Oloo v Republic (Criminal Appeal E030 of 2025)
[2025] KEHC 14152 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14152 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E030 OF 2025

A MABEYA, J

OCTOBER 9, 2025

BETWEEN

FELIX OCHIENG OLOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction & sentence of Hon. L.N. Kiniale SPM delivered on the 11/12/2024 in Nyando SPMC Sexual Offences Case No. E012 of 2023, Republic v Felix Ochieng Oloo)

JUDGMENT

1. The appellant was charged with the offence of rape contrary to section 3(1) (a)(c) 3 of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the charge were that on the 16/3/2023 at around midnight at Upper Kadiaga sub location within Kisumu County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of ZAK aged 19 years by use of force and threatened to stab her with a knife.

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

4. The appellant pleaded not guilty and a full trial ensued. The prosecution case was founded on the evidence of four (4) witnesses. The defence evidence was based on the appellant's sworn testimony. The trial court found the appellant guilty of the main count and sentenced him to serve 20 years' imprisonment.

5. Dissatisfied with that decision, the appellant filed his petition of appeal dated 26/2/2024 and supplementary grounds of appeal dated 4/7/2025 as follows: -

    a. That the trial court erred in law and in appreciating the evidence of a single identifying eye witness given by an intermediary that was inconclusive, flawed, mistaken and uncorroborated and further failed to test it with great care.

    b. The trial court erred in law and in fact in convicting the appellant relying on uncorroborated evidence of identification of an intermediary pursuant to section 31 (10) of the SOA No. 3 of 2006.

    c. The trial court erred in law and in fact in not appreciating that a properly conducted identification parade was decisive in a case where the identifying witness say that he had never seen the perpetrator before [a stranger] hence reaching at a wrong decision.

    d. That trial court erred in law and in fact in not appreciating that the failure of the prosecution case to call essential witnesses [the accused's mother] was fatal to this case.

    e. The trial court erred in law in its analysis in making a finding that the victim was not mentally challenged yet the prosecution case proves the same and its captured in treatment notes.

    f. The trial court erred in law and in fact in not appreciating the appellant's alibi defence by shifting the burden of proof and filling gaps in the prosecution case.

6. In support of his appeal, the appellant filed written submissions in which he submitted that the trial court made an error of law in not testing with great care the brightness and intensity of the candle light used in identifying him hence it had not been established to have been sufficient for positive identification of a stranger. Further, that the victim being mentally challenged, her reasoning and memory was suspect in positively identifying a stranger.

7. That the trial court denied the appellant his absolute right to a least severe sentence envisioned by law as envisaged in Article 25 (c) and 50 (2) (p) of *the Constitution* by sentencing him to 20 years' imprisonment instead of the minimum provided 10 years' imprisonment.

8. That the trial court failed to appreciate the appellant's alibi defence and shifted the burden of proof to him thus filling the gaps in the prosecution case.

9. On its part, the State submitted that all the ingredients of the offence of rape were proved beyond reasonable doubt, that identification was by recognition and therefore there was no need for the Investigation Officer to conduct an Identification Parade.

10. That the appellant's defence of alibi was an afterthought on his part given that it was never raised during the trial to be challenged by the prosecution witnesses. That the sentence meted out by the trial court was lawful and ought not to be interfered with.

11. This being the first appellate Court, its duty is well spelt out namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion but at all times bearing in mind that it did not see the witnesses testify. (See Okeno v Republic [1972] EA 32).

12. At the trial, Pw1 ZAK, the complainant, who was deaf, mute and mentally challenged was declared a vulnerable witness. She testified through an intermediary. It was her testimony that on the 16/3/2023 at around 9pm, she was travelling back from Ahero to Kolweny. That she alighted at a small town where she sought a place to sleep but ended up sleeping on a verandah.

13. That at midnight, she was woken up by a man who took her to a mud house that had 3 rooms. That the person threatened her using a knife to her neck and asked her to remove her clothes. That her assailant put on a condom and had sex with her without her consent. That in the morning, her assailant took her to his mother and left her there informing his mother that she was his wife.

14. That she met two neighbours who knew her grandmother and they took her to her uncle's place. She told her uncle what had happened then led him and others to where she had been assaulted. It was her testimony that she subsequently went to the hospital and then reported the case at a police station.

15. Pw2, MOO, a counsellor and English teacher testified that she hailed from Nyakach. That on the 17/3/2023 at 3pm while travelling home from Nyakach she received information from her sister in-law that the complainant had been raped on her way home. That she took the complainant to a hospital at Pap-Onditi then to Nyakach Hospital where it was confirmed that the complainant had been raped.

