Lobukwa v Republic (Criminal Appeal E019 of 2023)
[2026] KEHC 762 (KLR) (23 January 2026) (Judgment)

Neutral citation: [2026] KEHC 762 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E019 OF 2023

PJO OTIENO, J

JANUARY 23, 2026

BETWEEN

PHILIP LOBUKWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Background of the Appeal

1. The Appellant herein was charged with an offence of rape contrary to Section 3(1)(a)(b)(c) as read with Section 3(3) of the *Sexual Offences Act* Number 3 of 2006. The particulars of the charge alleged that on the 10/04/2023, at approximately 0100 hours in the [Particulars Withheld] of Turkana West Sub-County within Turkana County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of M.A.K., a female adult aged 20 years, without her consent.

2. In the alternative, the prosecution preferred a charge of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*. It was averred that at the same time and place, the Appellant intentionally touched the vagina of M.A.K. with his penis without her consent.

3. The Appellant pleaded not guilty to both counts when he was arraigned before the trial court on 14/04/2023. Following a full trial, the trial court delivered its judgement on 16/06/2023, found the prosecution to have proven their case beyond reasonable doubt and convicted the appellant of the primary count of rape. The Appellant was consequently sentenced to serve twenty years (20) of imprisonment.

4. Being dissatisfied with both the conviction and the sentence, the Appellant lodged the instant appeal citing nine distinct grounds contained in his undated petition of appeal. In summary, the Appellant asserts that the trial court's findings on conviction and sentence were both were erroneous in law and fact. He contends that the learned trial magistrate erred by convicting him despite the absence of a

key witness who could have provided independent eyewitness testimony of the assault. It is asserted that the medical evidence provided by PW3 was insufficient to sustain a conviction, as the clinical officer reported the complainant to be in a good condition and did not observe abnormal injuries or bloodstains.

5. The Appellant further challenges the identification evidence, arguing that the trial court failed to scrutinize the conditions of the night properly. He asserts that the trial magistrate erroneously rejected his defence of an alibi and failed to take judicial notice of a long-standing grudge between him and the complainant's family. Finally, the Appellant points to the investigation's failure to produce the complainant's inner garments as an exhibit during the initial stages of the trial, which he argues created a gap in the prosecution's proof beyond reasonable doubt.

Summary of Trial Proceedings

6. The Complainant, PW1 testified to have been a 20-year-old resident of [Particulars Withheld]. She stated that on the night of the 10/04/2023, around 1:00 a.m. she was returning home from a neighbour's home. That as she walked near a dry riverbed, she was accosted by the Appellant, whom she identified as Philip Lobukwa, and another man, Ndongo Mathaguru. She emphasized that she recognised the two because she had known both men since childhood as they were her neighbours.

7. She recounted that the two men grabbed her and forced her to the ground. With the aid of the moonlight, she observed their features clearly. While Ndongo was penetrating her, the Appellant reportedly held her mouth shut with his hands to prevent her from screaming and after Ndongo finished, the Appellant took his turn to penetrate her while Ndongo held her down. She testified that the men tore her blue skirt, orange T-shirt, and pink/white inner wear before they left her lying on the ground.

8. PW1 stated that she fled into and slept at the home of PW4 while naked because her attire had been torn and left at the scene. She then went to Erupe Hospital the following morning, where she received medication before being directed to the police at Kakuma for a P3 form. She produced the torn garments as exhibits and maintained that this was the second time the Appellant had attempted to assault her. When cross examined and ask about the whereabouts of the second assailant, she said he was still on the run.

9. PW2 and the Complainant's husband testified to have been in Uganda on the 11/04/2023 at the gold mine when his friend, PW4, called him to report that his wife had been raped by Philip Lobukwa and Dogo. He returned from Uganda at 3:00 p.m. that day and confirmed the details with his wife and neighbours. He subsequently searched for the suspects and managed to arrest the Appellant, whom he brought to the Kakuma Police Station. He testified that there was no grudge between them, but noted the Appellant had previously attempted to assault his wife unsuccessfully. He identified the torn clothing produced in court as his wife's attire for the night of the incident. On cross examination, he told the court that he was away at the time the victim was assaulted.

10. PW3, was a clinical officer stationed at Kakuma Mission Hospital who examined the complainant on the 13/04/2023. He recorded a history of sexual assault to have happened on the 10/04/2023. He noted that the complainant was 20 years old and approximately 27 weeks pregnant at the time of the examination. While her general condition was good and her body showed no other abnormal physical injuries, a targeted genital examination revealed that her genitals were wet and reddish with a clear discharge. Her missing hymen was however consistent with an adult woman who is pregnant.

