Kingori v Republic (Criminal Appeal E074 of 2023)
[2025] KEHC 849 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 849 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E074 OF 2023

DKN MAGARE, J

JANUARY 30, 2025

BETWEEN

ALBERT WAMBUGU KINGORI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of the trial court, Hon. N.W. Wanja, Resident Magistrate in Othaya PMCCR No. E008 of 2022 delivered on 13.6.2023.

2. The Appellant was charged with attempted rape contrary to Section 4 of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*, 2006.

3. The particulars of the offence were that on the night of 17th and 18th October 2022, at unknown time at [Particulars Withheld] of Nyeri County, the Appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of MWW.

4. The Appellant was arraigned and he denied the charges. A plea of not guilty was consequently recorded.

5. The trial court considered the case and rendered Judgment. The Court found the Appellant guilty and convicted him of the offence of attempted defilement. The Appellant was also sentenced to 5 years imprisonment.

6. The Appellant, aggrieved, lodged this appeal. The Petition of Appeal filed on 1.12.2023 raised the following grounds:

    a. The learned trial magistrate erred in finding that the prosecution proved the elements of the offence beyond reasonable doubt.

b. The learned trial magistrate erred in law and fact, in disregarding the controversies and contradictions.

c. The learned trial magistrate erred in law in dismissing the Appellant's defence.

Evidence

7. At trial, PW1 was the Complainant, MWW. It was her case that she was 105 years old. On 17.10.2022, at night, she was alone sleeping in her house, and she suddenly heard someone inside her house. She asked who it was, but the person did not respond. Instead, she tried to stand, but the person pounced on her and tried to force her to lie back on the bed. She managed to hide under the bed, but the person pulled her out. It was in the dark. A struggle ensued, and she scratched the chest of the assailant using her fingernails, but he also injured her to the neck and lips.

8. The witness stated that the assailant then escaped. She did not shout or follow to see who it was for fear that others could be out. In the morning, she called her daughter, HW. They realized the person gained entry by creating a hole near the door. The unknown person had left a yellow sweater, a red T-shirt, a cap, and a cigarette with a matchbox. There were also 2 packed and 1 unpacked condom in a pocket to the sweater. They then reported to Munyange Police Station. Subsequently, the Appellant was arrested.

9. PW2, the Complainant's daughter HW testified that on 18.10.2022 around 6.00 am, PW1 called her informing that she had been attacked. She went and on arrival saw an opening created by soil which had been dug. She found PW1 with blood on her face, swelling neck and lips. PW2's brother, DN also came. PW1 said that she had not been raped. They notified the Nyumba Kumi Elder JM, who took possession of the recovered items and directed that the matter be reported to the police station. On cross examination, it was her case that the clothes were in the house in different places.

10. PW3 was Joseph Maina , the Nyumba Kumi elder. PW2 called him and informed him about the incident to PW1. He went to PW1's house and saw the opening and the clothes, condoms, cigarette and matchbox. On 19.10.2022, PW2 called him informing that they had also found the yellow sweater inside PW1's house. He handed the shirt to the officer at Munyange Police Station and collected it in the evening to take it and show members of the public who would assist in identifying to whom it belonged and who would be the perpetrator. The members of the public informed him that the shirt belonged to Shadrack W also known as Albert Wambugu Kingori , the Appellant. On cross examination, he stated that he was informed by the public that the sweater, shirt and cap belonged to the Appellant.

11. PW4 was Thomas Mwagi, Clinical Officer from Othaya Sub-county Hospital. On examination, she had a cut to the lower lip and bruises on the inner part of the mouth. The genitalia was normal, the hymen old and broken with no physical evidence of rape. She was given injections and antibiotics due to the injuries in her mouth. The injuries were caused by sharp objects and were fresh.

12. Further, he also examined the Appellant. He reported that he was beaten by the mob. He had scratch marks on his neck and chest. The witness confirmed that the accused in the neck were similar to the ones on the chest. The injuries were of different days and sources. The injuries on the neck were caused by scratching. The injuries on the Appellant's chest were 4 days old, while on his breasts were 2 days old.

