Nyongesa v Republic (Criminal Appeal E020 of 2023)
[2026] KEHC 713 (KLR) (27 January 2026) (Judgment)

Neutral citation: [2026] KEHC 713 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E020 OF 2023

AC BETT, J

JANUARY 27, 2026

BETWEEN

DAVID JUMA NYONGESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction of Hon. D. Alego, (SPM) in Kakamega Criminal Case No. 717 of 2019, dated 14th December 2022)

JUDGMENT

1. The Appellant was jointly charged with four others with the offence of robbery with violence contrary to Section 296(2) of the Penal Code and gang rape contrary to Section 10 of the *Sexual Offences Act*. After a full trial in which seven witnesses gave evidence in support of the prosecution's case, the Appellant was found guilty of the offence of robbery with violence. Upon conviction, he was sentenced to 30 years' imprisonment.

2. Being aggrieved with the conviction and sentence, the Appellant lodged a petition of appeal in which he faulted the trial Magistrate for the conviction, which he asserted was based on an incurably defective Charge Sheet and for convicting him despite weak evidence.

3. The particulars of the offence were that, on the 12th day of February 2019 at Kenya Power Scheme area in Kakamega Central Sub-County within Kakamega County, jointly with others not before the court, while armed with crude weapons, namely pangas and metal bars, the Appellant robbed CAI of one Hisense 40 inches flat screen television with its remote control, one DVD machine make LG, one 6kg gas cylinder with its banner, one Tecno CX mobile phone.

4. The evidence was that on the material day, the Complainant was sleeping in her house when at 1.00 a.m., some thugs broke into her home, gagged her, and ordered her to surrender her phones, and took away the TV remote and the gas cylinder while assaulting her. Thereafter, they took her outside where

they raped her. They also ordered her to call people to send her money, and in compliance, she called her brother and asked him to send her Kshs. 50,000/= as demanded, which he did. The Complainant stated that in the process of making the call, she informed her brother in her mother tongue that all was not well and that after being released by the thugs, she went home while shouting for help and on arrival, she found her brother and the police to whom she narrated her ordeal. She then led the police to the scene, where they recovered a used condom, two torn packets, and her panties. Thereafter, she was treated at Kakamega General Hospital.

5. It was the Complainant's testimony that she was unable to identify her attackers as they were dressed in hoods and kept commanding her not to look up.

6. The Complainant's brother testified as PW2 and recalled how he received a suspicious phone call from his sister on 12th February 2019 at 2.30 a.m. in which she was asking for Kshs 50,000/= as her daughter was sick. He sent her the money, but made a report to the police and left Mbale for Kakamega immediately. He had police officers accompany him to his sister's house, and upon arrival, they found only her daughter asleep and unaware of the incident. According to him, he heard someone crying and informed the police officers that it could be his sister. They then proceeded to the source of the cries and found the Complainant in distress. She took them to the scene, where they collected her panties and used condoms, then took her to the hospital. Later, the police called to inform them that they had arrested some suspects.

7. PW3 was a Clinical Officer who produced the P3 and Post Rape Care Forms and confirmed that the Complainant had been raped. He said that the victim gave a history of being gang raped.

8. PW4 was Polycarp Lutta Kweyu, a Government Analyst with the Government Chemist at Kisumu. He testified that he received various samples for analysis in the laboratory and after conducting the tests, prepared his report. None of the samples forwarded to him matched those of the Appellant herein, although the samples were linked to the Appellant's co-Accused and one unknown person.

9. PW5 testified that he arrested one of the suspects, while PW6 testified that on 7th March 2019, while on patrol duties with his colleagues, they arrested the Appellant, who was being sought for gang rape and other robberies. He stated that the Appellant led them to the other suspects, whom they arrested and charged. PW7 was the Investigating Officer. He testified and produced the items recovered from the scene, as well as the M-Pesa statements, to prove that PW2 and his wife had sent the Complainant a total of Kshs. 50,000/= on the material date.

10. In his defence, the Appellant gave a sworn statement in which he stated that on 7th March 2019, he was arrested with 25 rolls of bhang and taken to the police station, where the police demanded that he give them Kshs 15,000/=, which he did not have. They then took him to his home, where a search yielded a further 17 rolls of bhang. He was charged and convicted for the offence, but also accused of the offences of robbery with violence and gang rape, which he denied ever committing.

