



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Oliech & 3 others (Sexual Offence 60 of 2020)
[2025] KEMC 122 (KLR) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEMC 122 (KLR)

**REPUBLIC OF KENYA
IN THE VIHIGA LAW COURTS
SEXUAL OFFENCE 60 OF 2020
JA AGONDA, PM
MAY 5, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

DENNIS OLIECH 1ST ACCUSED

WILLIS ONDIEKI 2ND ACCUSED

STAFFORD OCHARO 3RD ACCUSED

WILLIAM ONYANGO 4TH ACCUSED

JUDGMENT

1. On count 1, the accused Dennis Oliech was charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006.
2. Particulars are that on 1st October, 2020 at [Particulars withheld] area Ebusitsimi sub location within Vihiga county in association with Willis Ondieki, Stafford Ocharo and William Onyango intentionally and unlawfully caused his penis to penetrate the vagina of MA without her consent.
3. On alternative count, the accused Dennis Oliech is charged with committing indecent act with an adult contrary to Section 11A of the *Sexual Offences Act*.
4. Particulars are that on 1st October, 2020 at [Particulars withheld] area Ebusitsimi sub location within Vihiga County intentionally touched the vagina of MA without her consent.
5. On count 2 the accused Willis Ondieki was charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act*, No.3 of 2006.



6. Particulars are that on 1st October, 2020 at [Particulars withheld] area Ebusitsimi sub location within Vihiga county in association with Dennis Oliech, Stafford Ocharo and William Onyango intentionally and unlawfully caused his penis to penetrate the vagina of MA without her consent.
7. On alternative count, the accused Willis Ondieki is charged with committing indecent act with an adult contrary to Section 11A of the *Sexual Offences Act*.
8. Particulars are that on 1st October, 2020 at [Particulars withheld] area Ebusitsimi sub location within Vihiga County intentionally touched the vagina of MA without her consent.
9. On count 3 the accused Stafford Ocharo was charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act*, No.3 of 2006.
10. Particulars are that on 1st October, 2020 at [Particulars withheld] area Ebusitsimi sub location within Vihiga county in association with Dennis Oliech, Willis Ondieki and William Onyango intentionally and unlawfully caused his penis to penetrate the vagina of MA without her consent.
11. On alternative count, the accused Stafford Ocharo is charged with committing indecent act with an adult contrary to Section 11A of the *Sexual Offences Act*.
12. Particulars are that on 1st October, 2020 at [Particulars withheld] area Ebusitsimi sub location within Vihiga County intentionally touched the vagina of MA without her consent.
13. On count 4 the accused William Onyango was charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act*, No.3 of 2006.
14. Particulars are that on 1st October, 2020 at [Particulars withheld] area Ebusitsimi sub location within Vihiga county in association with Dennis Oliech, Stafford Ocharo and Willis Ondieki intentionally and unlawfully caused his penis to penetrate the vagina of MA without her consent.
15. On alternative count, the accused William Onyango is charged with committing indecent act with an adult contrary to Section 11A of the *Sexual Offences Act*.
16. Particulars are that on 1st October, 2020 at [Particulars withheld] area Ebusitsimi sub location within Vihiga County intentionally touched the vagina of MA without her consent.
17. On count 5, the accused Dennis Oliech was charged with offence of sexual assault contrary to Section 5(1)(a) and Section 11(2) of the Sexual Offence *Act No.3 of 2006*.
18. Particulars are that on 1st October, 2020 at [Particulars withheld] area Ebusitsimi sub location within Vihiga County unlawfully penetrated the vagina of MA with grass manipulated by him.
19. The 1st accused Dennis Oliech absconded and the prosecution withdrew count 1, alternative count 1 and Count 5 under Section 87(a)CPC.
20. The prosecution called five witnesses in support of their case. The 2nd, 3rd and 4th accused gave sworn statement in his defence.
21. MA testified as Pw1 the complainant in this matter. It was her evidence that she was 23 years and knew the accused persons by appearance before the incident. On 1st October, 2020 at 7.00p.m, she was going home from L to R. She contacted her boda boda rider who was not willing to go pick her. She began trekking. She met one Allan and they exchanged pleasantries. He decided to escort her until [Particulars withheld] area. They met some boys who greeted them. She did not respond and continued with her journey. They reached a church and Allan told her that they were being stocked. She looked behind and saw the boys following them armed with pangas. Allan was carrying her bag. He dropped her bag. She



