



REPUBLIC OF KENYA



KENYA LAW
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**Muthoni v Republic (Criminal Appeal E032 of 2024)
[2026] KEHC 42 (KLR) (16 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 42 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL E032 OF 2024
BM MUSYOKI, J
JANUARY 16, 2026**

BETWEEN

DAVID MURIMI MUTHONI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from conviction and sentence in the Chief Magistrate's
Court at Thika criminal case number 1115 of 2020 dated 25-07-2023)*

JUDGMENT

1. The appellant and one James Karanja Wambui faced two counts in the lower court as follows;

Count 1 against both- Robbery with violence contrary to Section 296(2) of the Penal Code where the particulars were that on the 14th day of May 2020 at [Particulars Withheld] in Thika West Sub County within Kiambu County being armed with a dangerous weapon namely a knife, robbed FWM of her mobile Tecno Camon II valued at 16,000/= and cash 11,200/= and at a time of such robbery threatened to use actual violence to the said FWM by threatening to stab her with a knife.

Count 2 against the appellant only- Rape contrary to Section 3(1)(a)(b)(3) of the [Sexual Offences Act](#) No 3 of 2006. The particulars were that on 14th day of May 2020 at [Particulars Withheld] in Thika West Sub-County within Kiambu County intentionally and unlawfully caused his penis to penetrate the vagina of FWM without her consent.
2. After hearing four prosecution witnesses and the appellant and his co-accused, the trial court returned a verdict of guilty and sentenced the appellant and his co-accused to thirty years in jail in the first count and the appellant to ten years in prison in the second count. Being dissatisfied with the conviction and sentence, the appellant filed this appeal setting out the following grounds;



1. That the learned Magistrate erred in law and fact by failing to re-evaluate the whole of evidence of the prosecution case as incumbent upon him to find that the ingredients forming the case in question was not established.
 2. That the learned Magistrate erred in law and fact by failing to observe that the prosecution's case was open to ambivalent since the trial was unfair in contravention of Article 25(c) of *the Constitution*.
 3. That the Magistrate erred in law by failing to give the appellant's defence and submissions adequate consideration, consequently acting inconsistently with Article 50 of the Kenyan Constitution.
 4. That the learned trial Magistrate erred in matters of law and facts by failing to find that the essential prosecution witnesses and exhibits, necessary to prove basis facts were not produced.
3. The appellant's co-accused in the first count had filed a separate appeal number E008 of 2025 which was consolidated with this appeal but withdrew his appeal after the prosecution served him with a notice of enhancement of sentence. The appellant elected to proceed with his appeal despite service of the said notice.
 4. The appellant has through his submissions dated 1-04-2025 sought to amend his petition of appeal under Section 350(2)(v) of the Criminal Procedure Code. The said Section provides that;

'Notice in writing of an application for leave to amend a petition of appeal shall be given to the Registrar of the High Court and to the Attorney-General not less than three clear days, or such shorter period as the High Court may in any particular case allow, before the application is made; and an application for leave to amend a petition of appeal shall be made either at the hearing of the appeal or, if made previously, by way of motion in open court.'
 5. The appellant has not given the grounds upon which he sought to amend the petition and in my view, such a prayer cannot be made through final submissions as the appellant has sought to do. The appellant appeared before the court on several occasions during pre-trials of this appeal and never sought to amend his petition and I consider it unprocedural and incompetent for such amendments to be sought through final submission as the appellant has done. I will consider this appeal based on the grounds as stated above and I see no prejudice in me doing so as the submissions by the appellant properly fall within the stated grounds.
 6. When the parties appeared before me on 10-09-2025, Miss Chebet for the respondent told me that they had filed their submissions together with the notice of enhancement of sentence. Although the appellant confirmed having been served with the respondent's submissions and actually filed a rebuttal to the said submissions, the court's record does not have these submissions. The case tracking system shows that the only document filed by the respondent in this appeal is the notice of enhancement of sentence filed on 31-03-2025.
 7. This is a first appeal and in disposing the same, I will proceed as required by the long-established position that in a first appeal, the appellate court must re-examine and re-evaluate the evidence produced before the trial court as if it were conducting a re-hearing and come to its own independent conclusion but bear in mind that it did not take the evidence of the witnesses and did not have the opportunity to observe their demeanour and give due allowance for that.