13. PW5 was NW. He was brother to PW2 and son to PW1. When PW5 went home on 18.10.2022, he found PW1 bleeding from her mouth with injuries on the lips and neck. They took PW1 to Kamoko Health Centre, where she was treated, and they were advised to report the matter to the police station. They later went to Othaya Sub-county hospital. The Appellant was known to him before the incident.

On cross examination, he testified that he saw the condoms. The clothes were found on the following day because they were all over the place.

14. PW6 was Joseph Waweru Ndungu . He testified that he identified the clothes as belonging to the Appellant as he had seen the Appellant wearing the clothes. On cross examination, he stated that the complainant was his grandmother. The village elder showed him the yellow sweater and cap, and he identified them as belonging to the Appellant since he had carried out casual jobs with the Appellant in Ndunyu. He could wear the yellow sweater for two weeks and was always with the black cap, which he never took off.

15. PW7 was No. 92661 PC Cecilia Loko of Munyange Police Station and the Investigating Officer. She stated that the Appellant was arrested by a mob who also called the police to arrest him. She produced a record of the exhibits found in PW1's house. On cross-examination, she stated that the mob knew the Appellant and identified him as the owner of the clothes and exhibits found in PW1's house. The clothes were brought to her by PW1, and she found the Appellant already in the police cell.

16. PW8 was No. 229827 PC Njoroge Joseph. On 19.1.2022, he heard someone knock on his door at 9.50 pm and, on opening, found a male person who asked for police help. He stated that a mob had gathered at Ndunyu and wanted to burn a suspect. He went to the scene where he found the mob and requested that the suspect be handed to him. They said it was the suspect who had been reported by an old woman on an allegation of attempted rape. On cross-examination, he stated that the person who knocked at his door was later recognized as the Appellant's father. The person confirmed that the sweater and cap belonged to the Appellant, but the shirt was not his.

17. PW9 was No. 235226, Inspector Stephen Natembeya. He produced the photographs from the CD. On cross-examination, he stated that the photos did not show the accused. He got the photos from the investigating officer.

18. DW1 was the Appellant. He testified that on 17.10.2022, he worked for Mama J, carrying firewood for her until 5 pm. He was in a white shirt and blue sweater that day. He went to rest with other young men, took soup, and went home at 8.30 pm to sleep. On 19.10.2022, he went to his grandmother's home to look for some work to help, and there was none, so he returned home at 7 pm; he was called by a friend who said there was work to do the following day, 19.10.2022. He knew nothing about the allegations against him.

19. On cross-examination, it was his case that he was in his house on the night of 17.10.2022 sleeping. He had no witnesses to corroborate this as he was alone. He wore a blue sweater and a white shirt and was not wearing the clothes produced in court. He did not know PW1 before the allegations, and that he was framed. He stated that the injuries were from his work fetching firewood and that he was also beaten by the mob.

Submissions

20. Although the parties indicated that they had filed submissions, I have found none on the physical file and the e-filing platform. I shall nonetheless proceed to determine the appeal.

Analysis

21. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the

evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

22. Therefore, this Court will not interfere with the exercise of judicial discretion by the court below unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 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 is 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."

23. It is thus beyond peradventure that this court dealing with the instant appeal is entitled to consider the evidence in the trial court as a whole as being submitted a fresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. In Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated as follows:-

1. 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.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

24. The issue for this court's determination is whether the prosecution proved the offence of attempted rape against the Appellant beyond a reasonable doubt.

25. Proof beyond reasonable doubt does not impose a standard of proof beyond the shadow of a doubt. Where the evidence tendered is so strong as to leave only a remote possibility in favour of the accused person, which can be dismissed with the sentence "of course it is possible, but not in the least probable," then it can be said in law that the case is proved beyond a reasonable doubt. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

> "What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible,

but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

26. At trial, PW1 testified that she was 105 years old, and the unlawful acts against her were committed at night on 17.10.2022. She did not know the assailant as she could not see in the dark. However, the Appellant was identified as the assailant when the clothes found to have been left in her house were established by the members of the public and PW6 to belong to the Appellant.

27. PW1 further testified that she realized when the assailant was already in the house and extended his hands to touch her, following which she stood and entered under the bed to hide. The assailant then tried to pull her out, and in the course of the struggle, she scratched his chest, leaving some marks. The Assailant then retaliated by scratching her neck and lips, leaving marks. The Appellant was examined and found to have scratch marks, as explained by PW1.

