DWW v Republic (Criminal Appeal E014 of 2024)
[2026] KEHC 245 (KLR) (20 January 2026) (Judgment)

Neutral citation: [2026] KEHC 245 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E014 OF 2024

DKN MAGARE, J

JANUARY 20, 2026

BETWEEN

DWW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arises from the judgment of the trial court, Hon. N. Wanja, Principal Magistrate, delivered on 11.09.2023 from Othaya PMC SO E002 OF 2022)

JUDGMENT

1. This appeal arises from the judgment of the trial court, Hon. N. Wanja, Principal Magistrate, delivered on 11.09.2023 from Othaya PMC SO E002 OF 2022. The appeal was filed out of time after leave was granted vide Nyeri High Court Misc Application Number E074 OF 2023.

2. The Appellant was charged with four counts. The first count was the offence of rape contrary to Section 3(1)(a)(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on 23.03.2022 at 1930 hours in Nyeri South Sub-County within Nyeri County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of BGG without her consent.

3. There was also an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on 23.03.2022 at 1930 hours in Nyeri South Sub-County within Nyeri County, the appellant intentionally and unlawfully touched the vagina of BGG against her will.

4. The second count was assault causing actual bodily harm, contrary to section 251 of the penal code. The particulars of the offence were that on 23.03.2022 at 1930 hours in Nyeri South Sub-County within Nyeri County, the appellant wilfully and unlawfully assaulted BGG by biting her on the upper lip and strangling her on the throat, thereby occasioning her actual bodily harm.

5. Count three was malicious damage to property contrary to section 339(1) of the penal code. The particulars of the offence were that on 23.03.2022 at 1950 hours in Nyeri South Sub-County within Nyeri County, the appellant wilfully and unlawfully broke 7 window panes valued at Ksh. 1,500/= the property of BGG.

6. The fourth count was being in possession of cannabis sativa contrary to section 3(1) as read with section 3(2)(a) *Narcotic Drugs and Psychotropic Substances (Control) Act*, number 4 of 1994. The particulars of the offence were that on 23.03.2022 at 2030 hours in Nyeri South Sub-County within Nyeri County, the appellant was found in possession of five grams of cannabis sativa of street value Ksh. 200 which was not under medical preparation.

7. The appellant was arraigned in court on 25.3.2022. He could not plead because he needed a mental assessment. He was also to be treated as he was severely injured. He was found unfit to plead. He was taken to Mathari National Teaching Hospital for treatment for mental issues. He was declared fit to plead on 7.03.2023. On the said date, he was found fit to plead. He pleaded guilty to counts 3 and 4, and not guilty to counts 1 and 2. The facts were read in respect of counts 3 and 4. He agreed that the facts are correct. In mitigation, he stated as follows:

> " When I committed the offence, I was labouring under insanity, and I was taken to Mathari on this court's orders.

8. Despite explicit derogation from the plea of guilty by setting up a defence of insanity, the court ordered a social enquiry to be made, and the matter be mentioned for sentencing on 30.3.2023. The appellant was supplied with documents on the said date pleaded not guilty to all counts. At the date of sentencing, the appellant prayed that the plea to the charges he denied be re-read. A fresh plea was ordered to be taken. There was no request for mitigation. In the subsequent attendance, the court cautioned the appellant on the gravity of pleading guilty. This was unnecessary since the plea had already been entered.

9. After the facts were read, the appellant stated that they are not true. A plea of not guilty was entered for counts 1 and 2. The matter was set for sentencing for counts 3 and 4 and a hearing for count 1.

10. The facts were read out. The accused confirmed that he was in jail between 2009 and 2015 and served 3 years from 2018 to 2020. The appellant was sentenced to serve 2 years for malicious damage to property and 1 year for possession. These sentences have been served and are not part of the matter herein.

11. The court heard a total of 4 witnesses and placed the appellant on his defence. The defence gave unsworn evidence. Upon hearing the witnesses, the court found the appellant guilty of rape and assault causing actual bodily harm. He was sentenced to 15 years and one year, respectively. The sentences were ordered to run concurrently.

