



REPUBLIC OF KENYA



**Shihalo v Republic (Criminal Appeal E001 of 2024)
[2025] KEHC 1243 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E001 OF 2024
JN KAMAU, J
FEBRUARY 27, 2025**

BETWEEN

EDWIN ANUSU SHIHALO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon M. Nabibya (SRM) delivered at Hamisi in Senior Principal Magistrate's Court in Criminal Case No 637 of 2017 on 11th November 2018)

JUDGMENT

Introduction

1. The Appellant herein was charged jointly with four (4) others with two (2) counts of 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) and one (1) count of the offence of gang rape contrary to Section 10 of the [Sexual Offences Act](#) No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with an adult contrary to Section 11(A) of the [Sexual Offences Act](#) No 3 of 2006.
2. He was tried and convicted by the Learned Trial Magistrate, Hon M. Nabibya (SRM) who sentenced him to fifteen (15) years imprisonment for the offence of robbery with violence and twenty (20) years for the offence of gang rape. She ordered that the said sentences run concurrently.
3. Being dissatisfied with the said Judgement, on 15th January 2024, he lodged the Appeal herein. The same was dated 20th September 2023. He set out five (5) grounds of appeal. Subsequently, on 13th June 2024, he filed Supplementary Grounds of Appeal dated 11th June 2024. He set out five (5) Supplementary Grounds of Appeal.
4. His Written Submissions were dated 11th June 2024 and filed on 13th June 2024 while those of the Respondent were dated 5th April 2024. They did not bear a court stamp. However, in view of the fact



that documents were being filed through the e-filing platform, this court admitted the same as there was a likelihood of the Registry may have omitted to stamp the same. 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 Supplementary Grounds 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 or not the Prosecution proved its case beyond reasonable doubt; and
 - b. 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. Proof of prosecution Case

9. The court dealt with the above issue under the following distinct and separate heads.

A. Robbery With Violence

10. Grounds of Appeal Nos (1), (2), (4) and (5) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1), (2) and (3) were dealt under this head.
11. The Appellant placed reliance on the cases of *Benard Gitonga Karanu vs Republic* [2019] eKLR and *Maitanyi vs Republic* [1986] KLR 196 where the common thread was that identification of a witness should be carefully tested. He also relied on the case of *Michael Nyongesa vs Republic* [2015] eKLR where it was held that it was in doubt whether in the circumstances of the case that the reflection of light from the torches could enable the robbery victim who was lying down to see his or her assailants.
12. He further relied on the case of *Kiarie vs Republic* (eKLR citation not given) where it was held that it was possible for a witness to be honest but mistaken and for a number of witnesses to be all mistaken. He argued that the fact that the Prosecution witnesses alleged to have recognised him out of ten (10) or more people that robbed them did not mean that they could not be mistaken. It was his case that there were no favourable circumstances for positive identification.
13. He argued that GS (hereinafter referred to as "PW 1") was a sole identifying witness under difficult conditions as she had no light of her own. He contended that as she testified that her attackers were moving around with torches, it was difficult for her to recognise any of them as there was no evidence that the torches' light beamed directly on the faces of the robbers. He was emphatic that the circumstances under which her identification by recognition was made were not favorable for positive identification.