stopped to pick it up and in the process they caught up with her and the three boys detained her. They were young boys and two of them were carrying pangas. She was able to see them with the motor cycle lights that were passing on the road. She did not know them. She began crying when they were pulling her. She was warned to keep quiet. They took her near a church not very far from where they accosted her. She pleaded with them to release her. They asked her if she had a boyfriend. She started shouting. She was again ordered to keep quiet. One of them who was dark in complexion started removing her clothes. She was wearing a pair of trousers, a shirt and a sweater. They forced her to lay on the ground and one of them removed his trousers while the other one was removing the top. The 1st accused who was dark in complexion started removing her trousers and panty. The 2nd accused removed her sweater and shirt. The 1st accused undressed and inserted his penis in her vagina. The others were pinning her on the ground. When the 1st accused was done, the 3rd accused mounted on her and raped her. The 2nd accused also raped her. The 1st accused came for the second round and when he was done he collected grass and inserted in her vagina. They threatened her to keep quiet or cut her with pangas. The 3rd accused alerted his accomplices that there was someone approaching where they were. He threw her phone near her and escaped. The 1st accused rushed and tried to snatch her the phone she had picked. He followed her demanding the phone as the 2nd and 3rd accused persons ran away. She was standing and she had only wore her bras. She walked for a short distance and saw a boda boda rider on the road with his headlights waiting for passengers. She went back to the scene and dressed up and returned to the road at the stage where the rider was. He told her that he had noises and she narrated to him her ordeal. He told her that he had a police friend and he contacted him using his number. He started following her demanding for her phone as she walked away. She saw a young man coming from behind. He had boarded a motor cycle. She noticed him as the 4th accused who was riding the motor cycle and he demanded the phone. It was the 2nd accused who had returned while aboard a motor cycle. The 4th accused told the 2nd accused to listen to what she had said. The 4th accused held her shirt by the neck and warned her from reporting the matter to the police. The 2nd accused was watching when the 4th accused was harassing her. She saw a vehicle approaching and the 4th accused released her. The vehicle did not stop. The two accused persons ran away and left with their motor cycle. She also ran into a thicket bush and stayed there for 3 minutes. She emerged and saw two motor cycles from afar and they had stopped at the road. She did not approach them. She stayed in the bush for long time until when they had disappeared, she began walking while checking her back. She reached the centre and met a masai man who escorted her back to the scene. On the way, they met two men who asked that they were looking for one girl who was asking for help. He said that there was a boy who ran to his house asking for help. They boarded the motor cycle and went to the man's house who never introduced himself to her. On arrival, she met Allan who had escorted her earlier on before she was attacked. He asked if the boys did anything to her. She narrated what had happened. They suggested she report the matter at the police station. They were six people who went to Muchio police post and she reported the matter. She later visited the hospital for treatment. She went to the man's house with his wife as Allan went away. The next day, she went back to Ramula hospital. She saw 4th accused riding his motor cycle. She told the woman that the rider was one of the people who attacked her. He had not changed his clothes and he was wearing red cap, brown sweater with red and black stripes. The woman phoned her husband who told her she knew the rider. After some days, she was contacted that there were some boys who had been arrested. That at the police station the boys were placed on the parade and she was told to look for her assailants. They were ten men in the parade. She was able to identify 2nd, 3rd and 4th accused persons. The 1st accused was not in the parade. Later, he was brought in the said parade and she identified him. The police interrogated the accused persons and they proceeded to Luanda police station where she recorded her statement. She stated that 1st, 2nd and 3rd accused raped her. The



