Ruto v Republic (Criminal Appeal 1 of 2025)
[2026] KEHC 1272 (KLR) (12 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1272 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 1 OF 2025

DR KAVEDZA, J

FEBRUARY 12, 2026

BETWEEN

KELVIN KIBET RUTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. A. Mwangi (CM) on 20th March 2025 at Kibera Chief Magistrates' court S.O. Case No. E002 of 2023)

JUDGMENT

1. The Appellant was charged and convicted before the Subordinate Court for the offence of sexual assault contrary to section 5(1)(a)(i)(2)as read with section 5 (2) of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to serve seven (7) years imprisonment.

2. Aggrieved, he filed the present appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He argued that the ingredients of the offence charged were not established. In addition, the trial court failed to consider his defence. He urged the court to quash his conviction and set aside the sentence.

3. The appeal was canvassed by way of written submissions which I have duly considered.

4. This is the first appellate court and in Okeno v. R [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

5. The complainant, PW3, a minor aged five years, provided unsworn testimony after the court established that she could not establish the nature of oath. She testified that on 29th December 2022, she was at the residence of the appellant, whom she referred to as 'Baba S'. She stated that while she, a

child named B, and the appellant were on a bed watching cartoons on a laptop, the appellant touched her genitalia (referred to by the witness as her "Kadudu" and "susu"). She specifically alleged that this physical contact resulted in her clothing and undergarments being torn in the vaginal area.

6. Following the encounter, she heard a call from an individual named Bibiana and returned home, where she made a prompt report to her mother. This report led to a medical examination where medication was applied to her private parts.

7. On the identity of the perpetrator, in her examination-in-chief, she asserted that the appellant was a person known to her as a neighbour and claimed she could recognise him if seen. During cross-examination, she maintained that the appellant, S, and B were the specific individuals present during the commission of the act, though she clarified that the appellant did not undress her. However, when granted an opportunity to perform a formal dock identification, the witness walked around the courtroom and failed to identify the appellant, explicitly stating that she did not see him (Baba S - the person who committed the act) in court and believed he was still "at home."

8. Furthermore, the witness provided details regarding the proximity and environment of the alleged offence, noting that the appellant lived within walking distance of her home and that the household included other children, such as S and B. She concluded her testimony by describing the post-incident events at her home, where an individual named Toi bathed her and cleaned the clothes she had undressed from herself.

9. PW2 B.M told the court that she was 15 years old and the complainant's cousin. She testified that on 29th December 2022, she permitted the complainant to play outside with a minor named B. At approximately 13:00 hours, PW2 sought to retrieve the complainant for lunch and was directed to the residence of "Baba S". Upon arrival, she entered the premises and discovered the complainant, B, and the Appellant inside a small room adjacent to the dining area.

10. Upon entering the room, she observed the Appellant lying on the bed with his phone, while B watched a laptop. The complainant was standing by the door, appearing to struggle with it from the inside. PW2 took the complainant home, where she subsequently undressed and bathed her. Critically, PW2 testified that she observed no physical abnormalities or injuries to the complainant's genitalia while washing her, nor did the complainant make any disclosure of an assault at that time.

11. PW2 confirmed the Appellant was a person known to her, whom she frequently saw at the residence. She corroborated the complainant's presence in the Appellant's company within a confined space at the material time. During cross-examination, she clarified that she only became aware of the alleged sexual assault at 19:00 hours that evening, after being informed by PW1 that the complainant's "Kasusu" had been touched.

12. PW1, the mother of the complainant, testified that on the evening of 29th December 2022, the child made a disclosure asserting that she had been touched by "Baba S" in his room. PW1 subsequently interviewed her niece, PW2, who confirmed that earlier that day, the complainant and a minor named B had been found within the residence of the Appellant. PW1 stated that she then proceeded to the Appellant's home and confronted him in the presence of his mother, Madam Judy. According to PW1, the Appellant, whom she identified as Kevin, admitted during this interrogation to sexually assaulting the complainant using his fingers.

13. PW1 clarified that although the child used the name "Baba S," the complainant habitually referred to men in the neighborhood as the "father of" the children in their respective households. PW1 maintained that the person the child was referring to was the Appellant, Kevin, despite the child's specific terminology. During cross-examination, PW1 admitted that prior to this incident, she did not

personally know the Appellant, though she was acquainted with his parents. She further confirmed that no formal identification parade was conducted by the police, as she had kept the complainant indoors to ensure she did not encounter the Appellant following the report.

