Mutiso & another v Republic (Criminal Appeal E032 & 33 of 2023 (Consolidated)) [2025] KEHC 4043 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4043 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E032 & 33 OF 2023 (CONSOLIDATED)

FR OLEL, J

MARCH 27, 2025

BETWEEN

KELVIN MUTISO ..... 1ST APPELLANT

RAYMOND MUASYA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being An Appeal From The Conviction And Sentence Delivered On 20Th July 2023 By Hon. Ann Nyoike (spm) In Machakos Sexual Offence Case No E040 Of 2020)

JUDGMENT

A. Introduction

1. Both Appellants were charged with the offense of "gang Rape" contrary to Section 10 of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on the 17th day of July 2020 at around 19.00 hours at Kathiani Sub-county within Machakos County intentionally and unlawfully penetrated the vagina of JM a child aged 14 years.

2. In the alternative the Appellants were charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on the 17th day of July 2020 at 19.00 hours at Kathiani Sub-County within Machakos County intentionally and unlawfully touched the vagina of JM girl aged 14 years with his penis.

3. During trial the prosecution called four witnesses who testified in support of their case. Both Appellants were placed on their defense, gave sworn evidence, and did not call any witnesses to support their case. The trial Magistrate considered all the evidence adduced and found the Appellants guilty of the offense of "gang rape" and proceeded to convict them under Section 215 of the *Criminal Procedure Code*. After mitigation, the trial Magistrate sentenced them to serve ten (10) years imprisonment.

4. Aggrieved by the conviction and sentence, the first Appellant filed Machakos High Court Criminal Appeal No 32 of 2023, while the second Appellant filed Machakos High Court Criminal Appeal No 32 of 2023. On 18.10.2023, the said Appeals were consolidated, with Machakos High Court Criminal Appeal file No. 32 of 2023 being the lead file.

5. Both Appellants raised similar and lengthy grounds of Appeal and averred that;

   a. The learned Trial Magistrate erred in matters of the law and fact in relying only on the evidence of the complainant to convict the accused person without sound reasons recorded in the proceedings, satisfactory enough that the complainant as a sole witness was telling the truth.

   b. That the learned trial magistrate erred in both matters of law in finding that the complainant knew the accused despite there being no details of the alleged identification parade purportedly carried out at the time of investigations.

   c. That the learned Trial Magistrate still erred in both matters of law and fact in holding that the complainant was aged 14 years wholly baing on a photocopy of an uncertified clinic card which was not provided as directed by the court during trial. The court relied on a non-existent clinic card to reach the finding.

   d. That the Learned Trial magistrate erred in law and in fact in finding that the prosecution was able to discharge its burden of proof on the main charge beyond reasonable doubt.

   e. That the Learned trial magistrate erred in law and in fact in convicting the subject under section 215 of the *Criminal Procedure Code* for the offence of gang rape contrary to section 10 of the *Sexual Offences Act* No 3 of 2006 despite there being no evidence.

   f. That the learned trial Magistrate erred in law and in fact in finding that the prosecution discharged the burden of proof against the accused herein.

   g. That the learned trial magistrate erred in law and in fact in failing to find that the prosecution did not prove the ingredients of gang rape against the accused person.

   h. That the learned Trial magistrate erred in law and in fact in finding against the accused person herein on a defective charge sheet.

   i. That the learned trial magistrate erred in law and in fact in failing to find that the age of the complainant was not proved as required as well as the elements of the charge.

   j. That the learned trial magistrate erred in law and in fact in failing to find that the identity of the appellant was not proved as one of the persons who committed the offence.

   k. That the learned trial magistrate erred in law and in fact in convicting the accused person herein without the DNA and the pregnancy tests conducted as recommended by the doctor in the P3 form.

   l. That the learned Trial magistrate erred in law and fact in failing to find that the state had a duty to take DNA samples from the accused, the alleged child and the complainant for the paternity test to prove whether the accused herein was one of the offenders as directed by the doctor in the p3 form.

   m. That the learned trial magistrate erred in law and in fact in failing to find that it was mandatory to subject the complainant, alleged child and the accused to a medical examination

to prove that it is the accused person who committed the offence and not the husband of the complainant. Therefore, identity was not done given that the complainant has a husband.

n. That the learned trial magistrate erred in law and in fact in failing to find that the state did not prove that the accused person penetrated the complainant in the absence of medical evidence to prove that the complainant was examined on 17/7/2020, the alleged date of the offence.

