



REPUBLIC OF KENYA



**Wanjala alias Lelly Murefu v Republic (Criminal Appeal
E057 of 2024) [2025] KEHC 8124 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 8124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E057 OF 2024**

MS SHARIFF, J

APRIL 8, 2025

BETWEEN

MELKEZEDEK WANYAMA WANJALA ALIAS LELLY MUREFU ... APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

A. Case background

1. The Appellant herein was charged jointly with Peter Wanyonyi and others not before the trial Court with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006.
2. The particulars were that on the 28th day of June 2022, between 1830 hours and 0400 hours in Webuye East Sub-County within Bungoma County, with a common intention, the appellant, his co-accused and the others not before court, caused their male organs to penetrate the vagina of CWN, without her consent.
3. The Appellant and his co-accused pleaded not guilty to the charges that they faced whereafter the case proceeded to trial. Peter Wanyonyi Murefu was acquitted under Section 215 of the *Criminal Procedure Code* (CPC) for lack of sufficient evidence. The appellant was convicted on the main charge by the Learned Trial Magistrate, Hon. Phoebe Y. Kulecho Principal Magistrate and was sentenced to serve fifteen (15) years imprisonment.

B. Evidence

4. The prosecution called a total of 5 witnesses in support of its case.
5. PW1 was the complainant. She testified that on 28th June 2022, at 6.30 p.m. she was at [Particulars withheld] fetching water when she received a text from one Levi, a platonic friend, notifying her that he would be visiting her. That whilst PW1 was returning to her house from the river she met Kelvin



and as the two were conversing, the Appellant herein emerged from the opposite direction with his face partially covered and when he almost crosses paths with them, he turned and slapped her and started dragging her. Pw1 testified that she attempted to scream but the Appellant then gagged her. It was her testimony that Levi then joined the Appellant in holding her hands and neck, and they both dragged her towards the river. The Appellant was on her right side while Levi on the left side and she was sandwiched between them. PW1 told the Court that after crossing the river she managed to slip out of their grip and run away but they pursued her. The Appellant managed to catch up with her whereat he slapped her thus causing her to fall down. Levi also caught up with them and he then took her mobile phone and they then led her towards [Particulars withheld] direction. They pushed her into the river and she started to drown. Levi then retrieved her from the river and she pleaded with them, in vain, to let her go home. She told the Court that Levi contacted one Peter on the phone who arrived accompanied by his friend and they all dragged her to nearby bushes where she heard them refer to each other by name and Levi kept referring to them as Melki, Peter and David. They pushed her and she fell down and Levi while armed with a stick threatened to beat her up. Levi posed to the group on who would want to sleep with her first and the Appellant herein tore up her clothes. She told the Court that she had on a white top and skirt and that Levi and the Appellant herein jointly tore up her clothes. The Appellant proceeded to remove his clothes, lay on top of her and forcefully penetrated her vagina. David was second in line in raping her. Peter was the third one to rape her. They all kept threatening her of dire consequences if she screamed for help and by that time it had gotten dark.

6. PW1 told the Court that the rapists later led her to the river where Peter washed her white under wear and they then dressed her up in the torn blouse and skirt. The Appellant gave her his light brown sweater to wear and they then frog marched her to the Appellant's house. She told the Court that Peter and David left and she stayed behind with the Appellant and Levi and when the Appellant left the house, Levi sexually abused her in the same house. After a while the Appellant returned with a soda and two buns and they forced her to eat the same. Thereafter the Appellant inquired about her identity and when she started mentioning some of the people she had attend school with, the Appellant realized that she knew him. Peter and David returned and the Appellant told them that she had recognized him and David then suggested that they should kill her. The Appellant was against that suggestion and asked them if he should get Hakim and that was when she realized that he was Pastor Hakim's son. She told the Court that, that night the Appellant kept sexually abusing her until 4.00 a.m. when she asked him to let her go. The appellant gave her his sandals and escorted her to the river, where she gave him back the sandals and she ran home. She met her mother and sister at 5.00 a.m. and when her mother asked where she was coming from she remained mute. She told the Court that in the course of the morning she finally opened up to her mother and her two brothers, who then took her to the Appellant's house and she informed the Appellant's mother about the gang rape. The latter then summoned the appellant's father who in turn confirmed that he met the Appellant on his way home that morning with a pair of sandals in his hands and when his father asked him where he was coming from the Appellant told him that he was from seeing off a girl.
7. This witness testified that when the Appellant eventually showed up, his parents asked him whether I had spent the night at his house and he confirmed the same. She told the Court that they reported the incident at the Chief's office and the Chief informed the police who then apprehended the Appellant while Peter was arrested the next day.
8. PW1 told the told the Court that she took police officers to the scene near the river and they recovered packets of condoms; used and unused. She maintained that the Appellant's bedroom was well lit with electric light and that prior to the incident she had not known the three assailants and that she was only acquainted to Levi.



