the anus. She was bleeding and she was taken to theatre for repair. She had active bleeding in her vagina and no spermatozoa were recovered. He produced the discharge summary as Pexhibit11. He also produced the PRC form as Pexhibit 12. He testified that the PRC form was filled by Dr. Wambui who was furthering her studies and he produced the document on her behalf. That the victim went to hospital clamming that she was assaulted, raped and sticks inserted in her vagina and was also tied on a tree. She had scratch marks on her neck from nails and on the left side of her vagina, there was a 5cm wide wound and second-degree perineal tear. She was anxious, she was a virgin and had not changed clothes. Her clothes were soaked in blood. She had lacerations in her left vaginal wall and hymen was broken. The scar was repaired. He also produced the P3 form as pexhibit13.
34. On cross examination, he testified that her vagina was actively bleeding hence no spermatozoa could be recovered. It was evident that she had been defiled and blunt object inserted in her vagina. That the P3 form can be issued way later as long as the PRC was filled on the very day or at the earliest opportunity. There was an error on the date on the P3 form. That they first treat the patient and if they need to report, they report later.
35. In his sworn defence, the Appellant testified that in February 2019, he left Mai Mahiu and went back home in Muthengera for farming purposes. On 25/11/2019 while heading to the farm, he was stopped by 3 men and he thought they were looking for their cattle. They ordered him to sit down and they told him that a girl had been 'caught' in the forest and that they will call the girl to confirm. They were armed with a panga, stone and a stick and he accompanied them to a place where they found PW6 and children and said that they should wait for the victim. PW9 arrived and she was asked whether he was the one but she said that the assailant had long hair. The police arrested him and he was taken to police cells and when he was being taken out, PW2 appeared and stated that he was the one. That the witnesses lied to court and were talking about an unknown person. That they did not give description in the documents and an ID parade was not done. That he grew up in Muthengera and he did not know those people. That PW9 was forced by the State counsel to lie to the court. He denied knowing the victims.
36. On cross examination, he testified that he was not known in that area but the ones in other farms knew him. That he was not the only one on that road but he was the only one who was stopped. That PW9 went to the scene and did not identify him and that the victims did not describe him. He admitted that he had a gap between his teeth and a tattoo and that there was a victim who identified him at the police station. That he was told to take off his jacket. That he had no grudge with the complainants and he was framed. He maintained that he did not know any of the victims.



37. I have had occasion to consider the evidence as recorded in the trial court. In doing so, I take cognizance that I never saw nor heard the witnesses testify and have given due allowance for that fact. In addition, I have applied my mind to the applicable law, learned submissions on record and case law cited.
38. The issues for determination are whether the charges in respect of the 2 Counts herein were proved to the required threshold in law and if the affirmative, whether the sentences meted out were legal and appropriate in the circumstances of the case.
39. The Appellant was charged with two counts, the count of defilement, (count I) in respect of PW2 and Rape (count II) in respect of PW3.
40. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This requirement is anchored in Section 8(1) of the *Sexual Offences Act* No. 3 2006.
41. The ingredients for the charge of rape are provided under section 3 of the *Sexual Offences Act* which are, penetration, that there was no consent or the consent was obtained by means of force or intimidation and identification of the perpetrator.
42. Proof of age is important in defilement cases. In *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR), 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.”
43. In the present appeal, proof of age for PW2 is not disputed. PW10 produced her birth certificate as Pexhibit10 which shows that she was born on 04/08/2007. According to the charge sheet, the offence was committed on 28/10/2019 hence she was 12 years 2 months old at the time of the offence and not 13 years as stated in the charge sheet. The charge sheet was not amended but this did not prejudice the Appellant as it was proved that she was a minor falling within the bracket established under Section 8(3) of the *Sexual Offences Act*. The indication that the victim was 13 years old is understandable as the minor had surpassed 12 years but was below 13 years.
44. Penetration in both counts is not disputed. The Appellant’s counsel in her submissions conceded to the fact that penetration was proved to the required standard.
45. What is disputed is the identity of the perpetrator. Counsel submitted at length that the complainants did not give the description of the assailant like physical stature or other collateral features like the gap between his teeth despite the fact that they testified that he spoke to them. None of them described the alleged tattoo on his hand and none of the witness knew the Appellant prior to the alleged offence. Further, there was no description of the assailant recorded in the witnesses’ statements and there were material contradictions in that during cross examination, PW2 stated that she could identify the perpetrator by a tattoo and his face. PW3 stated that she was able to identify the perpetrator by his face, clothes and a tattoo yet on cross examination, she stated to have seen the tattoo when he was asked to remove his jacket and that she had not seen the tattoo during the incident. That the Appellant testified that PW9 had stated that he was not the assailant and the witnesses had stated that the assailant who assaulted PW2 had long hair.
46. Further, the identification parade was flawed as it did not conform to Chapter 42 of the Police Force Standing Order in that PW5 testified that there were four people including the Appellant during the



identification parade hence the minimum number of 8 was not met and three out of four people lined up in the parade were police officers and measures were not taken to prevent the Appellant from standing out from other persons lined up during the parade. The parade was also conducted by the investigating officer and no description had been given to the police prior to conducting the parade. No documents as to how identification parade was conducted was ever tendered before the trial court.

