



**Mwongela v Republic (Criminal Appeal E008 of 2025)
[2025] KEHC 16612 (KLR) (13 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E008 OF 2025
SM GITHINJI, J
NOVEMBER 13, 2025**

BETWEEN

JACKSON KINYUA MWONGELA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Jackson Kinyua Mwongela was charged in the Lower Court with the offence of attempted rape, Contrary to Section 4 of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of this offence are that on the 13th day of September, 2023 at [Particulars Withheld] Village, Thinyaine Location, Tigania West Sub-County in Meru County, the Appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of TM without her consent.
3. He also faced an alternative count of Sexual Assault, Contrary to Section 5(1) (b) of the [Sexual Offences Act](#) 3 of 2006. The particulars hereof being that on the 13th day of September, 2023 at [Particulars Withheld] Village, Thinyaine Location, Tigania West Sub-County in Meru County, the Appellant illegally and unlawfully manipulated by forcibly touching the general body of TM with intention of causing his penis to penetrate the vagina of the said TM, an act she did not consent.
4. The Prosecution case is that the complainant in this case who offered her evidence as PW-1 is an elderly woman aged then 74 years old. On 13/9/2023 she had left her shopping basket at a posho mill and attended a funeral committee meeting of Julius Mwenda. Many villagers had attended the said meeting which ended at around 7:00pm. After the meeting they walked home as a group, each person in the group dropping off at their different stops.
5. Eventually they were left three of them and when she went to the posho mill to collect her bucket she was left all alone. As she got near her house, she saw someone who had sat down. When he saw her he jumped up, held her forcefully and threw her to the ground. He then lifted her from the ground and



- threw her over the fence into a compound. He lay on her while on the ground, and covered her mouth with the hand to prevent her from screaming. He then held her throat. She knew him and could see him.
6. PW-1 was in sweater, apron and a dress. The accused lifted her dress upward and removed her underwear. He had already removed his trouser. At that point a motorbike appeared which had its headlamp on. When the accused noted its light he dressed up and run away.
 7. The complainant supported herself on a nearby tree and rose. She got out of the compound and walked towards her house. Jane K, the PW-2 in this case was living nearby. She called on her name for help. She as well called out for Linguli, the husband to K. K heard her and went to the gate. When she opened the gate the complainant fell on her legs. K asked her what the problem was. It is then she explained to her what Kinyua had done to her.
 8. PW-3 had gone to the Canteen to buy milk. As he returned home at around 7:00pm he found his wife (K) with the complainant. He asked what was happening and the complainant told him what Kinyua had done to her. Both PW-2 and PW-3 knew Kinyua as he is from that area. The complainant also knew him as he had schooled with her children and had even seen him previously that same day. The complainant took the two witnesses to the scene. She was then led to her house by PW-3.
 9. The following morning they reported to the area Chief. They looked for Kinyua but he was not traced. The case was reported at Tigania Police Station on 16th September, 2023. The complainant was issued with a P-3 form. The P-3 form was filled at Miathene Sub-County Hospital by Dr. Geoffrey Muthomi, PW-4. He noted that she had scratch marks on anterior side and tenderness on her neck and back. The injuries were inflicted by a blunt object, He assessed the degree of injury as harm. The accused was then arrested and charged with the offences carried in the Charge Sheet.
 10. The accused in his defence stated that on 13/9/2023 he was not at home as he was a Kandebene where he had worked for a week as a Mason. He returned home on 23/9/2023. On Monday he went into a club where he was meeting a person who was to give him work of installing water pipes to his house. While in the club he took beer as he waited for the person. Members of the public then arrested him on allegation that he had committed an offence of which he will be informed about at the Police Station. The Police from Ngondoni re-arrested him. He was arraigned in Court on 25/9/2023 to answer a charge of an offence he did not commit.
 11. The trial court evaluated the evidence and found the appellant guilty of the offence in the main count. He was convicted of it and sentenced to serve 16 years in prison.
 12. Dissatisfied with the said conviction and sentence, he appealed to this court on the grounds that:-
 1. The sentence was harsh and excessive in the circumstances of his case.
 2. The light at the scene that was used to identify him was not properly analysed.
 3. His alibi defence was wrongly dismissed.
 4. The offence was not proved beyond reasonable doubt.
 13. The appeal was canvassed by way of Written Submission. The appellant filed his Submission but the Respondent did not.
 14. I have as the first Appellate Court re-evaluated the charges, evidence adduced in the Lower Court, the judgment entered, sentence meted, and considered the grounds of the appeal and submissions by the appellant.



15. The issue which arises for determination in this appeal is whether the appellant was properly recognized by the victim.
16. The Prosecution case is that the incident in this case happened at night, 7:00pm. In relation to recognition of the appellant as the culprit, the complainant stated:-

He held my throat. I knew him the whole time when he was pressing my throat. I could see him. I knew him.”
17. In Paragraph 5 of the record she said,

Then there was a Pikipiki passing by and the light shone, and the accused saw the light from Pikipiki he wore his trouser and he run away.”
18. The trial Magistrate in her Judgment at Paragraph 37 states:-

The victim (PW-1) testified that while the assailant threw her on the ground she immediately recognized him. In her Cross-examination she confirmed that she had known the accused since he was a young boy and in fact she even knew his parents. Additionally, when the light from the head light of the Pikipiki shone on the accused, she completely saw him. This was therefore a case of recognition and not identification.”
19. From the record it is clear that the trial court held it wrong when it observed that the light from the head light of the Pikipiki shone on the accused, and the complainant completely saw him. The complainant never said that, and the same is a wrong assumption by the trial Magistrate. The victim said the assailant saw the Pikipiki light and run away. She did not indicate where the light fell in relation to where they were or that it enabled her see and recognize the accused.
20. On Cross-examination complainant simply said, “ There was light. I saw you.” She did not indicate the source of the light and describe it. PW-3 also in Cross-examination indicted there was moonlight but did not describe its size and light intensity.
21. It is trite law that evidence of visual identification, especially at night and by a single eye witness, Must be examine with the greatest care, and should only be accepted when the court is satisfied that the circumstances of identification/recognition were favourable and free from possibility of error.
22. In *Maitanyi –vs- Republic* [1986] KLR 198, the Court of Appeal held that:-

It is necessary to test with the greatest care the evidence of a single witness respecting identification, especially when it is made under difficult condition such as at night. The Court must make an inquiry into the nature of the light, its brightness, and the time the witness had the accused under observation.”
23. Similarly, In *Wamunga –vs- Republic* [1989]KLR 424, the Court emphasized that:

Recognition may be more reliable that identification of a stranger, but even when the witness purports to recognize someone known to him, the Court must remind itself that mistakes in recognition of close relatives and friends are sometimes made.”
24. In this case the victim was age 74 years. The incident happened at night. She did not disclose the source of light that enabled her see and recognize the appellant. The omission is fatal to the prosecution case. Its impossible to draw a conclusion that she positively recognized the appellant without possibility of her having made a mistake of him.



25. The prosecution therefore failed to establish the charge against the appellant beyond reasonable doubt. The conviction is based solely on the uncorroborated and inadequately supported evidence of a single identifying witness at night and cannot therefore stand.

26. Accordingly, the appeal succeeds. The conviction is quashed and sentence set aside.

27. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MERU THIS 13TH DAY OF NOVEMBER, 2025

S.M. GITHINJI

JUDGE

Appearances:

Appellant – Present in Meru Prison.

Ms. Adhi – For the state.

