Kimanti v Republic (Criminal Appeal E059 of 2024)
[2025] KEHC 9436 (KLR) (14 May 2025) (Judgment)

Neutral citation: [2025] KEHC 9436 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E059 OF 2024

TM MATHEKA, J

MAY 14, 2025

BETWEEN

PRESTON KIMANTI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant Preston Kimanthi was charged with the offence of rape Contrary to section 3 (1)(a) of the *Sexual Offences Act* no.3 of 2006.

2. In the alternative he was charged with Committing an indecent act with an adult contrary to section 11 (1) of the *Sexual Offences Act* no.3 of 2006.

3. The particulars were that on the 8th day of May 2022 at [Particulars Withheld] in Mbooni West Sub County he intentionally and unlawfully caused his penis to penetrate the vagina of AMN aged 61 years old by use of force. In the alternative that he intentionally touched the vagina of AMN with his penis against her will.

4. He was also charged with the offence of grievous harm contrary to section 234 of the *Penal Code*. It was alleged that on the 8th day of May 2022 [Particulars Withheld] in Mbooni West Sub- county within Makueni County he unlawfully did grievous harm to AMN.

5. There was a full trial where the prosecution called 6 witnesses. The accused person was put on his defence and gave sworn statement, and called one witness. The learned trial court in the judgment dated 23rd July 2024 found him guilty of the offence of rape and the offence of causing grievous harm. He sentenced him to 15 years' imprisonment on each count.

6. Aggrieved, their appellant filed this petition of appeal on 8 grounds in which he faulted the learned trial magistrate for convicting him when all the facts regarding the case were not read out to him ;for failing

to find that the medical evidence adduced was insufficient to establish penetration; for failing to find that the alleged complainant never saw or positively identified him as the perpetrator of the offences against her; for convicting him yet the evidence of the prosecution was not accurate ,for relying on illegally tainted evidence which was mired in inconsistencies discrepancies and glaring gaps; for failing to take into account that the appellant was a person living with disability as a mitigating factor; for issuing a manifestly harsh and excessive sentence in the circumstances .

7. On these grounds the appellant sought that the court finds the appeal to have merit, set aside the conviction and the sentence, and set him free.

8. To support the appeal, the appellant through his learned counsel filed submissions. He summarized the grounds of appeal into three issues;

9. Whether all the facts regarding the case were read out to the appellant

10. Whether the prosecution had proved its case beyond reasonable doubt yet the medical evidence adduced was insufficient and did not establish penetration

11. Whether the accused was convicted out of inaccurate inconsistent evidence.

12. On the first issue whether all the facts regarding the case were read out to the appellant it is argued that from the judgment of the trial court it emerges that all the facts in all the counts that the appellant was charged with were not read out to him. It is argued that this violates the provisions of section 207 (1) and (2) of the *Criminal Procedure Code*. But beyond that it is argued that the court violated the principles of fairness and justice and therefore the trial was compromised and the only remedy is to set aside the conviction and the sentence.

13. On the second issue Whether the prosecution had proved its case beyond reasonable doubt yet the medical evidence adduced was insufficient and did not establish penetration it was argued that the medical evidence failed to establish a clear and definitive demonstration of penetration which is a key element required for the conviction on the charge of rape.It is submitted that the evidence by the prosecution in the absence of the medical evidence would not establish penetration beyond a reasonable doubt. That the court was required to give sufficient reasons why it believed the testimony of the complainant. The appellant relied on KYIAF vs Wono [1967] GLR 463 where it is submitted that the court made the following observations

> "It must be observed that the question of impressions or convincingness are product of credibility and veracity, a court becomes convinced or unconvinced, impressed with oral evidence, according to the opinion it forms of the veracity of witnesses. A court has to test its impression as to the veracity or truthfulness of oral testimony of a witness against the whole evidence"

14. Relying on Ruwala V R And Pandya V R it was submitted that the evidence of the complainant could not pass the test of credibility. It was submitted that based on her past antecedents she was a witness to be classified as a witness with propensity of dishonesty.