- 4th accused was at the road and she gave the police her clothes. She produced treatment note, PRC form and P3 form “PEXh.1”, “PEXh.2” and “PEXh.3” respectively.
22. BA testified as Pw2 a good Samaritan. It was her evidence that on 1st October, 2020 she was at home with her youngest child David Amikoye watching television. That a person was calling from outside the house. She opened the door and they saw a boy seated outside called Clinto from Sagam. He said had met a girl who he was escorting, when the boys chased them and the girl was unable to ran fast and they caught up with her. They went to the assistant chief who alerted the police who asked them to wait for them at their gate. While at the gate, one Raphael Omondo met them and they told him what had transpired. He confirmed having heard a voice of a girl screaming towards the road. They went towards the road, herself, her husband, C and boda boda rider. The rider went and returned with the girl and C ascertained that she was the girl. The girl also recognized C. They reported the matter at [Particulars withheld] police post. The girl and C were interrogated by the police. She accompanied the complainant to the hospital where the girl was examined and treated. Later, they were called at the police station to identify the boys who had been arrested and all the accused persons were among them. She knew the boys who lived in the same locality and she never identified any one of them.
23. Evans Ochieng testified as Pw3 the clinical officer based at Siaya County. It was his evidence that during the incident, he was Ramula Health Centre. He examined the patient, treated and prepared a report. He prepared the post rape care form for the victim was examined on 2nd October, 2020 at Ramula Health Centre. He stated that the patient was born on 12th August, 1998. There were four perpetrators who were between 20-30 years and gang raped her near ACK church in turns by penetrating her vagina using their penis without using condoms. She reported at Muchio police post. The victim was stable with mild abdominal pain but could walk properly. The waist had bruises, dirty hair with soil particles. On vaginal examination, there were lacerations on the vaginal wall and hymen was broken. She had UDI and the last date of sexual intercourse was in July, 2020. Her clothes were dirty and no change of clothes. She had not bathed. She had physical injuries on her back around her waistline and laceration on left vaginal wall with whitish discharge on the walls and cervix.
24. According, P3 form, the victim’s jumper was dirty but not torn. She had abdominal pain. On physical examination, she was anxious. Hymen was absent. Approximate age of the injury was three (3) hours. Labia majora and minora were normal. The left cervix wall was lacerated, whitish discharge on the vaginal wall and cervix. On vaginal examination, there was recent penetration. He did not know who committed the act. He produced treatment notes not in court, post rape care form and P3 form “MFI1”, “PEXh.2” and “PEXh.3” respectively.
25. PC Protus Wekesa [257749] testified as Pw4 the arresting officer based at Emabuyo police post. It was his evidence that on 1st October, 2020 at 2.55 a.m. a lady visited the station with the members of public that she was gang raped by unknown people. They escorted the victim to Ramula Health Centre for treatment. The girl was examined, treated and discharged. The girl spent the night at Beatrice Agiso Pw2 as her home was a long distant away and security was not good. On 2nd October, 2020 at 8.00a.m. following tip off from the members of public, they arrested one William Onyango the 4th accused was aboard a motor cycle going to Ramula Centre. He escorted him to Ebusubi police post. Afterwards, he arrested the 1st and 2nd accused persons at Ebisiki Shopping Centre. The 3rd accused arrested by members of public. He re-arrested him. The tip off was that the three accused were aboard a red motor cycle KMEZ 284T that was in possession of 4th accused. That the OCPD conducted Identification parade and the victim identified four accused persons.
26. Hellen Okumu [101487] testified as Pw5 the current investigating officer based at Luanda police station. It was her evidence that on 1st October, 2020 at 9.30p.m the complainant and Allan Smith