14. He argued that in her first report to the police, she did not claim that she was able to recognise or identify anybody among the robbers or record any description of the robbers or identify his name, which she got to learn after the identification parade.
15. He argued that despite the fact that she knew him as her student, she could only identify him when she saw him as she did not also report earlier that he was her student in Erusui. He pointed out that the evidence on record showed that he was arrested through information from the informers.
16. He also raised an issue about his arrest eight (8) days after the incident. He argued that if PW 1 knew him well and saw him among the robbers then she would have reported promptly for him to have been arrested immediately after the incident. He asserted that she did not give the description of her attacker before the identification parade.
17. He argued that if she knew him as her student, then her identification was based on her prior knowledge of him and not on what she saw during the attack hence faulting the correctness of the said identification. He questioned why despite saying that she knew him, he was still subjected to an identification parade.
18. He submitted that the Trial Court erred in relying on the evidence of the identification parade that faulted the provisions of Chapter 46 Force Standing Orders and was hence a nullity. He added that he was not asked to sign the Identification Parade Form indicating whether he objected to the parade or not. In the premises, he claimed that the said parade had no evidential value.
19. In this regard, he relied on the cases of Simiyu & Another vs Republic (2005) KLR 1921, Peter Ochieng vs Republic Criminal Appeal No 188 of 1987 and Terekali & Another vs Rex (1952) EACA where the common thread was that failure to make prompt report and failure to give names in the first report instant of assailants caused an uneasiness in believing the witness' evidence.
20. On its part, the Respondent submitted that owing to the presence of light from the bright torches held by the Appellant and his Co-Accused persons and the fact that they hailed from the same village with PW 1, she positively identified him and he was thus placed at the scene of crime.
21. It added that PW 1 and No 23964 Inspector Nichodemus Minyuki (hereinafter referred to as "PW 4") testified that the Appellant who had placed himself in the midst of members of parade was identified by being touched. It contended that as he did not raise any issue regarding the conduct of the said parade, it could then be concluded that he was satisfied with the manner in which the parade was conducted. It pointed out that he signed the parade forms.
22. It was categorical that the evidence of PW 1 and Achevi Fredrick (hereinafter referred to as "PW 2") proved the ingredients of the charge of robbery with violence contrary to Section 296(2) of the [Penal Code](#). It was its case that the evidence on identification before the Trial Court was carefully considered and found to be correct, positive and free from error. It added that the evidence adduced by the relevant witnesses, the facts of the case and the law were subjected to a thorough examination, analysed and tested by the Trial Court in arriving at conclusion that it had proved its case against the Appellant beyond reasonable doubt.
23. It averred that the Trial Court addressed its mind to the Appellant's defence which did not invalidate the credibility of the evidence the Prosecution adduced. It was its case that the Appellant's appeal lacked merit. It urged this court to uphold his conviction.
24. A perusal of the proceedings of the lower court showed that on 16th October 2017 at around midnight, PW 1 was sleeping with her husband and grandchildren when people entered their bedroom with bright torches. They were ordered to go back to sleep and cover their heads with blankets.



25. She stated that the attackers told them that they had been sent for their heads and Kshs 50,000/=. They took their meko (sic), microwave and PW 2's phone and car keys. They also took her Kshs 1,800/- from her hand bag.
26. Her further evidence was that they ordered her to wake up and hand over the money to them and when she did so, they pushed her to the floor and threatened to stab her if she did not give out the money. One of the attackers pointed a long knife at her neck. One of the attackers ordered him to stop and he kept away the knife.
27. She informed the Trial Court that one of the attackers held her by her chest on the right side and pulled her to the sitting room to show them where the television was. She showed them the microwave and the fridge and was made to sit near the television. The attackers then placed the hooper on the table and asked her if the same was working. When she said it was spoilt, she was pushed to the floor. One attacker stepped on her neck using boots, another pulled her legs on one side and another on the other side. It was her testimony that three (3) of the attackers raped her in turns.
28. She stated that during the movements with torches (sic), she was able to identify the Appellant and his Co-Accused person. One of the attackers came with some liquid in a green bottle which she believed was soda (sic) and he poured it on her private parts. He asked her why she had shaved her private parts and she managed to respond that it was because of cleanliness.
29. She testified that the attackers carried household items as they ate available food. Two (2) of them took her back to the bedroom and pushed her on the bed. After sometime, there was silence and PW 2, who was her husband woke up and went to his brother to borrow his phone. He called the local administrators and the police who responded.
30. She added that she identified three (3) of the attackers through an identification parade while the rest were arrested by the police for having handled the wiko mobile phone that belonged to PW 2. Her evidence was corroborated by that of PW 2 who was sleeping with her in the same bedroom on the material night.
31. Ruth Chelagat (hereinafter referred to as "PW 3") testified that on 23rd October 2017 at around 5.00pm, she went home after IEBC training and found the Appellant's Co-accused person, one Brian, who gave her a Wiko and a techno mobile phone. She picked the Wiko phone and agreed to buy the same at Kshs 3,000/=. She gave him a down payment of Kshs 500/= and Kshs 100/= for transport.
32. He came back on 24th (sic) and said the owner of the phone wanted more money. When she sent Kshs 500/= to the phone number he gave her, it brought the name of one Patrick Indiasi, the Appellant's Co-Accused person. As at 27th (sic), she had paid them a total of Kshs 2200/=. They promised to give her phone receipt, earphones and charger on payment of the last instalment of Kshs 800/=. The Appellants' Co-accused persons were arrested later. She pointed out that the phone was Wiko grey in colour.
33. PW 4 carried out the identification parade and made a report dated 24th October 2017. He testified that the identification parade was made up of eight (8) persons and that the Appellant was identified by touch and he was between No (5) and (6). He had no objection on how the parade was conducted.
34. PW 1 testified that the torches that were used by her attackers enabled her identify them. Thus, the lighting from the torches as they move around was conducive for positive identification. At one point the Appellant's Co-Accused person threatened to kill her but another Co-Accused person ordered him not to stab her. Further, she testified that the Appellants' Co-Accused persons raped her in turns.



