



REPUBLIC OF KENYA



KENYA LAW
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**Walela v Republic (Criminal Appeal E080 of 2024)
[2026] KEHC 4141 (KLR) (25 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 4141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E080 OF 2024
PJO OTIENO, J
MARCH 25, 2026**

BETWEEN

BENSON WALELA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant and his co-accused, identified as Brian Wamalwa (Minor), were charged with an offence of Gang Rape contrary to Section 10 of the [Sexual Offences Act](#) No. 3 of 2006. The particulars alleged that on the 10th day of August 2022, at [particulars withheld] Village within Kiminini Sub-County of Trans-Nzoia County, the duo, acting in association, intentionally and unlawfully caused their penises to penetrate the vagina of L.S. without her consent. An alternative charge of committing an indecent act with an adult, contrary to Section 11(A) of the same Act, was preferred. The Appellants also faced another count of assault occasioning actual bodily harm, contrary to Section 251 of the Penal Code, for the alleged assault on J.N. during the same transaction.
2. The Appellant and his co-Accused pleaded not guilty of charges. Following a full trial, the trial magistrate delivered its judgment on 15/11/2023 and convicted the Appellant on both counts of Gang Rape and Assault. The subject minor was however acquitted of the charges after the court found the evidence against him to be insufficient. The Appellant was consequently sentenced to fifteen (15) years imprisonment for the main count of Gang Rape and one (1) year imprisonment for the count of Assault. The sentences ordered to run concurrently from 15/01/2023.
3. Dissatisfied with the trial court's finding, the Appellant lodged the instant Appeal. The Memorandum of Appeal presents five grounds of appeal which primarily attack both the factual findings and the reasoning of the trial court on both conviction and sentence. It is asserted that the trial magistrate erred in law and fact by failing to note that the mode of identification was improper and did not meet the



- required threshold for a safe conviction, the same having been riddled with inconsistencies, particularly regarding the lighting conditions and the prior Appellant's familiarity to the complainant.
4. The trial court is accused to have failed to take into account that crucial witnesses, who supposedly identified the Appellant by name based on a description, were never called to testify thus shifting the burden of proof to the Appellant and failing to adequately consider his alibi defense.
 5. The Appellant also presents that the sentence of fifteen years was harsh and excessive, failing to consider the Appellant's youth, remorsefulness, and potential for rehabilitation.
 6. The Appellant thus prays that the court quashes the conviction, set aside the sentence, or in the alternative, grant a non-custodial sentence to allow him a second chance in life as a young man.

Summary of the Trial Proceedings

7. The prosecution's case at the trial court was hinged on the testimony of its six presented witnesses. PW1 and the complainant in the matter stated that on the 10/08/2022 at around 0020hrs, she left the Namanda Polling Centre with her cousin, PW5 and were attacked some 50 meters from the centre. She said that one of the male assailants flashed a torch at PW5, while the Appellant slapped a third person, Andrew, with a panga, shouting "Mimi nachunga kura za kuitila". PW5 fled leaving her behind and the two men forced her into a maize plantation.
8. She testified that the Appellant then raped her first before the other accomplice also raped her. She identified the Appellant by a scar on his nose, his voice, and a limp in his walk, noting that she had seen and heard him earlier at the polling centre.
9. During cross-examination, she admitted she did not scream because of the panga threat and that the only light came from the assailants' torch and the distant polling station lamps.
10. Both PW2 & PW4 being clinical officers provided the medical foundation for the case. PW2 examined PW1 on 10/08/2022, at Kiminini Sub-County Hospital, noting bruises on the labia minora and cervix, bloody discharge, and a torn hymen. PW4 corroborated these findings and also testified regarding PW5, who sustained a cut on his arm caused by a sharp object. During cross-examination, PW2 noted that the P3 form initially indicated the assailants were not known to the victim.
11. PW3, the Complainant's mother, testified that she received a call from PW5 and immediately began searching for her daughter. She found PW1 on the road, crying, and was told that the Appellant and the Co-Accused were the perpetrators. She explained that PW1 knew the Appellant as a neighbour and recognized him because Benson had called him by the name Brian during the incident. This isn't clear at all. Which of the two accused persons was the witness referring to?
12. PW5 confirmed they were intercepted by two men. He described one man having a scar on his nose, which he saw via the flashlight. He added that he blocked a panga blow with his arm and fled to get help. He confirmed to have given a description of the assailants to his friends, who then identified the suspect as Benson and the Appellant herein.
13. The investigating officer, PW6 visited the scene and observed disturbed vegetation. He testified that the suspects were arrested because the complainants provided specific physical descriptions, a nose injury and a limp for the 1st accused, and general appearance for the minor.
14. When put on defence, the Appellant who gave evidence as DW1 gave sworn testimony maintained no wrongdoing and put forth an alibi. The appellant's DW1 case was that he was at all material times guarding votes at the polling centre until 0400hrs, after which he went and slept at home.