o. That the learned trial magistrate erred in law and in fact in failing to find that there is no evidence to prove that the complainant genital organs were penetrated with a male organ on 17/7/2020 as the examination was done after 5 months and the genitalia was normal as per the p3 form.

p. That the learned trial magistrate erred in law and in fact in failing to consider that the accused was a minor during the Trial and ought to have applied section 19(1) of the children's act in sentencing.

q. That the learned trial magistrate erred in law and in fact in failing to consider the accused defence, submissions, and mitigation before sentencing.

r. That the learned trial magistrate erred in law and in fact in opting for sentencing as opposed to any other method of punishment to instill a sense of responsibility on the accused person as she found despite the fact that there was no evidence to connect the accused to the alleged unplanned pregnancy.

s. That the learned trial magistrate erred in law and in fact in sentencing the accused to the mandatory minimum sentence of 10 years despite addressing the issue of the unconstitutionality of mandatory offenses.

t. The learned trial court erred in sentencing the accused who was a minor at the time of the commission of the offence but is now an adult to 10 years imprisonment despite mitigation.

u. That the learned trial magistrate erred in law and in fact in convicting the appellant despite finding that the medical evidence was taken 5 months later when the complainant was already pregnant and the genitalia was normal and DNA test was not conducted and thus there was doubt whose benefit ought to have been given to the appellant herein.

v. That the learned trial magistrate erred in law and in fact in failing to find that the evidence adduced during trial did not support the charge against the accused.

w. That the learned trial magistrate erred in passing a very high sentence of 10 years imprisonment and failed to observe the issue of minimum mandatory sentence which is unconstitutional.

x. That the learned trial magistrate erred in law and in fact in failing to find that the mandatory sentence provided in the statutes is no longer binding and as well failed to consider the mitigation of the appellant herein.

6. The Appellants urged this court to find that their Appeal had merit and that their conviction and sentence be quashed and set aside.

B. Facts At Trial

7. The prosecution called 4 witnesses. PW1 JM testified that she was a resident of [Particulars Withheld], was not in school, but previously was a class 7 student at [Particulars Withheld] Primary School. She knew both Appellants given that they were their neighbors at home. On 17.07.2020 at about 7.00 pm she left their home and headed to the shops at [Particulars Withheld] Center. She was walking alone,

when she met both Appellants walking from the opposite direction. It was her further evidence that even though it was dark, she clearly saw both Appellants and also recognized them by their voices.

8. The Appellants held her, dragged her to a shamba belonging to Mama Manu, and proceeded to undress her. At the material time, she only knew the 1st Appellant and did not know the 2nd Appellant. The 1st Appellant forced her to lie on the ground, held both her hands, and covered her mouth, while the 2nd Appellant undressed her. Both Appellants then proceeded to rape her in turns. The 2nd Appellant was the first to rape her, and when done the 1st Appellant also took his turn and he too did proceed to rape her too.

9. The complainant further testified that after the incident, she did not tell her mother what transpired and only opened up about the incident about four months later, when she discovered that she was pregnant. PW1 also affirmed that at the time of the incident, she was 14 years old having been born on 14th February 2006.

10. After reporting this incident to her mother (PW2), they filed a complaint at Mitaboni Police Post and were referred to Machakos Level 5 Hospital where she picked up her P3 form. She carried the pregnancy to term and eventually was blessed with a baby in March 2021. She also confirmed that she got to know the 2nd Appellant later when they again wanted to forcefully violate her. PW1 insisted that the two appellants used force to violate her.

11. Under cross-examination, PW1 stated that she was currently living with and was married to one TM. On the material night, it was dark and she was not able to see who her two assailants were and did not tell the police that she knew her assailants by their voices. PW1 further contradicted herself and again restated that she knew the 1st appellant's voice and also heard the 2nd Appellant call the 1st Appellant, while they were undressing her.

12. The incident was reported to the police on 11.12.2020 after which, she accompanied the police as they went to arrest the Appellants, but was not the one who Identified them to the police. She further stated that once back at the police station, an identification parade was conducted on 17.08. 2020 but no identification parade forms were filled.

13. The complainant insisted that her evidence was truthful and again affirmed that the matter came to light, once it was discovered that she was pregnant. She safely delivered her baby on 02.03.2021 but no DNA test was done to ascertain who the father of the baby was. She had the child's birth certificate at home and did not have any medical evidence to show that she was raped on 17.07.2020.