12. This resulted in this appeal, where the appellant set forth the following grounds of appeal.

    a. That the learned magistrate erred in law and fact in failing to appreciate that the alleged victim in this case clearly demonstrated an incredibly doubtful integrity and whose evidence was and remains doubtful.

    b. That the learned magistrate erred in law and fact in failing to appreciate that the critical elements in defilement were not proved to the required standards.

    c. That the learned magistrate erred in law and fact in not considering that the whole prosecution case was riddled with material discrepancies which were capable of unsettling the verdict.

d. That the learned magistrate erred in law and fact in failing to consider the plausible appellant's statement in defence, which was not contested or unproven by the prosecution, and still stands, clearly demonstrating that the instant matter was an afterthought framed up to curtail my success for envious reasons.

e. The instant matter proof was below the required standards of proof and therefore capable of impeaching the whole substance of the matter.

Evidence

13. the complainant testified as PW1. She stated that on 23.03.2022 she was in her kitchen and had finished cooking and was warming water to bathe while PW4 had gone to buy sugar. She took the water to the second room in the kitchen where they used to bathe. As she was entering with water, she heard a sound on the wall towards the kitchen door and thought it awas an animal. The electric lights in the kitchen were on but the room she was about to enter did not have lights. She opened the curtain and saw the brother-in-law, the appellant, and was going towards where she was standing. The appellant then warned her not to make noise and said, "usijaribu kupiga nduru. Ukijaribu kupiga nduru kidogo hivi, nitakuua." She became fearful and started retreating. The assailant held her neck with both hands. She was pushed towards the logs. She could not scream as the appellant was holding her neck. The appellant removed the skirt with one hand while holding the neck tightly, pushing her to the timber posts, which hurt her back. He removed the black skinny tight, brown skirt and black pantie with white dots. The brown skirt became torn.

14. He then got access to the complainant's vagina where he penetrated for 20 minutes while holding the neck. When the complainant was asking the appellant why he was killing her, he got a reply that during earlier attempts, the complainant had screamed. The appellant bit the lips of the complainant. At that time, the back was being pierced with timber. The husband came back and called the complainant three times.

15. The appellant loosened his grip, and the complainant answered. the appellant dismounted. She went and sat on the bench and cried hysterically. The husband went and found the appellant, and, upon inquiry as to what he was doing in the kitchen, he warned PW4 not to point a torch at him, since he was not pointing it at him.

16. The appellant left the room where he had raped the complainant and went to the kitchen, took a cup, and asked the husband in Kiswahili, "wewe uko na mioto na mimi". The husband was dismissive of the appellant, asking him to mind his own business. PW4 took the complaint to the main house and showed him the injuries, including bite marks on his lips and back injuries. There were also neck scratches. PW4 went to report and came with police officers. Before the police officers arrived, the appellant destroyed window panes. The complainant screamed, and villagers responded. They arrested the appellant, who was then on the ground. The appellant left his cap at the scene. The complainant was taken to Othaya Level 4, where PRC and P3 were filled.

17. She stated that the appellant was a brother-in-law whom she found in prison when she was married in 2016. He had known him for 5 years before the incident.

18. On cross-examination, the complainant stated that she had no grudges, the appellant had attempted to rape her on 2.102022, but was forgiven. The remaining questions were about the prior incident.

19. Pw2 was PC Hilda Gitakaa Mongera of Othaya police station undertaking gender duties she received a report from PW1 on the incident that happened on 23.03.2022 at 7.30 pm. She had been raped by the

appellant, who held her neck tightly and bit her upper lip. The complaint was also held tightly against wood, injuring her back. The report was recorded in the occurrence book of that day

20. The appellant was attacked by a mob and re-arrested by the police from the Wahihara police post, who then called the Othaya police station. Sergeant Karanja, PC Mungaita, and Corporal Ndururu of Othaya police station took the appellant to the hospital for the injuries he sustained. she visited the scene of the crime, which was the wood in the appellant's kitchen. The appellant was wearing a black cap, which was recovered.

21. On cross-examination by the appellant, she stated that the complainant identified the cap, exhibit 9, as belonging to the appellant. She stated that the complainant was examined and the reports confirmed the offence was committed.