15. The appellant called his mother as a witness and she gave evidence as DW3 after the co-accused had testified as DW2. DW3 supported the evidence by the appellant of not being at the scene of crime but when cross-examined, admitted having visited and approached the victim's family to seek for forgiveness.
16. DW4 and DW5 provided conflicting testimony regarding the DW2's whereabouts, with DW5 explicitly disowning the minor's alibi during cross-examination. This is overly a summary. Set out what each witness said.

Submissions

17. It is the Appellant's submission that the mode of identification failed the Turnbull standards. He specifically argues that the darkness in the maize plantation and the reliance on a flickering flashlight made it impossible for the witnesses to accurately perceive a scar or a limp. He submits that the clinical officer's record in the P3 form that the attackers were not known fatally contradicts the prosecution's claim that this was a case of recognition.
18. The Appellant then points out that PW5 arrived at the name Benson through friends who were never called to testify. Relying on the case of Republic v Pattni and John Kenga v Republic, he argues that the court should draw an adverse inference from the prosecution's failure to call these witnesses, as their testimony might have revealed a flawed identification process. Finally, he pleads for a reduction of his fifteen-year sentence, citing his youth and the need for a rehabilitative rather than retributive approach.
19. The Respondent on the other hand maintains that the conviction was well-founded. It is argued that the identification was based on recognition, as the Appellant was a neighbour known to the victims. It is highlighted that the unique features, the scar and the limp served as positive markers that remained visible despite the night-time conditions. The Respondent emphasizes that PW1 was with the assailants for over an hour, providing sufficient time for recognition.
20. On the issue of the co-accused's acquittal, the Respondent submits that the acquittal of one gang member does not preclude the conviction of another if the evidence of association is clear. Regarding the sentence, the respondent argues that fifteen years is the statutory minimum for gang rape under Section 10 of the *Sexual Offences Act* and that the trial court exercised its discretion correctly by not enhancing it to life imprisonment. The prosecution relies on the case of Bernard Kimani Gacheru v Republic to assert that appellate interference with sentencing is only warranted in cases of manifest excessiveness or error in principle.

Issues, Analysis and Determination

21. Being a first appeal, the court is under a duty to re-evaluate and re-assess the entire evidence adduced at the trial and to come to 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. This was amplified in the East African case of Mbogo & Another v Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”