11. Laboratory tests for HIV, urinalysis, and High Vaginal Swabs (HVS) were performed, all of which returned negative results. He noted that the laboratory results might not reflect the true picture due to the three-day lapse between the date of the incident and that of the examination.

12. PW4, the Complainant's neighbour in whose home she sought refuge on the fateful night, testified that on the 10/04/2023, at approximately 1:00 a.m., the complainant arrived at his home while his family was sleeping. He stated that she was naked and carrying her torn skirt and inner wear. She immediately informed him that Philip Lobukwa and Ndongo Atabo had raped her near the lagga while she was coming from a neighbour named Akiron. PW4's wife provided her with clothes and a place to sleep. He confirmed that he had no grudge against the Appellant and corroborated the arrest of the suspect following the husband's return from Uganda.

13. PW5, PC Ekaran was the investigating officer who testified that she was assigned to investigate the case on the 12/04/2023. She recorded statements from the complainant, who identified the two attackers by name. The investigator recovered and tendered the torn blue skirt and pink inner wear as exihibits. She explained that the complainant had told her the Appellant closed her mouth to prevent her from screaming while Ndongo penetrated her. She confirmed the Appellant was arrested based on the complainant's identification.

14. On the basis of the evidence recorded from the five witnesses, the court found that the prosecution had established a prima facie case and put the appellant on his defence.

15. The Appellant gave sworn evidence as DW1. He stated that he worked at the quarry and was going about his normal business when he was arrested by neighbours. He testified that he was taken to the NPR and the chief, where he was asked for money. He claimed that because he had no money, he was taken to the police and charged. He denied any involvement in the rape and asserted that the case was a fabrication born out of a long-time grudge. He averred that the lack of bloodstains on the complainant's clothing proved that no rape had occurred. He however did not call any witnesses to support his presence at the quarry or his allegations of a financial extortion attempt.

Summary of Submissions

16. The court directed that the appeal be canvassed by way of written submissions and whereby all parties complied by filling their submissions. In his submissions, the Appellant argues that the prosecution failed to prove the element of penetration beyond reasonable doubt. He emphasizes that PW3, the clinical officer, found the complainant to be in good condition without visible injuries, which he suggests is incompatible with a violent sexual assault. He further submits that the evidence of identification was weak, as the incident occurred at night and involved a complainant who would have been in a state of panic. He reiterates his claim of a grudge and submits that the trial court erred in rejecting his alibi without requiring the prosecution to disprove it definitively. Finally, he submits that the sentence of twenty years (20) is excessively harsh for a first-time offender.

17. In response, the Respondent opposes the appeal against conviction. It is submitted that the ingredients of rape being penetration, lack of consent, and identification were established through the credible testimony of PW1 and the corroborating evidence of PW4 and PW5. The Respondent points out that this was a case of recognition, as the parties were neighbours and that the clinical evidence of redness and wetness is a common indicator of recent sexual contact.

18. The Respondent notes that the statutory minimum for rape is ten years under Section 3 of the *Sexual Offences Act* and faults the trial magistrate for failing to provide any special reasons for enhancing

the sentence to twenty years and, therefore, urges the court to reduce the sentence to the statutory minimum of ten years while upholding the conviction.

Issues, Analysis and Determination

19. Upon an anxious re-evaluation of the trial court's record, the grounds of appeal and the submissions made by both the Appellant and the Respondent herein, the court finds the sole issue for determination to be whether the prosecution proved its case to beyond reasonable doubt at the trial court, and if so, whether the twenty (20) sentence was legal and appropriate.

20. The court takes to mind the South African decision in decision in S vs Sithole and Others 1999 (1) SACR 585 (W) at 590 and reiterated in Ngala & 2 Others vs Republic [2025] KECA 660 (KLR) where the court had this to say on the standard of proof in criminal cases:

> "There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus, in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken."

21. The mandate of the court on a first appeal remains, to reappraise the evidence and draw our own conclusions. In principle, a first appeal takes the form of a retrial bearing in mind that it did not see the witnesses as they testified and give due allowance for that. See Selle vs Associated Motor Boat Co Ltd & Others [1968] EA 123. The court's cardinal duty is to re-evaluate, re-analyze and re-consider the evidence on record with the object to be satisfied that the only test in a criminal trial, proof beyond reasonable doubt, was met. In discharging that mandate, it must remind itself always that on appeal it will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion. See Makube vs Nyamiro [1983] eKLR.