22. PW3 was John Kiongo Maina S, the medical officer from Othaya Sub-County Hospital, a holder of Bachelor of Medicine and Bachelor of Surgery (MBChB) from JKUA, 2016. He produced a P3 of a 53-year-old BGG. She went to the hospital at 0100 hours on 24.3.2022. On examination, he found her in a lot of pain and no discharge. There were no signs of infection. VDR for sexually transmitted infection was positive. The vaginal opening of the vaginal canal had injuries caused by forceful vaginal intercourse or any other object. He filled a P3 on 24.03.22022. He also filled the PRC form, which had the same findings. He found bite marks on the upper lip, scratch marks on the back pain on the front side of the neck, pain on the vaginal opening, HIV test was positive, but VDR was negative.

23. On cross-examination. He stated that another person inflicted the injuries except the ones on the back. Another person made the scratch marks; however, it was difficult to know whether another person inflicted the bite.

24. On re-examination, he stated that spermatozoa could only be found if there was ejaculation. Sometimes, even with ejaculation, spermatozoa may not be seen.

25. PW4 was Paul Kirundi Gichuki, who said he was with his wife on 23.3.2022 at 7pm. He left to buy sugar at a nearby shop. He went back after 35 minutes. He found the kitchen door open and the lights on. There was no one. He called his wife's name twice with no answer, and she answered on the third time from the other room. The complaint came from the other room, trying to put on her black, skin-tight, which she had on when she left. She was crying hysterically when he tried to speak to her, and he realized something was wrong.

26. He had a torch on and checked the other room. The appellant, his brother, warned him not to point the flashlight at him, as he is not to be pointed at. He stated as follows, in Kiswahili, "unamulika nani na mimi simulikagwi." When the witness inquired what the appellant was doing in the witness's kitchen, the appellant stated, "nimemaliza kile nilikuwa nafanya ama uko na mioto na mimi?" The appellant obliged.

27. The complainant told her what happened and showed the witness a torn blouse, a torn skirt, and injuries on the back and on the lip. He went to report to the police station. While there, the complainant called him, telling him that the appellant had broken the house windows, and she screamed for help. The villagers had beaten the appellant and arrested him. He was re-arrested and taken to the police post and later to Othaya police station. The complainant then went to report the matter officially and was taken to Othaya Level 4 Hospital, where she was treated. He confirmed that the appellant was his younger brother, who had previously been living in Nairobi. The appellant had attempted to rape the appellant on 4.1.2022, but was forgiven.

28. On cross-examination, he stated that he is not aware of a romantic liaison between the Appellant and the complainant. He did not know whether the door was broken. The appellant usually stayed behind the kitchen. He stated that he is saved; otherwise, he would have beaten the appellant.

29. The prosecution's case was closed. The appellant was placed on his defense. He opted to give unsworn evidence.

30. He stated that he was in his house in Mahira when he was called for tea. It was the complainant who called him for tea. While they were having tea, the complainant indicated to him that she wanted to have sex. He knew that the complainant was HIV positive, and refused. He knew it could make the brother (PW4) angry. She jumped on the appellant not to get out. In his defence, he threw her in order to escape.

31. He stated that there is a dispute between himself and his brother over land which was his inheritance. She could have had vaginal injuries while having sex with her husband. He stated that he had leased land to the step uncles, whom the complainant keeps disturbing. There were attempts to get other witnesses, but in vain.

Submissions

32. The appellant filed submissions on 31.07.2025. They submitted that the court failed to consider that the appellant was framed. He repeated his defective evidence in the submissions on ground 1. He further stated that in the absence of spermatozoa or discharge, the offence was not proved. He submitted that the identity was not proved since PW4 stated that he had a torch. He relied on the cases of Wambui v Republic [2019] KECA 906 (KLR), where the court of appeal [RN Nambuye, DK Musinga, PO Kiage} held as follows:

    The mere fact that the complainant made the appellant her boyfriend had sex by consent several times and was willing to get married to the appellant shows that the complainant presented herself before the appellant as a mature girl ready to get married. After the parents of the complainant were made aware of the same, they approached the appellant for discussions of the way forward and if the appellant had agreed to pay the sum requested, they would not have reported. It is clear therefore that the charges facing the appellant were driven by ill will and vendetta for non-payment of Kshs 80,000.00."

