

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL APPEAL NO E005 OF 2025

STANLEY MUSUNGU.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(Being an Appeal from the Judgment of Hon J.A. Agonda (PM) delivered at Vihiga in Principal Magistrate's Court in Criminal Case No 248 of 2020 on 20th January 2025)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged jointly with five (5) others with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).
2. He was tried and convicted by the Learned Trial Magistrate, Hon J.A Agonda (PM) who sentenced him to twenty five (25) years imprisonment.
3. Being dissatisfied with the said Judgement, he lodged the Appeal herein dated 20th February 2025 and filed on 21st February 2025. He set out six (6) grounds of appeal. He also filed Supplementary Grounds of Appeal dated 8th July 2025 and filed on 24th July 2025. He set out six (6) Supplementary Grounds of Appeal.
4. His Written Submissions were dated 8th July 2025 and filed on 24th July 2025 while those of the Respondent were dated and filed on

18th August 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Petition of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. **Whether Section 200 of the Criminal procedure Code was complied with;**
 - b. **Whether or not the Prosecution proved its case beyond reasonable doubt; and**

c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. WHETHER SECTION 200 OF THE CRIMINAL PROCEDURE CODE WAS COMPLIED WITH

9. Supplementary Grounds of Appeal No (5) were dealt with together as they were both related.

10. The Appellant submitted on the same. He submitted that Hon B. Omollo (SRM) succeeded Hon S.O. Ongeru (SPM) and took the testimony of two (2) witnesses but failed to comply with the provisions of Section 200 of the Criminal Procedure Code . He added that the said Hon B. Omollo (SRM) then transferred the matter to Hon. J. A. Agonda (PM) without the order of the Chief Magistrate or the High Court. He pointed out that the said Hon. J.A. Agonda (PM) took the evidence of PW 10 but also failed to comply with Section 200 of the Criminal Procedure Code. He was emphatic that this was fatal to the case.

11. He argued that the magistrate ought to have observed the demeanour and credibility of the witnesses as was held in the case of **Richard Chadro Mole vs Republic (2010) eKLR** which was quoted in **Ndegwa vs Republic (1986) KLR 534.**

12. On its part, the Respondent submitted that, on both occasions, the court informed the Appellant of his right and his advocate elected to proceed from where the case had reached. It referred to the case of **Joseph Kamara Maro vs Republic (2014) eKLR** where the court emphasised that under Section 200(3) of the Criminal Procedure Code, the succeeding magistrate was not obliged to start the case *de novo* but was mandated to inform an accused person of this right.

13. A perusal of the record showed that the Appellant herein and his Co-accused persons were represented by an advocate. It was correct as the Appellant stated that Hon S.O. Ogeri (SPM), Hon Beryl Omollo (SRM) and Hon J. A. Agonda (PM) took the evidence of different witnesses. When the matter came up for directions on 14th December 2023, the Appellant's counsel prayed that the matter proceed from where it had reached. The Appellant was present in court.

14. The record further showed that on 19th August 2024, Hon. J.A Agonda (PM) took the evidence a witness. There was no indication in the file that when she took over the matter on 26th June 2024, the provisions of Section 200(3) of the Criminal Procedure Code were complied with.

15. Notably, Section 200(3) and (4) of the Criminal Procedure Code provides that;

“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded

by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

16. According to this provision of the law, whenever one trial magistrate took over a trial from the preceding or a previous trial magistrate, it was incumbent upon the succeeding trial magistrate to inform the accused of his right to demand that any witness who had testified before the previous magistrate be re-summoned and reheard afresh failing which the court could order a retrial if the accused person had been prejudiced as provided in Section 200(4) of the Criminal Procedure Code.

17. The general principle was that a retrial should only be ordered where it was unlikely to cause injustice to both the victim and the accused person. The court was mandated to consider the length of time that had lapsed from the date of arrest and arraignment of the accused person or appellant, whether on proper consideration of the admissible evidence, or potentially admissible evidence, a conviction could result as was held in the cases of **Muiruri vs**

Republic [2003] KLR 552 and Mwangi vs Republic [1983] KLR 522.