22. With its mandate well settled, the court has anxiously perused the trial court record vis a vis its judgement, the grounds of appeal raised herein as well submissions by both the rival parties, and has identified three issues to isolate for its determination. The three issues are: -
 - a. Whether the ingredients of the offence of gang rape were proved beyond a reasonable doubt;
 - b. Whether the acquittal of the second accused renders the Appellant's conviction for gang rape legally untenable; and,
 - c. Whether the sentence of fifteen years was legal, proportionate.
23. On the ingredients of Gang Rape, the court notes that the evidence unequivocally proved the commission of rape. PW1's narration of forced sexual intercourse while being threatened with a panga was corroborated by the medical evidence which confirmed penetration and physical trauma evidenced by the noted bruised labia minora, bruised cervix, torn hymen, and bloody discharge from the victim's genitals. How old was she? Was that her first sexual intercourse? How fresh? Any semen/sperms?
24. The element of association under Section 10 SOA is met if the perpetrator acted in concert with another or others. However, the integrity of this element of association, like the entire case, rests on the safety of the identification of the perpetrators. In the instant, the court notes that identification process occurred under challenging conditions: at night, in a maize plantation and during a violent assault. However, several factors mitigate the risk of error in prosecution's case of mistaking the Appellant. When did the two witnesses first mention the name of the appellant? On what basis was the co accused acquitted? Was there evidence that the appellant flushed light from the spotlight on his own face?
25. First, this was a case of recognition, not identification of a stranger. PW1 and PW5 knew the Appellant as a neighbour. Recognition of a known person is inherently more reliable as it involves identifying familiar traits rather than memorizing new ones. Second, the duration of the observation was approximately one hour. This far exceeds the fleeting glance scenario that often leads to misidentification. PW1's evidence was that both the assailants raped her in turns and was able to identify them with the nearby security lights.
26. Further, the presence of unique physical markers, a scar on the nose and a limp further bolsters the identification. While the Appellant argues that many people may limp, the cumulative effect of a known neighbour possessing both a specific scar and a specific limp, identified by a victim who had seen him earlier that day creates a strong chain of identification. The lighting, though described as insufficient by the defence, was provided by a flashlight and nearby security lamps, which PW1 testified were used by the assailants themselves to read her identity card. This court finds that the trial magistrate correctly applied the Turnbull guidelines and was justified in finding the identification to be positive and free from error.
27. The Appellant contends that the failure to call the friends mentioned by PW5 was fatal. However, the court notes that the named friends were not eyewitnesses to the rape; they were individuals who helped PW5 put a name to a description. While they might have provided more context on how the name Benson was suggested, they were not crucial to the unfolding of the primary narrative of the rape itself. The primary evidence of identification came from PW1 and PW5's own observations of the scar and limp. The friends would have merely provided evidence regarding the Appellant's name. Therefore, no adverse inference is warranted, as their absence did not create a fatal gap in the evidence.
28. The Appellant further challenges his conviction for gang rape on the basis that the second accused was acquitted. Section 10 of the *Sexual Offences Act* defines the offence of gang rape as rape committed in association with another or others. The Appellant suggests that if Brian was not there, then no



gang existed. However, the definition of a gang in Section 2 of the Act simply means two or more persons. The acquittal of a co-accused does not necessarily mean that the offence was not committed in association. It merely means that the evidence against that specific individual did not meet the threshold of beyond reasonable doubt. In this case, the acquittal of the minor was based on his aunt's initial support for his alibi and perhaps the court's caution in dealing with a minor. Yet, the consistent testimony of PW1 was that two men attacked her. Two people make a gang, if one is exonerated, is there still a gang? Can't the fact of acquittal invite doubt as to the accuracy of evidence on identification?

29. The fact that the Appellant was positively identified while the second man remained legally unidentified following acquittal does not change the nature of the transaction, it was a rape committed in association with another. This court affirms the reasoning in *Dominic Ochieng Odoyo & another v Republic* [2015] eKLR, which held that the key ingredient is proof that the assailant was in the company of another who committed or facilitated the offence.
30. Lastly on the legality of the fifteen-year sentence, the trial court imposed the minimum sentence prescribed by Section 10 of the *Sexual Offences Act*. The court makes In *Bernard Kimani Gacheru v Republic* (2002) eKLR, the Court of Appeal stated that:-

“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist”.

31. In the circumstances of this case, the sentence imposed was the least prescribed as the court did not enhance it above the minimum. The appellant has not established any grounds upon which the Court can interfere with his sentence.
32. Consequently, the court hold that the appeal against the sentence lacks merit and is dismissed. The fifteen-year sentence for count I was the minimum allowed by law and is proportionate to the violent nature of the crime. The one-year sentence for assault is also appropriate.
33. The upshot is that the court finds and holds that the prosecution proved its case against the Appellant beyond any reasonable doubt. Consequently, the appeal against both conviction and sentence are hereby dismissed for lack of merit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF MARCH, 2026

PATRICK J O OTIENO

JUDGE

