Koech v Republic (Criminal Appeal E042 of 2024)
[2025] KEHC 17053 (KLR) (21 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17053 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E042 OF 2024

JRA WANANDA, J

NOVEMBER 21, 2025

BETWEEN

CYRUS KURUI KOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgment of Hon. V. Karanja-PM, delivered on 5/09/2024 in Iten Senior Principal Magistrate's Court Criminal - Sexual Offences – Case No. E063 of 2023)

JUDGMENT

1. The Appellant was charged in the said criminal case with the offence of rape contrary to Section 3(l)(a)(c) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 17/17/2023 at around 2300 hours in [Particulars Withheld] village in Keiyo North Sub-County within Elgeyo Marakwet, he intentionally and unlawfully caused his penis to penetrate the vagina of PK without her consent. He was also charged with the alternative offence of the offence of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act* No. 3 of 2006.

2. The Appellant pleaded not guilty and the case proceeded to full trial in which the Prosecution called 4 witnesses. At the close of the Prosecution case, the Court found that the Appellant had a case to answer and put him on his defence. The Appellant then, in his defence, gave an unsworn statement and did not call any witness. By the Judgment delivered on 5/09/2024, he was convicted on the main charge, and sentenced to serve 10 years' imprisonment.

3. Aggrieved with the decision, the Appellant, through Messrs GK Kimaiyo & Co Advocates filed this appeal on 18/09/2024. The unnecessarily lengthy Petition of Appeal contains a whooping 18 repetitive grounds, which with a little bit of better drafting, could have been easily condensed into only 3 or 4 grounds. The same, reproduced verbatim, are as follows:

i. That the trial Court failed to analyse the medical evidence that did not link the Appellant with the offence in question and that there was no medical examination of the Appellant.

ii. That the trial Court failed to consider that there was contradiction between the testimonies of the complainant, PW1, who testified to have informed her sister of the alleged offence while PW2 claims to be the one who escorted PW1 home.

iii. That the trial Court failed to consider that there was contradiction meted by PW3, Clinical officer by alleging that the complainant, PW1 had a history of rape which was not substantiated nor in any way linked to the Appellant.

iv. That the trial Court failed to take into consideration the circumstantial evidence and practicality surrounding the testimonies of PW1, PW3and PW4 regarding the alleged action of the Appellant grabbing or removing the complainant from a motor cycle in motion without causing harm or injury.

v. That the trial Court immensely failed to avail essential witnesses to prove whether she was part and parcel of a conspiracy to choreograph the offence in question against the Appellant.

vi. That the trial Court failed to consider that there was animus of witnesses hence a single identifying witnesses was not sufficient to controvert the evidence which was not corroborated at all.

vii. That the trial Court failed to consider that there was no investigation undertaken by PW4 other than relying solely and exclusively on the report of the complainant PW1 which was not corroborated by any other evidence.

viii. That the trial Court failed to consider the circumstantial evidence provided by PW2 linking the Motor cycle rider to the scene of crime of the alleged offence and in particular being the person solely responsible for the movement, whereabouts, and occurrences thereof in respect of the causation of the alleged offence.

ix. That the trial Court failed to prove beyond reasonable doubt the element of consent of the complainant, who admitted to have taken alcohol hence impairing her testimony and recollection of events of the date in issue.

x. That the trial Court failed to prove beyond reasonable doubt the element of identity of the assaulter since PW2 and the rider of the motor cycle are expressly mentioned by the prosecution witnesses to have been present and party to the incidences surrounding the commission of the alleged offence.

xi. That the trial Court failed to prove beyond reasonable doubt the element of identity of the assaulter since the complainant admitted inter alia to have been taking alcohol hence raising doubts on her ability to clearly identify the Appellant as the assaulter.

xii. That the trial Court failed to consider the convoluted nature of the Court proceedings particularly the delay and multiple fresh hearings which is likely to have paved way to coaching of witnesses to the prejudice of the Appellant who was unrepresented.

xiii. That the trial Court failed to consider the defense of the Appellant who denied committing the offence, was never found in the act and no such evidence to the contrary was availed to the Honourable Court.

xiv. That the Court be pleased to consider that ingredients forming the offence were not altogether summed up and were not proved beyond reasonable doubt at all.

xv. That the Court be pleased to judicially consider the nature of the sentence passed.

xvi. That the Court be pleased to consider that long incarceration would ruin the Appellant's future and shelve his dreams considering his youthful age and thus to consider the provisions of section 333(2) of the CPC given that he is a first offender, if at all.

xvii. That the Appellant wish to be present during the hearing of this appeal and/or be supplied with the Court record so as to adduce more grounds.

xviii. That the whole of the judgment and sentence of the Principal Magistrate is against the pleadings, evidence, submissions and the law.