15. It was submitted that the complainant and the accused person had bad blood for a long time.

16. In addition it was submitted in the form of questions; how could the accused who has a disability of the legs with metal implants have chased the complainant? how could the accused with 30% permanent disability have executed the said crimes yet he walks with the aid of crutches? how could the accused who had been diagnosed with lack of masculinity have the capacity to commit the said crime?

17. On Whether the accused was convicted out of inaccurate inconsistent evidence Counsel submitted that there were explicit contradictions on the record. He submitted that the complainant recorded two statements which were supplied to the defence. In her first statement she stated that she was called by an unknown person to her door but in the second statement she said that the accused person came to her home at night. That in this circumstances the identity of the alleged perpetrator is unknown.

18. For the appellant it was argued that this scenario put the complainant's testimony to the test of credibility and reliability and that it fell short both ways.

19. Counsel submitted further that there is a difference between credibility and reliability of a witness. He cited Jenctons v HMA [2011] HCJAC 927 where it was observed

> " It is important to have in mind that while questions of credibility and reliability are said often to shade into each other they are distinct concepts. A witness may come across as entirely credible but, on reflection, be held to be unreliable. A person who is credible is one who is believed. A person who is reliable is one upon whom trust and confidence can be placed on. Credibility may be judged on the evidence, whereas reliability may be only capable of being addressed having regard to the various traced records " (emphasis added)

20. It was further argued that this could be a case of mistaken identity, and it was the onus on the part of prosecution to prove the case beyond a reasonable doubt.

21. To support this position learned counsel cited the 1997 Supreme Court of Canada decision in R V SLIFCHUS {1997} 3 SCR 320 where he submits the court made the following explanation

> " ...the accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such a time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty ...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and tradition of justice. It is so ingrained in our criminal law that sometimes it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if the lower court believed the accused is guilty or likely to be found guilty, that is not sufficient. In those circumstances a magistrate must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy him or her of the guilt of the accused beyond a reasonable doubt. On the other hand one must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, a magistrate is sure that the accused committed the offense then the Magistrate should convict since this demonstrates that he or she is satisfied of his guilty beyond reasonable doubt "

22. This court was urged to review the evidence with care and find that the prosecution had not discharged the onus. The court was referred to the Malawian case Chanya & Another v R CRIM Appeal No. 9 of 2007 where it was stated

> " Criminal law; it should always be recalled, thus, on the noble principle that it is better to make an error in the sense of wrongly acquitting a hundred guilty men than error by convicting and sending to an underserved punishment one innocent soul"

23. It is further argued that submitted that the evidence on identification was inaccurate, inconsistent and at times contradictory. That this could have been a case of mistaken identity. That the complainant stated that the appellant was at her door at 9:00 PM however she did not state which light she used to identify the appellant as the perpetrator of the offense. The allegation that the complainant recognised the accused was not established.

24. Counsel relied on Wanjohi & 2 Others V Republic [1989]klr, Wamunga V Rebulic [1989]KLR 424 where the Court of appeal found that recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made. The court must therefore be satisfied about the correctness of this visual identification. PW1 and PW3 have failed to satisfy the court that indeed they were able to identify the person who ran away from the scene that night.

25. It was argued that there was the possibility of mistaken identity and the court was invited to see John Njeru Kithaka &ibrahim Ndwiga Murugu V Republic Nyeri CA 436 of 2007 (UR) where the court cited with approval from Republic V Turnbull (1976) ALL ER 549, where it was stated:

> " First, whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation?
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> Had the witness ever seen the accused before? How often if only occasionally had he any special reason for remembering the accused? "

26. And the statement of Lord Widgery (CJ) on the risk of untested recognition evidence;

> " Recognition may be more reliable than identification of a stranger; But even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close related friends are sometimes made ... All these matters go to the quality of the identification evidence; If the quality of identification is good and remains good at the close of the accused case, the danger of mistaken identification"