9. On cross-examination, she told the Court that she was only in the company of the four assailants during the ordeal and that she had duly narrated the gang rape incident in her statement recorded with the police. She insisted that Levi texted her to meet him and that he took possession of her phone which she never recovered. She told the Court that Levi and David were never arrested.
10. PW2 EM testified that PW1 is her daughter and that on 28th June 2022 at around 6.00 P.M. she had left to fetch water at the spring and when she went there did not find her and her phone was switched off. That she kept waking up and going to ask her other daughter whether PW1 had returned to no avail and after making several visits to her daughters' room she finally found PW1 in but when she inquired about her whereabouts, PW1 remained mute and told her that she would tell her in the morning and she then went to sleep. In the morning, PW1 told her what had happened to her and gave her the names of the assailants. She told the Court that she did not know the people but she asked PW1's brothers to accompany her so that she could show them the house where PW1 had been taken to the previous night. This witness stated that PW1 took her brothers to the appellant's house. She recorded her statement and the appellant and one Peter were apprehended.
11. On cross-examination, she told the Court that PW1 when left for the spring she had a water jerry-can and her cellular handset. According to her, PW1 left the house at 6.00 p.m. and she went to check in on her at around 7.30 p.m.
12. PW3 Laetizia Mbalo testified that she is a clinical officer from Webuye County Hospital and she presented the medical record of PW1 who was seen at the said medical facility on 29th June 2022. According to her, PW1 had a history of physical and sexual abused by persons well known to her. Upon examination, she observed that PW1 had scratch marks around her neck and tenderness on the thighs. On laboratory examination, the urinalysis tests showed turbid urine with puss cells and moderate red blood cells with motile bacteria were seen. She observed that PW1 hymen was absent with no tears and she had white vaginal discharge. She filled PW1's P3 form and PRC form on 30th June 2022. She told the Court that PW1 was 19 years old at the time of the incident and this witness produced in Court the following exhibits: treatment notes marked as PEXH 1, PRC form marked as PEXH 2, Laboratory Report form marked as PEXH 3 and P3 form marked as PEXH 4.
13. On cross-examination, she told the Court that there were no spermatozoa found probably owing to the passage of time and no tears were noted.
14. PW4 No. 10xxxxPC Winfred Muriuki testified that she is based in Webuye Police Station and that she took over the investigation of this matter from PC Okuro. According to her, PW1 lodged a report on 29th June 2022, stating that she had gone to fetch water when she was waylaid by four men who took turns to rape her. PC Okuro visited the scene where he recovered used condom, and visited the house of the Appellant herein and recovered more exhibits. She produced the recovered exhibits in Court as follows: 3 sure condom packets marked as PEXH 7; a used condom marked as PEXH 8. PW1 also submitted the clothes she wore on the day of the incident which this witness produced in Court as follows: torn white blouse marked as PEXH 6 and torn black skirt marked as PEXH 5. She told the Court that PC Okuro recorded the witness statements and arrested the two suspects who were charged accordingly.
15. On cross-examination, she told the Court that PEXH 5 and PEXH 6 were recovered from PW1 and she submitted the same to the Police Station. According to her, PEXH 8 was never submitted for DNA profiling.
16. PW5 NW testified that PW1 is her sister and that on 28th June 2022, at around 6.30 p.m. she was at home when her sister left to go fetch water but she did not return. According to her, they tried to



contact her sister by calling her mobile number in vain as her mobile phone was unreachable only for her to resurface the next morning at around 4.00 a.m. and told her that she had been gang raped by four people upon being abducted. This witness testified that she then advised her sister to wait till morning and inform PW2 when she wakes up. She stated that PW1 named the Appellant and one Levi as among the perpetrators. This witness was not acquainted to them.