18. This court found and held that although Hon J.A. Agonda (PM) did not comply with the provisions of Section 200(3) of the Criminal Procedure Code, the Appellant was ably represented by counsel who was aware of the importance of the said provision but nonetheless proceeded with the trial. Indeed, the said counsel had informed Hon Beryl Omollo (SRM) that the case could proceed from where it had reached.
19. The only assumption this court could make was that the Appellant's counsel intended to continue from where the matter had reached. This court did not in fact see any prejudice that the Appellant suffered because he proceeded with the defence hearing and did not object when the Prosecution closed its case. If he suffered any prejudice, then he did not demonstrate the same.
20. Further, he did not also request the Trial Court to allow him to cross-examine his Co-Accused person, Peter Kavai Keya and the Trial Court declined his request. The Trial Court would not have known if he wished to cross-examine the said Peter Kavai Keya.
21. Whichever way this court looked at this matter, this was not a suitable case for it to order a retrial.
22. In the premises foregoing, Supplementary Ground of Appeal No (5) was merited and the same be and is hereby dismissed.

II. PROOF OF PROSECUTION'S CASE

23. Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) and Supplementary Grounds of Appeal Nos (1), (2) and (3) were dealt with under this head.
24. The Appellant cited **Abanga alias Onyango vs Republic CRA No. 32 of 1990** on the test circumstantial evidence should satisfy. He submitted that the phone that was alleged to have been recovered from him did not belong to the complainant nor was it linked to the alleged robbery. It was also not proved that it belonged to him as there was no evidence from Safaricom Liaison Officer to show that it was registered to him and he had used it. He added that no inventory was prepared to show that it was recovered from him and he cited **Letzer Teper vs the Queen (1952) 20 HC.48.**
25. He was emphatic that there was no evidence that linked him to the offence as PW 5 only testified on how he knew him as his neighbour and he was not aware on how he was linked to the offence. He submitted that the recovered turkeys were not recovered from him but from one Elijah and that the Investigating Officer failed to link him to the said Elijah or the recovered turkeys. He relied on the case of **Mwangi vs Republic (1957) EA 104** where the court stated that when an exhibit was not found in possession of an accused person, he was not liable for it.
26. He faulted the court for finding that the doctrine of recent possession was proved yet nothing was recovered from him. He stated that the court relied on suspicion and faulted the court for relying on the weakness of his defence and basing the conviction on

the strength of the prosecution's case. His further submissions were that PW8 failed to identify him during the parade.

27. On its part, the Respondent submitted that when the Appellant was arrested, he was found in possession of a mobile phone, Pexhibit3. While at the station, he was contacted by his Co-Accused person, one Benjamin Mayodi, who requested they meet but did not show up. It pointed out that the Appellant led to the arrest of his Co-Accused person, the said Benjamin Mayodi who had used his phone to receive money from PW 8. It argued that that this circumstantial evidence linked him to the offence.

28. It further submitted that the report from the Government Chemist at Kisumu where DNA examination was done showed that there was genetical relation between PW 8's vaginal swab and his saliva swab which placed him at the scene of crime. He was therefore emphatic that the evidence produced proved beyond reasonable doubt that the Appellant in company with others robbed the PW 8 and used violence after the said robbery.

29. A perusal of the proceedings of the lower court file showed that on 28th January 2020 at between 11.00 pm and 2.00am, PW 8 was woken up from her sleep by a bang on her door and was shocked to see someone in her room. She said that the person took her black techno phone, an airtel line and other things from the room which he was handing over to another person in the other room. Her evidence was that there were two (2) persons in the house and commotion outside her house.

30. She added that two (2) persons raped her after robbing her and that she was only able to identify the Appellant's Co-Accused person in an Identification (ID) Parade. She confirmed that she did not identify the Appellant herein. She told the Trial Court that she went and informed Elisha Chagisia (hereinafter referred to as "PW 1"), her father in law of her ordeal. PW 1 then mobilised neighbours who took her to hospital. PW 1 corroborated her evidence.