27. This court is urged to find that the evidence on identification of the appellant was insufficient. The appellant relies on Isaack Yeswa V Republic [2015] eKLR

28. Finally, it is argued that the trial court failed to reconcile the numerous contradictions and inconsistencies in the prosecution's case. This court is referred to Josiah Afuna Angulus Cr Appeal No. 277/2006 (ur), Charles Kiplangat Ng'eno V Republic Cr Appeal No 77 OF 2009 (UR) where the

Court of Appeal upon reconciling the contradictions in those cases found the appeal had merit and allowed it. This court is urged to find that the contradictions in this case are not minor and the failure by the trial court to reconcile them was prejudicial to the appellant and occasioned a failure of justice.

29. The Respondent set out five issues for determination;

    1. Whether there was penetration
    2. Whether the complainant consented to the penetration
    3. Whether the appellant was positively identified
    4. Whether there were notable inconsistencies in the testimonies of the witnesses
    5. Whether the sentence meted out to the appellant is safe

30. On the first issue whether there was penetration it is submitted that the complainant testified that on the 8th of May 2022 the appellant went to her house at 9:00 PM. She asked him what he had come to do at her residence at that time he hit her on the head she fell down the appellant proceeded to remove her panties and penetrated her. It is submitted that her evidence is corroborated by the evidence of PW2 her son who testified that he found the complainant lying on the ground naked with multiple injuries on the face; and PW 3 who testified that she heard noise coming from the complainant's house she went and found the complainant lying down naked with injuries on her face; PW4 who also said she found the complainant with injuries on her face nose and mouth without her inner wear and CPL Peter Inganga Luchea, the I.O who received the report, visited the scene and investigated the case; PW5 Dr Patrick Mukena Mutinda who examined the complainant on the 8th of May and found that the Labia Majora had lacerations, the hymen was broken, the vaginal wall was inflamed and reddened noting that there was forceful genital penetration causing injury on the Labia .

31. Relying on GOA Versus Republic [2018] eKLR the Respondent submits that the evidence of the complainant was believable considering the position of section 124 of the *Evidence Act* that no corroboration is necessary in criminal cases involving sexual offences. The state relied on

32. On the second issue whether the complainant consented to the penetration it is submitted that the evidence shows that there was no consent.

33. On the 3rd issue whether the appellant was positively identified it is submitted that the appellant was a neighbour to the complainant and was well known to PW2, PW3 and PW4

    .That the evidence shows there was positive identification. The state relied on Peter Wanjala Wanyonyi V Republic [2021] eKLR where the court addressed the issue as follows;

    > "As regards the identity of the perpetrator this was not in dispute he was a person well known to the complainant. The complainant's evidence was that of recognition. It is a well settled principle in criminal law that recognition is a better form of identification than identification of a total stranger. There was no doubt that the complainant properly identified the appellant as the perpetrator of the sexual assault. She knew where he resided. They were neighbours at home. This court therefore holds that the prosecution established to the required standard of proof that it was the appellant who sexually assaulted the complainant.

34. On the 4th issue whether there were notable inconsistencies in the testimonies of the witnesses it is submitted that the evidence of all witnesses looked at together points to the accused person as the perpetrator of these offences. The court was referred to Ali Mohamed Ibrahim V Republic [2017]

eKLR on the need to distinguish material inconsistencies from minor inconsistencies and discrepancies that do not go to the root of the case. The court was also referred to Erick Onyango Ondeng V R And Twehangane Alfred V Uganda Crim App No 139 Of 20001, [2003]UGCA.

35. On the 5th issue whether the sentence meted out to the appellant is safe it was submitted that the sentences that were meted out were safe and were as per the requirement of the law. That the offenses carry a maximum sentence of life imprisonment but the trial court gave out a sentence of 15 years' imprisonment. That sentencing is a matter of discretion of the trial court as per SKM versus Republic [2021] eKLR and the court was urged to dismiss the appeal and uphold the trial courts findings.