17. On cross-examination, she told the Court that PW1 got home at around 4.00 a.m. and she heard the dogs barking and went outside that was when she saw her.
18. When put on his defense, the Appellant gave an unsworn testimony that on 28th June 2022 he was sent home from school due to school fees arrears and, on his way, home he met Levi who was his brother's colleague and Levi asked him to give him his house keys so he could collect certain items from the said house. He told the Court that he went to school as usual the next day but was sent home due to school fees arrears and while at home a certain girl accompanied by three boys came to his house claiming that she had spent the previous night at his house.
19. Upon conclusion of the trial, Peter Wanyonyi Murefu was acquitted under Section 215 of the Criminal Procedure Code (CPC) for lack of sufficient evidence while the appellant was convicted on the main charge by the Learned Trial Magistrate, Hon. Phoebe Y. Kulecho Principal Magistrate and was sentenced to serve fifteen (15) years imprisonment.

C. Appeal

20. Dissatisfied with the decision of the trial court on both conviction and sentence, the Appellant filed a petition of Appeal dated 9th May 2024 which he premised on the grounds herein below:-
 - a. That the learned trial magistrate erred in law and in fact as she failed to discover Prosecution evidence was not corroborated and had contradiction.
 - b. That the learned trial magistrate erred in law and in fact misdirected herself to PW1 and relied on her planned statement in which at stage one of slap, she did not raise alarm, at stage two when she had managed to run away also did not raise an alarm, a matter that is questionable.
 - c. That the learned trial magistrate erred in law and in fact when she failed to consider the ages of the complainant who is an adult and that of the Appellant minor and it was just a framed story against the Appellant.
 - d. That the learned trial magistrate erred in law and in fact in her judgement when she quoted Appellant's father "met the accused with scandals" but his father did not testify making the statement a lie.
 - e. That the learned trial magistrate erred in law and in fact when she failed to discover that the Prosecution did not produce brothers/family members who went to accused's alleged house the following day.
 - f. That the learned trial magistrate erred in law and in fact when she failed to discover and consider time of the alleged incident and place at the spring was an active hour of day and that most villagers/community people came to draw water, none testified and distant residents were not mentioned by the Prosecution.
 - g. That the learned trial magistrate erred in law and in fact by considering and relying on extraneous matters which had in fact not been canvassed by the Prosecution during trial.



- h. That the learned trial magistrate erred in law and in fact when she failed to evaluate Prosecution evidence properly. PW1 said that she received a message then went to chat with a friend she knew, then PW3 was informed when she was coming from the river or spring.
 - i. That the learned trial magistrate erred in evaluation of the evidence before her.
 - j. That the learned trial magistrate erred in law and in fact by failing to test all the facts and evidence pleaded and adduced on a balance of probabilities and imposed sentence on the Appellant.
21. Based on the above grounds the Appellant prays that this appeal be allowed, his conviction be quashed and the 15 years sentence be set aside.
22. This Court directed that the appeal be disposed of by way of written submissions. Both parties complied.

D. Analysis And Determination

23. As a first appellate Court, I am duty bound to reconsider the evidence adduced before the trial Court, re-evaluate and re-analyze it and eventually arrive at my own independent conclusions and satisfy myself that the conclusions. While doing so I have to consider the fact that I did not see nor hear the witnesses testify. (See *Ngui -Vs- Republic* [1984] KLR 729 and *Susan Munyi -Vs- Keshar Shiani*, Civil Appeal No. 38 of 2002).
24. Upon consideration of the Petition of appeal, the lower Court's record and the rival submissions of parties I find that the following issues arise for determination: -
- i. Whether there was penetration devoid of consent.
 - ii. Whether the Appellant was properly and clearly identified as the perpetrator.
 - iii. Whether the Appellant committed the offence of rape in association with another or others.
25. The operative Section 10 of the *Sexual Offences Act* against which the Appellant was charged, found guilty of and convicted provides as follows: -
- “Any person who commits the offence of rape or Defilement under this Act in association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.”
26. It is incumbent upon the Prosecution prove the following four elements beyond reasonable doubt, in a gang rape charge:
- a. Penetration as defined by section 2 of the *Sexual offences act* without consent thereof;
 - b. Positive identification of the perpetrator
 - c. In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape
27. The question this Court must answer at the end its determination is whether all these elements were proved beyond reasonable doubt?



Penetration

28. 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.”

29. In the case *Mark Oiruri Mose vs R (2013) eKLR* the Court of Appeal observed as follows:

“...Many a 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 penetration need not be deep inside the girl’s organ....” (Emphasis mine).

