REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

HCCRA NO. E045 OF 2023

SAMUEL MWENDO KIIO …………………………………… APPELLANT

-VERSUS-

REPUBLIC ……………………………………………… RESPONDENT

(Being an appeal against the conviction and sentence of the Senior Principal Magistrates Court at Makindu by Honorable B Ireri dated 13th February 2023 in CR Case No. 14 of 2020)

JUDGMENT

1. The Appellant was charged before the Magistrate's Court at Makindu in **Sexual Offence Case No. 14 of 2020** with the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on diverse dates between 14th January, 2020 and 6th February, 2020 at Mbeleto Sub-location within

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Nzaui Sub-County, in association with another, the Appellant intentionally and unlawfully caused his penis to penetrate the anus of **AMM** without his consent.

2. The appellant and the co-accused also faced an alternative charge of committing an indecent act with an adult contrary to **Section 11 (a)** of the **Sexual Offences Act.**

3. Upon a full trial, the Appellant and the co-accused were convicted of the main charge - the offence of gang rape and sentenced to twenty (20) years' imprisonment. Dissatisfied with both the conviction and the sentence, the appellant preferred this appeal.

4. The other accused person, Daniel Kiio Mutua, also preferred an appeal in **Criminal Appeal No. E024 of 2023**. The e-platform indicates that the appeal was consolidated with this appeal, but the appellant did not participate in the present appeal. At the delivery of this judgment on appeal, the Deputy Registrar of the Court shall invite attendance and bring up his appeal file for such directions as may be necessary.

5. The appeal by Samuel Muendo Kiio is premised on the following grounds as set out in the Petition of Appeal:

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a. ***THAT, the learned judge (sic) failed in law and facts considering the evidence adduced of the doctor was not enough to base for conviction.***

b. ***THAT, the learned judge (sic) failed in law and facts that the first report of the complainant was doubtful according to other witnesses testimonies.***

c. ***THAT, the learned judge (sic) failed in law and facts convicting me basing on witnesses evidence which was fully contradictory.***

d. ***THAT, the learned judge (sic) failed in law and facts to give due consideration on the plausible defense.***

e. ***THAT, the learned judge (sic) failed in law and facts to rely on prosecution evidence that was riddled with contradictions and discrepancies leading to selective judgment.***

6. The appeal was canvassed by way of written submissions. In his submissions, the Appellant contended that the prosecution failed to prove penetration beyond reasonable doubt and that the medical evidence on record was inconsistent and inconclusive. He relied on

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the decisions in ***Aden Mohamed Abdi v Republic, Mercy Chelangat v Republic*** **[2022] eKLR,** and ***Gordon Omondi Ochieng v Republic [2021] eKLR*** to submit that material contradictions and discrepancies in the prosecution case were sufficient to vitiate the conviction.

7. He further cited ***Philip Njaka Watu v Republic [2016] eKLR*** and ***Stephen Nguli v Republic [2014] eKLR*** for the proposition that the burden of proof in criminal cases rests entirely on the prosecution and must be discharged beyond reasonable doubt. Reliance was also placed on the classical authorities of ***Woolmington v Director of Public Prosecutions [1935] AC 462*** and ***Miller v Minister of Pensions*** **[1947] 2 All ER 372** on the standard of proof beyond reasonable doubt.

8. The Appellant further relied on ***Pius Arap Maina v Republic*** **[2013] eKLR** to argue that evidential gaps in the prosecution case ought to be resolved in favour of an accused person. It was his submission that, given the absence of medical evidence confirming penetration, the conviction was unsafe and ought to be quashed.

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9. The Respondent opposed the appeal and urged the court to uphold both the conviction and sentence. It was submitted that penetration was proved through the evidence of the Complainant's mother and the medical evidence tendered. The Respondent argued that the complainant's mental disability rendered him incapable of consenting to the act. Reliance was placed on ***Peter Wanjala Wanyonyi v Republic*** **[2021] eKLR** for the propositions that lack of consent may be inferred from mental incapacity and that recognition is a more reliable form of identification than identification of a stranger.