36. I have carefully considered the submissions and the record.

37. In my view the issues that arise for determination are:

    1. whether the particulars of all the counts were read to the accused and if not the impact on that on the trial:

    2. whether the case for the prosecution was established beyond a reasonable doubt and in answering that:

    7. whether the case for prosecution was riddled with contradictions and inconsistencies;

    8. whether there was identification of the perpetrator of the offence;

    9. whether the sentences were harsh and excessive,

    10. whether the court considered the mitigation by the appellant.

38. On the issue of the charges, section 207 of the *Criminal Procedure Code* provides that the accused will be called upon to plead and states :

    1. The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

    2. If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary: Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

39. I have keenly perused the record. It shows that on the 17th May 2022, the charges were read to the accused. He was called upon to plead to them. It clearly reflects that each count and its particulars were put to the accused: Count I, the alternative charge to count I, count II. He pleaded not guilty to both counts and was admitted to bail. Clearly the learned trial court complied with s. 207 of the CPC.

40. On whether the prosecution proved its case beyond a reasonable doubt, I take guidance from the authorities cited on this issue. The duty is for the prosecution to present to the court a water tight case on all the elements of the charges faced by the accused person. The evidence must be credible and reliable. And witnesses must upon whose evidence the prosecution seeks to rely upon to prove their case, must not say or do things that will bring any doubt into the mind of the court as to their credibility or reliability of their testimony. Any such doubt must be resolved in favour of the accused person.

41. In this case it is not in dispute that there was no eye witness to the alleged rape and assault and the only evidence of what transpired that night is that of the complainant.

42. There is also no doubt that that the complainant was physically and sexually assaulted and that there was forceful penetration of her vagina. The medical evidence speaks for itself.

43. The dispute is who did it?

44. The prosecution's case is that it is the appellant.

45. The court on a first appeal is required to almost conduct a retrial, but without the physical presence of the witnesses

46. What was the evidence in support of the prosecution's position that it was the appellant?

47. First that the complainant's trouble with the accused began on the 8th of May 2022 at 9:00 AM when she heard a stone hitting her house. That she went to investigate and found a small stone lying on the ground. When she picked it up she noticed the accused person staring at her and she stared at him. NO words were exchanged and that he went away.

48. Second that that later that night while in her kitchen making her ropes, as she waited for her other children who usually came home from work about 9:00pm, she heard her door shaking and then it flew open. She went to the door holding her lamp. It was Mwanzia.. When she asked him what he was doing at her home at that time, he responded by hitting her on the head, the force pushing her to slump backwards. When she tried to scream he cupped her mouth, swiped her legs to the ground, then separated her legs using his legs lay on top of her removed her panties inserted his thing into her buttocks, and her vagina. She lost consciousness and found herself in hospital being treated. That it was one of her children who found her on the ground and who screamed for help and members of the public came and assisted him to take her to hospital.

49. In the same breath she had recorded two statements that the prosecution supplied to the defence as the evidence they were going to rely upon in their case.

50. On cross examination she conceded to the one she recorded her statement on the 16th of May 2022. She denied stating in her statement that she did not identify her attacker for the reason that when she opened the door he threw salt in her eyes. It was her testimony that she was raped in the kitchen. She denied that she recorded her statement after the accused person was arrested. She testified that she fell unconscious and did not know what happened to her. She stated that she did not know the accused before he raped her.

51. The investigating officer confirmed that complainant in her statement dated 16th of May 2022, stated that she did not identify her attacker. I think for avoidance of doubt it is important to reproduce the that statement here:

> "I recall on Sunday 8th May 2022 at around 2100 hours I was in my house weaving ropes when a person came knocked the door pronouncing my name S.I did open the door and was smashed with salt in my face. This made me not to see who the person was clearly as he had also put on some sort of a mask. He immediately grabbed me and started pulling me outside. When I tried to resist I was hit on the face using blows. I fell on the ground and became unconscious. My attempt to scream did not go through since I was held my mouth covered using a lesso. I tried to resist but I was overpowered as I got pulled towards the thicket that is next to my house beside the road planted eucalyptus trees was forced to the ground beside the roadside and removed my inner panty before he penetrated into my vagina. At that time blood was coming out of my face as a result of that commotion. When he was on top of me he heard the sound of approaching motorcycle which made him dash in the nearby thicket.

