



**Republic v Kavilu & another (Sexual Offence E039 of 2022)
[2025] KEMC 230 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEMC 230 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
SEXUAL OFFENCE E039 OF 2022
YA SHIKANDA, SPM
SEPTEMBER 25, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

RONALD KINYUMU KAVILU 1ST ACCUSED

RICHARD KYALO KAVILU 2ND ACCUSED

JUDGMENT

THE CHARGE

1. The charge herein was amended on 21/5/2025 wherein Ronald Kinyumu Kavilu and Richard Kyalo Kavilu were charged with the offence of Gang rape contrary to section 10 of the *Sexual Offences Act*. The general particulars of the charge are that on 18/5/2022 at [particulars withheld] village in Kibwezi Sub-county within Makueni County, the accused persons, in association with each other, caused their penises to penetrate the vagina of DNK without her consent. The accused persons were each faced with an alternative charge of committing an indecent act with an adult. The particulars of the offence are that on the same day and place, each of the accused persons intentionally and unlawfully touched the vagina of DNK using their penis, against her will. The accused persons pleaded not guilty where after the matter was set down for hearing. Initially, there were three accused persons but one of them passed on and the matter against the deceased accused person was withdrawn.

THE EVIDENCE

The Prosecution Case

2. The prosecution case was initially partly heard by another Magistrate who was subsequently transferred. When the matter was placed before me, I directed that the same starts de novo, for reasons I indicated in my ruling delivered on 31/12/2024. However, by the time the complainant was required



to testify, she could not do so owing to her health condition, which was supported by medical evidence. The parties agreed that her earlier testimony be adopted in evidence. The prosecution called a total of five witnesses. The testimony of the complainant was that she was attacked at her home by two men who injured her.

3. The record indicates that the complainant stated that nobody raped her but she was assaulted by three people. She then stated that she was raped and assaulted by the 2nd accused person. It was the evidence of the complainant that the initial 1st accused person [now deceased] and the current 2nd accused person did not do anything to her. PMK testified that on 19/5/2022 he was with the complainant who is his mother as well as his family. They had supper then the complainant went to sleep in her house which was nearby. The following morning, PMK was called and informed that his mother had collapsed in the house of the accused persons' father.
4. PMK informed his brother and also reported to the nearby police post. He proceeded to the scene in the company of his brother and police officers. The complainant was taken to hospital and upon examination, it was established that she had been raped. Doctor Kakundi Mbithi produced the PRC and P3 forms filled in respect of the complainant. Tabitha Mutanu Ngomo testified that on 19/5/2022 in the morning, she was on her way from her home when she was the accused persons' mother outside her house. The accused persons' mother asked the witness to go to her husband's house and see what had happened. The witness went to the house of the accused persons' father and found the complainant herein lying on the floor. The complainant was unresponsive. The witness called the Assistant chief and even went to the complainant's home and informed her son. Police Constable Issa Makaga testified that he took over the matter from the initial investigating officer who was transferred. He did not conduct any investigations in the matter.

The Defence Case

5. When the accused persons were placed on their defence, the 1st accused person gave sworn testimony whereas the 2nd accused person gave an unsworn statement. The 1st accused person testified that on 18/5/2022 he went to work in the morning and returned home in the evening. While asleep, he was woken up at about 2:00 am by his children and his father. The 1st accused person got out of the house then his father asked him to accompany him to his father's house. When they got to his father's house, the father asked him to enter but he declined. The father then informed the 1st accused person that the complainant had gone to his house and as they were talking, the complainant collapsed. The father asked the 1st accused person to enter the house and assist him carry the lady outside but the 1st accused person declined.
6. The 1st accused person woke up his elder brother and the rest of the family members woke up. It was the evidence of the 1st accused person that the complainant and the accused persons' father had a sexual affair known to the complainant's son. The 1st accused person called the 2nd accused person but learnt that the latter was not home then. Later, the complainant's son was informed but he did not turn up. The 1st accused person left for work early in the morning. On 27/5/2022 the accused persons' father was arrested. The 1st accused person was arrested on 29/5/2022. He learnt of the charges when he was brought to court. The 1st accused person denied having committed the offence.
7. The 2nd accused person stated that on 18/5/2022 he left home at about 7:30 pm and went to attend a funeral. At about 2:00 am he was called by the 1st accused person and informed that the complainant was at their home and was unwell. The 2nd accused person called his brother in-law and asked him to go and find out what the problem was. The 2nd accused person returned home at 6:15 am. Later, the complainant's son appeared in the company of his family members and the police then took away the



complainant. The 2nd accused person was arrested several days later. He denied having committed the offence.