Oluoch were walked from Luanda. The complainant noticed that they were being followed by three men before reaching Kuche Centre. They began running and her purse that had her ID card and phone fell down, she tried to pick it. That is when the three men caught up with her and detained her. She screamed and they warned her that they would kill her. They pulled her next to a church. The three men repeatedly raped her. The 1st accused raped twice and inserted grass in her vagina. The three men ran away. She ran in the opposite direction while naked. She saw a rider with the assistance of reflective lights. The rider approached her and asked for her number to call for police help but she refused. She discovered the pillion passenger was one of the men who raped her. The rider and the passenger warned her not to report at the police station. They tried to strangle her. They then rode away. She dressed up and walked away from the scene. She met two good Samaritan men asked her if she was with Allan. She was taken to the village elder's house where she spent the night. She was escorted to Kuche police post where she reported and later referred to Ramula Health Centre for treatment. The next day, she reported at Kuche police post and recorded her statement on her ordeala. The members of public managed to arrest the three men. The identification parade was done and the complainant positively identified them.

27. On the other hand the 2nd to 4th accused persons gave their sworn evidence. William Ondieki testified as Dw1. It was his evidence that on 1st October, 2020 at 9.00p.m. he was at home with his grandmother Jane Ondieki. That he was in the business of selling water using handcart. On the material night, he milked the cow, had supper and retired to sleep. On the material night, he was in the company of one Vincent. That he never raped the complainant. On 2nd October, 2020 he was arrested while selling water at Kuche near the school. He knew of the offence upon being arraigned in court. There was no identification parade done. That on the material date, he never rode any motor cycle as alleged. The motor cycle registration number was not stated in court. He found the 3rd and 4th accused at the at Kuche police post. They were ferried to Luanda police station. There was no blood or saliva samples taken from him for medical examination. That he never saw the PC Abubhakar Amin who testified in court. That PC Wekesa was the only police officer who testified in this matter. He testified that he never knew why he was linked to this alleged offence. At the present, he was schooling at Ebusimi Secondary school. The complainant never identified him. He testified that when the offence was committed, he was 16 years old as per his birth certificate "DExh.1." He denied raping the complainant.
28. Stafford Ocharo testified as Dw2 the 3rd accused. It was his evidence that on 1st October, 2020 he was at home with his mother Roselyne Atieno at Kuche area. While at home, he never heard of any screams/ noises as alleged. The next morning, on 2nd October, 2020 his grandfather requested him to take him to his grandmother one Atieno who was at the market. In the evening, they returned home and heard that there were boys who were arrested. He left with his grandfather to the police station and found that Willis 2nd accused was arrested together with other men. He was standing next to his grandfather when he was arrested and beaten by police officer and forced into the police vehicle. He was taken to Luanda police station. He was assaulted by PC Wekesa who did not give any reasons for beating him up. Later, he was told that he had raped the complainant. There was no blood or saliva samples for examination. He stated that there was no identification parade that was done. That the initial investigating officer did not testify but PC Wekesa testified in court. He produced his birth certificate as exhibit "DExh.2" He stated that he was seventeen (17) years when the alleged offence was committed. That William 4th accused was his cousin. That he met Willis 2nd accused at the police station. He never touched the body of the complainant. That Allan Smith who was the complainant on the fateful night did not testify. He denied any involvement in the rape.
29. William Arthur Onyango testified as Dw3. He stated that he resided at Kuche area. That Stafford 3rd accused was his relative and he knew Willis 2nd accused since childhood. It was his evidence that on 1st