4. In respect to the guide that grounds of appeal should generally be brief and concise, I advise Counsel to familiarize himself with the Court of Appeal cases of Ondieki v Omoi & 3 others [2025] KEHC, the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR, and the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR. These cases highlight the importance of brevity and the dangers of verbosity or numerous, repetitive grounds that can obscure the main issues.

5. Be that as it may, I will now recount the testimonies of the witnesses before the trial Court.

6. PW1 was the complainant. She testified that she knows the Appellant as he used to be schoolmates in primary school save that the Appellant was two classes ahead of her. She stated that on 17/12/2023 at 8:00 pm, she was watching football at a Bar, when the Appellant appeared and joined her and together, they consumed alcohol until 10:30 when she needed to go home. She testified that she did not find a motor-cycle taxi (boda boda) to take her home, and thus, together with the Appellant, they began walking until they found one motor cycle which they boarded together. She stated that she was drunk and when the motor-cycle reached a forest, the Appellant began pulling her and the motor-cycle rider left as the Appellant continued struggling with her. She testified that the Appellant then strangled her and proceeded to rape her. She testified that she tried to fight back and screamed, then she saw the rider and one other person approaching, and in panic, she ran away. She stated further that she had told him the Appellant to let her alight at a petrol station but he took her to the forest instead. She testified that when she reached home, she narrated the incident to her sister, they went to hospital and reported the matter and she was issued with a Post Rape Care Form and P3 Form. She named the rider as one Noah and added that she fell asleep after boarding the motor-cycle as she was drunk. She also testified that she does not wear panties most of the time. In cross-examination she stated that the rider was arrested and is the one who pointed out the Appellant's whereabouts before being released. She further stated that the incident occurred on 17/12/2023 and the Appellant was arrested on 22/12/2023. In re-examination, she denied that the rider is the one who raped her, nor was it a case of gang-rape. She explained that the Appellant pulled her off the motor-cycle and the rider walked away but left the motor-cycle at the scene.

7. PW2 was Cornelius Korir, who claimed to be also a bodaboda rider. He testified that he knows the complainant as she is a friend, and that on 17/12/2023 at 8:30 pm, he was watching football at the bar and the complainant was also there with the Appellant. He testified that the complainant informed him that she was leaving, and that she left with the Appellant, and he (PW2) even escorted them to the roadside then left to go to "a place where boys were being circumcised". He testified that he later heard screams and saw a boda boda rider running towards the motor-cycle and who then rode off, and that the rider told him that a person wanted to rape a lady. He testified that he proceeded to the scene where he found the complainant who told him that the Appellant had raped her after she fell asleep

on the motor cycle. PW2 stated that he then escorted the complainant home. He also stated that the rider was familiar to him, and that he also knew his home.

8. PW3 was Philemon Kitony, a Clinical Officer at the Iten County Referral Hospital. He stated that the complainant visited the facility on 23/12/2024 with history of gang-rape that occurred 72 hours earlier, and that her injuries were categorized as grievous harm. He testified that on examination, the complainant was found to have strangle marks at the throat, that in her genitalia, her labia majora and minora had bruises, the clitoris was inflamed, and that he confirmed recent penetration. He testified that laboratory results did not reveal spermatozoa, and then produced the Post Rape Care Form and P3 Form. In cross-examination, he stated that the examination should be carried out within 72 hours but clarified that it can still be done beyond the 72 hours. He also stated that the clothes brought by the complainant were stained with mud and torn, and there were stains in the inner clothing. He also testified that the complainant stated that there were 2 assailants.

9. PW4 was Police Constable Mary Goretti, from the Iten Police Station. She stated that she took over the file from the investigating officer who was on maternity leave. She testified that the complainant reported that she was raped by the Appellant after leaving a bar, and that she had boarded a motor-cycle with the Appellant, who grabbed her and raped her.