14. Under Re re-examination, the complainant confirmed that her current husband was not the father of her child and that on the material night, she was not able to see the two assailants who attacked her. She also averred that after the first rape incident, the appellants attempted to violate her again. She had no grudge against the Appellants and was not framing the charges brought against them.

15. The identification parade was carried out after she made a report to the police, and the appellants had framed themselves by confessing to their friends while playing football that they had raped her.

16. PW2, Mary Kabuu, testified that PW1 was her daughter and she knew both Appellants since they were neigbours at home. In 2020, (On a date she could not remember), she noticed that PW1 was expectant, and on inquiry, she informed her that some two boys had forcefully held her in July 2020 and proceeded to violate her.

17. She raised this issue with the 2nd Appellant's mother and after two days, she reported back that her son had denied any involvement in the rape incident. Be that as it may, the 2nd Appellant had later confessed

to being the culprit and incriminated the 1st Appellant as his co-conspirator. This was in December 2020, by which time her daughter was five months pregnant.

18. PW2 further testified that PW1 told her of the rape incident on the same day, and she, in turn, informed the 2nd Appellant's mother on the next morning but did not report the incident immediately to the police. PW2 also confirmed that her daughter was currently married and this incident had strained her relationship with the Appellant's parents.

19. Under cross-examination, PW2 confirmed that she did not immediately report this incident to the police, nor did not take her daughter to the hospital. She later discovered her daughter's pregnancy about five months later and had no evidence to prove the paternity of the child. PW2 also confirmed that she did not tell the police that PW1 had reported the rape incident on the same day it occurred.

20. PW3, Dr. John Mutunga, testified that he was a qualified doctor stationed at Machakos Level 5 hospital and had examined PW1 aged 14 years on 14.12.2020. The history given was that she was gang raped by two men known to her on 17.07.2020. On examination, he noted no physical injuries but PW1 was about five months pregnant and was already attending an antenatal clinic. He recommended DNA test to ascertain paternity as it was highly likely that she got pregnant at the point of gang rape hence the DNA test would be important to ascertain paternity. He also confirmed that both Appellants were also minors aged 16 and 17 years respectively and were therefore capable of impregnating a girl.

21. Under cross-examination PW3 stated that the report to the police was made on 11.12.2020 and he did not examine PW1 on 17.07.2020 hence relied on the history presented. The medical examination was done about 5 months after the incident and he noted no physical injuries including to the external genitalia. At the time of examination, PW1 was already five months pregnant and he had no evidence to link the suspects to the pregnancy.

22. PW4 Joseph Kamau, confirmed that he was attached to Mitamboni Police Post and was the investigating officer in this matter. He testified that on 11.12.2020 at about 6.30 pm a report was made of gang defilement by the complainant and her mother. He recorded the complaint made and referred the victim to visit a Government Hospital, but they told him that PW1 had already visited a Private Hospital where it was ascertained that she was pregnant.

23. Later, the Area Chief summoned the Appellants and their parents and brought them to the police post. PW1 was later issued with a P3 and he also established that she was a minor born on 14.02.2006. His investigations also established that the Appellants too, were minors and produced both Appellant's set of birth certificates as Exhibit P3(a)&(b). After completing investigations, he established that the suspects had committed the offence and had them arraigned before the court to answer to the charges filed.

24. Under cross-examination PW4 reiterated his earlier evidence and confirmed that he did not have any medical proof that PW1 had been gang raped on the material day. The first information report was made on 11.12.2020 and he was not aware whether the complainant was already married. He also confirmed that he did not take the Appellants for DNA testing to confirm paternity and also did not have any evidence to show that the Appellants had defiled and/or gang-raped PW1.

25. Finally, PW4 also confirmed that at time of investigation, PW2 only had PW1's clinical card ascertaining when she was born but did not have her birth certificate. He also did not direct that age assessment be done to ascertain PW1's age.

26. At the conclusion of the prosecution case, the trial Magistrate placed both Appellants on their defence and they both opted to give sworn evidence

C. Defence Case

27. The 2nd Appellant, who was the 1st accused person before the trial court, denied ever defiling or gang-raping PW1 and stated that on 11.12.2020 he was at home when he got a letter from the Chief summoning him to his office. He went accompanied by his parents and was informed of the allegations being made against him. They thereafter went to Mitamboni Police Post where he was again interrogated and was placed under custody. The complainant was present at the Police Post and he noted that she was pregnant but again denied ever violating her on 17.07.2020.