10. On the question of alleged inconsistencies, the Respondent cited *Ali Mohamed Ibrahim v Republic* [2017] eKLR and *Erick Onyango Ondeng' v Republic* [2014] eKLR, as read with *Twehangane Alfred v Uganda*, **Criminal Appeal No. 139 of 2001 [2003] UGCA,** to submit that only grave inconsistencies affecting the substance of the prosecution case can vitiate a conviction. On sentence, the Respondent submitted that the sentence of twenty (20) years' imprisonment was lawful and proper, citing ***Livingstone Asirika v Republic*** **[2019] eKLR** and ***SKM v Republic [2021] eKLR***, and urged

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the court not to interfere with the exercise of discretion by the trial court.

ANALYSIS & DETERMINATION:

11. This being a first appeal, this court is enjoined to reconsider and re-evaluate the evidence tendered before the trial court and draw its own independent conclusions, while bearing in mind that it did not have the opportunity to see or hear the witnesses testify. The duty of a first appellate court was succinctly stated in ***Kiilu & Another vs. Republic [2005]1 KLR 174,*** where the Court of Appeal held:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower court's findings and***

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conclusions; it must make its own findings and draw its own conclusions."

12. The same principle was restated in ***Pandya v Republic*** **[1957] EA 336**, where the Court observed:

> **"On a first appeal, the appellate court is entitled to re-evaluate the evidence and draw its own conclusions.**

13. Indeed, it is trite law that a conviction in a criminal case must be founded on evidence that proves the charge beyond reasonable doubt. Where doubts exist, they must be resolved in favour of the accused person. The circumstances under which an appellate court may interfere with a conviction were set out in ***Chemagong v Republic*** **[1984] KLR 611**, where the Court of Appeal held:

> ***"A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the trial***

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court is shown demonstrably to have acted on wrong principles in reaching the finding it did."

14. In ***Okale v Republic*** **[1965] EA 555**, the Court further stated:

> *"**An appellate court should not interfere with the findings of a trial court unless it is apparent that on the evidence no reasonable tribunal could have reached that conclusion."***

15. An Appellat court as I am, is therefore duty-bound to intervene where it is shown that the trial Court relied on inadmissible evidence, failed to properly evaluate material evidence, misdirected itself on the law, or where the resulting conviction is unsafe.

16. The Appellant was convicted of the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006**. **Section 10** of the **Act** provides as follows:

> ***"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of***

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rape or defilement, is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."

17. From the foregoing provision, the prosecution was required to establish the essential ingredients of the offence of gang rape beyond reasonable doubt. These are that there was penetration; that the penetration was without the consent of the complainant; and that the act was committed in association with another person or persons.

18. The court in ***Mutiso & another v Republic (Criminal Appeal E032 & 33 of 2023 (Consolidated)) [2025] KEHC 4043 (KLR) (27 March 2025) (Judgment)*** stated as follows in this regard:

"For a conviction based on a charge of "Gang Rape" to be sustained, the prosecution must

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prove the following four elements beyond reasonable doubt:

a. ***Penetration as defined by section 2 of the Sexual Offences Act without consent thereof;***

b. ***In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape.***

c. ***Positive identification of the perpetrator."***

19. Penetration is defined under **Section 2** of the **Sexual Offences Act** as:

> ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

20. It is now settled law that proof of penetration in sexual offence cases does not depend solely on medical evidence. In ***Kamau v Republic (Criminal Appeal E003 of 2024) [2025] KEHC 42 (KLR) (14 January 2025)***, the High Court reiterated that defilement may be proved by medical, oral, or circumstantial evidence. In that decision, the court cited with approval the holding in ***AML***

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***v Republic* [2012] eKLR (Mombasa)**, where it was stated:

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

21. The same principle was affirmed earlier by the Court of Appeal in ***Kassim Ali v Republic***, **Criminal Appeal 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."***

22. The import of these authorities is that medical evidence, while relevant, is not conclusive, and its absence or inconclusiveness does not necessarily defeat a charge of rape or defilement (as the case may be) where other credible evidence is available. At the same time, where medical evidence is tendered, it must be evaluated alongside the rest of the evidence on record to determine whether it supports or detracts from the prosecution case.

