Opanywa v Republic (Criminal Appeal E016 of 2025)
[2025] KEHC 12617 (KLR) (17 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12617 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E016 OF 2025

A MABEYA, J

SEPTEMBER 17, 2025

BETWEEN

KEVIN MOTI OPANYWA ALIAS DOUGLAS MWENDA NYAGA .. APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment & conviction of Hon. J. KIMETTO PM delivered on the 27/01/2025 and sentence passed on the 10/2/2025 in Maseno SPMCCr Case No. 135 of 2020, Republic v Kevin Moti Opanywa alias Douglas Mwenda Nyaga)

JUDGMENT

1. The appellant was charged in Count 1 with the offence of Robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.

2. The particulars of the charge were that on the 24/8/2019 and 25/8/2019 at around 00.30am at Maseno Township in Kisumu West sub-county within Kisumu County, jointly with others not before court, being armed with dangerous weapons namely pangas, robbed one GK of mobile phone make INFINIX XXX of IMEI Number XXX valued at Kshs. 18,000, a power bank charger USB cable (property of KNBS) back bag and cash of Kshs. 90 during which time of such robbery the appellant used actual violence against GK.

3. The appellant was also charged, in Count 2, with rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on the night of 24th and 25th August 2019 at around 00.30am at Maseno Township in Kisumu West sub-county within Kisumu County, in association with others not before court the appellant intentionally and unlawfully in turns, caused his penis to penetrate the vagina of G.K. without her consent.

4. The appellant was also charged with the alternative charge of committing an indecent act with an adult contrary to section 11 (A) of the *Sexual Offences Act* No. 3 of 2006.

5. The appellant pleaded not guilty and a full trial was conducted. The prosecution case was founded on the evidence of nine (9) witnesses. The defence evidence was based on the appellant's sworn testimony. In its judgment, the trial court convicted the appellant on Count 1 and 2. He was sentenced to serve 40 years' imprisonment on Count 1 and, 15 years' imprisonment on Count 2. Both sentences were to run concurrently.

6. Dissatisfied with that decision, the appellant filed his petition of appeal dated 19/02/2025 raising six grounds of appeal summarised as follows:

    a. That the trial court erred in law and fact in failing to make a finding that the ingredients of the offence were not proved to the required standard.

    b. That the trial court erred in law and fact in relying on a flawed evidence of identification under difficult condition and not corroborated by a properly conducted identification parade.

    c. That the trial court erred in law in breaching the appellant's constitutional rights to a fair trial.

    d. That the trial court erred in law and in fact in not ordering the appellant's sentence to be computed from the time of his arrest pursuant to section 333 (2) CPC.

    e. That the trial court erred in law and in fact in failing to appreciate the appellant's defence that overwhelmed the prosecution.

7. In support of his appeal, the appellant stated that he relied on his petition of appeal and urged the court to reduce his sentence.

8. On its part, the state submitted that all the ingredients of the offence of robbery with violence and rape were proved beyond reasonable doubt. That the appellant was identified by the complainant, PW1, as one of her attackers who was armed with pangas during the attack that caused her actual bodily harm. That the appellant was among those who took turns in raping her whilst armed with pangas.

9. That the trial court considered the appellant's defence which it found to be an afterthought and mere denial that could not shake the overwhelming evidence that was adduced by the prosecution.

10. On the sentence, the state submitted that there was no opposition to the invocation of section 333 (2) of the Criminal Procedure Code.

11. This being the first appellate Court, it is incumbent upon this Court to re-evaluate the evidence afresh and come to its own independent conclusions and findings but at all times considering that it did not see the witnesses testify. (See Okeno v Republic [1972] EA 32.)