28. The medical evidence presented did not prove that PW1 had been raped and though DNA examination was recommended, non was done. He urged the court to note that at the time of his arrest, he was 17 years and the Prosecution had not presented any incriminating evidence against him.

29. Under cross-examination the 2nd Appellant stated at the time of arrest, he was in form 2 at Kinyui Secondary School and knew the 1st Appellant as his schoolmate and was also the complainant's neighbour, though their home was about 2km away. He reiterated that on the day of the incident, he was at home and this could be verified by his parents. He also urged the court to note that the police report was made about 5 months after the incident and that PW1 had never made any other complaint against him.

30. DW2, Kelvin Mutiso, the 1st Appellant testified and stated that the allegations made against him before the court were false and it was not true that they had defiled the complainant. On 11.12.2020, he was at home doing domestic chores when his parents received a call from the area chief inquiring about his whereabouts and summoned them to come to the police post. At the police post, he was shocked to learn that he was being accused of defiling PW1.

31. He confirmed that has seen PW1 in the village but did not know much about her. To his knowledge, PW1 was already married and was pregnant. Further, the P3 form presented indicated that PW1 did not have any physical injuries, and though DNA test was recommended, none was done. He confirmed that at the time of arrest, he was 17 years old and reiterated that he did not defile PW1 on 17.07.2020.

32. Under cross-examination the 1st Appellant confirmed that he had not availed his birth certificate to the court to establish his age and resided in the same neighbourhood with PW1, and 2nd Appellant. He also attended the same school with the 2nd Appellant. He reiterated that on 17.07.2020 he was at home and never defiled PW1 nor had any report been made about the said incident earlier. To his knowledge, PW1 was already married by July 2020 and was living with her husband in Ngondi, which was far from their home.

33. The trial court considered the evidence adduced, convicted both Appellants on the 1st count, and sentenced them to serve a term of ten (10) years imprisonment.

D. The Appeal

i. The Appellant's Submissions.

34. The 1st Appellant counsel filed submissions dated 2nd April 2024 and faulted the trial Magistrate for relying on the evidence of a single witness, which lacked corroboration and further erred in not giving reasons as to why she believed and relied on the said evidence in contravention to Section 124 of the *Evidence Act*. Reliance was placed on Jeremiah Wachira Muchiri v Republic [2017] eKlr to buttress this point.

35. Secondly the 1st appellant pointed out that the ingredients of the offence of gang rape were not proved by the evidence presented, nor did PW1 positively identify him as it was dark on the material night. PW1 also did not tell the police that she had identified her assailants by their voices, nor was an identification parade done and the said forms presented as evidence to the court to confirm positive identification of the assailants.

36. The police inexplicably also ignored and/or neglected to carry out a DNA test to ascertain the child's paternity and the medical evidence adduced also did not contain any incriminating evidence. Considered in totality, the evidence adduced was insufficient to sustain a conviction and the 1st Appellant faulted the trial Magistrate for wrongly convicting him when the burden of proof had not been discharged. Reliance was placed on the case of Peter Kariuki Ndumberi v Republic [2016] eKLR, WLN v Republic [2021] eKLR, George Owiti Raya v Republic & Mwangi v Republic [1984] KLR where the issue of proper identification, necessity of DNA tests and penetration were discussed at length.

37. The final issue raised by the 1st Appellant was that the trial magistrate had erred by failing to consider that he was a minor during the trial and ought to have applied provisions of Section 91(1) of the Children's Act which provided for alternative methods of sentencing minors instead of punishing the Appellant as if he was an adult. Reliance was placed in the case of Daniel Lagat Kiprotich v State [2018] eklr.

38. The 1st Appellant thus urged this court to find that his conviction was not safe and proceed to discharge him.

ii. The 2nd Appellant's Submissions.

39. The 2nd Appellant filed submissions dated 3rd April 2024,

and submitted that PW1 was an untrustworthy witness, who had failed to identify her assailants and therefore it was unsafe to use her evidence to convict him. The 2nd Appellant's counsel further analyzed and brought out several inconsistencies in the said evidence, especially on identification, and urged this court to reevaluate the same and find that the prosecution evidence as a whole was unsafe to be used to convict them. Reliance was placed on the case of Marsabit HCCRA No E001 of 2020, Mohammed Boru v Republic, Siaya HCCRA No 58 of 2015, and Habel Omondi Onyango v Republic & Simiyu & Another v Republic [2005] 1KLR 192, which discussed the importance of proper identification.

