



**Shikokoti v Republic (Criminal Appeal E089 of 2024)
[2025] KEHC 18930 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KEHC 18930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E089 OF 2024
AC BETT, J
DECEMBER 19, 2025**

BETWEEN

DENNIS SHIKOKOTI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgement by Hon. V. O. Amboko (SRM) in Kakamega
CM Criminal (Sexual Offence) Case No. 129 of 2021 dated 18th December 2023)*

JUDGMENT

Introduction

1. The Appellant herein was charged jointly with two (2) others not before this court with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. He was also charged with an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences among other charges.
2. He was tried, convicted, of the offence of gang rape and sentenced to fifteen (15) years' imprisonment.
3. Being dissatisfied with the conviction and sentence, he lodged an appeal herein dated 1st October 2024 and set out five (5) grounds of appeal as follows:-
 - a. That the trial court erred in law in not proving the ingredients of the offence in the instant case beyond a reasonable doubt.
 - b. That the trial court erred in law and fact in relying on fanciful and remote possibilities to convict the appellant.
 - c. That the trial court erred in law and in fact in not weighing the conflicting evidence in the prosecution's case that was inconsequential to the conviction.



- d. That the trial court erred in law and in fact in not appreciating the Appellant's cogent defence that overwhelmed the prosecution's case.
 - e. That others are to be adduced upon perusal of the court's records.
4. The appeal was canvassed by way of written submissions.

Evidence in Brief

5. PW1, the Complainant, testified that on 28th August 2021, two men claiming to be police officers went into her house and knocked the door. She stated that she was able to identify them as there was a solar lamp and that the Appellant slapped her, closed her mouth and raped her. They then threw her into the house. After 30 minutes, she called her son and later her husband, who summoned people to her aid. She stated that she later went to the police and recorded her statement, and later on identification parade was done in which she identified the suspect.
6. PW2 was a minor aged 13 years. After a voire dire examination, the court was satisfied that he was possessed of sufficient intelligence to testify and that he understood the meaning of an oath. He therefore gave sworn evidence. He was the Complainant's son and testified that on the material day, the Accused persons came to their home at 2.00 a.m. claiming to be police officers, and when PW1 refused to open, they broke the door. He stated that he came out of the room and saw Dennis, Liyayi and Brian, and that Dennis beat him and locked him inside a cupboard, where he heard Kevin's voice as they went to his mother's room. There, they took her to the sitting room and raped her.
7. He further recalled that he had a torch when he walked out of his bedroom to check who was breaking the door. He said that he saw Dennis (the Appellant) and Liyayi (the 1st Accused) and Liyayi who was not present in court.
8. He stated that the neighbours came and took his mother to hospital, and later they reported the incident to Khayega police station. When the identification parade was conducted, out of the 10 people, he was able to identify the three Accused persons.
9. PW3 was the Clinical Officer who produced the P3, PRC and lab test forms on behalf of his colleague. According to the P3 form, the Complainant went to the hospital on 28th August 2021 with difficulties walking. She claimed to have been raped, and, upon examination, it was confirmed that she had been sodomized. Upon conducting a vaginal swab, they confirmed the presence of red blood cells and spermatozoa. The P3 form was filed on 8th September 2021 at Kakamega General Hospital and confirmed that the Complainant had been raped.
10. The Appellant, stated that on the date of the incident, he was working as a watchman in Siaya and on 2/8/2021 found out that a woman had been raped in the area. He went to see his father the following day and at 2.00 p.m. he was told that he was mentioned as being involved in the offence, and he was arrested the next day and taken to Khayega police station.
11. He said that he had two witnesses who could not come since he had no money for their transport and closed his case.

Appellant's Submissions

12. In his submissions dated 10/2/2025, the Appellant submitted that the prosecution had failed to prove their case beyond a reasonable doubt.