12. PW1 GK, the complainant, testified that on the midnight of 24/8/2019 whilst returning home from the census exercise, she was accosted by 3 men armed with pangas who stole her phone, Power Bank Charger USB Cable Back Bag and cash of Kshs. 90. That the armed persons escorted her into the bush where they took turns in raping her. She described her accosters and specifically the appellant as a shorter man with bushy eye brows and protruding forehead. It was her testimony that she was subsequently called to an identification parade where she managed to pick out the appellant out of a parade of eight men.

13. PW2 Michael Ochieng Otieno, a Clinical Officer at Coptic Hospital produced a PRC form and P3 form filled on the 25/8/2019 when PW1 was seen in the facility. It confirmed that she had been raped as was evident from the injuries sustained.

14. PW3 Victor Omange, testified that he worked with PW1 during the census exercise of 2019. That on the night of 24/8/2019, he and other colleagues dropped off PW1 by the side of the road to her home before they themselves proceeded home. The following morning, he learnt that PW1 had been raped by three men. His testimony was corroborated by another of his colleague PW6, Linet Awuor Midimu who owned and drove the car that dropped off PW1 on the road close to her home.

15. PW4 No. XXX, Inspector Zakayo Ekirapa, testified that he carried out an identification parade in which the appellant was identified. That he took the appellant thorugh all the procedures of the parade after which he asked him if he wanted to call any other person to be present which he declined. That after finding other members of the parade, he placed the appellant between individual 5 and 6 then left the room to go and get PW1 who identified the appellant 3 different times during which the appellant constantly changed his position in the parade.

16. PW5 No. XXX Sergeant James Makori from DCI produced the call data records of the phone stolen from PW1 and informed the court that from 10/8/2019 at 15.25hrs the mobile phone no. used in the said phone was 0724XXX registered in the name of Dorah Ngosia ID No. XXX that was active until 25/8/2019 at 00.44hrs. That on 25/8/2019 at 05.50hrs, another sim card no. 0725XXX was inserted in the phone and the said sim was registered in the name of Douglas Nyaga ID No. XXX. It remained active until 26/8/2019 at 15.53hrs.

17. PW7 No. XXX Inspector Paul Masika Bhureba, the Investigations Officer testified that on the 25/8/2019, he was assigned to investigate a case of robbery with violence. He corroborated PW1's testimony on how the incident unfolded and that following investigations, he managed to establish from data obtained from Safaricom that the appellant used PW1's stolen phone on the 25/8/2019 at 5.00am. That he used phone number 0725XXX of ID No. XXX.

18. That on the 14/3/2020, in the company of other officers, they arrested the appellant and recovered from his pockets an ID card no. XXX in the name of Douglas Nyaga and Kshs. 590. That he knew the appellant as Kevin Moti having encountered him in a previous case.

19. PW9 No. XXX Sergeant Antony Egesa, the Crime Scene Officer produced photographic prints from the scene of the crime though the said photos did not have the appellant's face.

20. When placed on his defence, the appellant testified that on the 13th Friday 2020 he was supplying water with a wheel cart when he was arrested by police officers who smelt chang'aa coming from the jerrycans. That recovered a roll of bhang from him. That he was shocked to be arraigned in court with the charge of robbery with violence. He denied using the phone.

21. The offence of robbery with violence is a creation of section 296(2) of the Penal Code. The offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the aspect of violence.

22. The offence is committed when a person steals anything capable of being stolen from another and immediately before or after the theft, he uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto.

23. Two things must, therefore, be proved for the offence of robbery with violence to be established. They are theft and the use of or threat to use actual violence. Robbery with violence is proved if any of the following three ingredients is also established: -

    a. The offender is armed with any dangerous or offensive weapon or instrument, or

b. The offender is in the company of one or more other person or persons, or

c. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

24. In the present case, the appellant has faulted the trial court's conviction and sentence on, amongst others, that the ingredients of the offence were not proved beyond reasonable doubt.

25. PW1, the complainant, testified that she was accosted by three men. They assailants were armed with pangas with which they threatened her as they stole from her. The complainant's testimony remained unchallenged in cross-examination.