28. The testimony of PW1 was corroborated by the evidence of PW2 and PW5, who came in the morning on 18.10.2022 to the Appellant's house. The Appellant was their mother. They found her bleeding on the lips and had blood on her neck. It is remarkable, however, from the testimony of PW1 that she never stated that the assailant intended to rape her. It is the recovery of the clothes, cap, and condoms that must have led to the presumption of attempted rape and the consequential pursuit of the Appellant as the suspect.

29. The identification of the Appellant was mainly based on the evidence of PW5, who testified that he knew the Appellant and the clothes he wore. The Appellant could wear the yellow sweater for two weeks and always wore the black cap. Therefore, the clothes recovered could not have been of any other person than the Appellant, and so the Appellant must have been the one who committed the offense.

30. Whereas it was said that a mob had identified the Appellant and, in fact, incarcerated him, following which he was rescued by PW8 and taken to Munyange Police Station to be charged, I note that such identification was not direct and much circumstantial. Further, the Respondent had the duty to prove attempted rape. Section 388 of the Penal Code defines "attempt" as follows:

    (1). When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

    (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

    (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

31. The law thus brings out the two main ingredients of an attempted offence: the mens rea, which constitutes the intention, and the actus reus, which constitutes the overt act towards executing the intention. In R vs. Whybrow (1951) 35 CR App. Rep, 141, Lord Goddard C.J., had the following to say on mens rea when the Court dealt with the offence of attempted murder: -

    ..... But if the charge is one of attempted murder, the intent becomes the principal ingredients of the crime...

32. The charge of attempting to commit an offense, the court should distinguish between mere preparation and the actual attempt to commit the offense. The Court of Appeal in Abdi Ali Bare vs. Republic (2015) eKLR, also stated as follows-

> ..... The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:
>
> D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position. loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now committed the attempted murder...
>
> In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In Cross & Joines' Introduction to Criminal Law, Butterworths, 8th Edition (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:..[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted....The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts.

33. These standards apply to inchoate offences including the offence of attempted rape that faced the Appellant. When a Court faces any charge of an attempted nature, care must be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved. It does not matter how strong the evidence presented to the court is since if such evidence only relates to acts in preparation to commit the alleged offence, the evidence cannot justify a conviction on an attempted charge. A person would attempt to rape when they intended to rape and the motive has to be established.

34. According to the evidence, the Appellant tried to grab PW1 and tried to sneak her into his arms, trying to get her to the bed, and she eloped and hid under the bed before he started pulling her out. She then scratched his chest, and then he scratched her lips and neck. She struggled with the Appellant, and then he left, but she did not follow him as she feared there could be other such persons around.

35. The offence of attempted rape is accessory to rape itself and for the offence of rape to be committed, there has to be penetration. Section 2(1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person." This position was fortified in Mark Oiruri Mose vs R (2013) eKLR when the Court of Appeal stated thus: -

Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.

36. Later, the Court of Appeal, then differently constituted, in Erick Onyango Ondeng v. Republic (2014) eKLR held as such on the aspect of penetration: -In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

37. Therefore, whereas penetration was not a requirement in the offence of attempted rape, the prosecution had to demonstrate that the Appellant had gone past all the preparatory acts into the arena of the possible commission of the offence and but for a certain intervention or interjection, the offence could have been committed.

38. In this case, the Appellant had condoms, one of which was unpacked. He was struggling to get the Appellant onto the bed. Surely, the condom was not for taking tea. Why struggle to get the complainant onto the bed while armed with a condom?

39. True the evidence is circumstantial and must be inferred from the evidence itself. For circumstantial evidence to work, it must be inconsistent with the accused's innocence.On circumstantial evidence the threshold as stated in R vs Kipkering Arap Koske [1949] 16 EACA 135 is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In Sawe vs Rep [2003] KLR 364, the Court of Appeal expressed that:

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.