10. As aforesaid, at the close of the prosecution case, as aforesaid, the Court found that the Appellant had a case to answer and put him on his defence. The Appellant then gave an unsworn statement as DW1, and did not call any witness.

11. In his defence, the Appellant denied committing the offence and claimed that the complainant lied. He observed that there were no eye-witnesses, and that the complainant went to hospital after 3 days. According to him, there can be no medical results for the offence after 72 hours. He also stated that the case was one of gang-rape and wondered why he is the only one who had been charged.

Hearing of the Appeal

12. The parties then filed written Submissions. The Appellant's is dated 20/12/2025 while the Respondent's, filed through Prosecution Counsel Ms. Racheal Mwangi, is dated 29/05/2025.

Appellant's Submissions

13. Counsel for the Appellant pointed out that no medical examination was conducted on the Appellant, and that the nature of the offence indicated in the medical documents is "alleged gang rape by two people". He observed that there is however no evidence of medical examination of any other person to establish gang-rape, or even the rape in the first place. Regarding the claim of gang-rape, he submitted that the Prosecution either ignored it, or was unable to prove it, or was deliberately left out so as to exclude other persons and thus, instead, focused on implicating the Appellant for an offence he never committed. He then cited the case of AML vs. Republic [2012] eKLR, and submitted that while acknowledging that sexual assault can be proved by evidence, and not necessarily by medical examination, in light of the provisions of Section 36 of the *Sexual Offences Act*, in this case, no such other evidence, whether circumstantial or otherwise, was provided. Counsel also submitted that the testimony of PW2 is full of contradictions and cannot be believed, and urged that, on one-part, PW2 testified that he saw a rider running towards a motor-cycle, who then told him that a person wanted to rape a lady, and on the other part, PW2 claimed that the complainant told him that the Appellant left her. He also submitted that further, PW2 testified that she heard the screams of a lady. According to Counsel, it is unfathomable and borders on the absurd that all these scenarios could have happened at the same time, that is, PW2 heard, saw, and was told of the same set of facts. He added that in examination in chief, PW2 stated that he saw a rider running, but in cross-examination, he stated that

he did not see the person running. According to him, the witnesses were coached with intent to absolve certain persons and implicate others, and submitted that the trial Court ought to have treated the evidence of PW2 with extreme caution.

14. Regarding the testimony that the complainant visited the medical facility 3 days after the incident and that her clothes were, at the time of the examination, muddy and torn, Counsel submitted that it is not feasible nor practical that the complainant could have been in the same clothes more than 3 days later, and that, in any event, it is not indicated whether there was rain, spills of water or any such instance so as to create a muddy environment. He also observed that nowhere in the record was it proven that any incident of violence happened that may have led to the "torn clothes". According to him, PW3, the investigating officer relied solely or largely on the report made by the complainant and thus her testimony was solely founded on hearsay. Regarding PW1's claim that the Appellant "grabbed her off" the motor-cycle, Counsel termed it strange that someone can be "grabbed off" a motor cycle, moving or still, with intent to rape, in the presence of others who could not help unless they were accomplices to the act - actions that are only possible in movies, not in real-life situations.

15. Regarding the complainant's testimony that she found herself in a forest while still aboard the motor-cycle and despite having told the Appellant that she was to alight at a petrol station, Counsel urged that the trial Court did not consider that the Appellant was not the rider of the motor-cycle, and should not have believed this evidence unless it was being invited to find that there was collusion between the rider and the Appellant. He faulted the Prosecution for not interrogating this scenario. Regarding the complaint's testimony that she was drunk and that she was not wearing panties, Counsel urged that based on these facts, the complainant could not have known for sure who committed the act of penetration, if at all, and thus, according to Counsel, the identity of the perpetrator of the offence was not proven, as the rider, amongst other people mentioned, may have been involved, if at all it did happen. Counsel also submitted that the conduct, and character of the complainant, as demonstrated by her failure to put on a panty, her drunkenness, and the circumstances surrounding the incident are a pointer of mannerless, reckless and irresponsible person and signifies the complainant to be a lady of questionable moral character capable of framing a person for the offence. According to Counsel, it is unfortunate that in the circumstances, the Appellant, a young innocent man, has fallen victim to the complainant's trap and now glares at a bleak and uncertain future if this Court does not remedy the situation. He urged the Court to look at the evidence bearing in mind the age, circumstances, conduct and character of the accused so that an innocent man's character is not cut short by the evil character of one person of reckless mannerisms.