35. PW 1 testified that whereas she identified three (3) of her attackers including the Appellant at the identification parade, the Appellant's other Co-Accused persons were arrested for being in possession of the Wiko phone that belonged to PW 2.
36. Notably, the Appellant and PW 1 were not strangers because they hailed from the same village. It was therefore clear from the evidence that was adduced by the Prosecution that she positively identified him as having been one of the attackers on the material night. His argument that her identification of him was full of inconsistencies thus fell on the wayside.
37. Turning to the issue on identification parade, this court had due regard to the case of *Kinyanjui & 2 Others vs Republic* (1989) KLR 60, where it was held that the purpose of an identification parade was to give an opportunity to a witness under controlled and fair conditions to pick out the people he was able to identify, and for a proper record to be made of that event to remove possible confusion.
38. It was precisely for that reason that courts have insisted that identification parades therefore had to be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades was necessary to eliminate any unfairness or risk of erroneous identification.
39. Indeed, Police Form 156 which is designed pursuant to Chapter 46, Force Standing Orders issued by the Commissioner of Police and which was invariably used in the conduct of identification parades expressly provides for the requirements which ought to be observed. As far as was relevant to this case, Standing Order 6(iv)(d) states as follows:-

“6.

- (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

.....

- (d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent”

40. A perusal of the Identification Parade Form dated 24th October 2017 in respect of the Appellant herein indicated that when he was asked whether he consented to appear in the parade and he responded in the affirmative. When he was informed whether he desired to have a friend or solicitor present, he replied that he did not desire to do so.
41. He was paraded alongside other eight (8) persons and when he was asked if he objected to the arrangements or the persons in the parade he responded that he did not have any objection. PW 1 identified him standing between non-accused persons No (4) and No (5) and when he was asked whether or not he was satisfied with the conduct of the parade, he replied, “Yes” and signed on the Identification Parade Form.
42. This court was satisfied that the identification parade was free from error and was sufficiently corroborated by the identification evidence of PW 1 in respect to the Appellant herein. His argument that the identification was not conducted properly therefore fell on the wayside.



