



REPUBLIC OF KENYA



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**Nganga v Republic (Criminal Appeal E101 of 2023)
[2025] KEHC 9554 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E101 OF 2023**

**A MSHILA, J
JUNE 20, 2025**

BETWEEN

DAVID NYOTU NGANGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal originating from the conviction and sentence by Hon. M.A.Opondo (SPM)
in Kiambu Criminal Case No.1076 of 2018 delivered on 21st September, 2023)*

JUDGMENT

1. The Appellant, David Nyotu Nganga, was charged before the Chief Magistrate's Court at Kiambu in Criminal Case No. 1076 of 2018 for the offence of Robbery with Violence contrary to Section 296(2) of the *Penal Code*. The particulars are that on the 15th day of June, 2018 at Kiamumbi area within Kiambu County jointly with others not before court while armed with a knife robbed ER of cash Kshs. 4,400/= and immediately after such robbery gang raped the said ER.
2. Count II; the appellant was charged with the offence of Gang Rape contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 15th day of June 2018 in Kiamumbi area within Kiambu County jointly with others not before court intentionally and unlawfully caused their penis to penetrate one after another the vagina of one ER without her consent.
3. Upon being found guilty, the trial court convicted the Appellant and sentenced him to 15 years. Being aggrieved by the said conviction and sentence the Appellant has lodged this Petition of Appeal based on the following grounds of appeal that:-
 - a. The Learned Trial Magistrate erred both in law and fact by convicting the appellant when the prosecution had not proved their case against the appellant beyond reasonable doubt.



- b. The Learned Magistrate erred both in fact and in law by failing to resolve the apparent doubts in the prosecution's case in favour of the appellant.
 - c. The Learned Trial Magistrate erred both in fact and in law by failing to scrutinize and evaluate the ingredients of the alleged offences viz a vis the prosecution's evidence which was contradictory and inconsistent in material facts thereby arriving at an erroneous decision.
 - d. The Learned Trial Magistrate erred both in fact and in law in failing to find that the prosecution failed to prove identification of and lack of penetration by the appellant upon the complainant beyond reasonable doubt.
 - e. The Learned Trial Magistrate erred in both fact and law by failing to find that the evidence of the complainant was not corroborated and hence not sufficient to return a guilty verdict.
 - f. The Learned Trial Magistrate erred both in fact and in law when she failed to hold and to find that failure by the prosecution to produce a DNA report was detrimental to the prosecution's case.
 - g. The Learned Trial Magistrate erred in both fact and law by failing to find that the prosecution did not carry out sufficient investigations in this matter including carrying out an identification parade before charging the accused persons.
 - h. The Learned Trial Magistrate erred both in fact and in law by failing to hold that burden of proof at all times rested with the prosecution and could not shift to the appellant.
 - i. The Learned Trial Magistrate erred in law and in fact when she made a partial evaluation of the evidence and finding in favour of the prosecution instead of awarding the benefit of doubt to the appellant especially where the alleged victim denounced the weapon brought by the prosecution to prove the offence of robbery with violence
 - j. The Learned Trial Magistrate erred both in fact and in law in failing to find that no tangible evidence was formed or presented to the court linking the appellant to the commission of the offences.
 - k. The Learned Trial Magistrate erred both in fact and in law by failing to find that the complainant's conduct immediately after she managed to escape from the house the alleged offences took place was suspicious and had an inference that she was keen on framing charges against the appellant.
 - l. The Learned Trial Magistrate erred both in fact and in law when she failed to appreciate the nature of the offences facing the appellant and afford him an opportunity to be represented by counsel especially at the defence hearing stage of the trial.
 - m. The Learned Trial Magistrate relied on insufficient evidence to convict the appellant and sentenced him to a total of 15 years imprisonment.
4. The prosecution called four witnesses in support of their case. ER (PW1) the complainant herein in her testimony stated that she resides in Kahawa West. On 15/6/2018 she visited Mama K at around 7.00 pm and left at 9.00pm heading to the matatu stage. At the stage she saw two men ahead of her and two behind her. She testified that one hit her on the forehead and warned her not to scream. Two others held her hands and led her to a nearby bush. They undressed her and started raping her in turns. She stated that they stuffed a cloth in her mouth. She mentioned that one was armed with a knife. She heard one of them call other people and that two people came and took her to their house. She left her