16. He urged the Court to take into account the 1769 doctrine ascribed to William Blackstone that ..."it is better that 10 guilty persons escape than that 1 innocent suffer (innocent person convicted)", and also, the Roman law that "it is better to let the crime of a guilty person go unpunished than to condemn the innocent". He also pointed out that there were several witnesses lined up, but who never testified, and also that there were several people adversely mentioned who could possibly have committed the offence, if at all, but who were neither interrogated, nor any effort made to bring them before Court. In his view, this casts doubt on the fairness and objectivity of the investigation and subsequent prosecution. On the issue of lack of consent for the sexual act and also identification of the perpetrator, Counsel submitted that the complainant, having admitted to have been drunk, she cannot recollect events of the date, hence her testimony is also vague and opaque as she was not in her proper senses at the time of the alleged offence. On the issue of identity, he reiterated that no medical examination was conducted on the Appellant to prove his link, if any, to the offence. He also urged that the Court disregarded the defense of alibi advanced by the Appellant. Regarding the sentence of 10 years imprisonment, he submitted that the trial Court ought to have considered that long incarceration would ruin the Appellant's future and shelve his dreams considering his youthful

age, and to thus consider the provisions of Section 333(2) of the Criminal Procedure Code given that he is a first offender, if at all.

Respondent's Submissions

17. Prosecution Counsel, on his part, regarding "penetration", submitted that it was proved beyond reasonable doubt as the complainant testified that the Appellant pulled her from the motor-cycle, strangled her and then raped her, and this evidence was corroborated by the evidence of PW3, the Clinical Officer, who testified that he found evidence of hand strangulation marks on the complainant's throat, and that her in the complainant's genitals, her labia majora and labia minora had bruises, and the clitoris was inflamed. On the issue of "consent", she submitted that the Prosecution proved that the Appellant strangled her and proceeded to rape her. On "identification", she pointed out the complainant's testimony that the Appellant was not a stranger to the complainant as they used to be schoolmates with the Appellant who was two classes ahead of her. She cited the complainant's testimony that she met the Appellant at around 8:00 pm, where they were watching football together, and they left the club at around 10:30 pm. Counsel submitted that there was therefore sufficient time for the complainant to identify the Appellant. According to her, the fact that the complainant had taken alcohol did not interfere with her ability to identify the Appellant, and urged that the complainant gave a detailed account of what happened to her and the injuries she sustained, which injuries were corroborated by PW3 and the medical evidence.

18. Regarding alleged contradictions or inconsistencies in witness' testimonies, Counsel urged that none was so material as to create doubt as to whether the Appellant committed the offence. She cited the case of John Nyaga Njukl & 4 others Republic [2002] KECA 288 (KLR). According to Counsel therefore, all the ingredients of the offence of rape were proved and corroborated. On the alleged failure to call some witnesses, Counsel submitted that the Prosecution is not obligated to call any particular number of witnesses so long as the evidence of those called, when taken together, is sufficient to prove the case, as determination of the number of witnesses to be called is at the Prosecution's discretion, and the Court will not interfere unless there is evidence of an oblique motive. She cited Section 143 of the *Evidence Act*, also the case of Thomas Mwambu Wenyi v Republic [2017] KECA 756 (KLR). On the issue of Section 333(2) of the Criminal Procedure Code, Counsel conceded and submitted that the Respondent is not opposed to the prayer that the time spent in pre-trial custody be factored in computation of the sentence since the same is a requirement of the law. She conceded that the Appellant took plea on 27/12/2023 and was released on bond on 26/03/2024, thus this period of 3 months should be deducted from the sentence of 10 years.

Determination

19. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32).

20. The issues for determination in this appeal can be summarized as follows:

    a. Whether the charge of rape was proved beyond reasonable doubt.

    b. Whether the sentence of 10 years imprisonment was justified.

21. The definition of rape is set out in Section 3(1) of the *Sexual Offences Act* 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."

