Chimwani & 2 others v Republic (Criminal Appeal E088 of 2023)
[2025] KEHC 4860 (KLR) (25 April 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E088 OF 2023

JRA WANANDA, J

APRIL 25, 2025

BETWEEN

MOSES CHIMWANI ..... 1ST APPELLANT

ALEX ALUVISIA ..... 2ND APPELLANT

KEVIN AYODI ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgment of R. Odenyo-SPM, delivered on 6th September 2022 in Eldoret Chief Magistrate's Court Criminal Case-Sexual Offences No. E113 of 2021)

JUDGMENT

1. The Appellants were charged with the offence of Gang Rape contrary to Section 10 of the *Sexual Offences Act*, No. 3 of 2006. It was alleged that the Appellants, on 22/03/2021 in Lugari sub-County, within Kakamega County, intentionally and unlawfully caused their genital organs, namely penis, to penetrate the vagina of EK, a girl aged 16 years, one after another without her consent.

2. They were also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

3. The Appellants pleaded not guilty to all the charges and the case then proceeded to full trial in which the Prosecution called 5 witnesses. At the close of the Prosecution's case, the Court found that the Appellants had a case to answer and put each one of them on their defence. The Appellants then gave unsworn testimonies and did not call any witnesses. By the Judgment delivered on 06/09/2023, they were all convicted on the main charge and each sentenced to 15 years imprisonment.

4. Dissatisfied with the said decision, the Appellants, through Messrs Oduor Munyua & Gerald Attorneys at Law LLP, filed this Appeal on 20/09/2023, against both conviction and sentence on 9 grounds reproduced verbatim as follows:

   i. The learned trial magistrate erred in law and fact when he misapprehended the facts and evidence tendered before court thus arriving at a wrong decision both on conviction and sentence when the court failed to read out the provisions of Section 211 of the *Criminal Procedure Code* Cap 75 Laws of Kenya to the Appellants herein.

   ii. The learned trial judge erred in law and fact when he misapprehended the facts and evidence tendered before court thus arriving at a wrong decision both on conviction and sentence when he concluded that the testimony of PW1 was truthful when it is crystal clear that PW1 during examination in chief indicated that she never knew the 3rd appellant while during cross examination it clearly came out that she was personally known to the 3rd Appellant clearly depicting her demeanour as an untruthful person.

   iii. The learned trial judge erred in law and fact when he misapprehended the facts and evidence tendered before court thus arriving at a wrong decision both on conviction and sentence when he concluded that the testimony of PW1 was truthful when she said that she was dragged through a thicket when it came out clearly on the P3 form as presented by PW3 that she did not have any physical injuries on her body despite being allegedly dragged through a thicket for approximately 1 Kilometre.

   iv. The learned trial judge erred in law and fact when he misapprehended the facts and evidence tendered before court thus arriving at a wrong decision both on conviction and sentence when he concluded that the testimony of PW1 was truthful when no evidence was led as to the phone number that was used to call a certain church member or the identity of the said church member that was allegedly called.

   v. The learned trial judge erred in law and fact when he misapprehended the facts and evidence tendered before court thus arriving at a wrong decision both on conviction and sentence when he failed to find that a P3 form is a secondary document and no initial treatment documents were produced before the court from Musembe hospital to confirm when and whether indeed PW1 was treated for the alleged injuries.

   vi. The learned trial judge erred in law and fact when he misapprehended the facts and evidence tendered before court thus arriving at a wrong decision both on conviction and sentence when he concluded that the element of penetration had been proved when it clearly came out through the testimony of PW3 that PW1 had healed hymnal tears barely 3 days from the date of the alleged gang rape with no physical injuries.

   vii. The learned trial judge erred in law and fact when he misapprehended the facts and evidence tendered before court thus arriving at a wrong decision both on conviction and sentence when he failed to take cognizance of the fact that PW1 reported the alleged offence at Chekalini police station but the matter was being investigated by Lumakanda Police Station without the examination of both initial reports made by PW1 at Chekalini Police Station and the initial report made by PW1 & PW2 at Lumakanda Police Station.

   viii. The learned trial judge erred in law and fact when he misapprehended the facts and evidence tendered before court thus arriving at a wrong decision both on conviction and sentence when

he failed to take cognizance of the fact that the Appellants and PW1 were all students and underage as at the time of the alleged offence before meting out the harsh sentence of 15 years.

ix. The learned trial Magistrate's decision albeit a discretionary one was plainly wrong.

