



REPUBLIC OF KENYA



**KENYA LAW**  
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**Esekun v Republic (Criminal Appeal 21 of 2019)  
[2025] KECA 1562 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1562 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 21 OF 2019  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
OCTOBER 3, 2025**

**BETWEEN**

**BRAMWEL ESEKUN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgment of the High Court of Kenya at Nanyuki  
(Kasango, J.) dated 24th May, 2017 in Criminal Appeal No. 97 of 2016)*

**JUDGMENT**

1. This is a second appeal arising from the conviction and sentence of Bramwel Esekun (the appellant), who was charged before the trial court 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 offence were that on 16<sup>th</sup> February 2015 at about 0200 hours at [Particulars Withheld] in Maralal town, Samburu Central Sub-County, Samburu County, jointly with others not before the court and while armed with offensive weapons namely a rungu and a knife, the appellant robbed BNK of a Bird touchscreen mobile phone valued at Kshs.5,800, and immediately before or immediately after the time of such robbery, used or threatened to use actual violence against the said BNK.
3. The appellant was further charged in Count II with the offence of gang rape contrary to section 10 of the *Sexual Offences Act*. The particulars thereof were that on the same date and time, at [Particulars Withheld] in Samburu Central Sub-County, in association with others not before the court, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of BNK without her consent. In the alternative, the appellant faced a charge of committing an indecent act with an adult contrary to Section 11A of the said Act.



4. The prosecution called four (4) witnesses. PW1, the complainant BNK testified that while walking home with her husband, IN (PW2) on the material night at around 2:00a.m., they were confronted by three assailants armed with rungun. The assailants demanded a cigarette, which PW2 provided, after which one of them snatched her mobile phone. PW1 and PW2 were subsequently assaulted.
5. Two of the assailants dragged PW1 to a trench, stripped and raped her, muffling her screams with a T-shirt. The ordeal lasted until about 4:00 a.m. when it was interrupted by a passing vehicle. PW1 flagged down the vehicle and he was taken home, reporting the incident to Maralal Police Station later that morning.
6. PW1 testified that she recognized the appellant by moonlight during the attack. Two days later, PW1 and PW2 encountered the appellant and his alleged accomplices at a bar. PW1 raised alarm and restrained the appellant until police officers arrived and arrested him.
7. PW2 corroborated PW1's testimony. He confirmed that the appellant was one of the assailants and was armed with a rungun and a knife. It was his further evidence that one of the assailants urged the others not to harm PW2 as PW2 was known to him. It was his further evidence that he used to see the appellant at Maralal town and knew him by appearance. PW2 narrated how the assailants dragged PW1 away and ordered him to lie down. He later saw the appellant at a bar, and with PW1's assistance, caused his arrest.
8. PC Police Woman No. 100264 Veronica Magure (PW3), a police officer, testified that she received the report of gang rape and recorded the complainant's statement. Stanley Parteneu (PW4), a Clinical Officer at Maralal District Hospital, produced the P3 form, noting physical injuries on PW1 but no genital injuries or presence of spermatozoa.
9. In his sworn defence, the appellant denied the charges. He stated that he had travelled to Baragoi for a family function and only returned to Maralal on 18<sup>th</sup> February 2015. He claimed that he was falsely implicated after failing to pay for a ride and was handed over to the police by the driver. He denied being arrested at a bar.
10. The trial court found that the prosecution had proved its case beyond reasonable doubt, convicted the appellant on both counts, and sentenced him to death for robbery with violence and to twenty years' imprisonment for gang rape, the latter held in abeyance.
11. On first appeal to the High Court, the appellant challenged the sufficiency and consistency of the evidence, contending that the identification was unreliable and unsupported by a proper identification parade; that the medical evidence did not establish rape; and that key witnesses were not called. The High Court dismissed the appeal, upholding both the conviction and sentence.
12. Aggrieved, the appellant now appeals to this Court raising the following grounds:
  - i. That the High Court erred in law by upholding the conviction on the basis of identification without considering the absence of an initial report describing the appellant;
  - ii. That the trial court improperly relied on the prosecution evidence despite the failure to call crucial witnesses, contrary to section 150 of the Criminal Procedure Code;
  - iii. That the conviction on Count II was not supported by medical evidence, rendering the finding unsafe; and
  - iv. That the trial court erred in rejecting the appellant's defence, contrary to section 212 of the Criminal Procedure Code .