22. The main ingredients of the offence of rape are therefore "intentional" and "unlawful" penetration of the genital organ of one person by another, coupled with the absence of consent. This was restated by the Court of Appeal in the case of Republic vs. Oyier [1985] KLR 353 in the following terms:

> " The learned magistrate had the correct appreciation of the mens rea in rape. It is primarily an intention and not state of mind. Thus the mental element is to have intercourse without consent, or not caring whether the woman consented or not: DPP v Morgan (1975) 61 Cr Appl. R 136 HL The prosecution must prove either that the complainant physically resisted, or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist; Archbold Criminal Pleading Evidence and Practice 40th Edn pp 1411 – 1412 paragraph 2881 and R v Harwood K (1966) 50 CR App R 56. So if a woman yields through fear of death or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."

23. In this case, the complainant testified that the Appellant took her to a forest and raped her. There were no other witnesses to the alleged act. Section 124 of the *Evidence Act* therefore comes into play. In respect to the evidence of a single witness, the Section provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

24. Regarding "penetration", Section 2(1) of the *Sexual Offences Act* defines it as follows:

> " the partial or complete insertion of the genital organs of a person into the genital organ of another person."

25. In the case of Mark Oiruri Mose v R [2013] eKLR, the Court of Appeal stated that:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

26. In this case, the Clinical Officer stated that the complainant's injuries were categorized as grievous harm, that on examination, the complainant was found to have strangle marks at the throat, in her

genitalia, her labia majora and minora had bruises and the clitoris was inflamed. According to him therefore, there was evidence of recent penetration and he produced the Post Rape Care Form and P3 Form. Although he also stated that the complainant visited the facility 72 hours after the alleged incident and that laboratory results did not reveal spermatozoa, his opinion that there was recent possession remained uncontroverted, and I find the same cogent and believable. I do not therefore find any fault in the trial Magistrate's findings that penetration was proved.

27. On "identification", the complainant testified that the Appellant was not a stranger to her as they used to be schoolmates, with the Appellant being two classes ahead of her. The complainant then stated that she met the Appellant at around 8:00 pm, as they were watching football at a bar, and they left together at around 10:30 pm and boarded a boda boda motor-cycle, the Appellant to alight at a petrol station to go to her home. PW2 corroborated the fact that indeed, the complainant and the Appellant were together at the bar at the period of time alleged by the complainant, and that they left together. PW2 stated that even escorted them to the roadside to look for a boda boda motor-cycle. I therefore agree with the Prosecution Counsel that that the complainant had sufficient time to identify the Appellant. Although the complainant agreed that she was drunk and that she fell asleep while onboard the motor-cycle before the assault on her happened, there is no evidence that such state of drunkenness interfered with her ability to identify the complainant.

28. Under the above circumstances, I do not find any grounds to depart from the trial Court's findings that the complainant's identification of the Appellants was credible. I thus agree that this was a case of "recognition" rather than identification of a stranger, which evidence is clearly more reliable and believable in "identification". In the case of Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR, the Court of Appeal guided as follows:

> "..... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).
>
> We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him.
>
> We are satisfied that there was no mistake as to the identity of the three appellants and they were properly found guilty of the offence with which they were charged in count 1."

29. In light of the foregoing, I do not find any fault on the part of the trial Magistrate in finding that the Appellant had been positively identified. This ground of Appeal therefore fails.

30. On whether the incident of rape actually happened, the complainant testified that she had told the Appellant to let her alight at a petrol station but, instead, the Appellant seemingly "engineered" the diversion of the motor-cycle to the forest. As aforesaid, the complainant could not clearly explain the issue of the supposed "diversion" of the motor-cycle as she stated that she fell asleep onboard the motor-cycle. She testified that when the motor-cycle reached a forest, the Appellant pulled her off the motor-

cycle, and in the struggle, the motor-cycle rider left but left the motor-cycle at the scene. According to the complainant, the Appellant strangled her and then proceeded to rape her. She testified that she tried to fight back and screamed, then she saw the rider and one other person approaching, and in panic, she ran away. In cross-examination she stated that the rider was arrested and is the one who pointed out the Appellant's whereabouts before being released, and that while the incident occurred on 17/12/2023, the Appellant was arrested on 22/12/2023. It is not clear whether the rider was part of the plan to assault the Appellant as it again it appears that it is he is the one went to seek

31. It is not lost on this Court that the complainant was the only witness to the alleged commission of the incident. What was before the trial Court could therefore be categorized as "single witness evidence". The Court of Appeal tackled the issue of "single witness evidence" in the case of Kiilu Vs Republic (2005) 1 KLR 174, in which it quoted the following statement made in the earlier case of Abdalla bin Wendo and Another v. R [1953], 20 EACA.166:

> " subject to certain well-known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error." ....."