26. In his defence the appellant offered up an alibi that the only reason he was arrested was because he was caught in possession of a roll of bhang and also suspected of having chang'aa.

27. In Kiarie v R [1984] KLR, the Court of Appeal laid down the following principle: -

> " An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons."

28. It is settled law that the prosecution bore the burden of proving the charge against the appellant beyond reasonable doubt. However, in relying on an alibi defence, the entirety of the prosecution evidence, direct or circumstantial evidence must be appraised to establish whether the appellant was elsewhere and not at the scene of the crime. The conduct of the appellant and the decision to raise an alibi defence during the defence hearing stage of the proceedings should not escape scrutiny of the Court.

29. In R v Sukha Singh S/o Wazer Singh & Others [1939] 6 EACA 145, it was held that: -

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interval and secondly, if he brings it forward at the earliest possible moment, it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."

30. In the present case, the plea of alibi was never raised at any stage during cross-examination. Though in law, time of the disclosure might not be in issue, the prosecution no doubt required adequate notice to investigate the allegation of the alibi defence in order to meet it.

31. The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See Charles Kasena Chogo v Republic [2019] e KLR.

32. The issue of identification of the appellant was hotly contested in this appeal. The appellant contended that the trial court relied on flawed evidence of identification that was not corroborated by a properly conducted identification parade.

33. PW1 testified that she could see the appellant during the incident. She went on to describe the appellant as the shorter of the three assailants. That he had a protruding forehead with bushy eyebrows. PW1

further reiterated the appellant's description in court and identified him in court. She also identified him during an identification parade conducted by PW4.

34. For an identification parade to be fruitful and of evidential value, the identification rules must be complied with. Failure to adhere to the identification parade guidelines affects the evidential value of a resulting identification.

35. In Samuel Kilonzo Musau v Republic [2014] eKLR, the Court of Appeal stated: -

> " The purpose of an identification parade, as explained in Kinyanjui & 2 Others v Republic (1989) KLR 60, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion." It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."

36. The procedures governing police identification parades are provided for in the Police Force Standing Orders pursuant to the *National Police Service Act*. These procedures were explained in R v Mwango s/o Manaa [1936] 3 EACA 29. These include that: -

a. The accused has the right to have an advocate or friend present at the parade;

b. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;

c. Witnesses should be shown the parade separately and should not discuss the parade among themselves;

d. The number of suspects in the parade should be eight (or 10 in the case of two suspects);

e. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;

f. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

g. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

37. PW4 who carried out the Identification Parade testified that he gave the appellant all the necessary information concerning the parade and even informed him of the right to have a person of his liking attending the parade but the appellant did not call anyone. That he then searched for members of the parade whom he subsequently introduced to the appellant and asked him to choose where he wanted to stand. That he then left and went and brought PW1 whom identified that appellant on three different situations during which the appellant constantly changed his position in the parade.

38. From the authorities referred to above, it is clear that PW4 complied with the rules for carrying out an Identification Parade. Despite the appellant's contestations, there was no evidence to support the appellant's claim that his identification was flawed.

39. In any event, PW7 the Investigations Officer testified that on arrest of the appellant, he recovered ID card no. XXX in the name of Douglas Nyaga that was proven through Safaricom Data to have been used in the stolen phone on the 25/8/2019 at 5.00am and used to register phone number 0725XXX as testified by PW5.

40. Accordingly, it's clear that the appellant was positively identified as one of PW1's attackers on the night of 24th and 25th August 2019.

41. Having considered the totality of the evidence of the prosecution witnesses, I find the evidence of the prosecution to be consistent, watertight and believable.

42. I thus find that the appellant's conviction on Count 1 for the offence of robbery with violence was well founded and I uphold the same.

43. As regards Count 2, gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006, Section 10 of the *Sexual Offences Act* provides 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 the offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than 15 years but which may be enhanced to life imprisonment."