47. According to the record, PW5, the investigating officer testified that they conducted identification parade and they called the complainants who identified Appellant as the person who had defiled them. That they identified him by his physical appearance, voice and tattoo on his arm. That during the identification parade, the Appellant was told to remove his jacket and they saw the tattoo. During re-examination, he testified that the parade had four people, three police officers in casual clothes and the Appellant.
48. Police Form 156 sets out the Force Standing Orders in regard to identification parades. One of the prerequisites of a fair parade is that the witnesses ought to give a description of the suspect to the police officer in charge of the crime so that the officer arranging the parade picks members to the parade who, as much as possible, fit the description of the suspect (See Order 6(iv) (h). Standing Order 6 (v) (d) provides:-

“The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent.”
49. I have reviewed the evidence in regard to the identification parade conducted. The conduct of the parade did not meet legal muster contrary to the requirement of Standing Order 6 (v) (d). This is confirmed by the fact that the parade had 4 members only. The identification report form detailing the conduct of the parade was not produced in evidence to show whether all requirements were adhered to.
50. Further, in breach of Standing Order 6(iv) (h). a description of the suspect to the police officer in charge of the crime had not been given to enable the officer arranging the parade to pick members, who, as much as possible, fit the description of the suspect.
51. That aside, I hasten to add that the identification of a perpetrator of a crime is not solely dependent on the outcome of an identification parade and the court is under a duty to weigh other alternative evidence available in making a determination thereof.
52. PW1 testified that she was able to identify the Appellant as she saw him clearly as they walked together before she ran off. On cross examination, she maintained that it was the Appellant who wanted to attack her. That he was carrying a stick and a black marvin and had hair at that time.
53. PW2 testified that when the Appellant was arrested, she was able to identify him since she had clearly seen his face and he had a tattoo on his left hand. On cross examination, she testified that he was wearing a jacket and a shirt and he removed his jacket and when he removed his jacket, she saw the tattoo on his hand and she identified him through his face and the tattoo.
54. PW3 stated that when he was arrested, she identified him since she had clearly seen his face and the clothes he was wearing. He also had scars and a tattoo on his hand. On cross examination, she stated that she had not seen the tattoo when they were struggling but saw it when he was arrested. That he was told to remove his sweater and she saw marks on his hand. That she identified him since she had seen his face. That he did not have any marks on his face and that she described his face, looks and what



- he was wearing to the police and on re-examination, she stated that she did not see the mark on his hand during the incidence but saw it later.
55. PW4 testified that she met the Appellant and conversed with him and shortly thereafter, she heard screams emanating from the forest and she was informed that a girl who was herding was raped. She stated that she saw the Appellant clearly when they spoke and that he was the only man she had seen that day in the forest.
56. PW5 on cross examination stated that when the second report was made on 29/10/2019, he asked the complainant and she said that the person had a tattoo and physically described him. That he did not know how he was arrested but was contacted to go and rescue him.
57. PW6 testified on cross examination that PW3 informed her that the man had a gap in his teeth and a tattoo which was confirmed by Dorcas (PW9). That this information was given to the police and if the description was not captured, it was an error on the part of the person who was recording the statements. It was his evidence that PW3 and Dorcas were present when he was arrested.
58. PW9 testified that she saw the man clearly and he had a tattoo on his arm and a gap in his upper teeth. She identified the Appellant in court. That she was called and she identified him. She was also called at the police station and confirmed that it was him. That she recognised his voice and when he was arrested, she asked him to speak and he spoke and she confirmed. On cross examination, she stated that he was not wearing a mask and she informed the police about the tattoo and the gap on his teeth and she could not tell why this was not recorded. That she even told people that she could recognise him because of the tattoo and the gap on his teeth. That she did not say that he had long hair. On re-examination she testified that she gave the description to the police and she identified him.
59. The court in R vs Turnbull [1976] 3 ALL ER 549 stated as follows in respect to identification of an assailant;
- “...the judge should direct the jury to examine closely the circumstances in which 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 (sic) 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”
60. In the instant appeal, the evidence available is that none of the witnesses knew the Appellant before. The evidence of identification was key and the prosecution was duty bound to treat that evidence with circumspection to ensure that the evidence on identification of the Appellant was water tight.
61. Counsel for the Appellant raised a pertinent issue to the effect that the persons who arrested him were not called to testify to shed light on the grounds upon which they arrested him. That the evidence of the person who arrested him while not knowing him and not having found him during the commission of the offence was crucial in explaining how they were able to identify him and to corroborate complainants’ evidence on identification.
62. Indeed, none of the witnesses who allegedly arrested the Appellant were called to testify to shed light on what led to his arrest. The investigating officer testified that he was not aware on how he was arrested but was only contacted by the chief to go and rescue a person whom the public wanted to lynch.