22. On the substance of the appeal, the offence of rape with which the Appellant was charged and convicted is coded under Section 3 of the *Sexual Offences Act*, which stipulates that the prosecution must prove intentional and unlawful penetration of the genital organs without consent. Penetration under Section 2 of the Act encompass any partial or complete insertion of the genital organ of one person into that of another.

23. The Appellant's primary challenge to this element is that the medical officer did not find lacerations or blood on the complainant. The court is of the learning that in sexual offence cases, penetration must not be complete and does not therefore, necessarily result in visible trauma, especially in adult women who have had previous sexual experiences. Penetration must thus not be proved by lacerations or bleeding. Evidence of the victim, if credible is always sufficient.

24. Here, the PW3 form tendered in evidence recorded that the complainant's genitals were wet and reddish thus consistent with recent sexual activity and provides the necessary corroboration for the complainant's testimony that penetration occurred.

25. Further, the lack of consent remains glaringly evident from the circumstances. The complainant testified that she was grabbed and pinned down by two men, one of whom covered her mouth to silence her screams. Evidence by PW4 revealed that the complainant arrived at his home at 1:00 a.m. naked and in a state of obvious distress. In the court's mind, this spontaneous and immediate reporting of the incident to the first person she encountered is a powerful indicator of the truthfulness of her allegation. The recovery of torn undergarments further supports the conclusion that the sexual contact. The court finds that the combination of PW1's consistent account, the medical finding of redness, and the corroborating testimony of PW4 regarding the complainant's immediate condition after the assault provides a complete and unshakeable proof of the elements of rape.

26. The Appellant avers that the evidence of identification was weak, as the incident occurred at night and involved a complainant who would have been in a state of panic. The court however notes that in the present case, the prosecution evidence shifts from mere identification to recognition. The court in Anjononi and Others vs The Republic [1980] KLR 59 had this to say with regard to evidence of recognition:

> " ... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

27. In the same vein, the Court of Appeal in Peter Musau Mwanza vs Republic [2008] eKLR expressed itself thus:

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

28. Further, in AHM v Republic [2022] KEHC 12773 (KLR), the court correctly observed that:

> " ... the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before."

29. Herein, the court finds the conditions for recognition to have been favourable for the following factors, first, PW1 testified that she had known the Appellant since they were growing up together in the same neighbourhood; second, the Appellant with the aid of moonlight affirmed to be in a position to clearly see the assailants whom she had known from childhood; thirdly, the incidence itself involved close physical contact over an extended period; and finally, the complainant named the Appellant to PW4 immediately after the incident ruling out all odds of implication.

30. The Appellant's argument that he was not escorted to a hospital for a comparative penis probe is not a legal requirement for identification. Identification parades are also unnecessary in cases of recognition where the victim knows the suspect well.

31. On the Appellant's alibi of having been at a quarry, the court notes that no corroborating evidence was provided in support of the same. PW1's consistent evidence of placing him at the lagga through her direct recognition remains cogent and strong to effectively disproves the alibi.

32. Accordingly, the court is satisfied that the identification of the Appellant was positive and that the possibility of a mistaken identity was non-existent. The prosecution proved its case against the aappellant beyond reasonable doubt. In coming to this conclusion, the court takes the learning from the decision by Lord Denning in Miller vs Ministry of Pensions, [1947] 2 ALL ER 372 where the judge said, of the standard; -

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

33. On sentence, the court notes that the Appellant was sentenced to 20 years' imprisonment. Section 3(3) of the *Sexual Offences Act* provides that a person convicted of rape is liable to imprisonment for a term of not less than ten years, which may be enhanced to life imprisonment.

34. In his appeal, it is argued that the trial record is silent on the reasons for this enhancement asserting that a court should generally impose the statutory minimum unless there are aggravating factors such as the use of extreme violence, the transmission of HIV/AIDS, the vulnerability of the victim or a prior criminal record.

35. The court remains to protect and respect the right of every accused to benefit from the least severe of the prescribed punishment for the offence. It must take a good reason for the court to enhance a sentence beyond the minimum provided. Where there is proffered no such reason, the discretion on sentencing fails to be judicious and the sentence must be disturbed. The sentence of 20 years is therefore set aside, and in its place, substituted a term of 10 years to be computed from the 12.04.2023, the day he was arrested and placed into custody, pursuant to Section 333(2) of the Criminal Procedure Code.

36. The upshot of the above is that the appeal against the conviction is dismissed but that against the sentence allowed to the extent that the sentence is reduced from 20 to 10 years. The conviction is hereby upheld but sentence set aside and substituted with the least severe punishment prescribed.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 23ST DAY OF JANUARY, 2026

PATRICK J O OTIENO

JUDGE