The prosecution's case

8. The complainant was the first prosecution witness. She told the court that on 14-05-2020, she was coming from Thika police station to bail out a friend and while at Thika arcade, she stopped a motor cycle and agreed with the crew to take her to cravers at 50/-. While on the way, they changed the route towards kassmart and the one seated behind held her throat and removed a knife as they went towards castle. They took her phone valued at Kshs 16,000.00, Kshs 11,200.00 in cash and demanded her Mpesa pin and one of them sent money to himself. The other one was raping her after which they left her at the scene. The complainant added that the assailants removed her trousers and inner pants. She added that the rider did not rape her as he was not interested. After they left, she went to a shop where a woman gave her phone with which she called the guy she had bailed out upon which she was taken to Thika level 5 hospital.
9. The complainant told the court further that the attack was at 7.30 pm and there was security light. It is stated that they negotiated for three minutes and none of the two men had a helmet and she clearly saw them. At the scene of the rape, there was no light. She added that, she went to Safaricom the following day and got her Mpesa statement and discovered that the Kshs 1,000.00 had been sent from her account to 07XXXXXXX78 owned by Alice Nduta. She took the statement to Thika police station.
10. According to the complainant, she was called by the police after the men were arrested and an identification parade which had about ten men was conducted and she was able to identify the two men. She was firm that it was the appellant who raped her and that his co-accused did not. She added that the appellant had a mark on the hand. She produced the mpesa statement as an exhibit.
11. In cross-examination, she insisted that the appellant raped her and that there was security light at the place they negotiated fare. She swore that she would not forget their voices and faces till her death. She admitted that the accused persons' names did not appear in the Mpesa statement and that the knife and the phone were never recovered.
12. Naomi Towett was the 2nd witness. She was a clinical officer at Kiandutu health centre. She stated that on 15-05-2020, she examined the complainant who had been sent from Thika police station. She stated that the external genitalia were normal with no whitish discharge and the hymen was broken. The complainant had some infection for which she was treated but she had no spermatozoa. She produced the lab tests as an exhibit.
13. PW3 was Inspector of Police, Wycliff Nyakwara attached to Thika police station in charge of traffic. At the time of the incident, he was in charge of Kiandutu police post. He told the court that he received a call from a community policing member who informed him of a rape case which had been carried out on [Particulars Withheld]. According to this witness, this was the 3rd incident in the same area. The incident had been reported to the station and the victim had been taken to hospital.
14. The witness looked for the complainant who told her that her line had been used to send money to 07XXXXXXX78 upon which he went on to conduct a search of the owner from the registrar of persons. He tried to call the number but it was off and opted to look for the number which most frequently communicated with it. He identified 07XXXXXXX0 registered under James Karanja and another 07XXXXXXX3 registered under Esther Wanjiru which numbers he tracked. After establishing that Esther was from Kiandutu, he called the police and community policing members and after further investigations, Esther was arrested and upon dialing the number for Alice Nduta they discovered that she had saved him as Lambalolo who she said was her boyfriend.