31. PC Augustine Sifuna (hereinafter referred to as "PW2"), testified that on 21st February 2020, they received information that the Appellant was arrested with a golden Tecno. He stated that the Appellant's Co-Accused person called him through Telephone Number 0745746828 wanting to know where they would meet. He said that the Appellant was at the time using Telephone number 0759925640 they meet in church but he did not show up. He stated that they traced the Appellant herein and arrested him. He tendered in evidence a Tecno phone and odeion(sic) phone which he identified in court.

32. When he was cross-examined, he testified that he did not have Safaricom details so he could not demonstrate that the line was registered in Appellant's name. He also confirmed that nothing that had been stolen was found in his house.

33. PC Ibrahim Chars (hereinafter referred to as "PW3"), also corroborated PW 2's evidence. On cross-examination, he testified that he conducted a search on the Appellant's Co-Accused person and recovered mobile phone from his underpants which had

Safaricom and Zain line. He said that the number that was used during the robbery was 0745746826. He said that he had seen some of the Appellant's Co-Accused persons who had been accused of stealing things and the said Benjamin had used the same number.

34. No 235791 CIP Samuel Mariengo (hereinafter referred to as "PW4") testified that he arrested the Appellant herein but that he was not present when the Appellant's Co-Accused person was arrested but that he was nearby. He stated that the Appellant's Co-Accused person was arrested with a mobile phone and sim card but he did not see the phone. He stated that the woman who was robbed money which had been transferred to Appellant Co-Accused person's number led them to investigation.

35. The Assistant Chief, Eugene Ambale, (hereinafter referred to as "PW 5") said that he knew the Appellant but he did not know how he was linked to the offence. He also explained how he had arrested the Appellant and his Co-Accused person, one Kennedy Ogonda Ishuga, at different times for stealing.

36. No 237830 IP Mary Boke (hereinafter referred to as "PW 6") told the Trial Court that she carried out an Identification Parade and the Appellant was not identified by PW 8. She pointed out that PW 8 only identified one of the Appellant's Co-Accused person, Peter Kawai Keya, as one of the persons who robbed and raped her.

37. No 62919 PC William Kemboi (hereinafter referred to as "PW 7"), only produced the photographic evidence of the turkeys that were recovered. They were not linked to the Appellant herein.

38. A Court Administrator at Vihiga Law Courts, Dina Kusa, (hereinafter referred to as “PW 9”) produced the file for **SO Case No 10 of 2020** where the six (6) accused persons were charged with the offence of gang rape. At the time that she testified, judgment in the aforesaid case was pending delivery.

39. No 95159 PC Hussein Osman (hereinafter referred to as “PW 10”) testified on behalf of the initial Investigating Officer who was on retire. On cross- examination, he testified that the Appellant herein was linked during investigation as his oral swab matched PW 8’s vaginal swab. He also added that the Appellant and his (2) Co-Accused persons, the said Peter Kawai Keya were the only ones who were convicted of the offence of gang rape in **SO Case No 10 of 2020.**

40. Although PW 2 and PW 3 testified that they arrested the Appellant with a phone, Tecno in make and his phone number was 0759925640. Notably, his phone and the alleged phone number were not linked to the robbery. Even though he was contacted by his Co-Accused person, this line of evidence did not link him to the commission of the offence.

41. The Trial Court noted that PW 8 and all the Appellant’s Co-Accused persons were subjected to DNA examination at Kisumu Government Chemist where vaginal swab from PW 8 and saliva swabs from the Appellant and his Co-Accused persons were taken. It connected the Appellant to the scene of crime through the evidence that was produced in **Sexual Offences Case No 10 of 2020** which

file was produced by the Court Administrator, Diana Kusa (PW9). Based on the said DNA results, the Appellant herein and his Co-Accused person, Peter Kawai Keya, were found guilty of gang rape and convicted.

42. Notably, the results ascertained that there was genetical relation between the vaginal and saliva swaps (**sic**) of the Appellant and his Co-Accused person, namely Peter Kawai Keya. This was confirmed by PW 10.