43. The fact that the Wiko phone that was stolen from PW 1's and PW 2's house was found with his Co-Accused person squarely placed him at the scene of the incident as one of the perpetrators on that material night.
44. Turning to the issue of the Appellant's defence of alibi, this court had due regard to the definition of "alibi" in the Black's Law Dictionary, 10th Edition. It was defined as:-
- "A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".
45. It was also trite law that once a respondent raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of *Victor Mwendwa Mulinge vs Republic* [2014] eKLR.
46. In this case, the defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) that provides that:-
- "If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."
47. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Appellant's alibi evidence to have been watertight enough to have weakened the inference of guilt on his part.
48. Turning to the issue of whether the Prosecution demonstrated the elements of the offence of robbery with violence or not, this court had due regard to the case of *Oluoch vs Republic* [1985] KLR where the Court of Appeal set out the elements of robbery with violence as being that at the time the offence was committed, the offender must have been armed with a dangerous and offensive weapon or instrument or he must have been in the company with one or more person or persons or at or immediately before or after the time of the robbery, the offender wounded, beat, struck or used other personal violence to any person.
49. Section 295 of the *Penal Code* stipulates that the elements of robbery with violence are :-
- a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;
 - b. That the offender is in the company of one or more persons;
 - c. That or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.
50. PW 1 and PW 2 confirmed having seen the Appellant and his Co-Accused persons entered their bedroom armed with knives. PW 1 testified how one of the attackers pointed a long knife to her neck. They stepped on her head and thighs. PW 5 examined PW 1 at Kaimosi Hospital. He opined that PW 1 had been assaulted as she had injuries on the thigh which was tender. He produced the P3 Form as exhibit which showed that she was raped during the atrocious attack.
51. PW 1 and PW 2 testified that the Appellant and his Co-Accused persons robbed them of their meko (sic), Kshs 5000/= which was under PW 2's pillow, PW 2's car keys, Kshs 1,800/= from PW 1's handbag, both their phones, makes Wiko and Huawei. PW 6 tendered in evidence the Wiko phone which was recovered from the Appellant's Co-accused persons.



52. PW 6 testified on behalf of Sergeant Majani and PC Bwoti who were the investigating officers in this case. His evidence corroborated that of PW 1, PW 2, PW 3, PW 4 and PW 5. He produced the recovered Wiko phone which PW 2 identified as his through the IMEI Number and features like whatsapp messages, photos and email.
53. It was evident that the Appellant was in the company of others when they robbed PW 1 and PW 2. They were armed with dangerous weapons. During, immediately before and after the offence, they wounded PW 1. PW 2's Wiko phone was recovered from PW 3 who had purchased it from the Appellant's Co-Accused person.
54. As the chain of events was unbroken, this court was satisfied that the Prosecution established its case of robbery with violence against the Appellant herein beyond reasonable doubt. The Trial Court thus proceeded correctly when it found that all the ingredients constituting the offence of robbery with violence were present in this case and convicted him accordingly.
55. In the premises foregoing, Grounds of Appeal Nos (1), (2), (4) and (5) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1), (2) and (3) were not merited and the same be and are hereby dismissed.

B. Proof of Gang Rape

56. Grounds of Appeal No (3) of the Petition of Appeal and Supplementary Ground of Appeal No (4) were dealt with under this head.
57. The Appellant argued that the offence of gang rape and in particular the element of penetration on his part was not proved beyond reasonable doubt. He submitted that the evidence of PW 1 was that he did not rape her. He pointed out that the injuries on PW 1's thighs were caused by stepping and kicking and that presence of sperms in a woman's vagina was not conclusive evidence of penetration. It was his case that the medical examination did not corroborate her evidence.
58. He argued that PW 1 was sleeping with her husband on the bed and that no DNA was done to determine the rightful producer of the spermatozoa as was held in the case of *Mwangi vs Republic* [1984]eKLR 595. He also relied on the case of *Hamisi Bakari & Another vs Republic* [1987]eKLR where it was held that where a heavy minimum sentence was involved, the lower court should be particular to see that each ingredient in the charge was reflected in the particulars of the offence and was properly proved. The court therein observed that seven (7) years was a long time to serve in a case where the issues were not clear.
59. On its part, the Respondent submitted that PW 1 testified that she was raped in turn by her attackers inclusive of the Appellant and that PW 5 in his testimony, confirmed the presence of sperms and pus cell in the vaginal area in the laboratory tests that were done.
60. PW 1's evidence of what transpired on the material night of 16th October 2017 was unwavering and was corroborated by PW 2. The evidence that the Appellant and his Co-Accused persons raped her was cogent and was further corroborated by the scientific evidence that PW 5 adduced during the trial. Indeed, there was presence of sperm cells and pus cells in PW 1's vagina which led PW 5 to conclude that she was raped.
61. The Appellant's assertion that the spermatozoa in PW 1's vagina belonged to PW 2 were a figment of his imagination and was intended to mislead this court.
62. Notably, the ingredients of gang rape are that the offence must have been committed in the company of others and the offence was committed with common intention. This court had due regard to the