October, 2020 he was charged with the offence of gang rape together with others in court. He stated that on the material date, he was at Kuche with his two cousins. They were preparing a meal. He heard people shouting from a distant. He heard the screams that persisted. He took his motor cycle and rode to the scene. He saw a woman coming between the AIC church and the school. He talked to her. She told him that she had been gang raped. He referred her to the police station that was nearby. That the girl had a phone and she gave it to him and Carl Marks saw him and approached them. The girl took her phone back and he tried assisting her and he left with his cousin. That he had gone to pick his boss Phoebe Ombima at Kuche near Ramula. He took her to Mbale and went home. On the way, he saw two police officers aboard motor cycle who stopped him and arrested him. One of the officers was PC Wekesa. On reaching the station he found his friend Ochieng who also had a motor cycle. He was handcuffed. The woman said that he had carried a boy with dyed hair and identified his cousin and Carl Marks was released. He did not record his statement . He said that he was arrested by PC Wekesa and not by mob as he alleged in his testimony. That he never heard of Willis or Stafford being involved in gang rape. He stated that the complainant identified him and the only time he interacted with her is when he went to assist her after the incident. There was no identification parade done. There was no blood or saliva samples taken for medical examination. He stated that Corporal Ambasa did not testify in this matter. He requested for justice as he had been attending court for five years.

30. Karl Marks Omondi testified as Dw4 the cousin to William 4th accused. It was his evidence that it was alleged that his cousin 4th accused on 1st October, 2020 at 9.00p.m. was involved in a gang rape. That he was at home with his cousin when he was preparing ugali. They heard a girl screaming and crying that she had been raped. His cousin rushed to the scene where the girl screamed, it was near their house. After finishing with cooking, he followed his cousin 4th accused to the scene. When the girl saw him with his dyed hair she stopped talking to his cousin. They told her to report the matter at the police station but she refused. That the following morning PC Wekesa visited their house and arrested them. At the police station, he met a remandee who had dyed hair. That when the girl was asked if she knew him and she said No! She said that his cousin William had not raped her. That his cousin Ochieng was with them and she was asked about him and she said that he never raped her. They were bundled and placed in police vehicle and never recorded their statements. That Willis and Stafford hailed from the same village. He affirmed that on the material date, he was with his cousin William at home and he never committed the alleged act.

Issues & Determination

31. I have carefully evaluated the evidence on record. I have also given due consideration to the written submission furnished to the court by the counsel for accused persons. I have now to decide whether or not the prosecution has proved to the required standard either of the counts preferred against the accused person herein. Starting with the main count, the main issues that calls for my determination are as follows:-
- i. Whether the offence of gang rape was proved specifically that the accused persons committed the offence of rape in association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape; and
 - ii. Whether there was penetration and
 - iii. Whether the accused persons were properly and clearly identified as the perpetrators together with others.



32. In criminal cases, the burden of proof rests on the prosecution and the standard is that of beyond any reasonable doubt. As regards the main count, the offence with which the accused persons were charged with gang rape contrary to section 10 of the *Sexual Offences Act* which states:

“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 the fifteen years but which may be enhanced to imprisonment to life.”

Section 2 defines penetration to mean

“The partial or complete insertion of the genital organs of a person into the genital organs of another person.”

33. In determining this case, I will refer to ingredients as set out in the case of Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 where it was stated that:

“It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant’s genitalia; and whether the penetration was by the Appellant.”

34. The ingredients of the offence of gang rape which the prosecution need to prove are proof of penetration and positive identification of the perpetrators. With this in mind, I have carefully considered the evidence presented by the prosecution and the defence offered by the accused person together with his submissions.

35. On the first issue, as regards to penetration, there was no eye witness evidence presented on the issue of penetration as the complainant stated that on 1st October, 2020 at 9.00pm she came from Luanda going home. On the way, she was joined by one man Allan. As they had walked some distances, they noticed three men were following them. They began running away but in the process Pw1’s purse fell down. As she was picking it up, the three men caught up with her. They held her and frog marched her near a church. They removed her clothes and began raping her in turns, all the three men raped her and the 1st first man returned the second time raped her and inserted grass in her vagina. When they heard someone approaching nearby they ran away. Pw1 ran away wearing only a bra to the opposite direction. While walking towards the road, she saw a motor cyclist. She returned to the scene and dressed up. She walked and in the process met a rider who inquired if she was okey, that the pillion passenger was one of the men who raped her. She refused to speak, they rode off and she ran into the thicket and stayed there for a long time. After sometime, she emerged from the thicket and walked away. While on the way, she met two persons who inquired whether she was with one Allan/C and she had been attacked. They rescued her and took her to the police station where she recorded her statement. Afterwards, she was referred to go to the hospital where she was examined and treated. The doctor confirmed that she had been raped.