40. The Supreme Court in the case of Republic v Mohammed & another (Petition 39 of 2018) [2019] KESC 48 (KLR) (15 March 2019) (Judgment) (with dissent - MK Ibrahim & SC Wanjala, SCJJ) posited as follows regarding circumstantial evidence:

> 55. The law on the definition, application, and reliability of circumstantial evidence has, for decades, been well settled in common law as well as other jurisdictions. Circumstantial evidence is "indirect [or] oblique evidence ... that is not given by eyewitness testimony." It is "[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact." 6 It is also said to be "[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence...."
>
> 56. On its application, circumstantial evidence is like any other evidence. Though it finds that its probative value is reasonable and not speculative, inferences to be drawn from the facts of the case, and, in contrast to direct testimonial evidence, it is conceptualized in the circumstances surrounding disputed questions of fact, circumstantial evidence should never be given a

derogatory tag. Jowitt's Dictionary of English Law, 4th Edition, states thus of circumstantial evidence:

> " ...with circumstantial evidence, everything depends on the context: circumstantial evidence can sometimes amount to overwhelming proof of guilt, as where the accused had the opportunity to commit a burglary, and items taken from the burgled house are found in his lock-up garage, ... a fingerprint recovered from the window forced open by the burglar matches the accused's fingerprints, ... [or where there is] a ... DNA match between the accused's control sample and genetic material recovered from the scene of the crime ...."

57. This is why, way back in 1928, the English Court of Appeal asserted that circumstantial evidence "is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with an accuracy of mathematics."

58. However, conclusive as it may be, as it has long been established, caution is always advised in basing a conviction solely upon circumstantial evidence. The Court "should proceed with circumspection when drawing from inferences from circumstantial evidence." The court should also consider circumstantial evidence in its totality and not in piecemeal. 12 As the Privy Council stated in Teper v. R [1952] AC at p. 489 "Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another."

59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable, and not speculative, but also, in the words of the Indian Supreme Court,

> " The circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established...." As was stated in the case of Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135, a locus classicus case on the reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the "... the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable

41. In the case of circumstantial evidence, the prosecution had the duty to establish the circumstances from which the conclusion of guilt is to be drawn in the first instance and, therefore, need for the trial court to ascertain that the facts sought to be relied on were proved individually. In Abanga Alia Onyango Vs Republic Criminal Appeal No. 32 of 1990, the Court of Appeal stated thus:

> " It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests (1)
>
> i) The circumstances form which an inference of guilt is sought to be done must be cogently and firmly established.
>
> ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of accused.
>
> iii) The circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by accused and no one else.

In Deepok Sarna Vs Republic the court of Appeal stated that: -

"In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. Each fact sought to be relied on must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on one hand inference of facts to be drawn from them on the other. In regard to proof of primary facts the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved the question whether the fact leads to an inference of guilt of the accused shows be considered.

In dealing with this aspect of the problems the doctrine of benefit of doubt applies. Although there should not be any missing link in the case yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from proved facts. In drawing these inferences the court must have regard to the common cause of nature events and to human conduct and their relations to the fact of the particular case. The court, thereafter has to consider the effect of proved facts. In deciding the sufficiency of circumstantial evidence, for that purpose of conviction, the court has to consider the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt."

42. The evidence from the prosecution was that the Appellant tried to grab PW1 and tried to sneak her into his arms, trying to get her to the bed, and she escaped and hid under the bed before he started pulling her out. She then scratched his chest, and then he scratched her lips and neck. She struggled gallantly, in spite of advanced age and frail frame, with the assailant. The Assailant left, but with marks that will later prove crucial to the case. She did not follow the Assailant because she feared there could be other such persons around.

43. The medical officer's report and evidence were that the injuries to PW1 were fresh, and the probable weapon was sharp nails. The injuries were fresh and old. The Appellant's defence was that he was not at the crime scene on that night as he was sleeping in his house. The allegations were, however, countered with evidence of scratch marks. He attempted, in reexamination, to explain away the injuries, stating he was scratched on the 15th. However, the medical evidence placed the injuries at 4 days. The belated explanation was an afterthought and was clearly an admission of scratch.

44. The evidence of the condoms, his cap, and clothes, which were identified, and later, the scratch marks consistent with the one inflicted by the complainant displaced the defense evidence.

45. With reference to alibi evidence, the Court of Appeal in Erick Otieno Meda vs. Republic [2019] eKLR stated thus:

" In considering an alibi, we observe that:

a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.

b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)."