15. With the help of Esther, they arrested James Karanja at Kiganjo who upon interrogation admitted that the incident took place but stated that he did not commit the act but his colleague did. James took them to David Murimi Muthoni who first denied committing the offence but upon finding his colleague in the police vehicle, he changed and admitted having committed the offence. The witness added that he called the complainant to Thika police station and that the two suspects were identified by the victim at the police station.
16. In cross-examination, the witness stated that it was not the complainant who led them to the appellant. He also admitted that they did not recover any exhibits from the accused persons but they were holding the motor bike which was used to ferry the complainant. None of the numbers he used to trace the accused persons belonged to any of them. He arrested them on 26-05-2020. He could not tell the type of phone the complainant had at the time of the incident. He added that upon investigations, he found that the 2nd accused was the one using Alice Nduta's phone. He admitted that Esther and the community policing member who called him did not record statements and they were not witnesses in the case. He stated further that the 2nd accused had disposed off the sim card by the time they arrested him.
17. The 4th witness was corporal Lawrence Olwal who was the investigating officer and who stated that on 28-05-2020, he was at the crime office at Thika police station when he was allocated the case while the two suspects were in custody. He issued the complainant with a P3 form which was filed together with a PRC form. He stated that the assailants transferred Kshs 1,000.00 to Alice Nduta who was the 2nd accused's wife and also stole Kshs 10,000.00 He added that he organised an identification parade and the two accused persons were positively identified. He alleged that after interrogations, the accused persons admitted committing the offence.
18. In cross-examination, he could not recall the accused persons being assaulted by the police. He also admitted that the number that received the money was not registered to any of the accused persons. He did not have the call data or the receipt the complainant used to purchase the phone. He alleged that Alice Nduta was the 2nd accused's wife and she was at the time pregnant. He added that the identification parade was on 29-05-2020 and had 12 suspects and that the parade officer was not indicated in the charge sheet as a witness.
19. The witness added that in the first report, the complainant did not describe the physique of her attackers and that he went to the scene but no recovery was made there. He stated further that they could not force a spouse to give evidence against the other. He also stated that he explained to the accused persons the purpose of the identification parade but they refused to sign. He did not see anything wrong with the parade. He clarified in re-examination that the parade was on 25-09-202 and not 29-05-2020.

The defence case

20. Upon being placed on their defence, the appellant chose to give an unsworn statement. I do not find it relevant to reproduce the evidence of the appellant's co-accused as he has since withdrawn his appeal and the same has no bearing on the outcome of this appeal.
21. The appellant stated that on 26-05-2020, he was doing his kazi mtaani in Makongeni Kisii estate when a young man who used to sell bhang to him came. He went aside to smoke his bhang and as he was smoking, the police came and arrested and ransacked him, took his two rolls of bhang and Kshs 9,600.00. After about 500 metres, they arrested two other people at a wine and spirit shop and later other men and a woman. They were taken to Kiandutu police station and placed in cells and after 30 minutes, the two people from the wines and spirits shop were released after giving a bribe. He added



that all the other people were released leaving him alone in the cells. He added that he was asked where he used to buy bhang and who was his employer and one of the officers started beating him but was stopped by the OCS and he swore to teach him a lesson.

22. The appellant added that he was later taken to Thika police station and although the police at the report desk refused to accept him, the OCS of Kiandutu insisted that he be placed in cells. He stated that he could not recognise anyone in the cells and on 29-05-2020, he was taken to court after his fingerprints were taken. He alleged that he saw his co-accused during the date of plea taking. The appellant added that during the period he was alleged to have committed the offence, he would be home before 7.00 pm as it was during the covid-19 curfew.

Analysis and determination

23. I have gone through the lower court records, proceedings and judgment as well as the petition of appeal and the submissions of the appellant dated 1-04-2025 and rebuttal dated 8-10-2025. I note from the rebuttal submissions that the appellant has elected to withdraw his appeal on sentence noting the notice of enhancement of sentence served upon him. This judgment is therefore on the conviction only.
24. The appellant has fronted his case on identification parade, evidence of rape and lack of exhibits as well as failure by the prosecution to call some pertinent witnesses. I will start with the issue of identification parade.
25. The appellant has submitted that the identification parade was not properly conducted because there was nondescription of the assailants before the same was conducted. He has also argued that there is contradiction on the date the parade was conducted and as such the same is a nullity. I have gone through the proceedings and I discern that the appellant did not challenge the identification parade or procedure in the lower court. It is always desirable that such issues be raised during the trial so that the prosecution gets a chance to respond to the objections the accused person raises. Raising such an issue for the first time on appeal amounts to ambush which is procedurally and substantially wrong. However, this be a pertinent and central issue in this matter, I will proceed to look into it.
26. There is no dispute that the identification parade was conducted. What the appellant disputes is that the same was not properly done. I have looked at the identification parade form which was produced as prosecution exhibit two. The appellant did not object to the production of the form or ask any questions in relation to the correctness of the form or the contents therein.
27. The appellant has also argued that the complainant did not give description of the assailant to the investigating officer. The complainant did not know her attackers either by name or acquaintance and it would not be expected that she knew their names. The purpose of description of suspects at the earliest opportunity is to give the investigators leads towards search and identification of the suspects. In this case, the complainant gave the police officer her mpesa statement which had the number for Alice Nduta to which Kshs 1,000.00 was sent. This was lead enough to search and identify the persons who would later be arrested upon investigations. I do not see failure to give the description would be fatal to the prosecution's case.
28. The complainant testified that the parade had ten participants while the PW4 said that they were twelve. Either of this number satisfied the minimum required by the police standing orders. There is no much recording in the proceedings of the procedure used in conducting the parade and the court can only resort to what is contained in the form. In his evidence in chief, PW3 stated that the parade was conducted on 29-05-2020 but in re-examination he clarified that the same was done on 25-05-2020.