trouser in the bush. Further, she stated that she was raped and that she lost consciousness until 10.00 a.m. she stated that she was in a lot of pain and was unable to go to the toilet that was outside and was helped by a man who she informed that she had Kshs. 4,400/= in her trousers. The man went to get her trouser leaving behind an ID by the name Samuel Ngugi Kamande. She stated that she covered herself with a vest and rushed to the stage where she boarded a matatu to her home and later went to Medicine San Frontiers Hospital for treatment. She was issued with a recovery report, PRC form. She indicated that she reported the case the following day as she spent the day in hospital and could not walk. The police issued her with a P3 form. She stated that the incident occurred near Jiko Mart where there are many houses and that the place was well lit. She testified that she saw the two people who were ahead of her well as one of them is the one who threatened her with a knife and that he is brown in complexion. The two who took her to the house were black and young. The house was a single room and was lit with electricity. She stated that she gave the description to the police as well as the name of Stephen Ngugi. She took the police to the house as she could remember the green gate of the house which was not far from the stage where they found the two accused persons. She stated that the 1st accused is the one who hit her on the forehead and that the 2nd accused was among the men who raped her in the bush. Her blue jeans and black pant were recovered by the police in the said house. Her Kshs.4,400/= was not recovered and that she did not know the accused before.

5. In cross examination, she stated that 1st accused was armed with a sword and not a kitchen knife which was recovered from the house. She stated that she had not met Stephen Ngugi in a bar prior to the incident.
6. No. 68492 Corporal Geoffrey Mukaria (PW2) testified that on 23/06/2018 he was called by CI Nyambura to escort the complainant to Kiambuni area where she took them to the house where she was gang raped where he found two (2) men who were identified by the complainant as the men who had raped her. Under the bed they recovered a trouser and a panty that the complainant identified as being hers. A knife was also recovered. They proceeded to Kiamumbi Police Station with the exhibits as well as the accused persons.
7. No. 86399 Sergeant Catherine Nyambura (PW3) testified that on 15/6/2018 a case was reported OB 26/17/6/2018 where the complainant stated that on 15/6/2018 at around 9.30 pm as she walked through Jikwa area towards Kamiti Road she was attacked by 4 men who took her to a nearby bush took her cash and gang raped her in turns. Two others appeared, took her to a house and she was raped again. The following day she woke up next to a man and upon asking for her clothes the man went to fetch them from the bush and it is at this point that she ran away wearing a vest. She went to MSF hospital where she was treated and discharged and reported to police on 17/6/2018. She testified that they recorded her statement and that she was given a P3 form to be filled at Kiambu Level Hospital. She stated that with the help of Corporal Mukaria they proceeded to the house where the complainant had escaped from and they arrested the two accused persons. They found the complainant's clothes underneath the bed and a knife was recovered under the mattress. They raided the said house at 5.30 am when the accused were present and asleep.
8. Jesica Wahu Njonge (PW4) testified on behalf of the doctor who filled the P3 form. The complainant was examined on 15/6/2018. The findings were that she is alleged to have been gang raped by persons not known to her. She walked with difficulty, complained of pain on her scalp and private area which was found to have abrasions upon examination. There was hyperemia and tear on the left lip of the vagina. The anus also had a tear. She stated that vagina swab was taken and it showed presence of spermatozoa. Pregnancy test and HIV test were said to be negative. The victim had been treated at MSF and a PRC form had been filled. She produced both documents. This marked the close of prosecution case.