46. The alibi put up by the Appellant was effectively disproved. Although he stated to have been away, he failed to give any justifiable reason for the presence of the scratch marks that were consistent with PW1's evidence that he scratched her. It remained unshaken that there was no purpose other than the attempt to rape PW1 when the Appellant, ready with one unpacked and two packed condoms, tried to grab and put PW1 on the bed before she scratched his chest using her nails in self-defence. As a result of the struggle, the Appellant also inflicted injuries on the PW1. The injuries suffered by both the Appellant and the PW1 in the course of the struggle were corroborated by medical evidence.

47. Further, alleged contradictions do not exist. Courts have held that minor contradictions in the glare of overwhelming evidence to establish the accused person's guilt cannot go to the root of disproving guilt. In Dickson Elia Nsamba Shapwata & Another V. The Republic, CR. APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

48. The Prosecution thus proved the offence to the required degree. I find that the Appellant was proven to be the assailant. The evidence irresistibly led to his guilt. The evidence tendered in the court below was incompatible with his innocence. Consequently, I find no basis to interfere with the conviction.

49. On sentence, the same must be commensurate with the blameworthiness. The Court of Appeal in the case of Thomas Mwambu Wenyi – vs- Republic (2017) eKLR stated as follows: -

> "A sentence imposed on an accused person must be commensurate with the blame worthiness of the offender and that the court should look at the facts and circumstances of the case in its entirety before settling for any given sentence."

50. I have perused the Sentencing Guidelines. The Supreme Court has propounded them in Francis Karioko Muruatetu & Another v Republic (2017) eKLR. The following are guidelines with regard to mitigating factors before sentencing.

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

51. The Appellant was sentenced to serve 5 years imprisonment. This Court's discretion in sentencing permits balanced and fair sentencing, which is also the hallmark of enlightened criminal justice, as was stated in State vs. Tom, State v. Bruce (1990) SA 802 (A), Smalberger, JA:

> "The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person.

52. The offence of attempted rape is provided under Section 4 of the *Sexual Offences Act* as follows:

> Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.

53. The court granted the Appellant the statutory minimum sentence of 5 years. In the circumstances, I find the sentence most lenient and have no reason to interfere. The court clearly considered the mitigation. The Appellant's image in the community is of the conduct he was charged and convicted with, and the court correctly sentenced him from the date he was arrested on 19.10.2022. The sentence was necessary also to serve as deterrence to the Appellant.

54. The purpose and objectives of sentencing, as stated in the Judiciary Sentencing policy, should be commensurate and proportionate to the crime committed and how it was committed. The sentencing should meet the end of justice and ensure that the principles of proportionality, deterrence, and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 Sentencing Guidelines are as follows: -

> "1. 3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
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> i. Retribution: To punish the offender for their criminal conduct in a just manner.
>
> ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
>
> iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
>
> iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs. Community

v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.

vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.

vii. Reconciliation: To mend the relationship between the offender, the victim and the community.

viii. Reintegration: To facilitate the re-entry of the offender into the society."

55. Sentence is a matter that rests in the discretion of the trial court. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, 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 some wrong material, or acted on a 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."

56. It must be shown that the court erred in arriving at the sentence. The court cannot interfere with a lawful sentence. In the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R. (1989 KLR 306)"

57. The Court of Appeal posits on alteration of the sentence in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, where it pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

58. Sentencing is based on a judicial officer's discretion. Consequently, the Appellate Court must be careful not to interfere with such a decision as held in the case of Hillary Kipkirui Mutai v Republic [2022] eKLR:

> 9. Sentencing is an important aspect of the administration of justice. Noting that sentencing is based on a judicial officer's discretion, this Court must be careful not to interfere with such a decision, unless it is demonstrated that the sentence was manifestly excessive, was illegal, improper or founded based on misrepresentation of material facts.

59. The sentence meted out befitted the sentence. Consequently, it is not amenable to setting aside. Therefore, I dismiss the appeal and uphold the conviction and sentence.

Determination

60. I make the following final orders:

    i. This Appeal on conviction and sentence is dismissed.

    ii. 14 days right of appeal.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 30TH DAY OF JANUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Ms. Atina for the State

Court Assistant – Jedidah