16. In cross-examination, Pw2 testified that they traced the complainant's journey up to the appellant's mother and his house.

17. Pw3, David Kihara, a clinician testified that he attended to the complainant at Nyakach sub-county Hospital following a report that she had been forced into sexual intercourse. That the skirt which the complainant had was stained with blood. That on examination, he found that the hymen was broken with fresh bruises and that she had a pungent vaginal discharge. That there was no evidence of spermatozoa

18. PW4, No. 22688 PC Charles Madona, the investigating officer, testified that the complainant was brought to the Station accompanied by her aunt on 1/2023 (sic) and reported a case of rape. That the complainant led them to the appellant's house where they recovered a knife that was used to threaten the complainant from under the mattress.

19. On cross-examination, Pw4 told the court that the appellant went missing following the report of the rape. That the appellant took advantage of the complainant who was mentally challenged and deaf. That there was no need to conduct an ID parade as the complainant knew who had raped her.

20. When placed on his defence, the appellant denied committing the offence. He stated that on the 27/3/2023 between 4.30am – 5am whilst coming back from his father's funeral, he was arrested by police officers who ransacked his house but did not find anything. That he was taken to the police station and placed in the cells till 4pm the following day.

21. In cross-examination he testified that on the 16/3/2023, he had gone to pray in the Mountain. That the complainant had never been to his house and he was not aware how she described his house correctly.

22. I have considered the evidence on record. I have also carefully considered the submission on record. The appellant was charged, tried, convicted and sentenced for the offence of rape. Section 3 of the *Sexual Offences Act* No. 3 of 2006 (hereinafter 'the Act') defines 'rape' as follows: -

> "(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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

23. From the above definition, the ingredients of the offence of rape, include proof that the victim was not a minor, proof of penetration, proof of the perpetrator and proof that the consent was not freely given.

24. The age of the complainant was not contested in this appeal. The complainant testified that she was aged 20 years old as at the time of giving her testimony meaning that she was 19 years old at the time the offence was committed. That was confirmed by the P3 and Treatment Notes which were produced as exhibits by Pw3. The complainant was not a minor.

25. On penetration, the complainant's testimony was compelling as to the occurrence of penetration. She testified that the appellant used a condom to rape her. The complainant's testimony on her rape was corroborated by the medical evidence adduced by Pw3 who examined the complainant following the incidence. The complainant further described the appellant's residence with precision further corroborating the details of her testimony.

26. The totality of the foregoing is that there is no doubt that penetration was proved beyond reasonable doubt.

27. As to whether the appellant was the perpetrator and the issue of consent, the complainant testified that she could see the appellant and further that the appellant took her to his mother the following day and introduced her as his wife.

28. The appellant has impugned the complainant's testimony on identification stating that there was need for an identification parade to be carried out.

29. The general rule is that, where the prosecution case rests entirely on evidence of identification or recognition, the trial court is enjoined to thoroughly and cautiously interrogate such evidence to ensure that it did not leave any room for doubt regarding the identity of the perpetrator. The evidence must be watertight and should not create any impression on the mind of the court that a possibility existed for mistaken identity.

30. In Wamunga v Republic [1989] KLR 424, the Court of Appeal stated as follows: -

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

31. In Kiarie v Republic [1984] KLR 739, the same court gave the rationale for need to carefully weigh the evidence of the alleged identification or recognition before making it the basis of a conviction. The Court expressed itself thus: -

> "It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction"

32. In convicting the appellant, the trial court stated as follows on the issue of identification;

> "On the issue of identification, I find that the Accused was well known to the complainant as they proceeded to the home of the mother to accused the following morning and by that time the complainant was able to observe the accused in broad daylight and recognize her assailant well, she also knew his mother and family well.....
>
> I am therefore satisfied that the accused has been identified by recognition by the complainant who knew the accused person during the commission of the offence and subsequently when they left the scene of crime the following morning to his mother's home. There was therefore no need of an identification parade to be conducted. Secondly, the complainant's disability was not mental but she was deaf and mute but all her other faculties were okay as per the disability form produced as an exhibit. She was clear in her narration in detail on how the offence took place and how she was confident that it was the accused who raped her."

33. It is clear that from the foregoing that the trial court considered the circumstances under which the appellant was identified as the perpetrator and concluded that he was properly and positively identified. That his was a case of recognition.

34. I find no reason to fault the learned trial magistrate's finding on identification. Pw1 was clear and straightforward in her evidence that it was the appellant who raped her. That the following day he took her to his mother and introduced her as his wife. Having seen his face at close quarters and having interacted with him as he took her to his mother's house during broad day light, I find that the circumstances in this case were conducive to a correct and positive identification/recognition of the appellant as the perpetrator of the offence. There was no room for any possibility of error.