36. The complainant’s evidence was corroborated by Pw2 who upon being informed by C that as they were walking home, they were followed by the three men who gave them a chase. He managed to escape but the girl remained behind. He went to her homestead and began calling out when she opened the door and found him seated in her compound, he narrated his ordeal. She called the village elder who in turn called the police. They then went towards the scene and met the complainant who narrated to them what had transpired and confirmed to them that she had been raped by three men. They took her



to the police station and reported the matter. She took her to hospital where the medical examination revealed she had been raped.

37. The complainant's evidence was fortified by Pw5 the investigating officer who booked the case in the occurrence book and she had a chance to interrogate the complainant at the police station in the presence of Pw2 and other good Samaritans, s she disclosed to her that the accused persons raped her in turns on the fateful night

38. The issue of penetration therefore rests solely on circumstantial evidence. In considering whether a case of defilement can be proved by circumstantial evidence. I cite the case of *A.M.L-vs-Republic* [2012] eKLR where the Court of appeal stated that:-

“The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence.”

39. With this in mind and having considered the circumstantial evidence, I cite the case of *Sawe-vs-Republic* [2003] eKLR where the Court of Appeal held that:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. Circumstantial evidence can be a basis of a conviction only if there is no existing circumstances weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypotheses of innocence is on prosecution. This burden always remains with the prosecution and never shifts to the accused.”

40. Based on the prosecution evidence, I note that the complainant recalled clearly that on material night, she was accosted by the men/boys who raped her repeatedly in turns. In addition, the evidence of Pw3 the clinical officer was that when the complainant was examined at their facility, it was concluded that there was evidence of vaginal penetration, given the observations made by the clinical officer who ascertained that in the treatment notes dated 1st October, 2020 that the lady had repeated vaginal penetration without use of condoms and the incident took place three (3) hours. The complainant had mild abdominal pains, bruises on her waist and had dirty hair with soil particles. According to PRC form dated 1st October, 2020, it indicated that the complainant was repeatedly raped by three men who were unknown to her before the incident. On genitalia examination, there were lacerations on the vaginal wall and the hymen was absent. On P3 form dated 1st October, 2020, it was indicated that the complainant was gang raped by unknown men, she had sustained bruises on her vagina, there was absent of hymen. It is clear from the evidence that the complainant was raped by three men that fateful night as confirmed by the clinical officer. Though she said the three men were not tested. There were no DNA samples taken from accused to prove whether they were the offenders. I cite the case of *Martin Nyongesa Wanyonyi-vs-Republic* [2015] eKLR the court held that:

“As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded.”

41. All the above medical evidence tendered by the clinical officer Pw3 together with the exhibits the treatment notes, P3 form and post rape care form in my humble view perfectly corroborated the complainant's evidence to the extent that she was actually penetrated. Both from the oral evidence and the documentary evidence it was clear that there was penetration of the complainant's genital



organs with male genital organs since there were bruises and lacerations in her genitalia. In *Mwangi-vs-Republic* [1984] KLR 595 at 603, the Court rendered itself thus: What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape." It is therefore clear that there was penetration of the complainant's genital organ.