MAIN ISSUES FOR DETERMINATION

8. Having considered the nature of the charges and the evidence on record, I find that the main issues for determination are as follows:
 - a. Whether the complainant was gang raped on 18/5/2022;
 - b. If so, whether it was the accused persons who raped the complainant;
 - c. If not, whether an indecent act was committed against the complainant on the aforementioned date;
 - d. If so, whether such indecent act was committed by the accused persons;
 - e. Whether the prosecution has proven its case against the accused persons to the required standard.

ANALYSIS AND DETERMINATION

9. I have carefully considered the evidence on record as well as the law applicable. 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 an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life”.

10. Section 2 of the [Sexual Offences Act](#) defines the term "gang" to mean two or more persons. Section 3 thereof provides:

“[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.”

11. Section 2 of the [Sexual Offences Act](#) defines “penetration” as the partial or complete insertion of the genital organs of a person into the genital organs of another person. From the above provisions, I gather that the key ingredients of the offence of gang rape of an adult are as follows:



1. The accused person must have committed an act which causes the partial or complete insertion of his or another person's genital organ into the genital organ of another person or the accused person's genital organ. My understanding of the law is that it does not matter who inserts, what matters is who causes the insertion. For instance, a woman who causes a man to insert his penis into her vagina under the circumstances referred to in section 3 above may be guilty of rape. In a nutshell, the prosecution must prove penetration;
 2. The act of penetration must have been committed by two or more persons in association or any person who, with common intention, is in the company of another or others who commit the offence;
 3. The penetration must have been made without the consent of the victim or the victim must have consented owing to force, intimidation or threats;
 4. Positive identification of the accused person. The evidence of the prosecution must show that the accused person was positively identified as the person who committed the impugned act against the complainant or victim.
12. Section 43 of the *Sexual offences Act* provides that:

- “[1] An act is intentional and unlawful if it is committed—
- [a] in any coercive circumstance;
 - [b] under false pretences or by fraudulent means; or
 - [c] in respect of a person who is incapable of appreciating the nature of an act which causes the offence.
- [2] The coercive circumstances, referred to in subsection [1][a] include any circumstances where there is—
- [a] use of force against the complainant or another person or against the property of the complainant or that of any other person;
 - [b] threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
 - [c] abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.”

Penetration

13. The only direct evidence in respect of the offence is that of the complainant herself. Majority of sexual offences are usually committed in secrecy and as such, it would be difficult to get an eye witness apart from the alleged victim. In *Bassita Hussein v Uganda*, Criminal Appeal No. 35 of 1995, the Supreme Court of Uganda held as follows:

“The Act of sexual Intercourse or penetration may be proved by direct or circumstantial evidence and corroborated by medical evidence or other evidence. Though desirable, it is not a hard and fast rule that the victim's evidence must always be adduced in every case of



Defilement to prove sexual intercourse or penetration. Whatever evidence the Prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt”.