35. Consequently, the appellant's argument that his identification by Pw1 was not positive or reliable because no identification parade was conducted after he was arrested is misconceived. This was a case of recognition not identification of a stranger and conducting an identification parade in such a case was not necessary.

36. In Katana & Another v Republic [2022] KEC 1160 (KRL), the Court of Appeal observed: -

> "…. 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…"

37. As regards consent, the complainant testified that the appellant forced her into having sexual intercourse under threat by a knife which he held over her neck. Pw4 testified that he recovered a knife under the appellant's mattress. I am thus satisfied that this ingredient was met.

38. The appellant impugned the complainant's testimony on account of it being given by an intermediary, that it was inconclusive, flawed, mistaken and uncorroborated.

39. In the present case, the complainant was found to be deaf, mute and mentally challenged and was subsequently declared a vulnerable witness hence an intermediary was appointed on her behalf and in this case the intermediary was a sign language interpreter.

40. Under the *Sexual Offences Act*, the term "intermediary" means a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness, and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker. The question is: was Pw1 testifying in any of the capacities aforesaid?

41. In MM v Republic [2014] eKLR as cited in the Court of Appeal case of Nahashon Otieno Odhiambo v Republic [2019] eKLR, the Court explained that: -

> " The role of an intermediary is provided for in subsection 7 of section 31 namely, to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess. It is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross- examination. The thinking behind the enactment of section 31 was, in our view, to moderate these traumatic effects in criminal proceedings. It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed."

42. In practice, an intermediary may be an expert in a specified field or a person who, through experience, possesses special knowledge in an area, a social worker, a relative, a parent or a guardian of the witness. An intermediary is a medium through which the accused person or complainant communicates with the court.

43. In my understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim. To explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from an unfamiliar environment and hostile cross-examination. Also, to monitor the witness' emotional and psychological state and concentration and to alert the court of any difficulties that the vulnerable witness might be experiencing.

44. In the present case, I note that that the complainant's disability was that she was deaf and mute. The Prosecution alleged that she was mentally challenged however there was no evidence presented to back this assertion. The trial court which had the advantage of observing the complainant noted that her disability was not mental but that she was deaf and mute and that all her other faculties were okay as per the disability form produced as an exhibit. I find no reason to depart from this finding.

45. Accordingly, I am satisfied that the complainant testified through an intermediary. I see no error with the testimony so far.

46. The appellant further impugned his conviction on the grounds that the prosecution failed to call an essential witness, the appellant's mother, which was fatal to the case.

47. Section 143 of the *Evidence Act* Cap 80 Laws of Kenya makes provision that no number of witnesses is required to prove any fact. In Bukenya and others v Uganda [1972] EA 549, the then Court of Appeal for Eastern Africa stated that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. Second, that the court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case; and Thirdly, that where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

48. In Keter v Republic [2007] 1EA135, the court was categorical that: -

> " The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

49. In the present case, the evidence presented was adequate and sufficient for the prosecution to prove its case. If at all the appellant wanted to rely on the evidence of his mother, he had the option of calling her in his defence which he failed to do. I thus find that this limb of the appeal lacks merit.

50. Finally, the appellant impugned the trial court's judgment on the ground that the trial court failed to consider his alibi by shifting the burden of proof to him and filling gaps in the prosecution case.

51. A perusal of the judgment of the trial court specifically at pages 8 & 9, shows that the defence advanced by the appellant was given due consideration and found to be wanting. That it was an afterthought and not sufficient to dislodge the prosecution's evidence.

52. In R v Sukha Singh s/o Wazir Singh & others (1939) 6 EACA 145, the Court of Appeal 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 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 prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

53. The appellant ought to have put forward the allegation of having not been at the scene of the incident at the earliest opportunity to enable the prosecution investigate it. In Charles Anjare Mwamusi v R CRA No. 226 of 2002 the Court of Appeal stated that: -

> " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of

proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."

54. The trial court rightly found that the appellant's defence and alibi was an afterthought. At no point during the trial did the appellant raise the issue of being at the mountain praying. I similarly find that the appellant's defence and alibi was given due consideration and rightfully dismissed.

55. As to the sentence, the trial court considered all that was necessary before meting out the sentence. Considering the circumstances of the case, I do not think the sentence of 20 years was excessive. The appellant took advantage of a vulnerable person who needed care and attention.

56. The upshot of the above is that I find that this appeal lacks merit and I dismiss it in its entirety.

It is so ordered.

DATED AND **DELIVERED** AT KISUMU THIS **9TH** DAY OF **OCTOBER, 2025**.

A. MABEYA, FCI Arb

JUDGE