13. In supplementary grounds, counsel for the appellant asserted that the prosecution failed to prove its case beyond reasonable doubt and that the circumstances of identification were not free from the possibility of error.

### **Submissions by Counsel**

14. Learned counsel for the appellant, Ms. Nganga submitted that the failure by the prosecution to call crucial witnesses, notably the driver who rescued PW1 and the bar staff who allegedly witnessed the arrest, fatally weakened the case. Counsel urged the Court to draw an adverse inference under Section 143 of the *Evidence Act*, citing the case of Peter Mungai v Republic, Cr. App. No. 140 of 2000.
15. On identification, counsel submitted that PW1 did not previously know the appellant, gave no prior description to the police, and the evidence on the lighting conditions was not corroborated by independent evidence. Counsel asserted that the recognition by PW2, who only knew the appellant by appearance, was unreliable. Counsel further submitted that the absence of an identification parade rendered the identification unsafe.
16. As regards Count II, counsel pointed out that the P3 form disclosed no genital injuries or other evidence to substantiate the offence of rape, arguing that dusty clothes alone were insufficient to prove the case. Counsel urged us to allow the appeal, quash the conviction and set aside the sentence.
17. In response, learned State Counsel, Ms. Varoline Lubanga, submitted that the prosecution met the threshold under Section 143 of the *Evidence Act*, as PW1's evidence was corroborated by that of PW2. Counsel submitted that the lighting conditions were sufficient for positive identification, and that the appellant was found shortly thereafter wearing the same clothes and armed with the same rungu.

On Count II, counsel maintained that the totality of the evidence sustained the conviction, urging the Court to find the conviction and sentence safe and to dismiss the appeal.

### **Determination**

18. We have carefully considered the grounds of appeal, the submissions by counsel, the authorities cited, and the applicable law. Being a second appeal, our jurisdiction under section 361 of the Criminal Procedure Code is confined to matters of law. Ordinarily, we are bound by concurrent findings of fact by the two courts below, save in rare cases where those findings are based on no evidence, misapprehension of evidence, or are plainly untenable. See *Karingo v Republic* [1982] KLR 219.
19. The central issue raised in this appeal relates to the correctness and reliability of the identification of the appellant as one of the perpetrators. The law on identification is well settled. In *Anjononi & Others v Republic* [1980] eKLR, the Court held that recognition is more satisfactory than mere identification of a stranger, but still demands careful scrutiny.
20. In *Wamunga v Republic* [1989] KLR 424, the Court cautioned that evidence of visual identification, particularly when made under difficult circumstances, must be tested with the greatest care to avoid miscarriage of justice.
21. In the present case, the complainant (PW1) asserted that she recognized the appellant by moonlight during the ordeal. PW2, on his part, testified that he knew the appellant by appearance and identified him as one of the assailants. No first report to the police contained a description of the appellant, and no identification parade was conducted. The alleged recognition by PW2 was based only on prior sighting of the appellant in the locality, which the law regards as tenuous unless firmly corroborated. See *Roria v Republic* [1967] EA 583.



- 22. The conditions prevailing at the time of the alleged identification were admittedly difficult - at night, during a violent encounter, and under extreme stress. The failure to provide an initial description, coupled with the absence of an identification parade, fatally undermined the reliability of the purported identification. In those circumstances, we are unable to hold that the identification was free from the possibility of error. Where the identification evidence is not fool-proof, a conviction based on it cannot be sustained. See *Nzaro v Republic* [1991] KLR 58.
- 23. We find that the two courts below erred in law in relying upon evidence of identification that did not meet the threshold of certainty required in criminal law. Once that identification is excluded, there remains no cogent or credible evidence linking the appellant to the offences he was charged with. Consequently, the convictions were unsafe and cannot stand.
- 24. In the result, we find merit in this appeal and allow it in entirety, with the result that the conviction on both counts is hereby quashed and sentences set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.
- 25. It is so ordered.

**DATED AND DELIVERED AT NYERI THIS 3<sup>RD</sup> DAY OF OCTOBER, 2025**

**W. KARANJA**

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**JUDGE OF APPEAL JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