29. Having said the above, I have observed that the form has in the second page, 29-05-2020 as the date of the parade while the signed and stamped last page indicates 25-05-2020. PW3 and PW4 testified that the appellant was arrested on 26-05-2020. It is not possible that the parade was conducted before the appellant was arrested and I believe that there was no time for the same on 29-05-2020 because that is the date the appellant was arraigned. Page three of the form has cancellation which are not countersigned in respect of the statement of where the suspects were placed during the parade. Identification parade is a very crucial part of investigations and such defects as the one appearing in this exhibit must vitiate the process. I therefore hold that the said exhibit could not found a basis of identification.
30. What would be the effect of vitiating of the identification parade on the trial court's judgment on conviction of the appellant? I have not seen anything in the proceedings that would suggest that the appellant denied that the parade took place. I have also not seen anything in the judgment of the trial court that suggests that the Magistrate's mind or judgement was solely influenced by the process of identification parade in reaching the conclusion of guilty of the appellant. That issue was not before the trial court as it was not raised.
31. The complainant was categorical that she was able to see the two accused persons during the time of negotiation of the fare which took about three minutes as there was security light. The appellant has argued that the complainant was inconsistent on this in that she stated at one time that there was light but elsewhere that it was dark. What I gather from the testimony of the complainant is that there was sufficient light when she was negotiating the fare but where the rape incident occurred, there was darkness.
32. There was no indication that from the time the complainant boarded the motor cycle to the place of the incidence, the rider stopped and other persons boarded or joined the complainant and the two accused persons. The complainant stated that the 2nd accused person held her by the neck. She even maintained that she would recognize the both men's voices and the faces until the time she will die.
33. The complainant also remembered the features of the appellant by stating that he had a scar on his hand. The complainant identified the appellant at the dock and in my view, that is sufficient for the court to find that the complainant was able to identify her assailant notwithstanding that the process of parade was marred by irregularities. A mistake by the officers conducting identification parade in my view should not be a basis of an acquittal if all the other evidence available is sufficient to convince the court that the accused person committed the act he is accused of. In *Samuel Kilonzo Musau v Republic* (2014) KECA 372 (KLR), the Court of Appeal held that;
- 'As the Committee on Evidence of identification in Criminal Cases, 1976 (The Devlin Committee), Cmnd, 338 observed, the identification parade is not a scientific test and cannot safely be treated as one. Instead, it is merely the best practical method of achieving an identification without confrontation. The purpose of an identification parade, as explained in *Kinyanjui & 2 Others Vs Republic* (1989) KLR 60 "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion."
34. Having gone through the evidence of the witnesses in this matter, I am satisfied that there was cogent and strong evidence that the appellant was one of the assailants and dock identification would be sufficient to found a conviction even without taking into account the identification parade. I am in



finding so guided by the Court of Appeal judgment in *Moses Kinoti Nkoroi & 2 others v Republic* (2013) KECA 256 (KLR) where it held that;

‘However, this Court in *Muiruri & 2 other – v- R* {2002} KLR 274,277 at paragraphs 25-35 stated that not all dock identification is worthless. In the present case, upon our re-evaluation of evidence, we are satisfied that the absence of an identification parade did not prejudice the 2nd appellant. There is credible, cogent and reliable evidence from PW 6 as corroborated by PW 1 and PW 5 that identified the 2nd appellant. As was stated in *John Njagi Kadogo & 2 others – v- R*, {2006} eKLR, “a court might base conviction on the evidence of dock identification if it is satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto, the court warns itself of possible dangers of mistaken identity”.