33. He further submitted that suspicion cannot be a basis for conviction. The appellant relied on the case of Sawe v Republic [2003] KECA 182 (KLR), where the court of appeal, [RO Kwach, AA Lakha, EO O'Kubasu] held as follows:

    > We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt.

34. He stated that the jurisprudence now obtaining is that the critical elements of the offence must be proved. He identified them as age, penile penetration, and identity of the perpetrator. This part is plainly wrong as the elements indicated below are related to the realm of defilement. Reliance was placed on the case of Fappyton Mutuku Ngui v Republic [2014] KECA 570 (KLR), where the court

of appeal(Kihara Kariuki (PCA), Maraga & J. Mohammed, JJ.A) addressed defilement of a 5-year-old. The court, however, addressed a point that will be poignant in this appeal. The court stated as follows:

The appellant's second major ground was that there was no tangible medical evidence adduced to link him with the defilement of PW2. He also argued that a DNA examination was not conducted to link him to the defilement. In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her.

In Aml v Republic [2012] eKLR (Mombasa), this Court upheld the view that:

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

This was further affirmed in the case of Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) where the court stated:

"... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

The evidence of the minor witnesses squarely placed the appellant as the one who defiled PW2. It cannot, therefore, be said that there was no evidence that would link him to the crime. This ground of appeal is therefore baseless and is accordingly rejected.

35. The appellant further referred to the decision of John Muthama v Republic [2016] KEHC 3190 (KLR). The decision has since been confirmed on appeal vide Muthama v Republic [2022] KECA 1214 (KLR). The decision, however, dealt with defilement of a 10-year-old minor. He further relied on the case of Francis Ndungu Tweni V Republic [2011] KEHC 123 (KLR), which deals with defilement of a girl child aged 9 years.

36. He submitted that the charges should be assault but not rape. In a rather comical way, the appellant invited me to be wary of experts as was Lord Campell in the Traly peerage(1839)10 Cliff 154, 191. An extract was not attached, and the court cannot vouch for the authenticity.

Respondent's Submissions

37. The respondent filed submissions dated 4.08.2025. They submitted that the appeal has no merit and ought to be dismissed. they posited that the elements of rape were espoused in the case of Republic v Francis Otieno Oyier [1985] KECA 55 (KLR), where the court of appeal stated as follows:

> The prosecution still had to prove the second element of the offence of rape, and that is lack of consent for as the predecessor of this Court said in Upar v Uganda [1971] EA 98, lack of consent always remains an essential element of the crime of rape and so it should be specifically dealt with.

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.

38. They submitted that the appellant meted out violence to yielded the sexual intercourse. Further on identity, they reiterated that the appellant was a brother-in-law, hence well known to the complainant. The appellant was equally found at the locus in quo by PW4, who is the appellant's brother and husband to PW1. they added that PW4 found PW crying hysterically with visible injuries.

39. On identification, they relied on the cases of Karaton Ole Lesarau v Republic [1988] KECA 94 (KLR), where the court of appeal [] held as follows:

> Where, as here, identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. We would require evidence of a much higher quality than there is on the record before we can be persuaded to say, as we are required to do, with any degree of certainty, that the testimony of Hussein Abdi, the complainant, is free from the possibility of error. In view of this doubt in our minds, we consider the appellant's conviction to be unsafe.

40. Further reliance was placed on the case of Shida Katana Thoya v Director of Public Prosecution [2021] KEHC 4376 (KLR). The relevancy is still lost on me. The respondent prayed that the court dismisses the appeal.