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23. The prosecution case on penetration rested on the testimony of **PW1**, the Complainant's mother, the medical evidence tendered by **PW2** and **PW3,** and the testimony later given by the complainant as **PW4. PW1** testified that the Complainant informed her that the Appellant and another person penetrated his anus using their penises on different occasions. She further stated that she took the Complainant to the hospital where, according to her, a wound was observed on his anus.

24. **PW2**, a nursing officer at Benu Health Centre, testified that upon examining the Complainant on 10/2/2020, he complained of pain in the rectum and that healing scars were noted on the rectum. **PW3**, a clinical officer at Sultan Hamud, testified that upon examining the complainant on 18/2/2020, he found no injuries and no discharge on the anus, and that laboratory tests were normal. He produced the P3 form and post-rape care forms and confirmed on cross-examination that there was no evidence of injury on the complainant's anus.

25. The Complainant later testified as **PW4** and stated that the Appellant and the co-accused penetrated his anus on several occasions, both in his house and in a bush nearby

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their home. He stated that he felt pain and that the acts occurred at night.

26. I have carefully re-evaluated the above evidence in its totality. **PW1's** evidence on penetration was not based on her own observation but on what the complainant allegedly reported to her. While such evidence was relevant, it was derivative and required corroboration from other evidence on the record.

27. The medical evidence tendered by **PW2** and **PW3** did not speak with one voice. **PW2** testified that healing scars were noted on the rectum on 10/2/2020. **PW3,** who examined the Complainant eight days later and completed the P3 form, was categorical that there were no injuries, no discharge, and no objective findings on the anus. He further confirmed on cross-examination that there was no evidence of injury on the Complainant's anus at the time of examination. The laboratory investigations were normal.

28. **PW3** testified that the Complainant alleged that the acts had occurred on several occasions prior to the date of examination. Notwithstanding that history, no injuries were observed at the time of the medical examination

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upon which the P3 form was based. The P3 form nonetheless classified the degree of injury as harm, despite the absence of observable anal injuries.

29. The Complainant's own testimony as **PW4**, in which he stated that the Appellant and another person penetrated his anus on several occasions, constituted oral evidence which, in law, could sustain proof of penetration if found to be credible and reliable. However, that testimony fell to be considered together with the surrounding circumstances in which it was received, the earlier proceedings relating to the complainant's competency to testify, and the medical evidence on record.

30. Upon a careful examination of the record, I note that the mental assessment report dated 7/6/2021, which the prosecution informed the trial Court it had obtained from Makueni Referral Hospital, was <u>not produced as an exhibit</u> and does not form part of the record of proceedings. No medical practitioner from Makueni Referral Hospital testified to produce or explain the contents of the report, and the report itself is not traceable on the record.

31. What the record shows is that when the complainant was first presented before the trial Court, an examination was

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conducted. During the examination, the Complainant gave responses inconsistent with his age and demonstrated difficulty with comprehension. At that stage, the prosecution informed the Court that it had a mental assessment report dated 7/6/2021 from Makueni Referral Hospital indicating that the Complainant was not competent to testify and required assistance. Upon considering the Complainant's responses during the hearing together with that representation, the trial Court made a clear finding that the Complainant was not competent to testify.

32. Although the trial Court thereafter remarked that the Complainant was a stammerer and was able to speak with the assistance and translation of the Court Assistant, the record further shows that no intermediary was formally appointed, and no directions were given regulating the manner in which the Complainant's evidence was to be received following the earlier finding.