35. The other issue the appellant has taken up is the ingredient of penetration. It is true that penetration is an ingredient of the offence of rape. Section 3(1) of the *Sexual Offences Act* provides that;

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.

36. According to the appellant, the medical evidence produced by the prosecution did not show lacerations or injuries or spermatozoa on or in the complainant’s genitalia. It is the position in law that presence of spermatozoa or injuries is not the only proof of rape. The complainant was an adult and she did not claim to have been a virgin before the incident. Spermatozoa can only be seen where the assailant ejaculates during the act. Ejaculation is not an ingredient of rape. I agree with the holding of Honourable Justice F. Gikonyo in *Daniel Kaberu v Republic* (2021) KEHC 9272 (KLR) thus;

‘The medical evidence did not find any evidence of spermatozoa in her genital organs. But, this is not a strict requirement for purposes of penetration. Accordingly, there was penetration.’

37. The law is that penetration is complete once the male sexual organ is inserted in the victim’s sexual organ including partial penetration. Section 2 of the *Sexual Offences Act* defines penetration as;

penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.’

38. In *Erick Onyango Ondeng’ v Republic* (2014) KECA 523 (KLR), it was held that;

‘We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence.’

39. As rightly observed by the trial court, I find the evidence of the complainant consistent and firm on how the incident occurred. There was no reason for the complainant to make allegations of rape on a person she had never met before. She positively identified the appellant as the one who raped her and actually remembered his physical features.



40. Section 124 of the *Evidence Act* allows the court to convict on testimony of the complainant only if it has reason to believe that she is telling the truth. The trial court had the opportunity to take the evidence of the witnesses and observe their demeanour and was best suited to make judgment on the truthfulness of the testimonies and unless there is proof of inconsistency or clear contradictions of material nature, this court would refrain from imputing that the complainant was telling lies.
41. The appellant has faulted the process of his arrest and submits that the same created a doubt as to his culpability. In the same breath, he alleges that the trial court used the evidence of the co-accused to convict him. Indeed, evidence of a co-accused is taken with a lot of caution and should not be a basis for a conviction.
42. However, going through the judgment of the trial court, I do not see anywhere it relied on the evidence of the appellant's co-accused. The appellant's argument is therefore a lame one and has no basis in this appeal. The appellant was convicted on the basis of identification and in my view, the court did not take into account the process of arrest save where it made reference to the effect that the 2nd accused's act of sending money to Alice Nduta sold him out. The appellant may have been arrested through assistance of his co-accused but I do not think that the same influenced the mind of the court in returning a verdict of guilty and it would also not influence this court.
43. The appellant argues that the prosecution's case was muddled by contradictions and inconsistencies. He alleges that the complainant was inconsistent in giving details of which hospital she went to or whether she was raped by the appellant or the both attackers. I do not find the contradictions on the hospital material neither have I seen anywhere in the proceedings where she alleged to have been raped by both. The proceedings are clear in evidence in chief and cross-examination of the complainant that she was raped by the appellant only. The appellant argues that if the complainant was raped, then it must have been by the 2nd accused because she had the same infection as the 2nd accused had claimed to have. This is a pedestrian argument. There was no evidence that the 2nd accused had the same infections as the complainant neither were the infections detected in her discharge said to have been related to the rape.
44. It has also been argued by the appellant that essential exhibits were not produced in evidence. He has submitted that the stolen phone and the attack weapon were not recovered from him and therefore the doctrine of recent possession could not be applicable against him. It is my considered opinion that failure to recover the crime weapon and the stolen phone was not fatal to the prosecution's case. The doctrine of recent possession is applicable where the court is called upon to decide a matter on the basis of circumstantial evidence. The evidence produced in this matter was direct and came from the victim and the connections discovered in the process investigations.

The obvious and inevitable conclusion from the above is that this appeal lacks merits and the same is disallowed.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY 2026.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of the appellant in person and Miss Torosi for the respondent.