42. I therefore have no option but to believe the same as the whole truth. In the foregoing premises, I hereby do find the first issue herein in the affirmative to the extent that the complainant was actually penetrated on 1st October, 2020.
43. On the second issue, as regards the identity of the assailants, the first encounter between the complainant and the assailants was at the road while she was going home in the company of Allan/C that night. When she was accosted by the three men who repeatedly raped her and the 1st man raped her the second time and inserted grass in her vagina. Considering the length of time, the complainant spent in the company of the three men while raping her having taken her near a church where the assault occurred. She also recognized the three men by appearance but she did not know their names. Accordingly, there was sufficient opportunity for the complainant to properly identify her assailants.
44. The accused persons also took issue with the fact that no DNA samples were taken from them to prove whether they were the offenders. However, in *Martin Nyongesa Wanyonyi vs. Republic* [2015] eKLR the court held that: "As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded."
45. On the third issue of offence committed by association or commo intention, that however is not the end of the matter. If the rape of the complainant was committed in association with the accused persons or with common intention of both, the accused persons would still be guilty of gang rape. In present case, the complainant's evidence is that on the material night, she was raped by three men who accosted her while she was walking home. She was in the company of a male friend who she met in Luanda. Few distances away, they saw three men following them in hot pursuit. They detained her and frog marched her to a near church. They removed their clothes and her clothes and they repeatedly raped her in turns. According to the complainant, while each man was raping her, the rest were pinning her on the ground and guarding the place. She tried screaming and they threatened to kill her and she remained quiet throughout the ordeal. Afterwards, they fled and the complainant also run away in her a different direction. It is clear that the complainant was raped by three men. It is clear that the three men knew their intention and assisted and abetted the same. Considering the definition of gang rape, I am satisfied that the offence was committed in a group of three men.
46. On the other hand, the three accused 2nd, 3rd and 4th accused all in their sworn evidence stated that they never committed the offence herein. Dw1 the 2nd accused stated that on 1st October, 2020 at 9.00pm with his grandmother Jane Ondieki. He milked the cow, took his supper and went to sleep. He averred that that night he was also with Vincent. That on 2nd October, 2020 he was arrested and there was no identification parade done. The 3rd accused Dw2 gave his evidence that on 1st October, 2020 he was at home with his mother Roselyne Atieno at Kuche area. That on 2nd October, 2020 his grandfather requested him to take him to his grandmother at the market. In the evening the returned home and they heard from the neighbours that there were some boys who had been arrested. He went to the station with his grandfather and found Willis 2nd accused was arrested. The police also arrested him at the station for no apparent reason. According to 4th accused Dw3 stated that on 1st October, 2020 at 9.00p.m he was at home with his cousin Dw4 preparing a meal. They heard a scream from a girl. He immediately took his motor cycle and rose to the scene. He saw a woman walking from AIC church and school. He approached her and narrated her ordeal. When she saw his cousin Dw4 approaching



she stopped talking. He left to go pick his boss Phoebe Ombima at Kuche took her to Mbale and was on his way home. When he met two police officers who arrested him. That previously he had carried a boy with a dyed hair and he identified his cousin Dw4 who was released. Dw4 an independent witness stated that on 1st October, 2020 he was at home with the 4th accused Dw3 his cousin preparing ugali. They heard a girl screaming. His cousin left home and went to the scene. After he had finished preparing ugali, he ran towards the scene. The girl saw him with dyed hair and stopped talking to his cousin Dw3. They advised her to report the matter at the police station and refused.