32. Further, the Court of Appeal in the case of Rajab Iddi Mubarak v Repulic [2018] eKLR, while analyzing the ratio decidendi in its earlier case of Maitanyi Vs Republic (1986) KLR 198, stated as follows:

> " 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
>
> 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.
>
> 3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made."

33. I may also state that, the proviso to Section 124 of the *Evidence Act* earlier referred to, expressly permits a trial Court, in sexual offence cases, where appropriate, to convict on the evidence of a sole witness without the need for corroboration, where such witness is the victim of the sexual offence. In this case, the trial Magistrate believed the complainants' evidence and there is nothing to demonstrate that the trial Magistrate failed to warn herself of the danger of relying upon a single witness before reaching her decision. For this, she cannot be faulted.

34. The Appellant's defence was also clearly a general denial which did nothing to shake the Prosecution evidence. That he was with the complainant that night he did not expressly deny. It was clear that he was being economical with the truth and evidently went to great lengths to withhold crucial information on

what exactly transpired. Of course, he was fully within his rights to withhold information as he did not bear any burden of proof nor was he compelled to give self-incriminating evidence. Again, as he gave unsworn testimony, he was not cross-examined and again, this was within his rights. However, since his liberty was at stake and if convicted, he was facing a long time in jail, I believe that the Appellant, if indeed he had any explanation or evidence capable of exonerating him, would not have hesitated to disclose it. That he presented none waters down his claim that the charges were fabricated. In any case, he gave no theory or motive why all the witnesses whom he did not allege had any grudge against him, would all gang up to implicate him in such a heinous offence. Defence Counsel's submission that the conduct, and character of the complainant, as demonstrated by her failure to put on a panty, and her drunkenness, are a pointer of mannerless, reckless and irresponsible person and signifies the complainant to be a lady of questionable moral character capable of framing a person for the offence. I do not share in the wisdom or lack thereof, in this submission and the less I comment on it the better.

35. Counsel also faulted the police for failing to pursue the gang-rape angle that had featured and submitted that the motor-cycle rider might have been the perpetrator, and not the Appellant. In his view, the police were shielding the rider to implicate the Appellant. It is indeed true that according to the P3 Report which PW3 produced, the information given is that the complainant reported a case of gang-rape by 2 people. However, in cross-examination, the complainant denied that the rider is the one who raped her, nor that it was a case of gang-rape. Under these circumstances, and in the absence of any contrary evidence, I do not find that the lack of information on what happened to the gang-rape angle is sufficient, by itself, to vitiate the conviction. I also take judicial notice of the fact that Part 1 of P3 Forms, just like written statements of witnesses, is ordinarily written down by police officers based on narratives and information given, as they understand it, by complainants or the witnesses. It is therefore not uncommon for these documents to end up containing inaccurate details. To therefore rely solely on these documents without reading them together with other circumstances and evidence on record will be turn to turn a blind eye to the reality on the ground.

36. Regarding alleged contradictions or inconsistencies in the witness' testimonies, the Court of Appeal, in the case of John Nyaga Njukl & 4 others Republic [2002] KECA 288 (KLR), guided as follows:

> "..... In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

37. Like the Judges of the Court of Appeal above, I, too, am satisfied that the discrepancies in the evidence in this matter are of a minor nature considering the facts and circumstances of the case looked as a whole. In my view, none was so material as to create doubt as to whether the Appellant committed the offence

38. On the claim that the Prosecution failed to call crucial witnesses point, the East African Court of Appeal, in the case of Bukenya & Others vs Uganda [1972] E.A.549 held that the Prosecution must make available all witnesses necessary to establish the truth even though their evidence may be inconsistent, that the Prosecution has the right and the duty to call any person whose evidence appears essential to the just decision of the case and that where the evidence called is not, or is barely adequate, the Court may infer that the evidence of uncalled witness would have tended to be adverse

to the prosecution. It is therefore true that the failure by the Prosecution to call critical witnesses may, in appropriate cases, entitle the Court to make an adverse finding against the Prosecution case. In this case, I agree that the rider of the motor-cycle was a person of interest whose evidence might have been important but who was not called as a witness and also, no explanation was given for this omission. However, it is also true that the Prosecution is not obligated to call any particular number of witnesses so long as the evidence of those called, when taken together, is sufficient to prove the case. Determination of the number of witnesses is therefore at the Prosecution's discretion, and the Court will not interfere unless there is evidence of an oblique motive.

