Wangari & another v Republic (Criminal Appeal 27 of 2023)
[2025] KEHC 10330 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10330 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 27 OF 2023

TW OUYA, J

JULY 18, 2025

BETWEEN

DAVID GICHUKI WANGARI ..... 1ST APPELLANT

PAUL GATHAKA WAMBUI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellants herein, David Gichuki Wangari and Paul Gathaka Wambui, were charged in Count I, with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars of the offence allege that on the night of 7th and 8th of December, 2016, at Waki stage of Ruiru within Kiambu county, while armed with dangerous weapons, namely a panga and a knife, robbed SC a phone make Samsung Galaxy, ATM cards for KCB and National bank, and cash Kshs. 32, 700 and immediately before such robbery, used actual violence to the said SC.

2. In Count II, the appellants were charged with the offence of gang rape, contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. It is alleged that on the night of 7th and 8th December, 2016, at Waki stage of Ruiru within Kiambu county, the appellants intentionally and unlawfully caused their penis to penetrate the vagina of SC in turns, without her consent.

3. In the alternative, the appellants were charged with the offence of committing an indecent Act with an adult, contrary to Section 11 (A) of the *Sexual Offences Act*, No. 3 of 2006. It is alleged that on the night of 7th and 8th December, 2016, at Waki stage in Ruiru within Kiambu county intentionally and unlawfully caused their penis to contact the vagina of SC without her consent.

4. After a full trial, the appellants were convicted of the offences in both counts and sentenced to death in Count I whereas the sentence in count II was to remain in abeyance. The appellants were aggrieved

by their conviction and sentence and they filed separate appeals to this court raising different grounds of appeal.

5. The 1st appellant filed a Memorandum of Appeal on the 17th of August, 2023 while the 2nd appellant proffered an appeal vide an undated petition of appeal christened 'Memorandum grounds of appeal'. This appeal was registered as HCCA No. 27 of 2023.

6. I would like to state at this juncture, that the institution of the present appeal vide a Memorandum of appeal was not only unprocedural, but also irregular. I say so because, Section 350 of the *Criminal Procedure Code*, makes it clear that an appeal to the High Court from a subordinate court should be filed through a Petition of appeal and not a memorandum of appeal; as a Memorandum of appeal is a pleading through which Civil appeals are lodged.

7. That notwithstanding, Article 159 (2) (d) of the *Constitution* makes it clear that justice shall be administered without undue regard for procedural technicalities, as such, I will proceed to consider the appeal on its merit.

8. The 1st appellant in his Memorandum of appeal, advanced a total of six (6) grounds of appeal, in which he faulted the learned trial magistrate for failing to observe that the prosecution's case was marred with inconsistencies and contradictions; for failing to find that the evidence adduced by the prosecution cannot sustain a conviction; for failing to observe that the entire prosecution case was impeachable under section 163 (1) of the *Evidence Act*, thus unworthy to be relied upon; for failing to give his defence adequate consideration as per the requirements of Section 169 (1) of the *Criminal Procedure Code*; and for failing to observe that the prosecution failed to recall crucial witnesses to prove its case against the appellant as provided for under Article 50 (2) (c) of the *Constitution*.

9. the 2nd Appellant filed his memorandum of appeal on 10th July 2023 which was registered as HCCA No E42 of 2023. The 2nd appellant on the other hand advanced a total of six (6) grounds of appeal, wherein he faulted the learned trial magistrate for relying on a single evidence; for relying on evidence that was riddled with contradictions and discrepancies; for failing to observe that the charge sheet was fatally defective; for failing to observe that the prosecution evidence was in variance with the charges; and for failing to consider his defence.

10. It is noteworthy at this juncture that the two appeal were consolidated under one lead file being HCCA No. 027 of 2023.

11. The appeal was canvassed by way of written submissions, which I have duly considered. The 1st appellant's submissions were filed on his behalf by his learned counsel Prof. Kiama wangai & Company Advocates, while those of the respondent were filed by Ms. Grace Emisiko, learned prosecution counsel.

12. In support of its case at the trial court, the prosecution called a total of five (5) witnesses. The victim who testified as PW1, stated that on the 17th of December, 2016, her friend who lives in Ruriu requested her to go and visit her as she was not feeling well. She stated that she went to ruiru and alighted at the junction to ruiru, so that she could use a motor bike to her friend's place. It was her evidence that when she alighted from the matatu, she started walking towards the motor cycle, however, she suddenly felt someone hold her hair while showing her a knife and the person then instructed her not to scream.