44. Therefore, when one commits either rape or defilement in association with another or in association with others, such person will be guilty of gang rape.

45. In the present case, PW1 testified how the appellant and his companions, whilst armed with pangas, led her to a bush and proceeded to cut her panties with a panga and took turns in having sexual intercourse with her without her consent.

46. This testimony was corroborated by PW2, a Clinical Officer at Coptic Hospital who produced a PRC form and P3 form filled on the 25/8/2019 when PW1 was seen in the facility confirming that she had been raped.

47. I thus find the appellant's conviction on Count 2 to have been well founded and similarly uphold the same.

48. On whether the trial court considered the defence of the appellant, at pages 4 and of the trial court's judgment, the trial court set out the appellant's case and considered it. The trial court did not believe it. I reject that contention.

49. The appellant also impugned the trial court's conviction on account that he was not afforded a fair trial. The appellant has however not detailed how his right to a fair trial was violated.

50. It is now well settled that one must do more than simply allege a constitutional violation. Thus, in Anarita Karimi Njeru v Republic [1979] KECA 12 (KLR) it was held:

> " if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

51. Accordingly, this limb of the appeal lacks merit and has to fall.

52. As regards the sentence, it was the appellant's contention that the same was excessive and that it did not comply with section 333 (2) of the Criminal Procedure Code.

53. Under section 296(2) of the Penal Code cited above, the only one express and mandatory sentence prescribed upon conviction for the offence of robbery with violence is the death penalty.

54. The sentence prescribed by the law, section 296(2) of the Penal Code is death. In the present case, it is clear that the appellant was lucky to escape with a sentence of imprisonment rather than death.

55. In the case of Idi Hassan Kazungu v Republic Criminal Appeal No. 6 of 2018 (UR), the Court of Appeal expressed itself as follows: -

> " Francis Karioko Muruatetu & Another vs Republic, Katiba Institute & 5 Others [2021] eKLR [Muruatetu 2], the mandatory death sentence prescribed under Section 296 (2) of the Penal Code for the offence of Robbery with violence is still legal. Differently put, the appellant could not find refuge in the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic [Muruatetu 1] as that decision only addresses mandatory death sentence in regard to the offence of murder contrary to Section 203 and 204 of the Penal Code. Muruatetu 2 directed that the decision in Muruatetu 1 does not apply to the mandatory death sentence provided under section 296 (2) of the Penal Code."

56. In the circumstances, I find no error in the trial court's sentence of 40 years' imprisonment for the conviction of robbery with violence.

57. Section 10 of the *Sexual Offences Act* No. 3 of 2006 provides for a sentence of not less than 15 years but which may be enhanced to life imprisonment where one is convicted of gang rape.

58. The appellant was sentenced to 40 years' imprisonment for the offence of Robbery with violence and 15 years' imprisonment for the offence of gang rape. The court ordered the sentences to run concurrently meaning that the appellant is to serve 40 years' imprisonment.

59. Sentencing is an exercise of discretionary power by a trial court – see Thomas Wambu Wenyi v Republic (2017) eKLR. In this case I am in agreement with the sentencing court. I hence find that the sentences were proper and that they should run concurrently as ordered.

60. The appellant has sought that the provisions of section 333(2) of the Criminal Procedure Code be taken into account in computing the period of his incarceration. The State did not oppose the application but urged the Court do consider what the appellate Court held on their sentence.

61. Section 333(2) of the Criminal Procedure Code provided that: -

> " Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

62. I have considered the entire record. I note that since his arrest on the 13/3/2020, the appellant spent his trial in custody.

63. In the circumstances, I direct that the tabulation of the sentence of 40 years shall commence on 13/3/2020.

64. The upshot of all the above is that I find that this appeal lacks merit and is dismissed save for the tabulation of the sentence.

It is so decreed.

DATED and DELIVERED at Kisumu this 17th day of September, 2025.

A. MABEYA, FCI Arb

JUDGE