40. The 2nd Appellant further submitted that the trial Magistrate erred in convicting him yet no medical evidence was adduced to prove penetration and/or DNA test conducted to establish paternity. The age of the complainant too was not established and the trial Magistrate had erred in holding that she was 14 years old based on a photocopy of an uncertified clinic/immunity card. He relied on Kennedy Nyaa Mwige v Austin Kiguta & Another [2015] eklr, which delved into the admissibility of documents marked for identification and not produced into evidence.

41. The final issue raised by the 2nd Appellant was that the trial magistrate erred in law in failing to consider that he was a minor and ought to have been sentenced in line with Section 91(1),(b) as read with Section 91(7) of the Children's Act 2020. Reliance was placed in the case of Daniel Langat Kiprotich v State [2018] eklr & E21 of 2021, The State v FOO, where minors were sentenced in line with recommendations made under the Children's Act.

42. The 2nd Appellant therefore urged this court to find that his conviction was not safe and he be discharged.

43. The ODPP did not file any submissions in this Appeal.

E. Analysis And Determination

44. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up with its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. The Court of Appeal in Kiilu & Another v Republic, [2005] 1 KLR 174, stated thus:

> " 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.
>
> 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."

45. Also in Peter's v Sunday Post [1958] E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. The Appellate court must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate's findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

46. In the case of Republic v Edward Kirui [2014] eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another v State by Prosecutor, Tamil Nadu & Another [2008] INSC 1688 where the case of Bhagwan Singh v State of M. P. [2002]4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

47. Having considered the lower court record, the grounds of appeal and the submissions of the parties, I find the following as issues for determination;

    a. Whether the prosecution proved their case beyond reasonable doubt.

    b. Whether the sentence should be reviewed.

Issue I:

I. Whether the prosecution proved the case beyond reasonable doubt.

48. It is trite that in all criminal offences the prosecution is required to prove their case beyond reasonable doubt. Lord Denning in Miller v. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " 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 beyond reasonable doubt, but nothing short of that will suffice."

49. In this case, the Appellants were charged with the offence of "Gang Rape" contrary to Section 10 of the *Sexual Offences Act*, No 3 of 2006 which section provides as follows:

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

50. For a conviction based on a charge of "Gang Rape" to be sustained, the prosecution must prove the following four elements beyond reasonable doubt:

    a. Penetration as defined by section 2 of the *Sexual Offences Act* without consent thereof;

    b. In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape.

    c. Positive identification of the perpetrator.

Issue I:

i. Penetration

51. Section 2 of the *Sexual Offences Act*, No 3 of 200 defines 'penetration' as:...

    the partial or complete insertion of the genital organs of a person into the genital organ of another person.

52. On whether there was penetration of the victim's genital organ, it is now well settled that penetration can be proved by direct or circumstantial evidence. The Supreme Court of Uganda put it succinctly in Bassit*a v Uganda S.C. Criminal Appeal No. 35 of 1995* which was quoted with approval in Sammy Charo Kirao v Republic [2020] KLR where the court stated;

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, sexual intercourse is proved by the proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence

the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

53. PW1 alleged that both accused persons "gang raped" her on 17.07.2020 at about 7.00 pm while she was enroute to the shop and the issue became known about five (5) months later, when her mother (PW2), discovered that she was pregnant. They reported this incident to the police on 11.12.2020 and thereafter was sent for medical examination at Machakos Level 5 Hospital, where her P3 form was filled.

54. PW3 Dr John Mutunga confirmed that he examined the minor at Machakos level 5 hospital and his physical examination of PW1 did not reveal any physical injuries, but it was discovered that she was about five (5) months pregnant. It was likely that she might have conceived during the "gang rape" and that was an issue, which could only be ascertained by undertaking a DNA test to determine paternity.

55. PW1 testified that she safely delivered her bouncing baby in March 2021, but inexplicably, no DNA swab was taken from her baby to be matched with that of either of the two Appellants. This was a serious lapse on the part of the investigations and confirmed the Appellant's assertion that the prosecution did not provide any evidence to prove the element of penetration.