14. PW1 further testified that she escorted the complainant to Nairobi Women's Hospital-Rongai for examination. She identified the resulting P3 and PRC forms and noted that the examining physician informed her of inflammation in the child's genital area. She testified that the doctor ruled out external factors, such as a bathing towel or tight clothing, as the cause of the inflammation. PW1 clarified that while she alleged the Appellant had inserted his fingers into the complainant's vagina, she did not claim that full penetration had occurred. Finally, PW1 stated that there was no history of conflict between her family and the Appellant's family that would suggest a motive for fabrication.

15. PW5, a clinician at Nairobi Women's Hospital, testified that the minor was examined by Rachel Ngina, who was no longer at the facility. He testified that the complainant was examined on 29th December 2022 at 21:23 hours. Upon examination, PW5 stated that while the child's external genitalia appeared normal and inflammation on an intact hymen. Additionally, the complainant was diagnosed with a moderate bacterial urinary tract infection (UTI). During cross-examination, PW5 clarified that the infection was moderate in nature and could potentially resolve without intervention as it was asymptomatic, noting he could not determine the exact duration of the infection. He produced the Post-Rape Care (PRC) form, the P3 form, and the Gender Violence Recovery Centre (GVRC) form.

16. He noted that the name "Kevin" was recorded in the PRC form as part of the history provided by the complainant's mother. PW5 also confirmed that the complainant had changed her clothing prior to the examination and was escorted to the hospital by her mother. In re-examination, he reiterated that asymptomatic UTIs are generally left untreated.

17. PW4, the investigating officer, testified that on 29th December 2022, PW1 made a report alleging that the Appellant, Kevin, had sexually assaulted the complainant. PW4 facilitated the medical examination and subsequently charged the Appellant with sexual assault. She produced the complainant's birth certificate as an exhibit, confirming the child was born in 2018.

18. PW4 noted that while the victim used the name "Baba S," PW1 identified the suspect as Kevin. PW4 clarified that the child associated the assailant with the household ("owner of S's house") but struggled with specific names due to her tender age. No identification parade was conducted. PW4 confirmed that a scene visit was performed, though the Appellant's laptop was not recovered.

19. During cross-examination, PW4 admitted the complainant's mother was a colleague and neighbour. She further testified that during interrogations, the child alleged the Appellant removed his hand from her private parts when Bibiana called. Notably, while the minor B confirmed being in the house watching a movie, he did not speak to the incident itself.

20. In his sworn defence, the Appellant testified that on the material day he remained at home during the morning hours, assisting DW3 (his sister) with her mathematics assignment at approximately 11:00. Following lunch at 13:00, he stated he left the residence at 14:00 to play basketball at a pitch approximately one kilometre away, returning home at 18:30 after stopping at a supermarket. DW3 (his mother) corroborated his presence in the house during the morning and his departure in the afternoon. Both DW2 and DW3 maintained that no visitors, including the complainant or other children, entered their residence on the material day.

21. The Appellant and DW2 provided a description of the household layout to rebut the prosecution's narrative. They described the residence as a two-bedroom house where one room is partitioned between the Appellant and DW3. They clarified that the "call box" is a small storage area for water jars

and jerrycans, asserting it is too small to accommodate a bed. Furthermore, the Appellant and DW3 explicitly denied owning a laptop, testifying instead that they only possessed a television and mobile phones at the time of the alleged offence.

22. The Appellant also denied knowing the complainant, B, or S, and claimed he did not know his immediate neighbours or their children. DW2 noted that the complainant's residence was approximately 800 metres away, rather than in the immediate vicinity. Regarding the arrest, the Appellant testified that he was summoned to the police station at 22:00 without prior explanation, only learning of the allegations during interrogation the following morning. He denied any involvement in the incident and maintained he had never met the complainant until the court proceedings.

23. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them.

24. The offence of sexual assault is created by Section 5 of the *Sexual Offences Act* which provides that:

> "(1) Any person who unlawfully:
>
> (a) penetrates the genital organs of another person with—
>
> (i) any part of the body of another or that person; or
>
> (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
>
> (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault."