13. PW1 testified that the person who held her was a man, and that she could see his face as there were security lights in the area, and the man had also not covered his face. The man then pulled her towards a forest, away from the road, told her to remove her clothes as he also removed his trouser; the man then put a condom on his penis and raped her.

14. It was her testimony that after raping her, the said man then began ransacking her handbag where he found Kshs. 200. She stated that she then heard footsteps of two (2) other men approaching them, and one of the said men removed his trouser and put on a condom and raped her; after a while the other man also removed his trouser and raped her without a condom.

15. She testified that after the incident, the three men then used mobile banking to transfer a total of Kshs. 20,000 from her KCB and Equity bank accounts to her M-pesa, and then from her M-pesa account to their M-pesa account. PW1 stated that when the two men who had come later left, and she was left alone with the first man who had dragged her to the bush and raped her; and that the man then took her to another spot and began raping her again. It was her testimony that she was crying and asking the man to release her, but the man was beating her a lot. Thereafter, the man told her to dress up and leave and not turn back, which she did and she ran very fast following the direction of the road; and that she later got help from a motorcyclist who took her to her friend's place and later to Ruiru Police Station, where she reported the incident and was escorted to the Hospital.

16. PW2, Celestine Cheptum, told court that on the 7th of December, 2016, she informed PW1 that she was feeling unwell and PW1 told her that she would go and see her. It was her testimony that at about 6pm, she got a call from PW1, who informed her that she was on her way to ruiru to see her, and that she got worried at around 9Pm, when PW1 failed to show up. She stated that she tried calling PW1, but her phone had been switched off.

17. PW2 testified that at around midnight, she heard a knock on her door, and on peeping through the window, she saw a motor cyclist, who informed her that he had brought PW1. It was her testimony that PW1, who looked traumatized, was crying and could not speak properly; thereafter they proceeded to ruiru police station where PW1 narrated her ordeal to the police. They then went to the hospital, where PW1 was treated.

18. PW3, C.I Wilson Peter Bakori, testified that on 3rd February, 2017, he conducted an identification parade on the 2nd appellant, Paul Gathaka Wambui, at the time of his arrest. He testified that he had 8 participants in the identification parade, and that the complainant identified the 2nd appellant, who was standing between participant 6 and 8. He stated that the complainant identified the 2nd appellant by touching his shoulder, and the 2nd appellant stated that he was satisfied with how the parade was conducted.

19. PW4, Samuel Kariuki, a senior clinical officer at Gachororo health center, testified that he examined PW1 when she came in for treatment and he filled in the P3 form. It was his evidence that when PW1 came in for treatment her scarf was torn, her dress and top had mud on them and that she had injuries on her left elbow joint, right knee joint and right leg. He stated that some lab investigations were conducted and he concluded that the patient's vagina had been penetrated. He also put her on medication to prevent her from contracting HIV.

20. PW5, Sgt Lydia Migwi, the investigating officer, testified that on the 8th of December, 2016, she went to work where she found a report booked concerning PW1. She testified that when PW1 came back to the police station, she issued her with a P3 form, and referred her to ruiru hospital where she received treatment. She stated that she thereafter, visited the scene in the company of the complainant, and they were able to recover her underpants, scraf, purse and used condoms.

21. She then recorded PW1's statement and thereafter sent her to Safaricom to get her statement; and it is from the statement that they were able to locate and arrest two of the accused persons, namely Paul Gathaka and Andrew Theuri, who had transferred money from her KCB account account to their

Mpesa accounts. It was her testimony that the two suspects were then taken to Ruiru Police station, where PW1 positively identified them in an identification parade.

22. Regarding the arrest of the appellant herein, PW 5 testified that they recovered PW1's phone from Sheila Odhiambo, who said she had bought the mobile phone from Edward Gichuki, who in turn said he had bought the phone from David Gichuki, the appellant herein. It was her evidence that at the time, the appellant was in industrial area remand, over another offence, and they took him to Ruiru police station where they charged him.

23. When placed on his defence, the 1st appellant gave an unsworn statement; and indicated to court that he did not know why he had been arrested. He stated that he was being framed and that he was innocent. The 2nd appellant on his part gave an unsworn statement and stated that he did not know why he was in court, as he was innocent.

24. This being a first appeal to the High Court, I am reminded of my primary duty as the first appellate court, which is to subject the evidence adduced before the trial court to a fresh and exhaustive analysis, in order to arrive at my own independent conclusions bearing in mind that I did not have an opportunity to hear or see the witnesses.