Luckily it is my son who was coming from work. He pursued the person inside the forest and was able to arrest him after chasing for some time. Later members of the public assembled and rescued me from the scene. They helped me with a lesso which I covered myself with and later was escorted to Mbooni Sub County Hospital" (emphasis mine)

52. It is here in her initial statement that the compliant states she did not identify the perpetrator. The perpetrator was masked up, and threw a substance into her eyes making it impossible for her to identify him.

53. I Note that there is no mention of any earlier encounter, no mention of light (lamp) no mention that she even recognised the voice of the person who called her name. The alleged identification is by her son, PW2 who alleged to have arrested in the thickets near the scene.

54. Before we get to that it is noteworthy that although she denied recording a statement after the arrest of the accused, the IO confirmed that she had done so, and the Prosecution supplied the statement she recorded on 17th June 2023 where she stated that ;

> "I can vividly remember very well on the 8th of May 2022 around 700 hours when I have just woken up from my bed to start my daily operations at home. Minutes later I started preparing ropes for selling having some customers whom had made an order . At around 900 hours while at home on the same date I heard someone had thrown a stone at my door. This prompted me to find out who, immediately I saw a well-known person armed with a huge stick and never talked to me at all .
>
> Minutes later he went back as I continued with my daily assignment of preparing the ropes. At around 2000 hours I was in my house still preparing my ropes and listening to the radio minutes later I had the radio announced stating 2030 hours then immediately heard a huge knock at my door. This prompted me to move closer to the door to find out what had happened at my door. Upon moving closer to the door I saw a well-known person to me as Mwanzia Kimanthi upon seeing him I asked him what are you doing at my home at this time. At this point we were looking at each other face to face. The accused person walked closer to me with intention to harming.. .within no time I heard a slap on my face at that point of slap I heard an itching on my face ...Substance suspected to be salt mixed with other substances. This forced me to give him a bite since he kept his hands on my face and it was itching thoroughly. At that point he kept on assaulting me on my head and neck and I was busy struggling to rescue my life. I tried to scream but the sound could not come out clear since he had held my neck tightly. At that point I became unconscious since he had assaulted me on my head and was already swollen and eyes itching as a result of itching substances. Later on after falling down unconscious the accused person ran away. Later on my son AMM came to the scene and rescued me. At this time, I couldn't have any information on what had happened to me since I was unconscious. I later found myself in the hospital while I am being treated. Medical examination was done on me and found that I was raped having been assaulted. Up to date I'm still on medication.

55. There was no explanation by the prosecution how the statement developed from not being able to identify the attacker to being able to do so long after his arrest. In this statement she identifies the attacker by name. There is no explanation on the part of the prosecution as to how a month after the first statement she was now able to identify the perpetrator by name.

56. It is important to point out that in her testimony the record states she had not known accused before. In the first statement she said her attacker was masked up and never gave her the slightest opportunity

to see his face. Evidently the her testimony in court starts to become doubtful in the face of these contradictions and inconsistencies leaving the answer to the question as to whether or not she saw the perpetrator uncertain.

57. In addition, the injuries sustained by the complainant at the time of the attack were serious. PW6 who produced the P3 stated that she was not able to open her eyes she was not able to talk and see. There were severe facial injuries with swelling and optical fracture. She was not able to open both her eyes. She had obvious injuries on the face and neck there were bruises and swelling of inner lining of the eye there was laceration of the lower lip bruises on the neck she had chest pains. The attack was obviously vicious. The time the complainant had with the attacker appears to be so brief that she in my view told the truth the first time when she said she could not identify her attacker.