Analysis

41. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. Thus, the duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

42. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's

findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

43. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

44. Since the appellant, as an accused, enters the proceedings presumed innocent, he is entitled to the benefit of doubt. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

45. The legal burden refers to the burden of proof which remains constant throughout the trial. It is the obligation of a party to establish the facts and contentions necessary to support its case, in this case the prosecutor. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the

party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

46. The standard of proof required in such cases was addressed by Brennan, J. in the United States Supreme Court decision of In re Winship 397 U.S. 358 (1970), at pages 361–364, where he stated that:

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

47. From the submissions, count two is conceded. The appellant is beseeching me to sentence him for assault, not rape. However, given that the appeal on that aspect was not withdrawn, the court will make a finding. The offence with which the appellant was charged in Count 1 is established under section 3 of the *sexual offences act*, which provides 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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

48. The court then has to determine whether the offence of rape occurred. The elements of rape have been settled by superior courts. In the case of, the court elaborated the elements of rape as follows:

On the issue of whether there was sufficient evidence to convict the Appellant for the offence The Court of Appeal in its decision in Republic vs Oyier (1985) KLR 353 elaborated on these elements as follows:-

1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

2. To prove the mental element required in rape, the prosecution had to prove 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.

3. Where 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.

49. Therefore, the elements constitute the following in summary:

a. Penetration of the genital organ by the genital organs of another.

b. Lack or consent to the penetration.

c. The consent was vitiated by threats, or force or fear of death.

d. The perpetrator.

50. It is settled that for the offence of rape the intention and not the state of mind is key. The intention to have sex without consent is the key element. It must be remembered that in most cases, rape is a crime committed away from the public eye. Therefore, circumstantial evidence is crucial.

51. Rape also has its defences.

a. The main defence is that consent was given.

b. The second was that there was no penetration.

c. Incapacity to commit the offence by virtue of a statutory exemption for perpetration, as set out in section 43(5) of the *sexual offences Act*.

d. The presumption applies mutatis mutandis to a person suffering from mental illness.

e. The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection [43](1) include circumstances where such a person is, at the time of the commission of such act, as set out in section 43(4) of the *sexual offences Act*.

52. In this case, the appellant set out the Defence that he did not penetrate the appellant. It is the appellant who wanted penetration but the appellant threw her off and bolted. This may have injured the complainant. Ipso facto, from the defence set out, consent was not one of the elements that were said to be given. He had already declined to consent to the act. He cannot, therefore, set up the defence of consent or the complainant's lack of integrity. First, none of the facts were disputed when the complainant was giving her evidence. Her character was not impeached. The story that the complainant had tried pulling Potiphar's wife's staff does not add up.

53. There was no evidence tendered whatsoever, even in the cross-examination of any advances made to the appellant. The appellant was found in the locus in quo. He was not supposed to be in the appellant's Kitchen. Further, the aftermath of that meeting is severe injuries to the back, a painful vagina, stigmas on the neck, biting on the upper lip, and a hysterical complaint.

54. The evidence of PW1-PW4 was consistent on what happened. Indeed, after PW4 had left the scene to go to the police station, the appellant caused further mayhem. He was arrested by members of the public. I therefore dismiss the defence evidence alleging that he was the one resisting approaches from the complainant. If he was being pursued with unwelcome advances from the complainant, why go back to destroy the window panes?

55. This then brings me to the question of identity that he raised in submissions. First submissions are not the way to raise issues. Mwera J, posited as follows when postulating on what is the role of submissions are. He stated that they are "a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim" in the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

> " Indeed, and strictly speaking, submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly

establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case."

56. However, the state was able to tender evidence that the parties knew each other. The complaint was being penetrated for about 20 minutes. In the pain of rape, she was able to recognize the appellant as a brother-in-law. They even discussed the first failed attempt to rape her. The appellant gave her the reason for strangling her, to avoid her screaming like she did last time. True to his word, the complainant screamed at the next available time, when the appellant was breaking window panes. The appellant admitted the offence of malicious damage to the window panes and was convicted. She saw him in the well-lit room and was under him for 20 minutes. There was no mistake. The brother also came and found him at the locus in quo. They were in flagrante delicto when PW4 came and started calling. The Appellant did not controvert this. In Anjononi & Others vs. Republic [1980] KLR 59, the Court of Appeal stated as follows:

> ...recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.