However, PW6 tried to shed light on what led to his arrest. She testified that after PW2's incident, he went back to the forest and he wanted to rape another girl but the girl ran away. That the girl who was with her brother had seen his face as well as her brother. The brother hunted for the man and an ambush was laid and the suspect was arrested and taken to the police station. This line of evidence coming from PW6 remains hearsay that is unsubstantiated.

63. It is trite law that the prosecution is not bound to call numerous witnesses to prove a fact. This is in line with section 143 of the Evidence Act which provides that;

“In the absence of a provision of the law, no particular number of witnesses is required to prove a fact.”

64. In *Bukenya and Others V. Uganda* [1972] EA 349 it was held that;

“While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

65. There is no requirement that the prosecution has to call a number of witnesses to prove a fact. But, if he fails to call crucial witnesses, an inference can be made that their evidence would have been adverse to their case. However, as per the above case, the inference can only be made where the evidence is barely adequate.

66. A look at the evidence by the prosecution on the identification of the perpetrator of the heinous acts against the 2 complainants is to say the least disjointed. Firstly, the conduct of the identification parade is botched and adds no value to the prosecution's case.

67. Secondly, there is no evidence establishing a nexus between the evidence of PW1, PW2, PW3, PW4 and PW9 with the arrest of the Appellant. As correctly put by counsel, the persons who arrested him were not called to testify to shed light on the grounds upon which they arrested him. Since the Appellant was not arrested by any of the persons who had interacted with him during the alleged incident, the begging questions are, on what grounds did the unnamed persons who were not called to testify arrest the Appellant? Who identified him to them? Why were they not called to testify? These were persons who did not know the Appellant before and who had not seen him at the crime scene. Their evidence was crucial in explaining how they were able to identify him and to corroborate complainants' evidence on identification.

68. The evidential burden is upon the prosecution to prove its case beyond any reasonable doubt. The Court of Appeal for Eastern Africa, in the celebrated case of *Okale VS. REP* 1965 EA 555 held:

“In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches;

(repeating the principles set out in *Ndege Maragwa VS. REP* (10)), the burden of proof in criminal proceedings is throughout on the prosecution, and it is the duty of the trial judge to look at the evidence as a whole.”



69. In the case of Faith Muthoni M’ngondu & 3 others v Republic [2018] eKLR, the Court of Appeal addressing itself to the principles applicable where identification of a perpetrator is disputed stated;

“The guiding principles that the learned Judges took into consideration when addressing the appellants’ challenges to their identification/recognition at the scene of the robbery are the same principles we are enjoined to apply in determining the same issue as now placed before us. These have now been crystallized in a long line of cases. See Cleophas Otieno Wamunga versus Republic [1989] KLR; Paul Etole & Another versus Republic [2001] eKLR; and Francis Kariuki Njuru & 7 Others versus Republic Criminal Appeal No. 6 of 2000 (UR). They may be summarized as follows:-

- (i) Evidence of visual identification in criminal cases can bring about miscarriage of justice. It is for this reason that a court is enjoined to examine such evidence carefully to minimize such danger.
- (ii) Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification 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 such identification/recognition.
- (iii) The court has an obligation to examine closely, the circumstances in which the identification by each witness come to be made.
- (iv) The court also had a duty to remind itself of any specific weaknesses which may have appeared in such identification evidence.
- (v) It is true that recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knew, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.
- (vi) Evidence relating to identification has to be scrutinized carefully and should only be accepted upon if the court is satisfied that the identification was positive and free from any possibility of error.
- (vii) Among the factors surrounding evidence of identification/recognition that a court is required to inquire into is whether the witnesses gave either the description or the names of the attackers to either the police or persons who come to the scene of the attack soon after the attack and at the earliest opportunity”.

70. Applying the principles in Faith Muthoni M’ngondu & 3 others v Republic (supra), and in light of my scrutiny of the evidence and analysis thereto, it is my finding that the evidence on identification of the Appellant in this matter was far from satisfactory and am unable to state with any degree of certainty the identification was positive and free from any possibility of error. The conviction was unsafe.

71. With the result that the Appeal herein has merit and is allowed. I quash the conviction and set aside the sentence and substitute thereof an order acquitting the Appellant. He is to be set at liberty forthwith unless otherwise lawfully held.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 4<sup>TH</sup> DAY OF APRIL 2025.**



**A.K. NDUNG’U**  
**JUDGE**