58. That uncertainty amounts to doubt as to the identity of the attacker.

59. Third, the prosecution brought the evidence of PW2 as an identify witness. His testimony was that he was heading home on his bike on the 8th of May at 9:00 PM when he saw his mother on the ground on the road. She had injuries on the face and she was naked and bleeding. He said he saw someone rushing inside the bushes and he followed while screaming chased the person and arrested the person. He testified that he screamed and the villagers came to the scene and found him with the person he had arrested. That the person was wearing a cap on his head.That upon removal of the cap they found it was one Kasia, whose other name he said is Mwanzia. That PW 2 told the villagers what had transpired. He also told them that his mother was on the road.

60. It was PW2's testimony that when he arrested the accused, the accused person called his neighbours claiming that he PW2 had assaulted him. That the accused's wife came to the scene while armed with a rungu and he hit PW 2 with it. That he fell down and the accused person escaped. He said he called the village elder who came to the scene and the elder called the police who came from Kikima and found his mother was on the road side .He also told the court that the person he arrested was the accused he had known him since childhood.

61. On cross examination he said that he arrested the accused, that the villagers came and left him with the accused. He said he was not aware that the accused person had had an accident. He said the wife of the accused who assaulted him was not arrested though she assaulted and injured him.

62. The I.O said that a Community Policing Representative is the one who arrested the appellant. That PW2 also stated that at some point the appellant was not in his custody and he has to call an elder to come to the scene. He avoided an explanantion as to how the appellant came back into his custody after he allegedly escaped, sticking to the contradictory version that the appellant escaped, and that at the same time the appellant was in his custody where the other witnesses found him.

63. The appellant in his defence told the court how he ended up in this matter. He made a sworn statement and said that he was a KDF officer since 2010.On the 8th of May 2022 he left home at 6:00 PM to get supplies from the market in Kikima and returned home. At his gate he was accosted by four men who had interfered with his security lights. He tried to scream they covered his mouth and took him a few meters from his home and started to beat him. He said he was able to identify PW2 who tied his legs and attacked him. Members of the village responded to his cries for help and they came and pleaded with PW2 not to attack him. He called his wife on phone and when she reached the scene PW2 went away. He proceeded home with his wife but as they go to the gate PW2 came with another group of men and they arrested him.

64. What emerges from this is that there is no dispute that there was an incident where the PW2 and the appellant were involved in a violent encounter. The PW2's testimony that he arrested the appellant

in the bush near the place where his mother lay in pain is clearly challenged by that of the appellant that he was attacked while near his home, and his wife and villagers came to his rescue. The PW2 states that he was a violent fracas between him and the wife of the appellant and that even the appellant's neighbours came. He states that the appellant escaped after the wife assaulted he PW2.

65. From the foregoing that the prosecution's evidence that the appellant was arrested at the scene is untenable. The Prosecution does not account for this first incident between the PW2 and the appellant which incident was conceded to by the PW2. It happened in the neighbourhood of the appellant's home not in the bush. The PW2 states that the appellant 'escaped' which confirms that wherever he says he arrested the appellant from is not proved. In addition the I.O confirmed that the actual arrest was by the Community Policing representative who did not testify as to circumstances of the arrest. The appellant confirmed this arrest by other people accompanied by the PW2.

66. The prosecution glossed over the fact that the accused person was not arrested at the scene. PW2's allegation that he chased him for a while is not corroborated by any other evidence. The evidence which is not disputed is that there was a confrontation between the PW2 and others and the accused where the wife of the accused and others intervened. The actual arrest happened near the home of the accused. The Investigating officer did not look into this evidence.

67. The person the PW2 says he arrested was wearing a cap. PW2's testimony is that he only identified him after 'they removed' the cap from his head. The prosecution's case is that the attacker was masked up. If it is true then the possibility that the capped, masked attacker actually escaped, and PW2 found the appellant near his gate around the same time appears possible. The identity of the perpetrator becomes even more doubtful as neither the mask nor the cap were produced in court, but more importantly, this evidence on how the perpetrator had concealed his identity is contradictory and throws doubt into the identity of the perpetrator.