25. This duty was re-stated by the Court of appeal, in Okeno versus Republic (1972) EA 32; as follows: "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958] E. A. 424."

26. Guided by the principle in the aforementioned duty, I have carefully considered the grounds of appeal, the rival written submissions made on behalf of both parties; I have also read the evidence on record together with the impugned judgement. Having done so, I find that the main issue arising for determination, is whether the evidence adduced by the prosecution proved the case against the appellants beyond all reasonable doubt.

27. Before delving into the issue isolated for determination, I would first like to deal with the 2nd appellant's complaint that the charge sheet was defective, although he did not state what made the said charge sheet defective. On my part, I have gone through the charge sheet, and there is no indication that the same was defective.

28. Furthermore, the trial court read out the charges to the 2nd appellant, and he was able to understand and plead to the charges. The 2nd appellant was also able to cross examine all the prosecution witnesses before the court and he did not at any moment give an indication to the court that he was not able to understand the charges levelled against him or that he was prejudiced in any way. As such, I am of the view that nothing turns on this ground.

29. Turning now to the main issue for determination, Section 296 (2) of the *Penal Code*, which provides for the offence of Robbery with violence stipulates as follows: "If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

30. A careful reading of the above provision of law will reveal that in order for the prosecution to prove the charge of robbery with violence against an accused person, it must prove beyond all reasonable doubt, any of the ingredients of the said offence which are:

    i. That the accused was armed with a dangerous or offensive weapon or instrument; or

    ii. That the accused is in the company of one or more other person or persons; or

    iii. That immediately before or immediately after the time of robbery, the accused wounds, beats, strikes or uses any other personal violence to any person.

    It is also important to note that it is not necessary for the prosecution to prove all the above ingredients in order to prove the offence of robbery with violence against an accused person; proof of one ingredient is sufficient to prove the said offence.

31. This position was reiterated by the court of appeal in Johana Ndungu v Republic [1996] KECA 187 (KLR); as follows:

> "In order to appreciate properly as to what acts, constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the *Penal Code*. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
>
> i. If the offender is armed with any dangerous or offensive weapon or instrument, or
>
> ii. If he is in company with one or more other person or persons, or
>
> iii. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

32. On my part, I find that the evidence of PW1 was clear and straight forward, as to what transpired on the night of 7th December, 2016. In her testimony before the trial court, PW1 had indicated that the 1st appellant was the man that accosted her after alighting from the matatu and while she was looking for a motor cycle to take her to PW2's house.

33. It was her evidence that the 1st appellant was the one who showed her a knife, dragged her to the forest, raped her and ransacked her handbag, before they were joined by two other men, one of them being the 2nd appellant, who also raped and robbed her of Kshs. 20,000. PW1 also testified that the 1st appellant then took her to another spot where he again raped, while beating her; before telling her to dress up and leave the scene.

34. The appellants when given a chance to defend themselves, did not adduce evidence to challenge that of the prosecution, that placed them at the scene of crime on the night of 7th December, 2016 or that they took part in robbing her of her belongings.

35. The appellants only stated that they were innocent and that they were being framed. It is however not clear why PW1 or any of the prosecution witnesses would want to frame them, considering that none

of them, including the victim knew them prior to the robbery incident. Furthermore, PW1's mobile phone was recovered and the people who were found with the said mobile phone, clearly identified the 1st appellant as the person who had sold the same to them. The 2nd appellant was identified by the victim at an identification parade, and he stated that he was satisfied with how the parade was conducted.

36. Based on the above, I am satisfied that the evidence tendered by the prosecution was sufficient to prove that the appellants robbed PW1 while armed with a dangerous weapon and while in the company of another person. I am therefore of the view that the prosecution proved beyond all reasonable doubt the charge of robbery with violence against the appellants. The same was not marred with inconsistencies and contradictions as alleged by both appellants.

37. Regarding their conviction for the offence of gang rape; Section 10 of the *Sexual Offences Act* stipulates as follows: "Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."

38. PW1 in her testimony indicated that after she alighted from the matatu the 1st appellant dragged her to a forest and instructed her to remove her clothes. She stated that the 1st appellant then put on a condom and raped her. She further testified that the 2nd appellant and another man joined the 1st appellant and they raped her in turns.