11. The appeal was canvassed through written submissions.

Analysis and Determination

12. This being a first appeal, the duty of the court is as laid out in the case of Okeno v Republic [1972] EA 32 which is to subject the entire evidence from the trial court to a fresh scrutiny, re-evaluation and analysis to reach its own independent conclusion while not losing sight of the fact that, unlike the trial court, it did not have the opportunity to hear and observe the witnesses as they gave evidence.

13. It is trite law that the burden of proof in criminal cases lies on the prosecution, which must prove the guilt of the Accused person beyond reasonable doubt. This principle was laid down in the case

of Woolmington v DPP (1935) A. C. 466, which was quoted by the Court of Appeal in Moses Nato Raphael v Republic [2015] KECA 787 (KLR) as follows:-

> " The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. There are of course, a few instances where the law provides for the converse, and shifts this duty to the accused, but that is not the case here. This Principle is well captured in the time honored English case of Woolmington v. DPP (1935) A. C 462 where the court stated:-
>
> > "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 the qualification involving the defence of insanity and 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..."

14. There was no direct evidence connecting the Appellant to the offence. The court must therefore interrogate the forensic evidence against the evidence of the Arresting Officer and the Investigating Officer.

15. The consolidated Charge Sheet indicated the Accused persons as David Juma Nyongesa, Davis Kamadi Busisa, Patrick Okinda Charles, Charles Odhiambo Obonyo and Nelson Nageya Ravasa. The Government Analyst tendered evidence on the various samples forwarded to him for examination. He stated that he found the DNA material of Charles Odhiambo, Nelson Nangeya, and the victim on the victim's panties. He indicated that the third DNA material found on the panty belonged to an unknown person.

16. In his testimony, PW6 stated that when he arrested the Appellant after a tip-off that he was planning a robbery to be executed in Webuye, he led them to Charles Abonyo Odhiambo, Patrick Okinda, and Nelson Nageya, who were involved in a series of crimes in Muliro Gardens. PW6 stated that upon arresting Nelson, they conducted a search that yielded a vesta gun. Aside from that, there was no evidence linking the Appellant to the offence. He was only suspected because he named the aforesaid suspects. Since the victim could not recognise her attackers, no identification parade was held. None of the items stolen from the Complainant was recovered or linked to the Appellant. Despite the police alluding to information provided by the Appellant that led to the arrest of some suspects in the case, no effort was made to record a confession from him. Moreover, there is no evidence that the Appellant ever confessed to the offence. What is evident is that the Appellant was strongly suspected of being part of the group that committed the offence.

17. The Appellant denied culpability and claimed that the police framed him after finding him in possession of bhang.

18. Having considered the case in its totality, the court is not entirely convinced by the Appellant's contention that he was framed after failing to raise a bribe as demanded by the police upon his being found with bhang. However, the Prosecution's case was weak. The trial court did not address its mind fully to the gaps in the Prosecution's case. It failed to do a detailed analysis of the evidence and chose to reject the Appellant's defence and accept the Prosecution's case wholly, notwithstanding the absence of direct or circumstantial evidence against the Appellant. In doing so, the trial court seems to have relied on the uncorroborated claim by PW6 that the Appellant was being sought by the police as he was a suspect over a spate of robberies and on being arrested, he led the police to other suspects, two of

whom were conclusively linked to the offence by DNA. There is a strong suspicion that the Appellant was among the offenders. However, suspicion alone cannot lead to a conviction.

19. In the case of Mary Wanjiku Gichira v Republic [1998] KEHC 59 (KLR), the Court held that:-

> " ...suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life".

20. There is no doubt that the victim was subjected to a terrifying and traumatising ordeal after being robbed of her personal items. There is also no doubt that the Appellant was somehow connected to the suspects who were eventually convicted for robbery with violence and gang rape. Nevertheless, the apparent association between the Appellant and the offenders is not evidence of the Appellant's guilt for the same offence. Their association is a basis for suspicion, and, in the absence of any other evidence, the court finds that the trial Magistrate erred in convicting the Appellant.

21. Consequently, the court finds that the Respondent was right in conceding the appeal. The conviction was unsafe. The appeal is hereby allowed, and the conviction quashed and the sentence set aside. The Appellant is at liberty to be released unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 27TH DAY OF JANUARY 2026.

A. C. BETT

JUDGE

In the presence of:

Appellant present in person

Ms. Chala for the Respondent

Court Assistant: Polycap