33. The issue of vulnerable witnesses and the use of intermediaries was considered by the High Court in ***Njoroge v Republic (Criminal Appeal E015 of 2022) [2023] KEHC 1312 (KLR)***, where the Court stated that it

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is at the discretion of the Court to appoint an intermediary where the circumstances allow. The Court observed that an intermediary is a person authorized by the Court, on account of expertise or experience, to give evidence of a vulnerable witness, and may include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker, as provided under **Section 2** of the **Sexual Offences Act.**

34. In the same decision, the Court cited with approval the holding of the Court of Appeal in ***MM v Republic* [2014] eKLR**, where the Court stated:

> ***"It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voire dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared***

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vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed."

35. Unlike in ***Njoroge above***, where the trial Court regulated the proceedings and the prosecution sought to secure an intermediary once the witness's vulnerability became apparent, no intermediary was formally appointed in the present case. No application was made to appoint an intermediary after the finding of incompetence, and no directions were given by the trial Court regulating how the Complainant's evidence was to be received thereafter.

36. The Complainant's testimony was therefore received without compliance with the safeguards articulated in ***MM*** and applied in ***Njoroge above***. Given that proof of penetration in this case rested substantially on oral testimony, the failure to properly address the

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Complainant's vulnerability and competency materially affected the reliability of the evidence upon which the conviction was founded.

37. Turning onto whether the Appellant was positively identified as one of the perpetrators of the alleged offence, the prosecution case on identification rested on the evidence of **PW1**, who stated that the Complainant informed her that the Appellant and another person, whom she knew as neighbours, had penetrated him, and on the testimony later given by the Complainant as **PW4,** in which he stated that he knew the Appellant prior to the alleged incidents.

38. This Court is mindful that recognition is generally more reliable than identification of a stranger. However, even in cases of recognition, the Court is required to exercise caution and to examine the circumstances under which the alleged recognition was made. As was stated in ***Wamunga v Republic*** **[1989] KLR 424**:

> ***"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the***

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circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

39. **PW1** did not witness the alleged acts and did not identify the Appellant herself. Her evidence regarding identification was based entirely on what the complainant allegedly told her. That evidence was therefore derivative and depended wholly on the reliability and admissibility of the Complainant's account.

40. The Complainant's testimony as **PW4** was the only direct evidence linking the Appellant to the alleged offence. As already noted, that testimony was received after the trial court had earlier found the Complainant not competent to testify, and without the appointment of an intermediary or a fresh inquiry into competency. In those circumstances, the Court is unable to treat the Complainant's testimony as a safe basis for positive identification.

41. In addition, the Complainant testified that the alleged acts occurred at night, sometimes while he was asleep, and at other times in a bush. No evidence was led on the prevailing conditions at the time, including lighting,

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duration of observation, or other circumstances that would have enabled the Court to assess whether the identification was free from the possibility of error. **PW1** mentioned that it required significant persuasion for the Complainant to disclose the sexual assaults. The charge sheets indicate there were multiple incidents. What specific interaction led the Complainant to confidently identify the Appellants? What if the abuse was perpetrated by someone else or others?

42. It will suffice to refer to the case of ***Toroke v Republic*** **[1989] KLR 424**, where the Court of Appeal cautioned that:

> ***"It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken."***

43. While it is tragic what the Complainant experienced, the rights of the accused to a fair trial must still be upheld.

44. Taking the evidence on identification as a whole, and bearing in mind the manner in which the Complainant's

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testimony was received, the Court finds that the identification of the Appellant was not free from the possibility of error and could not safely sustain a conviction.

DISPOSITION:

45. Having considered the entire appeal, I do find and hold as follows;

a) ***the conviction of the Appellant for the offence of gang rape contrary to section 10 of the Sexual Offences Act was unsafe.***

b) ***The conviction is hereby quashed and the sentence of twenty (20) years' imprisonment is set aside.***

c) ***The Appellant shall be released forthwith unless otherwise lawfully held.***

46. It is so ordered.

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DATED, DELIVERED and **SIGNED** at **NAIROBI** through the Microsoft Teams Online Platform on this **17TH** day of **FEBRUARY, 2026.**

……………………………….

HON C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant present

Ms Mutua, ODPP

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