68. That the identification of the appellant was not based on any recognition but on deductions based on the evidence of the PW2.

69. In convicting the appellant the learned a trial magistrate found as follows

> "The complainant narrated to court how they accused person pushed his way into her house. He attacked her with his fist on the head and fell on the ground. He thereafter separated her legs lay on top of her and inserted his pennies in her buttocks and vagina. ...the doctor examined the complainant ...and concluded that there was forceful genital penetration causing injury on the labia...accordingly I find the element of penetration sufficiently proved by the prosecution ...Genital examination on the complainant revealed inflammation and reddening of the vagina wall ...The complainant's evidence coupled with the medical findings demonstrates that the genital penetration was unconsented and unwanted. The same was procured through physical violence or force a classic case of rape."

70. On identification, the trial court took into account the evidence that earlier in the morning the complainant had seen the accused person who had thrown stones at her house. That later at 9:00 PM the same person stormed into her house and committed these offenses. The court accepted the evidence of PW2 that he saw someone rush into the bushes whom he arrested. It was his view that six prosecution witnesses had placed the accused person at this scene immediately after the offense was committed.

71. From my analysis of the evidence it emerges that the findings on identification were not supported by cogent and sufficient evidence.

72. I noted from the judgment that the trial court did not consider the credibility of PW1 with regard to the circumstances of the offence as the prosecution presented four conflicting scenarios with respect to the identification of the perpetrator.

73. What investigations were conducted?

74. PW5 was the IO No 22 2540 CPL Peter Iganga Luchera Mbooni police station, received the report and instructions from the OCS through a phone call on the material night. He proceeded there in the police vehicle in the company of PC Mareta .He found a crowd .the accused had been arrested .The victim was lying on the ground about 30 meters from the house .She did not have her inner wear .Blood was oozing from her face with injuries all over and her throat was swollen .she was unconscious and could not talk. He testified that the complainant was taken to Mbooni Sub County Hospital in a coma where she was discharged after two weeks.

75. Beside her at the scene there was a torn blood stained lesso. Here also recovered a black biker which had blood stains. He recovered a black top which was torn and also a panty which was also torn. He found two open shoes which were not in the same place and opined that they were an indication of struggle. In the house he recovered a rope. He produced all these as exhibits. He rearrested the accused and took him to the police station where he charged him with this offence.

76. On cross examination he said he recovered the exhibits from the scene and the rope he collected from the complainant's house. He said he also took photos but did not produce that photos. He said he did not take the blood stained clothes to government chemist for analysis .he also said he did not produce any exhibit memo. He confirmed that the complainant recorded her statement on the 16th of May 2022 in which she did not reveal. That he recorded another statement of the complainant on the 17th of June. That it was the community policing member of the community who arrested the accused but he did not see the need to avail that witness to testify. He told the court that he did not see any need to conduct an ID parade.

77. It is relevant here that the appellant was arrested on the same night of the alleged offence but no specimens were taken from him for forensics.

78. The appellant had injuries which he said he sustained from the attack by the PW2. The investigator ought to have ruled that out by taking specimens from the complainant and the appellant to government analyst for forensic examination. This is because circumstances of the case raised the possibility of the perpetrator's DNA being found on the complainant and vice versa, a fact that would assisted to identify the perpetrator. Secondly even the Complainant's torn clothes could have contained the perpetrator's DNA. This crucial investigation was passed up by the I.O.

79. This brings me to something I have stated before: the DCI and DPP must stop the over reliance on proviso to s. 124 of the SOA.

80. Here I must join my voice to the Judge in C K (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others [2013] eKLR . Though the matter was brought on behalf of children the principles still hold true in all sexual offences. Victims deserve the highest level of investigations. It is not lost to me and should not be lost to Police and ODPP that the failure to conduct investigations is a violation of the rights of the victim, and to some extent those of the suspect who gets charged without sufficient evidence.