13. On the first ground of identification, he cited the case of Daniel Kaberu vs. Republic (2021) eKLR. He argued that there was a contradiction by the prosecution's witnesses, such as PW4, who testified that the Accused was arrested on 1/9/2021, while the charge sheet indicated that the 2nd Accused was arrested on 30/08/2021.
14. He faulted the prosecution for not subjecting him to a DNA examination contrary to Section 36 (1) of the *Sexual Offences Act* to prove that he was among the persons who had gang raped the Complainant. He claimed that the trial court relied on the fanciful tales of the Complainant's son, PW2, who never saw his mother being raped.
15. He faulted PW2's evidence as he claimed that he had been locked in the cupboard by the said Appellant and could not have witnessed the incident.
16. The Appellant further faulted the identification parade, claiming that according to the witnesses, the parade was done on different dates being 1/9/2021 and 31/8/2021 and that the PW4 the officer who carried out the identification parades stated the 3rd Accused never went through the parade. He argued that out of the three suspects that were arrested, only Silas was able to be identified and that he was not subjected to an identification parade, questioning whether he had been positively identified
17. Concerning his defence, he submitted that the trial court failed to consider his alibi defence and asserted that he was unable to call his other two witnesses due to lack of transport.
18. He finally prayed that the court dismisses the evidence of the PW3, the Clinical Officer who had produced the P3 form, PRC form and lab test form on behalf of his colleague who when examining the Complainant was on medical internship and not an expert. He contended that documents authored by such a witness was inadmissible.
19. The Respondent did not file any submissions.

Analysis and Determination.

20. As this is the first appeal, the court will re-evaluate the evidence afresh with the aim of arriving at its independent conclusions while being minded to give allowance to the fact that the court neither saw nor heard the witnesses firsthand. See *Okeno v. Republic* [1972] EA 32.

Issues

21. From the grounds of appeal, the evidence adduced in the lower court, and the submissions, the broad issue for determination is, "whether the ingredients of gang rape were established beyond reasonable doubt".
22. 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 than fifteen years but which may be enhanced to imprisonment to life."
23. For the Prosecution to obtain a guilty verdict in the offence of gang rape, it needs to prove the following three elements:-
 - a. Commission of rape; Penetration as defined by section 2 of the *Sexual Offences Act* without consent thereof;



- b. 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.
 - c. Positive Identification of the perpetrator.
24. Accordingly, a person may not have engaged in the sexual act of rape but is guilty of gang rape if, with the common intention of committing the offence, he was in the company of another or others who commit the offence.
25. The question thus for this court to determine is whether all these elements were proved beyond reasonable doubt.

Whether the Prosecution was able to prove penetration

26. Penetration is defined under Section 2 of the Act as “...the partial or complete insertion of the genital organs of a person into the genital organ of another person.”
27. In the case of *Mark Oiruri Mose vs R (2013) KECA 67 (KLR)*, the Court of Appeal stated thus:-
- “...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 provided. 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.”
- Accordingly, it is not necessarily that medical evidence be availed to prove penetration. As long as there is evidence that there was even partial penetration only on the surface, penetration has been demonstrated for purposes of the *Sexual Offences Act*.
28. PW3, the Clinical Officer, confirmed that upon examination, PW1 had bleeding on her anal orifice, which confirmed that she had been sodomized. A vaginal swab revealed that there were red blood cells and spermatozoa which proved that PW1 was raped.
29. PW1 narrated how the Accused persons forcefully entered her house at night, gagged her and took turns in raping her. She stated that she was able to identify her attackers as there was a solar lamp.
30. The medical corroborated her claim that there was penetration. According to the Appellant, the absence of spermatozoa and the fact that he was not subjected to a DNA test proved there was no penetration or rape. Nevertheless, this is not a strict requirement for purposes of proof of penetration according to the case of *Mark Oiruri Mose vs R (supra)*.
31. The Appellant further claimed that the medical report produced by PW4 that being the P3, PRC and lab test forms were filled by one Christie Namatsi who he claimed was on internship and as such the report ought to be quashed for want of admissibility as the medical intern was not an expert and the documents she authored was not admissible.
32. Section 77 of the *Evidence Act* provides:-
- “(1) In criminal proceedings, any document purporting to be a report under the hand of a Government Analyst, Medical Practitioner or of any Ballistics Expert, Document Examiner or Geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.