case of Republic vs Oyier (1985) KLR where it was held that lack of consent was an essential element of rape. As PW 1 did not consent to having sex with the Appellant and his Co-Accused person, the offence of gang rape was established.

63. This court was satisfied that the Prosecution established its case of gang rape against the Appellant herein beyond reasonable doubt and the Trial Court therefore acted correctly when it convicted him for the offence of gang rape as PW 1 also identified the Appellant's Co-Accused as a person who also raped her.
64. In the premises foregoing, Grounds of Appeal No (3) of the Petition of Appeal and Supplementary Ground of Appeal No (4) were not merited and the same be and are hereby allowed.

II. Sentencing

65. Supplementary Ground of Appeal No (5) was dealt with under this head.
66. The Appellant submitted that he was arrested on 31st October 2017 and was sentenced on 11th December 2018. He pointed out that he was in custody all through the trial and his sentence was made to run from the date of its pronouncement which amounted to unfair trial pursuant to Article 25(c), 50(2)(p), 24(1)(c) of *the Constitution* of Kenya, 2010. On its part, the Respondent urged the court to uphold the Appellant's sentence.
67. Notably, the Appellant was found guilty of the offence of robbery with violence and gang rape.
68. Section 295 of the *Penal Code* states that:-

“ Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

69. Further, Section 296 (1) and (2) of the *Penal Code* provides as follows:-
1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
 2. If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

70. Section 10 of the *Sexual Offences Act* provides that:-

“ Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.”

71. The Trial Court sentenced the Appellant to fifteen (15) years imprisonment for the offence of robbery with violence and twenty (20) years imprisonment for the offence of gang rape which sentences were to run concurrently. In the mind of this court, the Trial Court was very lenient as it had the option of sentencing the Appellant to death and life imprisonment for the offence of robbery with violence and gang rape.



72. The African Charter on Human and Peoples' Rights on the Rights of Women in Africa provided that any practice that hindered or endangered the normal growth and affected the physical and psychological development of women and girls should be condemned and eliminated. Rape was one of those practices and actions. It must therefore be condemned in the harshest terms.
73. It was a crime that robbed the victim all her dignity and carried lifelong trauma. It was an unforgivable crime because the perpetrator took something valuable to the victim by force and unexpectedly. It was similar to the effects of the offence robbery with violence that left victims shocked and traumatised. It was even more traumatic when the same victim was raped and robbed at the same time and further raped by a gang.
74. In view of the atrocity that was meted on PW 1 and PW 2 herein, this court found and held that this was one of the instances that the sentence ought to be higher than what was meted upon the Appellant. However, in view of this court's discretion on sentencing, it left the sentence of fifteen (15) years and twenty (20) years imprisonment which were to run concurrently, undisturbed.
75. Going further, 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).
76. 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).
77. 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.”
78. 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.
79. Notably, as per the charge sheet, the Appellant was arrested on 31st October 2017. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 11th December 2018. 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.

Disposition

80. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 20th September 2023 and lodged on 15th January 2024 and Supplementary Grounds of Appeal dated 11th June 2024 and filed on 13th June 2024 were not merited save for the



grounds on Section 333(2) of the *Criminal Procedure Code*. The Appellant's conviction and sentence be and is hereby upheld as they were both safe.

81. It is hereby directed that the period between 31st October 2017 and 10th December 2018 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).

82. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF FEBRUARY 2025

J. KAMAU

JUDGE