39. The above is also affirmed in Section 143 of the *Evidence Act*, which provides that:

> " No particular number of witnesses shall, in the absence of any provisions of law to the contrary be required for the proof of any fact."

40. In the same Bukenya case (supra), and reiterated in the case of Keter v Republic [2007] 1 EA 135, the Court was also categorical that the Prosecution "is not expected to call a superfluity of witnesses" and that adverse inference will not be made where the evidence tendered is sufficient to prove the particular matter in issue or the entire case. Since in my re-evaluation and analysis of the evidence in this case, I have reached the finding that the evidence presented was adequate on its own, I find that the omission or failure to call other potential witnesses is incapable of overturning the conviction.

41. For the above reasons, I find no grounds to fault the trial Magistrate for finding that the Prosecution proved all the ingredients of the offence of rape beyond any reasonable doubt.

42. Regarding the sentence of 10 years imprisonment, upon conviction for the offence of rape, Section 3(3) of the *Sexual Offences Act* provides as follows:

> " 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."

43. In view of the above, it is clear that the sentence imposed by the trial Court, although the minimum prescribed, was within the law. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should now be discouraged and that Courts should retain the discretion to depart from such sentences. (see the case of Francis Karioko Muruatetu and Another vs Republic [2017] eKLR)

44. On the strength of the Murautetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum sentences imposed on convicts for different offences other than murder, including for sexual offences and robbery with violence. However, by the clarification made by the same Supreme Court in its subsequent directions given in Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Court made it clear that Muruatetu only applies to murder cases, and not to any other type of case, not even sexual offences. The Supreme Court reiterated and restated these directions in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment).

45. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh. In view thereof, I cite Majanja J, in quoting the case of Francis

Karioko Muruatetu & Another v Republic [2017] eKLR) in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, in which he stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ....."

46. The Court in the Muruatetu Case also guided that, in sentencing, the following mitigating factors would be applicable;

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender; and

(h) any other factor that the Court considers relevant.

47. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> "With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....."

48. Applying the above principles to the facts and circumstances of this case, I have considered that the offence of rape is a serious one, and I agree that the Appellant thus merited a stiff punishment. He was also given the opportunity to mitigate, which he did by pleading that he was a 1st offender, a student, and that he had a young family. It was therefore upon the trial Court to impose a sentence that is proportionate to the offence committed. Considering the horror that the victim went through, she will definitely be traumatized for a long time and will no doubt bear the scars of the assault for the rest of her life. The Appellant is also not remorseful as he continues to deny committing the offence despite the overwhelming evidence against him. Considering the above circumstances, I do not find the sentence of 10 years imprisonment to be excessive or unjustified.

49. On the issue of Section 333(2) of the Criminal Procedure Code, as aforesaid, the same is conceded. The time spent by the Appellant in pre-trial custody ought to have therefore been taken into account by the trial Court in computation of the sentence as required by the law. Indeed, this has been restated in many cases, most notably, the Court of Appeal cases of Bethwel Wilson Kibor vs. Republic [2009] eKLR, and Ahmad Abolfathi Mohammed & Another vs Republic (2018) eKLR. The same is also reiterated in the Judiciary Sentencing Policy Guidelines.

Final Orders

50. The upshot of the foregoing is that this Appeal fails on both limbs of conviction and sentence.

51. Regarding sentence however, as stipulated under the proviso to Section 333(2) of the Criminal Procedure Code, the period spent by the Appellant in remand custody before he was released on bond, shall be deducted in computation of the prison sentence of 10 years. For avoidance of doubt, the subject period is between 27/12/2023, the date when the Appellant took plea, and 26/03/2024, the date when he was released on bond, a period of about 3 months.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF NOVEMBER 2025

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Present physically in Court

Ms. Mwangi for the State

Court Assistant: Brian Kimathi