9. David Nyotu Nganga (DW1) in his unsworn evidence testified that he is a butcher man and never closes his job at 9 pm as he works near a bar and has to serve customers. On the said day he closed at 12 midnight and went to sleep. The following day the complainant came with her friend and stayed past midnight and that they were very noisy. He later went to work as usual and on coming back he found that the complainant and her friend had stolen his TV, gas and woofer. He produced his OB No. 25/7/2018. He was arrested together with his brother. He denied ever raping anyone asking how he could have taken himself to Kiamumbi Police Station if at all he had raped someone.
10. James Gitau Nganga (DW2) testified that he works as a matatu driver. On 15/6/2018 he woke up and proceeded to work. In the evening when he went back to his house he found that his house had been locked as he had not paid rent as such he went to his brother DW1s house. While there he called his brother and asked him why clothes were on the bed. His brother came and reported the issue at Kiamumbi Police Station. He stated that he stayed at his brother's place for the whole week and was arrested on Saturday morning. The complainant said she never saw him.
11. In the end, the trial court made the determination that based on the evidence presented the prosecution established beyond all reasonable doubt that the 1st accused person committed the offence of robbery with violence and gang rape and convicted him on the two counts. On Count I he was sentenced to 10 years imprisonment and on Count II he was sentenced to 5 years imprisonment. The sentences were to run concurrently from 21st September, 2023 the day he was convicted.
12. The parties were directed to canvass the appeal by way of written submissions.

Appellant's Submissions

13. The Appellant submits that the burden of proof in criminal cases rests on the prosecution and it's threshold was beyond reasonable doubt which the prosecution failed to meet in this matter. The prosecution was said to have failed to produce the weapon allegedly recovered from the Appellant's house which was fatal to the prosecution's case. Stephen Ngugi Kamande being the man who the complainant found in the house when she woke up was never availed in court as well as the DNA report. Any doubts were said should be resolved in favour of the accused. Reliance was placed in the case of *Peter Nkonge Gatundu vs Republic* (2021) eKLR. The trial magistrate was said to have arrived at an erroneous decision for failing to scrutinize the ingredients of the alleged offences. It was submitted that the identification of the Appellant was not conducted in a manner that meets the threshold required by law. Corroboration was also said to be crucial to eliminate any reasonable doubt. Reliance was placed in the case of *Moses Mutahi Mugo vs Republic* (2022) eKLR. The medical evidence relied on was said to have not proved beyond reasonable doubt that the Appellant had committed the alleged act of penetration. The Appellant submitted that failure to call the government analyst to produce the DNA report should have led to an acquittal of the Appellant. Also that failure to conduct a proper identification parade undermined the integrity of the identification evidence presented in court. The complainant's conduct immediately after she managed to escape from the house was suspicious and meant to frame charges to the Appellant.

Respondent's Submissions

14. It was submitted that given the testimony of PW1 and corroborating evidence, the prosecution proved all elements as the offenders were armed with a knife, and used violence. The prosecution also demonstrated that the 1st accused in association with others, committed rape with the common intention and collaborative actions qualify the act of gang rape. The prosecution was said to have provided consistent and corroborated evidence from multiple witnesses. The evidence against the



Appellant was said to be compelling and cohesive evidence against the Appellant leaving no reasonable doubt regarding his guilt. It was submitted that any minor inconsistencies were not significant enough to cast doubt on the overall credibility of the prosecution's case.

Issues for Determination

15. After reading the written submissions this Court has framed the following issues for determination;
 - a. Whether the ingredients of the charge, were proved to the required standard;
 - b. Whether the Appellant was positively identified.
 - c. Whether the Appellants defence was considered by the court.

Analysis

16. This being a first appeal, the court is clothed with the jurisdiction to re-evaluate and re-analyze the evidence of the trial court and arrive at its own independent conclusion as was cited in the case of David Njuguna Wairimu V – Republic (2010) eKLR where the Court of Appeal stated that:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

17. Reference is also made to the case of *OKo v R* (1972) EA 32.

Whether the ingredients of the charge, were proved to the required standard.