- (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
- (3) When any report is so used, the court may, if it thinks fit, summon the Analyst, Ballistics Expert, Document Examiner, Medical Practitioner, or Geologist, as the case may be, and examine him as to the subject matter thereof.”

33. Under Section 33 (b) of the *Evidence Act*:

“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

When the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.”

34. In *Gathonjia Hiram v. Republic* [2014] KEHC 5112 (KLR), Emukule J (as he then was) held:-

- “23. Firstly, these were forms which were filled by a medical officer in the course and discharge of his professional duty (S. 33(a)). Secondly, the reports were made by a Medical Practitioner (77(1)), and under Section 77(2) the court is called upon to presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it. Thirdly the court has the discretion to summon such medical practitioner and examine him as to the subject matter.
24. Again it is clear to me unless the court deems it necessary (although it is always good practice to do so), failure to call and examine such medical practitioner as to his report is not fatal to the prosecution’s case as suggested by some authorities, and the appellant. That is the effect of the proviso to Section 124 of the *Evidence Act*.
25. But even if the medical evidence were excluded, (and there is no legitimate reason to do so), the evidence adduced by the prosecution of the circumstances of the offence are clear that it was committed by the Appellant.”[Emphasis added]

35. Concerning the Appellant’s contention that the maker of the medical report was not a medical expert, the record shows that PW3 clearly stated that he was a Clinical Officer and knew Christine Namatsi who was his colleague as he had done internship with her and worked with her and he was therefore familiar with her handwriting and work. There is nowhere where he stated that Christine Namatsi filled the forms while she was an intern. During cross-examination, the Appellant and his co-Accused did not challenge PW3’s evidence to that effect. However, even if the medical evidence was discounted, the court can still resort to Section 124 of the Law of *Evidence Act*.



36. Section 124 of the Law of *Evidence Act* provides that:-“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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 offence, 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.”

37. This position was fortified by the holding in the case of *Martin Nyongesa Wanyonyi v. Republic* [2015] KECA 607 (KLR), citing *Kassim Ali v. Republic* Criminal Appeal No 84 of 2005 (Mombasa) where the Court of Appeal stated that:-

“The absence of medical evidence to support the fact of rape is not decisive, as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence.”

38. The trial court found that there was overwhelming medical evidence and that of the victim proving penetration. The trial court is the one that saw the witness while testifying and believed her testimony. I agree with the trial court that the prosecution proved that there was penetration of the vagina and anus of the victim.

Whether the Appellant was positively identified as having been among the assailants.

39. According to the Appellant, there was a contradiction on when the Accused persons were arrested, as well as the evidence of PW2.

40. In the case of *John Kimotho Tumbo vs Republic* (2014) KECA 458 (KLR), the Court of Appeal held that:-

“...In the case of *Maitanyi v Republic* 1986 KLR 198, this Court stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect.”

41. I have duly warned myself of the need for special caution in accepting the evidence of identification where the same occurred under unfavourable circumstances, which in this case was at night.

42. I have carefully reviewed the evidence of the Complainant that she was able to positively identify the assailants since there was a solar light, and further, the testimony of PW2, who shone a torch directly at the assailants.

43. The Complainant was able to note that the Appellant was in front and slapped her and closed her mouth and that he was followed by the first accused. The assailants were in close proximity to her as they committed the offence. She was able to pinpoint that she saw the Appellant and the first Accused only and heard the voice of the third Accused. The Appellant did not put it to her that he was not among the assailants. As for PW2, he said that he knew the Appellant and that he was the one who pushed him into his room and locked him inside. I am satisfied that there was sufficient time for PW2 to recognize the Appellant through his torch as he used it when going to check who had broken into their house. It was also the witnesses’ testimony that they knew the assailants. More specifically, PW2 said that the Appellant did not live far from them and he knew him as a motorbike repairer.