81. That must be the purport of Article 50(1) of *the Constitution* on Fair hearing. It states:

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

82. Both the victim and the perpetrator deserve a fair hearing, In criminal cases it begins from the point of investigations. It is clear from the Ripples case where the Judge set out the following declarations inter alia:

1. A declaration be and is hereby made to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' complaints of defilement violates the first eleven petitioner's fundamental rights and freedoms-

    a. to special protection as members of a vulnerable group,

    b. to equal protection and benefit of the law;

    c. not to be discriminated against,

    d. to inherent dignity and the right to have the dignity protected;

    e. to security of the person,

    f. not to be subjected to any form of violence either from public or private sources or torture or cruel or degrading treatment; and

    g. to access to justice as respectively set out in Articles 21(1), 21(3), 27,28,29,48,50(1) and 53(1) (c) of *the Constitution* of Kenya.

2. A declaration be and is hereby made to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' respective complaints violates the first eleven petitioners' fundamental rights and freedoms under-

    a. Articles 1 to 8(inclusive) and 10 of the Universal Declaration of Human Rights,

    b. Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the rights of the child;

    c. Articles 1, 3, 4, 16 and 27 of the African Charter on the Rights and welfare of the child, and

    d. Articles 2 to 7(inclusive) and 18 of the African Charter on Human and people's rights.

    3) An order of mandamus be and is hereby made directing the 1st respondent together with his agents, delegates and/or subordinates to conduct prompt, effective, proper and professional investigations into the 1st to 11th petitioners' respective complaints of defilement and other forms of sexual violence.

83. An order of mandamus be and is hereby made directing the 1st respondent together with his agents, delegates and/or subordinates to implement Article 244 of *the Constitution* in as far as it is relevant to the matters raised in this Petition.

1. Article 244 of *the Constitution* provides for the Objects and functions of the National Police Service. It states that the National Police Service shall—

a. strive for the highest standards of professionalism and discipline among its members;

b. prevent corruption and promote and practice transparency and accountability;

c. comply with constitutional standards of human rights and fundamental freedoms;

d. train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and

e. foster and promote relationships with the broader society.

84. The above is a clear guideline of what the responsibility of the Police, the DPP is in these case. The fight against all forms of SGBV will not be won until we take even the slightest case seriously.

85. Herein exhibits were collected from the scene. They were not taken for forensic examination. The primary scene, the Kitchen of the complainant was not visited, for any clues as to the perpetrator, eg dusting for finger prints, or testing for the substance alleged to have been thrown into the face of the complainant, for its identification, no search was conducted in the home of the appellant or his body for this alleged substance, yet he was arrested on the same night, the mask and cap that he was allegedly wearing were not looked for , neither were his clothes recovered for forensics. Even the photos of the scene were not processed for clues.

86. This rush to charge for serious offence without carrying out proper instigations is what sometimes gets innocent persons in prisons and persons who commit horrendous crimes end up not paying their dues to society leaving the victims feeling that justice has not been done for them. It is my view this is one of those unfortunate cases

87. Instead of carrying out proper investigations, here the prosecution went on to obtain a new statement from the complainant that simply created confusion in the matter and made the complainant an unreliable witness whose evidence regarding the circumstances of the offence and the identity of the attacker could not be relied upon

88. The upshot is that I find prosecution established that the complainant was attacked and raped on the night of 8th May 2022, however from my analysis of the evidence and what was placed before the trial, court it is my finding from all the foregoing that the alleged visual identification or recognition of the appellant as the perpetrator is unreliable and unsafe to sustain the conviction herein.

89. I find that the appeal is merited and allow it.

90. The conviction on each count is quashed and the sentence be and is hereby set aside.

91. The appellant be set at liberty unless otherwise legally held.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 14TH MAY 2025

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

JUDGE

Chrispol: Court Assistant

Appellant present virtually from Makueni Main Prison Mr MWENDA AK for Appellant

Mr. Kazungu for state

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2025-05-14 14:36:46