18. The trial court made a determination that was based on the facts and evidence presented by the prosecution, that the Appellant was one of the persons who committed the offence of robbery with violence and gang rape. The ingredients of the two (2) counts are more or less the same; this Court will proceed to re-analyze the offence of gang rape, only, so as not to sound repetitive, because the facts and evidence are the same. The Appellant alleges that the prosecution did not prove its case beyond reasonable doubt.

19. In this case the Appellant was charged with the offence of rape which is provided for under Section 3 (1) of the Sexual Offences Act

“(1) A person commits the offence termed rape if—

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



20. The main ingredients of the offence of rape are intentional and unlawful penetration with his/her genital organs, lack of consent or the same being obtained by force.
21. On the issue of penetration, the complainant testified that on 15/6/2018 she visited Mama K at around 7.00 pm and left at 9.00pm heading to the matatu stage. At the stage she saw two men ahead of her and two behind her. She testified that one hit her on the forehead and warned her not to scream. Two others held her hands and led her to a nearby bush. They undressed her and started raping her in turns. She stated that they stuffed a cloth in her mouth. She mentioned that one was armed with a knife.
22. The complainant gave a candid account of what transpired on the fateful night. The same was corroborated by testimony of PW4, the clinical officer who produced the PRC form. On examination the complainant was said to have physical injuries consistent with the use of force, including abrasions and hyperemia and tears on her vagina and anal area and upon taking a swab of her vagina found spermatozoa. The Complainant's evidence according to the court was corroborated by the medical evidence to prove that indeed that there was penetration. This Court is satisfied that the prosecution proved this ingredient of penetration to the desired threshold.
23. On the issue of consent, the case of *Republic vs. Oyier* (1985) KLR 353 the Court of Appeal held that:-
 - “ 1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
 2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
 3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”
24. The complainant testified that the accused threatened her with a knife and that she was dragged into a bush and forced her to have sex with them; this court is satisfied that the Appellant had carnal knowledge with the Complainant through duress and that she never consented to the act. This ingredient was also proved to the desired threshold.
25. On identification this ingredient was said to have been supported by recovery of PW1's clothes from the Appellant's house. The complainant's evidence was that she led the police to the house where she had been gang raped; herein she recovered her clothes and the knife and this provided robust corroboration on identification. The necessity of an identification parade is found to have been diminished by the immediate identification by the Complainant. The judgment reflects a comprehensive evaluation of all the evidence presented. This ground of appeal is found to be devoid of merit and it is hereby dismissed; this Court is satisfied that the prosecution proved its case to the desired threshold

Whether the Appellants defence was considered by the court.

26. On whether the trial court considered the Appellant's defence, the trial court found the same to be a mere denial. The Appellant contends that the Complainant wanted to settle scores by using the court



as she was kicked out of the room to pave way for his other girlfriend. The Appellant referred to the complainant as an angry girlfriend.

27. The evidence of the complainant coupled with the medical evidence points to the offence of rape consent having not been sought. This court having carefully perused the lower court record, is satisfied that the complainant's evidence was consistent on both offences of robbery with violence and gang rape and the defence as found by the trial court was indeed a mere denial and the trial court was justified in disregarding it as it did not dislodge the prosecutions' case.
28. This ground of appeal is found lacking in merit and it is hereby disallowed.
29. The prosecution is found to have presented a coherent and compelling case proving beyond reasonable doubt the Appellant's guilt in both Counts as such the appeal lacks merit.

Findings and Determination

30. For the forgoing reasons this Court finds that the Appeal is devoid of merit and it is hereby dismissed in its entirety. The conviction and sentence is upheld on both Counts.

Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 20TH DAY OF JUNE, 2025.

A. MSHILA

JUDGE

In the presence of;

Sanja – Court Assistant

Waweru – for the Appellant

Magero for the State

Appellant – present from Kamiti