30. PW1 stated that she was gang raped. She gave evidence of penetration. According to the complainant, the sexual intercourse was not consensual but forced upon her by the Appellant, Levi and 2 other unknown men. She described the ordeal. She narrated that the Appellant and his accomplices had during that gruesome gang rape, forcefully submerged her in River Nzoia to the point of almost drowning, whereafter, knowing that they had instilled in her real fear of loss of her life, took turns in raping her. They then frog marched her to the Appellant’s house where both Levi and the Appellant raped her again. The appellant released her at around 4 a.m. and escorted her to the river.

31. The evidence of penetration adduced by PW1 was corroborated by the medical evidence adduced by PW3 who testified that on physical examination of the PW1 had scratch marks on her neck, white vaginal discharge with tenderness on the thighs and her hymen was not intact but she had no tears. On laboratory examination, the urinalysis test indicated turbid urine with puss cells with no spermatozoa and motile bacteria.

32. It is trite law that penetration however slight constitutes the offence of rape and it is not necessary that medical evidence be availed to prove penetration.

33. In any event the proviso to Section 124 of the Law of *Evidence Act* provides 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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.

34. The trial magistrate found that there was overwhelming medical evidence and that of the victim to show that there was penetration. The trial magistrate is the one who saw the witness while testifying and believed her testimony. The testimony that there was penetration is supported by medical evidence produced herein. I find that Prosecution proved that there was penetration on the vagina of the victim at the material time as rightly held by the trial Magistrate.

Positive Identification of the assailant

35. The gravamen of this appeal turns on identification of the Appellant by PW1. The offence was committed from dusk onwards into the night. Generally, identification at night may be difficult and the Court must warn itself of the dangers of admitting evidence of identification conducted at night unless the circumstances were favorable to a positive identification. The incident occurred between



6.00 p.m. and 4.00 a.m. which was ample time for PW1 to see the Appellant well with the help of the sunset and the electric light in house of the Appellant. It was the evidence of PW1 that the appellant was the one who started to tear up her clothes and Levi then assisted him. He was the one who raped her first and last: when the others left, the appellant stayed with PW1 overnight and he kept raping her until 4 a.m when he finally let her go. He then gave her his light brown sweater and sandals and escorted her to the river where she gave him back the sandals. PW1 had thus been in the company of the appellant from 6 p.m to 4 a.m and had ample time to see the Appellant and even capture his name. In the course of the night, upon being interrogated by the appellant PW1 realized that the appellant was a son of Pastor Hakim. PW1 was able to trace her way back to the Appellant's house in the company of her brothers wherein she narrated what happened.

36. In his defence, The Appellant he claimed that he gave Levi his house keys and then he went to school.
37. It is trite law that even where an accused person raises a defence of alibi the Prosecution still bears the burden of proving their case beyond any reasonable doubt and this burden does not shift to an accused person.
38. In the case of UGANDA v. SEBYALA & OTHERS [1969] EA 204, the learned Judge quoted a statement by his Lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

39. In the case of Victor Mwendwa Mulinge v Republic (2014) eKLR, it was held that:

“It is trite law that the burden of proving the falsity if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja vs Republic*; the court held that in a proper case, a trial court may in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond reasonable doubt; take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby present any suggestion that the defence was an afterthought.”

40. I have carefully weighed the alibi and the testimony by PW1 wherein she told the Court that when the Appellant arrived at his house the next day and found her awaiting him in the company of her brothers, and was asked whether she spent the night at his house and he confirmed the same. I find that the appellant was positively identified at that point. I do also find that the evidence of PW1 and the other prosecution witnesses was credible. The alibi defence did not shake the evidence of PW1 on identification and I do find that the said defence was a sham.

Appellant raped the victim in association with another or others

41. I find that Appellant raped PW1 in association with the other men who were in his company and they thus gang raped her within the meaning of Section 10 of the *Sexual Offences Act*.
42. I have re-evaluated the entire evidence on record and I find that the Prosecution proved their case in the lower Court against the Appellant. The conviction was thus sound and within the law. I find his appeal on conviction to lack merit and I dismiss it.



43. A reading of the Petition of Appeal reveals that the Appellant had no contention with the issue of sentence wherefore the same is upheld.

E. Conclusion

44. On the balance I do find that the respondent had proved the offence of gang rape against the appellant beyond any reasonable doubt and I thus cannot fault the trial court for making a finding of guilt against the appellant. I therefore dismiss the appeal herein for want of merit and I uphold both the conviction and the sentence.

45. It is so ordered.

DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 8TH DAY OF APRIL 2025.

M.S.SHARIFF

JUDGE

In the presence of:

Appellant present virtually

MS Kibet for the Respondent

Diana Court Assistant.