25. The Court of Appeal in the case of John Irungu V Republic, [2016] eKLR pronounced itself on the essential ingredients of the offence of sexual assault as follows:

> "…. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

26. From the foregoing, it is clear that in order to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person appellant of the offence or any other person or objects manipulated by the appellant person for that purpose.

27. The essential elements of the offence therefore are, proof of penetration and positive identification of the assailant.

28. In the instant case, the complainant, PW3, was a minor aged four years at the time the offence was allegedly committed. Given her tender age, she provided unsworn evidence after a voir dire examination. Consequently, as a matter of law under Section 124 of the *Evidence Act*, her testimony required independent corroboration to connect the Appellant to the offence.

29. The central issue for determination is whether the Appellant was positively and reliably identified as the perpetrator of the offence. The evidence on record demonstrates that identification was fatally flawed.

30. The minor complainant referred to the alleged perpetrator as "Baba S". However, when afforded an opportunity to identify the appellant during trial, she categorically failed to do so, stating that she did not see "Baba S" in court and believed him to be "at home". This was not a mere lapse but a complete failure of dock identification by the primary witness.

31. This deficiency was aggravated by the Prosecution's failure to establish that the Appellant, known as "Kelvin", and the person referred to as "Baba S" were one and the same individual. No evidential link was drawn to reconcile the two identities. The explanations offered by PW1 and PW4, suggesting that the child was confused or assumed the Appellant to be "Baba S", were speculative, unsupported by evidence, and incapable of curing the absence of positive identification.

32. Further, the evidence disclosed that a person known as "Baba S" indeed existed. Despite this, the investigating officer did not conduct any inquiries to exclude this person as a potential suspect. The failure to conduct an identification parade, particularly in circumstances where identity was contested, further weakened the Prosecution's case and left the court without an objective basis for connecting the Appellant to the offence.

33. The evidence relating to the commission of the offence was equally fragile. The minor did not provide a detailed or graphic account of the alleged act. Crucially, the Prosecution failed to produce material exhibits that were said to be central to the incident, namely the laptop allegedly used during the occurrence and the torn undergarment worn by the child. In the absence of these exhibits, the case rested entirely on the unsworn and uncorroborated testimony of a child of tender years.

34. The medical evidence tendered by PW5 did not resolve these deficiencies. While inflammation of the hymen was observed, PW5 also confirmed that the child was suffering from a urinary tract infection. Given that the child was examined on the same day as the alleged assault, it is medically improbable that a UTI could be contracted and manifest within such a narrow window. The possibility that the observed redness resulted from the infection can therefore not be excluded. This evidence therefore did not conclusively corroborate sexual assault.

35. The trial court, with respect, failed to adequately appreciate the cumulative effect of these evidential gaps. The Prosecution relied heavily on an alleged extra judicial confession made to PW1. However, in the absence of corroborative physical evidence and in light of the complainant's failure to identify the Appellant, such reliance was unsafe.

36. The High Court has consistently emphasised the need for certainty in matters of identification. In Kariuki Njiru & 7 others v Republic, Criminal Appeal No. 6 of 2001 (unreported), the court stated:

> " The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

37. Similarly, the Court of Appeal in Wamunga v Republic [1989] KLR 424 held as follows:

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification."

38. While the law is settled that no particular number of witnesses is required to prove a fact, the evidence adduced must be of such quality as to establish guilt beyond reasonable doubt. This includes proof that identification is both truthful and accurate.

39. Truthfulness relates to the credibility of the identifying witness. Accuracy concerns whether the identification is free from honest mistake and depends on the witness's capacity for observation, memory and recall, as well as the opportunity the witness had to observe the alleged offender.

40. Where the complainant herself fails to identify the person in the dock, the Prosecution cannot be said to have discharged its burden of proof.

41. Upon a holistic evaluation of the record, the Prosecution's case was marred by material gaps and contradictions. The most fundamental and fatal defect lay in the failure to positively identify the Appellant as the perpetrator of the offence.

42. In the circumstances, the doubts arising from the evidence must be resolved in favour of the Appellant. I therefore find that the Appellant was not positively identified, and the conviction founded on such evidence is unsafe.

43. In the premises, the appeal is found to have merit and is allowed. The conviction of the trial court is quashed and the sentence imposed is set aside. The Appellant is acquitted is set at liberty unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 12TH DAY OF FEBRUARY 2026

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mr. Mutuma for the Respondent

Karimi Court Assistant.