39. Her evidence was corroborated by that of PW4, the clinical officer who examined PW1 after the incident. PW4 confirmed to the learned trial magistrate that upon examining PW1, he came to the conclusion that she had been raped. PW5 the investigating officer and PW2, also corroborated the evidence of PW1, as they confirmed that on the 8th of December, 2016, when they went back to the scene, they found two used condoms amongst other items that belonged to PW1. There was therefore evidence that she had been raped by not only the appellants, but also by another man who was in their presence.

40. As for identification of the appellants, PW1 had indicated that the 1st appellant was not wearing any disguise at the time that he dragged her to the forest and began raping her. She also indicated that she spent a lot of hours with the appellants and that she was able to clearly identify them as there was sufficient light at the scene of crime. I am therefore satisfied that PW1 was able to properly identify the appellants as her perpetrators.

41. Based on the above evidence, I am of the considered view that the prosecution proved beyond all reasonable doubt the offence of gang rape against the appellants.

42. I have also noted that the 1st appellant has challenged his conviction on grounds that an identification parade was never conducted to identify him. To this I would like to state that though the identification parade was never conducted, from the evidence on record, PW1 and the appellant spent a considerable amount of time together at the scene before he allowed her to escape, as such she could easily identify him. Furthermore, there was evidence on record that although it was at night, there were street lights in the area, and considering also that the appellant was not disguised, PW1 was able to clearly see his face and she could therefore easily identify him.

43. Aside from that PW5, the investigating officer testified that the victim's phone was found after successfully tracking the same, and the people who had been found in possession of the said phone led the police to the appellant, as the person who had sold the phone to them.

44. The court of appeal in Katana & Another versus Republic [2022] KEC 1160 (KRL); held that: "…. it is also notable that an identification parade is not necessary where the witness is positively confident at the time of commission of the crime as to the identity of the perpetrator of the offence and will only become necessary where the victim of the crime did not know the accused before his acquaintance with him during the commission of the offence, or identification was made under difficult circumstances such that the witness may have made a mistake….."

45. It is clear based on my analysis of the evidence on record that the identification of the 1st appellant by PW1 was not made under difficult circumstances. There was evidence that the 1st appellant was not disguised, as such, PW1 was able to clearly see his face. There were also street lights in the area, so PW1 was able to clearly see the appellant. Furthermore, there is evidence that PW1 spent a lot of time with the appellant during her ordeal, and she could therefore clearly identify him. Based on the above, I am of the considered view that the identification parade was not necessary.

46. On the allegation by the 1st appellant that the prosecution did not call crucial witnesses to prove its case against the appellant; Section 143 of the *Evidence Act* makes it clear that the prosecution has wide discretion in calling the witnesses it felt were sufficient to prove its case. The said provision of law stipulates thus:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

47. In my considered view, all the witnesses who testified for the prosecution were enough to establish beyond all reasonable doubt the case against the appellants.

48. Regarding the sentence, the learned trial magistrate after convicting the appellants for the offence of robbery with violence and gang rape, sentenced them to death in count I, while the sentence in count II was held in abeyance.

49. It is trite that sentencing is a matter which is at the discretion of the trial court, and this court, as an appellate court, can only interfere with its sentence when it is satisfied that the trial court acted upon some wrong principles, or overlooked some material factor or that the sentence was manifestly excessive in the circumstances of the case.

50. This principle was reiterated in the court of appeal case of Bernard Kimani Gacheru Versus Republic (2002) eKLR; as follows:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

51. Again, the court in Sayeko versus Republic (1989) KLR 306; held as follows:

> "The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a different sentence. The appellate

court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower court has acted upon some wrong principles or overlooked some material factor or the sentence is manifestly excessive in the circumstance of the case."

52. Having stated that, Section 296 (2) of the *Penal Code*, makes it clear that anyone found guilty of the offence of robbery with violence shall be sentenced to death. In my view, the sentence meted out by the trial court was legal and lawful; there is no indication that the learned trial magistrate while sentencing the appellant applied some wrong principles, overlooked some material factors or that the sentence was harsh and excessive. I therefore see no reason why this court should interfere with the same.

53. Flowing from the foregoing, I am of the considered view that the present appeal lacks in merit and should be dismissed. The conviction and sentence by the trial court should be upheld.

Final orders

54.

i. Appeal Dismissed

ii. Conviction on counts I and II by the trial court upheld

iii. Sentence on count I by the trial court upheld

iv. Sentence on count II remains in abeyance

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH JULY 2025.

HON. T. W. OUYA

JUDGE

For Appellant.....Absent

For Respondent.....Ms Torosi

Court Assistant.....Brian