43. This court did not have the advantage of perusing **Sexual Offences Case No 10 of 2020** as it was not part of the Record of Appeal. However, it could not fault the Trial Court for finding the Appellant culpable since it had the advantage of seeing and perusing the documents therein. Indeed, the Appellant did not deny that he was convicted in **Sexual Offences Case No. 10 of 2020** and this court was not aware of any decision that had overturned the said finding of the Trial Court. It was, therefore, the view of this court that the Appellant was convicted on sound evidence that connected him to the scene of crime.

44. However, the Trial Court erred in convicting the Appellant on the basis of the doctrine of recent possession since the recovered turkeys were not recovered from him and there was no connection between him and the homestead where they were recovered.

III. WHETHER THE APPELLANT WAS DENIED A CHANCE TO CROSS EXAMINE HIS CO-ACCUSED PERSON

45. Supplementary Ground of Appeal No (4) was dealt with under this head.

46. The Appellant faulted the Trial Court for not according him right to cross examine his Co-Accused person, Peter Kavai Keya, who admitted during his defence that he committed the offence with his Co-Accused persons. He was emphatic that the Trial Court ought to have informed him of his right to cross examine the said Peter Kavai Kenya when he gave incriminating defence against him and his Co-Accused persons.

47. On its part, the Respondent argued that although the right to cross examine a co-accused was a fundamental aspect of a fair trial, the same was not mandatory. It added that the decision to cross-examine rested with the accused or his advocate. It submitted that the Appellant had an advocate and the court could not invite him to cross examine his Co-Accused person. It was emphatic that the Appellant was not prejudiced.

48. It was correct as the Appellant stated that his Co-Accused person, Peter Kavai Keya admitted to having committed the offence when tendering his defence. This was a fact that he reiterated during cross examination and re-examination.

49. Notably, the right to cross examine witnesses including an accused person's co-accused was a fundamental tenet of the right to a fair trial which was protected under Article 50 (2) (k) of the Constitution of Kenya, 2010 and which guaranteed an accused

person the right to adduce and to challenge evidence. The same provided as follows:-

“Every accused person has the right to a fair trial, which includes the right to adduce and challenge evidence.”

50. Notably, the Trial Court never relied on the evidence of the evidence of the Appellant’s Co-Accused person, the said Peter Kavai Keya, to convict them both. It considered the defence that was tendered by the Appellant and his C-Accused persons. It took into account the Appellant’s alibi defence and found the same to have been an afterthought and vague as he did not state where he was at the material time.

51. It was the view of this court that since that the Trial Court did not rely on the evidence of the Appellant’s Co- Accused person, Peter Kavai Keya, to convict the Appellant herein, he was prejudiced by the purported omission by the Trial Court to give him an opportunity to cross-examine his Co-Accused person, the said Peter Kavai Keya. He was convicted based scientific evidence that linked him to the offence and not by the admission of his said Co-Accused person, Peter Kavai Keya.

IV. SENTENCE

A. PERIOD SPENT IN REMAND

52. Supplementary Ground of Appeal No (6) was dealt with under this head.

53. The Appellant submitted that he was denied the right to least prescribed sentence pursuant to Article 25(c), 50(2)(p) **(sic)** and Section 333(2) of the Criminal Procedure Code. He stated that he was arrested on 24th February 2020 and was sentenced on 9th November 2022 and that he was in remand throughout the trial. He urged this court to order that the sentence commence from the date of his arrest.
54. On its part, the Respondent submitted that the sentence was within the legal limits and the Appellant failed to demonstrate that the Trial Court erred in principle. Further, the Trial Court considered his mitigation, the severity of the offence and the principles of sentencing. It urged this court not to interfere with the sentence considering the nature of the offence and the trauma caused on the victim.
55. However, it did not oppose the Appellant's prayer of the sentence to commence from the date of his arrest. It submitted that though the Trial Court stated that it had taken the period the Appellant had been in custody, it did not state when the sentence was to commence.
56. This court was mandated to consider the period the Appellant spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
57. The said Section 333(2) of the Criminal Procedure Code provides that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”

(emphasis court).

58. Further, the Judiciary Sentencing Policy Guidelines provide that:-

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

59. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.**

60. Notably, the date of arrest was not indicated in the Charge Sheet. He was, however, arraigned in court on 10th March 2020. He was denied bond and he was sentenced on 17th February 2025. It was important to note that according to Court administrator Dinah Kusa (PW 9), the Appellant was convicted in **Sexual Offences Case No. 10 of 2020** on 29th September 2022 hence from that period, he was serving a lawful sentence.