47. Based on the defence evidence, 2nd accused Dw1 in his sworn evidence stated that on the material night, she was at home with his mother and had his meal and went to sleep. Dw1 did not call his mother to confirm that that night he was at home with him. Further, 3rd accused Dw2 averred that on the material night he was with his mother, grandfather and grandmother at home but failed to call them as witnesses in this matter. Considering the evidence of 2nd and 3rd accused it is suspicious why they failed to call their aforementioned relatives who were crucial witnesses who would have exonerated them by ascertaining that they were not the men who raped the complainant. Whereas 4th accused Dw3 contended that he was with his cousin Dw4 while preparing evening meal. When they heard screams from a girl near their house. 4th accused rode his motor cycle to the scene to rescue the girl. On reaching the scene, he engaged the girl who narrated to him how she was gang raped by three men. In the process, he was joined by his cousin Dw4 and as he approached them, the girl stopped talking as he had dyed hair. It is clearly that during identification at the station, the complainant confirmed that Dw4 did not rape her and he was then released by the police.
48. I note that the 2nd and 3rd accused defence of alibi was not corroborated as they did failed to call their crucial witnesses in this matter. It is not clear why both of them asserted that when the offence was committed both of them were minors namely 2nd accused was 16 years whereas 3rd accused was 17 years as per the two birth certificates produced as exhibits “DExh.1” and “DExh.2” respectively. This is an indication that they would wish the court to be remorseful in case they are found to be guilty. Thus, the offence was premeditated by the said accused persons. Being pupils in Primary school went on rampage without the knowledge of their mothers and relatives who lived with them in the same homesteads and due to peer influence engaged in such heinous act without thinking of the consequence. Such acts should not be condoned in a country where there is law and order. I find that 2nd and 3rd accused participated in committing this act. I find that the 2nd and 3rd accused’s alibi was an afterthought. I find that the prosecution led cogent evidence that the accused raped the complainant who knew them by appearance and the accused did not offer any evidence that controverted the prosecution case. Having considered the heinous act that was meted out on the complainant by the 2nd and 3rd accused and having considered the circumstances of the offence. In this case, the 2nd and 3rd accused were the principal offenders of this act.
49. On the contrary, regarding the 4th accused from his sworn evidence, I tend to believe his narration that on the material day he was at home with his cousin Dw4 when they heard a girl screaming near their home. 4th accused responded to the voice that was crying for help. He dashed to the scene as fast as he would. He had no intention to rape the complainant. The complainant confirmed that after the three men ran away, she also took off in a different direction. That she walked some distance and met a rider who engaged her. Further, Dw4’s evidence absolved the 4th accused from the commission of the offence herein. The 4th accused stated that he was arrested after having been falsely accused of committing an offence he did not commit. I believed that the complainant mixed her evidence as she was the only eye witness and her evidence was not corroborated. Whereas 4th accused’s evidence was fortified by Dw4 who had been arrested with the other men. But was released upon the complainant ascertained that he did not rape her. 4th accused and Dw4’s evidence corroborated each other that they were at home



preparing supper when they heard a girl screaming and 4th accused moved into action. I hold that 4th accused did not commit the offence herein. I find that the prosecution has not proved to the required standard of beyond reasonable doubt against 4th accused and I find him not guilty of the offence herein.

50. On the alternative count, of committing indecent act with an adult, based on the overwhelming evidence by the prosecution against the 2nd and 3rd accused. I find them guilty as the prosecution had proved the same to the required standard of beyond reasonable doubt. Whereas for 4th accused based on his overwhelming evidence that was corroborated by Dw4, the prosecution has failed to convince this court that he committed indecent act with adult. I find him not guilty.
51. In the foregoing premises and based on all the reasons I have advanced hereinabove, the prosecution has failed to prove its case against the 4th accused beyond reasonable doubt. I therefore find him not guilty on both counts and proceed to acquit him as per Section 215. Whereas, I hold and find that the prosecution has proved its case preferred against 2nd and 3rd accused to the required standard. I hereby do find them guilty as charged on both counts and therefore proceed to convict them accordingly in terms of Section 215 of the *Criminal Procedure Code* Cap 75 Laws of Kenya.

Orders accordingly

DATED, DELIVERED AND SIGNED THIS 5TH DAY OF MAY, 2025.

J.A. AGONDA

PRINCIPAL MAGISTRATE

On: 05.05.2025

Before: J.A.Agonda PM

Pros: Muchiri

C/A: Busuku

2nd Accused: Present

3rd Accused: Present

4th Accused: Present

Counsel for the Accused: Mr. Shifwoka

Interpretation: English/ Kiswahili Language.

Court: Judgment read out in the open court.

J.A.AGONDA

PRINCIPAL MAGISTRATE