14. In most cases, penetration is proved by testimony which may be corroborated by medical evidence. However, absence of medical evidence does not ipso facto mean that there was no penetration-See the case of *Fappyton Mutuku Ngui v Republic* [2014] eKLR. The primary evidence of penetration must be from the alleged victim. I did not hear the complainant and will thus rely on the record to know what she stated. Her evidence on whether or not there was penetration is not clear. Quite unfortunately, it is not clear from the record what language the complainant used in her testimony. The record indicates that she used the word “raped” in her testimony. I am not sure whether that is the exact word she used or it was the court’s rendition of what the complainant stated. The word “rape” is a technical or legal term and unless there is an explanation of what the witness meant if at all they used the term, it becomes unclear to the court what the witness meant, particularly where the court relying on the record did not take the testimony of such witness. Trial courts should record as nearly as possible what the witness says happened to him or her.
15. At the beginning of her testimony, the complainant stated that nobody raped her. Later in her testimony, the complainant stated that it was the current 1st accused person who raped her. The complainant was categorical that the 2nd accused person did not do anything to her. However, when the complainant was cross-examined by the current 1st accused person, she stated that the said accused person did not do anything to her. She further stated clearly that the 1st accused person did not rape her. The complainant later stated in cross-examination that the 1st accused person raped her. From the entire testimony of the complainant, it is not clear where the incident is said to have occurred or even how the offence was committed.
16. In my view, it is not sufficient for a witness to simply state that he or she was raped. The witness ought to narrate a series of events showing how and where the offence was committed. I am afraid that the testimony of the complainant is not clear as to what really happened to her on the material night. There is no clear evidence to show how she ended up in the house of the accused persons’ father. It is not the duty of the court to concoct a story of how the complainant ended up at the house belonging to the accused persons’ late father and what transpired. The medical evidence indicates that the complainant’s genitalia was bruised and inflamed. That could be an indication of some form of injury on the genitalia but in my view, it takes the testimony of the complainant to explain what caused the injuries.
17. Without testimony from the victim that the injuries were caused by unconsented sexual intercourse or penetration, the doctor cannot conclude that the victim was raped. There would be no basis for such conclusion. When the investigating officer was cross-examined by the 1st accused person, he stated that the complainant did not record in her statement that she had been raped. Her statement was that she was assaulted and lost consciousness. It would appear that the prosecution relied on the medical reports to form the opinion that the complainant had been raped yet no such report was made by the complainant. From the evidence on record, I cannot state with conviction that there was penetration of the complainant’s vagina.

Consent

18. Without sufficient or acceptable evidence of penetration, it would be unnecessary to determine whether there was consent or lack of it. The issue becomes moot.



Identification of the assailant[s]

19. It is not in doubt that the complainant and the accused persons were neighbours. The incident is said to have occurred at night. Other than stating that she was attacked by three people, the complainant's testimony was not clear on who the three people were. It is not even clear how the complainant was able to identify the attackers at night. In the case of *Anzaya v Republic* [1986] KLR 236, the Court of Appeal sitting at Kisumu held that there is a danger in relying solely on the evidence of a single witness regarding identification, particularly when the identification is said to have occurred at night. In *Mwenda v Republic* [1989] KLR 464, the Court of Appeal held that whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, special need for caution before convicting in reliance on the correctness of the identification is necessary.
20. The Court of Appeal in the case of *Marube & Another v Republic* [1986] KLR 356 observed that in the evaluation of the evidence of the identifying witness, the court must ensure beyond all reasonable doubt that the witnesses were honest and unmistakable about their identification. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal was of the opinion that where the evidence relied upon to implicate an accused is entirely of identification, that evidence should be watertight to justify a conviction. A similar observation was made by the Court of Appeal in the case of *Wamunga v Republic* [1989] KLR 424 where the court held as follows:
- “Where the evidence against an accused 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 conviction”.
21. In the English case of *R v Turnbull & Others*, [1976] 3 ALL ER 549, it was held that the factors for consideration by the court on the question of identification are as follows:
- i. The distance between the witness and the suspect when he had him under observation;
 - ii. The length of time the witness saw the suspect; and
 - iii. The lapse of time between the date of the offence and the time the witness identified the suspect to the police.
22. Further in the case of *Simiyu & Another v Republic* [2005] I KLR 192 at page 195 the Court of Appeal observed:-
- “In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought to be given first of all by person or persons who gave the description and purported to identify the accused and then by the persons or person to whom the description was given. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity.”
23. Similarly, in the case of *Francis Kariuki Njiru & 7 others v Republic* [2001] eKLR, the same court held:
- “The law on identification is well settled as this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted



and acted upon if the court is satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witnesses gave a description of his or her attacker or attackers to the police at the earliest opportunity.” [Emphasis mine]