56. It is also noted based on the case of Sammy Charo Kirao (supra) that the act of penetration could be orally proved by other corroborating evidence. A review of the evidence herein did not reveal any other corroborative evidence to support proof of defilement and thus I do find and hold that penetration in this matter was not proved.

ii. Identification

57. PW1 in her evidence in chief initially asserted that she knew both Appellants as they were persons who were their neighbours at [Particulars Withheld], and affirmed that on 17.07.2020, they attacked her while she was going to the shop at about 7.00pm. she stated that, " I met Raymond and Kelvin on the way. I saw them clearly though it was dark. I heard Kelvin voice and Raymond's too. We were going in the opposite direction. They held me undressed me after taking me to a shamba. I did not know Raymond at that time but I knew Kelvin."

58. Under cross-examination, PW1 recanted her evidence and stated that, "On 17.07.2020, it was dark at the time I was not able to see who the two were. I did not tell the police that I heard the voices..... I am not the one who pointed them out to the police."

59. In this case, PW1 was not sure if indeed the two Appellants were her assailants and her evidence clearly revealed this fact. It was, therefore, incumbent on the trial Magistrate to carefully examine the said evidence and convince herself that the identification of the perpetrators was safe and free from error.

60. Visual identification in criminal cases can cause a miscarriage of justice and must be carefully tested. In Wamugunda v Republic [1989]KLR 424 at page 424 the court had this to say.

> " where only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely Make it the basis of a conviction."

61. It was also held in Charles O. Maitanyi v Republic, that it is necessary to test the evidence of a single witness respecting to identification, and, absence of collaboration should be treated with great care. In Kariuki Njiru & 7 others v Republic the court held that evidence relating to identification must be

scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

62. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question.

63. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before. The factors the court will therefore include : -

    a. What were the lighting conditions under which the witness made his/her observation?

    b. What was the distance between the witness and the perpetrator?

    c. Did the witness have an unobstructed view of the perpetrator?

    d. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

    e. For what period of time did the witness actually observe the perpetrator?

    f. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

    g. Did the witness have a particular reason to look at and remember the perpetrator?

    h. Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

    i. Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

    j. What was the mental, physical, and emotional state of the witness before, during, and after the observation?

    k. To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

64. Finally, the trial court is also expected to assess the demeanor of a witness and to make a finding as to the integrity, honesty, and truthfulness of such witnesses, not his or her boldness or firmness. The Court of Appeal in Toroke v Republic had this to say: -

> " It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So, the error or mistake is still there whether it be a case of recognition or identification

65. PW1 gave scanty evidence to support her contention that she positively identified the Appellants as her assailants, who "gang raped" her on the night of 17.07.2020, and in cross-examination did a complete about turn and was emphatic that "it was dark at that time and I was not able to see who the two were." The trial Magistrate failed to properly evaluate this evidence and wrongly concluded that the victim

had positively identified the two Appellants herein, while in actual fact, that was not the case. This was a clear misdirection, which justifies this court's intervention.

66. The above finding is enough to dispose of this Appeal, but I do further find that there were other serious inconsistencies in the evidence of PW1 and PW2, which also created doubt regarding their credibility and their evidence as a whole.

67. PW1 stated that she did not inform anybody about this incident until she was discovered pregnant about five (5) months later, while the evidence of her mother (PW2) was that,

> " My daughter told me that she had been raped on the same day of the incident. The next morning, I informed Raymond's mum. I did not go to the police immediately."

Under cross-examination, she further testified that;

> " On 17.07.2020, the child was not raped, I discovered the pregnancy then went to the police that was after five months"

68. PW1 also stated that an identification parade was carried out after both Appellants were arrested, which allegation turned out not to be true as no such parade was carried out. In totality, the evidence of PW1 and PW2 are shaky at best and cannot form the basis of a safe conviction. In the case of Ndungu Kimanji v Republic [1979] KLR 282 this Court said: -

> " The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

Disposition

69. Having considered the entire appeal, I do find and hold as follows;

a. That the conviction and sentence of both Appellants is manifestly unsafe as the prosecution did not prove their case beyond reasonable doubt.

b. The Upshot is that the Conviction and sentence passed by Hon Anne Nyoike (SPM) in Machakos CMCC CR (SOA) Case No E040/2020 on 20th July 20223 is hereby quashed and set-aside.

(c) Both Appellants will forthwith be set free, unless otherwise lawfully held.

It is so Ordered.

JUDGMENT READ, SIGNED AND DELIVERED IN VIRTUALLY COURT AT MARSABIT THIS 27TH DAY OF MARCH 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 27TH DAY OF MARCH, 2025

In the presence of:-

.....Appellant

..... For O.D.P.P

..... Court Assistant