57. It is therefore a foregone conclusion that the appellant was correctly identified. When he went out and started destroying property, he was apprehended at the scene. He also admitted to the assault in court. The assault was contemporaneous with the rape. There is no way to separate the rape and assault. They are conjoined like Siamese twins.

58. The appellant took issue with spermatozoa and non-bleeding. The complainant was a 53-year-old veteran. She was not expected to bleed. Secondly, the lack of spermatozoa was taken as evidence of a lack of sex. This cannot be true. Further, he attributed the painful vagina to sex with his husband. This was not raised with the witnesses. Even the rape of woman who has just had consensual sex remains rape. In this case, the complainant's evidence was cogent as to what transpired. Though there is no requirement of corroboration, her evidence was well corroborated.

59. The medical doctor testified and gave cogent evidence on penetration. The examination was done less than 5 hours after the event. There was an invitation to disregard experts; I do not find that the invitation merited. The general trend is that such evidence is not necessarily conclusive and binding. As was held in shah and another vs. Shah and others [2003] 1 ea 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

60. Further, the Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> " ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

61. Courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them as stated in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts: -
>
> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

62. The expert opinion was in sync with the rest of the evidence. It shows that there was penetration of the complainant's vagina by a person known to her, that is, the appellant.

63. The next question is whether, independent of the words of the appellant and PW1, there was other evidence on record in respect of the offence of rape. This is essentially a question of circumstantial evidence. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, Court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

64. The appellant's clothes were torn, the blouse, the scratch marks, and the tangled marks. The appellant was also in the locus in quo soon after the complaint was defiled and was involved, admittedly, in an assault on the appellant. The circumstantial evidence thus points irresistibly to the appellant as the guilty party and no one else.

65. On discrepancies, the appellant has not demonstrated any single discrepancy in the evidence on record. In addressing discrepancies, they must be of such magnitude that they soil the evidence and create reasonable doubt. In the case of Philip Nzaka Watu vs. Republic [2016] eKLR, the Court of Appeal held that:

> However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be

expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way.

Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In Dickson Elia Nsamba Shapwata & Another V. The Republic, CR. APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court ha to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

66. The trial court analysed all the evidence which I have also painstakingly gone through. Only when contradictions are huge and unexplained that the court will need to consider them. The case of Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6, dealt with contradictions as follows:

> With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

67. Therefore, in my overall reevaluation of the evidence, I am unable to find fault in the finding of the court below regarding the conviction. I find and hold that I am satisfied that the conviction was safe, as the case in that court was proved beyond a reasonable doubt.

68. Having found that the conviction was proper, the next question is the sentence. Though shown in submissions, there was no appeal of the sentence. The appellate court cannot deal with a ground that has not been appealed. The principles upon which an appellate Court will act in exercising its discretion to interfere with a sentence imposed by the trial court are now settled. The Court of Appeal in the case of Ogolla s/o Owuor vs Republic, [1954] EACA 270, pronounced itself on this issue as follows:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-
>
> sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R. (1989 KLR 306)"

69. The appellant did not embark on that area. The sentence provided is between 10 years and life. The court gave a very lenient sentence. However, the court cannot deal with the same having not been moved. Section 350 (1) and (2) of the Criminal Procedure Code provides as follows:

(1) An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.

(2) A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal:

Provided that—

(iv) 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.

70. I decline to handle the question of sentence as there is no appeal in that respect. In any case, even if the court had dealt with the same, the proper order could have been to dismiss the appeal, since the acts were reckless, heinous, and without regard for the complainant's life and dignity. Not only was she raped, but she was also subjected to a risk of re-infection and tampering with her immunity, given her status. The appellant was equally reckless with his own life. A sentence of 15 years was a slap on the wrist. He must learn to live with it.

Orders

71. In the circumstances, I make the following final orders: -

a. The appeal is not merited and is hereby dismissed.

b. The conviction and sentence of the trial court are affirmed.

c. Right of appeal of 14 days explained.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI, VIRTUALLY ON THIS 20TH DAY OF JANUARY, 2026. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Pro se Appellant

Ms. Kaniu for the Respondent

Court Assistant - Michael