61. The proviso to Section 333 (2) of the Criminal Procedure Code was clear that the same applied to the period the convict was in remand custody awaiting conclusion of his trial and did not apply to the when the convict was serving a lawful sentence in a different case during the trial.

62. A perusal of the lower court proceedings indicated that the Trial Court did not take into consideration the said period while sentencing the Appellant. This was a period that therefore ought to be taken into consideration while computing his sentence.

63. In the premises foregoing, Supplementary Ground of Appeal No (6) was merited and the same be and is hereby allowed.

B. RUNNING OF THE SENTENCE

64. The Appellant did not raise the issue of how the sentences ought to run. This was an issue that had been raised by his Co-Accused person, one Peter Kavai Keya. They were both sentenced to twenty five (25) years imprisonment. Their other Co-Accused persons were, however, sentenced to twenty years (20) years

imprisonment for the same offence. While sentencing the Appellant herein, the Trial Court considered his mitigation and aggravating factors. It also took into account that he had been convicted in another offence related to the instant case. The Trial court never stated whether this was the reason why he was sentenced to twenty five (25) years imprisonment.

65. Although it was discriminatory for the Trial Court to have sentenced the Appellant herein and one Peter Kawai Keya to a higher sentence despite finding that all accused persons were guilty of the same offence of robbery with violence, this court noted that it was meting out thirty five (35) years imprisonment to persons who had been convicted of the offence of robbery with violence and gang rape during re-sentencing. This court was not persuaded that it should enhance the sentence as no notice had been issued to the Appellant herein that there was a risk of the sentence being enhanced if his Appeal were to be unsuccessful.

66. As the Trial Court still had the option of sentencing the Appellant to death, this court found the sentence of twenty five (25) years to have been fair and did not, therefore, interfere with the same. Indeed, this court set aside the convictions and sentences of his Co-Accused persons who had been sentenced to twenty (20) years imprisonment and hence, there would be no discrimination if this court left the twenty (25) years imprisonment undisturbed.

67. A perusal of the proceedings showed that initially, the Appellant and his Co-Accused persons were charged on two (2)

counts, of robbery with violence and gang rape as the second count and an alternative count of committing an indecent act with an adult. On 11th March 2020, the Prosecution sought that the Counts be separated and amended its Charge with only one (1) count of robbery with violence being tried in **Criminal Case No 248 of 2020**. The said Charge Sheet also indicated that the Appellant and his Co-Accused persons raped one EC, the Complainant herein.

68. Under Section 37 of the Penal Code Cap 63 (Laws of Kenya), the trial court was given discretion to determine whether sentences imposed subsequent to prior conviction and sentence of the convict in a different case shall be executed concurrently with the former sentence. The said provision provides as follows:-

“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof.”

69. It was the view of this court that the Trial Court had the discretion to order the two (2) sentences in **Criminal Case No. 248 of 2020** and **Sexual Offences Case No 10 of 2020** to run concurrently since they were committed at the same time in a

single transaction and the victim was the same. Failing to direct that the sentences run concurrently led an error which called for interference by this court.

70. This court found it necessary to grant the Appellant this relief as he was a lay person and was entitled to the equal benefit of the law as was provided in Article 27(1) of the Constitution of Kenya as follows:-

“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

71. Failure to consider this issue would lead to discrimination which was prohibited under Article 27(4) of the Constitution of Kenya that stipulates as

“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

DISPOSITION

72. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was dated 4th July 2025 and filed on 25th July 2025 were partly merited only to the extent of when the sentence ought to start running. His conviction and sentence be and are hereby upheld as they were both safe.

73. It is hereby directed that sentences in **Criminal Case No 248 of 2020** and in **Sexual Offences Case No 10 of 2020** shall run concurrently.

74. It is further directed that the period between 10th March 2020 and 28th September 2022 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

75. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **30th** day of **April** 2026

J. KAMAU
JUDGE