24. It is agreed by both parties that the complainant was found in an unresponsive state in the house of the father to the accused persons. As already indicated, there is no clear evidence to show how she got there. The prosecution evidence does not sufficiently place the accused persons at the scene. There is no evidence to show the circumstances under which or grounds upon which the accused persons were arrested. The initial investigating officer who caused the arrest of the accused persons was not called to testify. Without his testimony, it cannot be known how and why the accused persons were arrested.
25. The evidence on record does not indicate that the complainant knew the accused persons by name. Her testimony was that she was attacked by her grandchildren. It is obvious from the evidence that the accused persons are not the complainant’s grandchildren. From the evidence on record, I gather that the complainant did not positively identify the persons who allegedly attacked her. In a nutshell, the evidence on record does not positively identify the accused persons as the ones who attacked the complainant. There is no evidence to show that upon their arrest, the complainant confirmed to the police that it was the accused persons who had attacked her. The matter was reported to the police on 19/5/2022 and the complainant was examined at the hospital on the same day. The first suspect was arrested on 27/5/2022. The accused persons were arrested on 29/5/2022. No explanation was given for the delay, given the fact that they were well known and were neighbours to the complainant. From the delay, it can only be inferred that the complainant was not sure of who had attacked her.

Whether the prosecution has proven its case

26. I have considered the accused persons’ defence bearing in mind that they shoulder no duty to prove their innocence. The gist of the accused persons’ defence is that they were framed up. It is the word of the complainant against that of the accused persons, bearing in mind that the burden is on the prosecution to prove the allegation against the accused persons beyond reasonable doubt. In *Philip Nzaka Watu v Republic* [2006] eKLR, it was held that to find a conviction in a Criminal case, the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in *Stephen Nguli Mulili v Republic* [2014] eKLR:

“It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, [1935] UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa v R*, [2013] eKLR.”

27. In the famous case of *Miller v Ministry of Pensions* [1947] 2 All ER 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”



28. In *Bakare v State* [1987] 1 NWLR [PT 52] 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.” [Emphasis mine]

29. The standard of proof "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" [see *Clarence Victor, Petitioner 92-8894 v. Nebraska*, 511 U.S. 1 [1994]; *Rex v. Summers*, [1952] 36 Cr App R 14; *Rex v. Kritz*, [1949] 33 Cr App R 169, [1950] 1 KB 82 and *R. v. Hepworth*, *R. v. Feamley*, [1955] 2 All E.R. 918]. Beyond reasonable doubt is proof that leaves the court firmly convinced that the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged.

30. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt. I cannot state with certainty that the complainant lied to court. However, I am equally not certain that she told the truth. As already indicated, there is a reasonable possibility that she could have been mistaken as to the identity of the assailant[s]. I cannot rule out the fact that she could have been attacked by another person[s] other than the accused.

31. In as much as I may want to believe the complainant's testimony, I find difficulties in dismissing the accused persons' defence. Having analysed the entire evidence on record, I tend to feel that the accused persons could be innocent, but I am just gambling on probabilities. I may be wrong. I may be trying to return guilty men to the community. The accused persons' defence is not far-fetched. I have a reasonable doubt, and this is a safeguard that has enormous value in our system. I cannot declare that the accused persons are innocent, but I have reason to believe that they may not be guilty. Alan Dershowitz, an American Lawyer and former Law Professor once said that Scientists search for truth, Philosophers search for morality and a criminal trial searches for only one result: proof beyond a reasonable doubt. Has this proof been established? I think not.

32. It is possible that the complainant could have been raped on the material night but with the kind of evidence on record, that remains a mere suspicion which cannot form the basis for a conviction. In the words of the Court of Appeal in the case of *Joan Chebichii Sawe v Republic* [2003] eKLR, suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. The prosecution must prove the case against the accused person beyond any reasonable doubt. The accused person is not under duty to prove his innocence. He may as well remain silent in defence. For avoidance



of doubt, it is my finding that the prosecution has failed to prove its case against the accused persons to the required standard.

DISPOSITION

33. In view of the foregoing, I find that the prosecution has failed to prove its case against the accused persons beyond reasonable doubt. Consequently, I hereby find the accused persons Not Guilty and proceed to Acquit them of the offence of gang rape contrary to section 10 of the *Sexual Offences Act*, pursuant to the provisions of section 215 of the Criminal Procedure Code. Having acquitted the accused persons on the main count of defilement, it follows that the alternative charges of committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act* suffers the same fate for the same reasons. For avoidance of doubt, the accused persons are equally acquitted of the alternative charge. It is so decreed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 25TH DAY OF SEPTEMBER, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