44. Regarding the identification parade, PW4, an Inspector of Police testified that the Complainant and PW2 were able to identify the Appellant and the first Accused in an identification parade which was carried out in a procedural manner. Furthermore, PW4 testified that the Complainant's initial report was that she was raped by persons some of whom she knew and others she did not know and that she identified the first Accused and the Appellant by name as the people who entered her bedroom. This evidence was in consonance with the evidence of the Complainant and her son.
45. In respect to the contention that DNA sampling should have been done for analysis, it is well settled that DNA is not necessary to prove a sexual offence. See *Fappyton Mutuku Nguu v Republic* [2014] KECA 570(KLR).
46. From my analysis, it is my finding that the Appellant was positively identified and placed at the scene of the offence. It is also my finding that the Appellant acted in concert with his co-accused with whom they had a common intention to commit the offence and did rape the Complainant.

Whether there were material contradictions and inconsistencies in the Prosecution's case

47. The Appellant claims that there was a contradiction in the prosecution witnesses' testimony, such as the time of the arrest and when the identification parade was conducted. He claimed that, according to PW4, the arrest occurred on 1/9/2021, while in the charge sheet the date of arrest was indicated as 13/9/2021. I have reviewed the initial charge sheet and PW4's evidence and established that the Appellant was arrested on 1/9/2021 then charged in Kakamega Criminal Case No. 130 of 2021 on 2/9/2021 before it was later consolidated with other files. The consolidated charge sheet indicates the date of arrest as 1/9/2021 and the date of appearance in court is 23/9/2021. There is no inconsistency whatsoever regarding the dates as they appear in the charge sheets.
48. The Appellant questioned how PW2, who was locked inside a cupboard, was able to break free and jump the wall to access his mother's bedroom. However, the Appellant did not challenge the witness on this averment during cross-examination. Moreover, it is common knowledge that cupboards ordinarily do not have sturdy locks. The trial court, which observed the witness as he gave evidence and I have no reason to discredit its findings in that regard.
49. On the related issue, the Appellant argued that the prosecution evidence had discrepancies. In *Richard Munene vs Republic* (2018) KECA 186 (KLR), the Court of Appeal stated as follows concerning contradictions or inconsistency in the evidence of prosecution witnesses:-

“...contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

50. It has been held that no two witnesses' recollection of events can be the same. Certainly, a gang rape victim who underwent the trauma of vaginal and anal rape by multiple persons may not be psychologically ready to recount the painful ordeal to the letter. From the evidence adduced, I find minor discrepancies and contradictions in the evidence tendered by the Prosecution. I have considered the Appellant's argument and the trial court's analysis of the issues, and it is my view that any



contradictions or inconsistencies in the Prosecution’s case are attributable to human nature and were not fundamental as to cause prejudice to the Appellant. See Philip Nzaka Watu v Republic [2016] KECA 696 (KLR).

51. The final issue for determination is whether the defence of alibi was viable. The Appellant argues that the trial court failed to consider his defence that at the time of the offence, he was a watchman in Siaya, and further, he had two witnesses to support his claim.

52. In *Erick Otieno Meda v Republic* [2019] KEHC 4959 (KLR), the Court of Appeal stated that:-

“In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused’s alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt... The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:

- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
- (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
- (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mhlongu -v- S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014).”

53. From the above case, it is clear that the alibi must be so cogent that any court addressing its mind to it is left with no doubt but to accept it as the truth.

54. The Appellant did not raise his alibi defence from the beginning of the trial. He never put it to the two identifying witnesses that he was not present at the scene on the material date. He also never presented any evidence to support his claim that he was not in town on the day of the ordeal nor made any effort to ensure that the persons who would validate his case made it to court to support him.

55. It is my considered view that the alibi is highly unlikely and does not cast doubt on the Prosecution’s case. As held by the trial court, the alibi did not dislodge the Prosecution’s case.

56. Having analyzed and re-evaluated the evidence on record, it is my finding that the Prosecution was able to prove its case beyond reasonable doubt and that the trial court was right in sentencing and convicting the Appellant accordingly.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 19TH DAY OF DECEMBER 2025.

A. C. BETT

JUDGE

In the presence of:

Appellant in Kisumu Maximum Prison



Mr. Shaka holding brief for Mukavale K. for the Appellant

Ms. Chala for the Respondent/State

Court Assistant: Polycap