5. Subsequently, a Notice of Change of Advocates was filed by Messrs Oyaro J & Associates Advocates on behalf of a party described as the "1st Defendant". The said firm then filed the Supplementary Memorandum of Appeal dated 14/10/2024. The grounds listed, again quoted verbatim, are as follows;

i. That the learned magistrate erred in failing to appreciate that the appellant's rights under Article 50 (2) (b) (g) (h) (j) of *the Constitution* of Kenya was not observed thereby making the proceedings a nullity.

ii. That the learned magistrate erred in failing to appreciate and inform the Appellant the substance and importance of mitigation upon conviction, notwithstanding the fact that the Appellant was unrepresented.

iii. That the learned magistrate erred in imposing a relatively high sentence against the Appellant under the circumstances.

iv. That the learned magistrate erred in failing to consider the best interests of the minors while convicting and sentencing the Appellant.

Prosecution evidence before the trial Court

6. PW1 was the minor-complainant (victim). She testified that she was 16 years in age having been born on 10/10/2004 and a Form 3 student. She stated that on 22/03/2021 at about 7.00 pm, she was on her way home from a shop when she met the Appellants whom she knew as the 1st and 2nd Appellant were in the same schools as she and the 1st Appellant was in fact her classmate. She stated that the 1st Appellant stepped in front of her and the 2nd Appellant held her hand while the 3rd Appellant bound her mouth using a cloth and they then led her through a thicket up to the 1st Appellant's house where they lay her on a bed and had sex with her in turns, that the 2nd Appellant is the one who started, followed by the 1st Appellant and then the 3rd Appellant and when they finished, they refused to let her go. She stated that she started tearing books that were there and that is when they let her go, that when she reached home, she told her grandmother what had happened but who did not say anything, and that she later on told her church members who escorted her to the police station where she recorded her statement. She stated that she was referred to the Moi Teaching and Referral Hospital (MTRH) where she examined. She then referred to the P3 Form and her Certificate of Birth. In cross-examination, she stated that the 1st Appellant's house was near her mother's but she did not know whether his mother was home that night.

7. She maintained that it is the 2nd Appellant who held her hands and led her through the field, that they did not meet anybody, that she could not remember the clothes worn by the Appellants that evening, that although there are neighbours, she does not know whether they heard her crying although she was not screaming, that she told her church mates about the incident when her grandmother failed to take any action and that she did so by phone. She stated that she had been seeing the 3rd Appellant as he goes to school to [particulars witheld] and believes the Appellants were coming from a football match, that the field that they led her through was so thick that people could not walk through it and that she recognized the 3rd Appellant when they reached the 1st Appellant's house. She stated further that they had bound her mouth so she could not scream loudly, and that while one was raping her, another held her hands while the 3rd held her legs.

8. PW2 was KMA, PW1's (complainant's) father. He testified that he is a boda boda (motor-cycle) rider and lives in Eldoret, that on 25/03/2021, he was at home when at about 6.15 pm, he received a phone call from the Chekalini Police Station informing him that his daughter had been defiled, and that he travelled to the village on the next day and met the complainant who confirmed that she had indeed been defiled. He stated that he then went to the Police Station where he recorded his Statement and on 26/03/2021, she took the complainant to the MTRH where she was examined and a P3 Form filled. In cross-examination, he stated that the 1st Appellant was arrested after about 1 month, that the complainant did not show her the clothes she was wearing on that night, and that he took the complainant to where the 2nd Appellant was and the complainant identified him.

9. PW3 was Dr. Irene Simiyu, a doctor at MTRH. She produced the P3 form on behalf of Dr Taban who was said to have proceeded for further studies. She stated that the complainant was 16 years old and went to the hospital on 26/03/2021. She stated further that the complainant had changed her clothes by that time, that she stated that she was coming from the shop when she met 2 boys known to her together with a 3rd one whom she did not know, and the 3 forcefully led her to the house of one of them and defiled her. PW3 then stated that upon examination, no injuries on other parts of body were found, except on her private parts, that she had a healed hymenal tears at 3.6.7 and 11 o'clock, multiple abrasions on the posterior fourchette and also whitish discharge. In cross-examination, she stated that before the complainant went to MTRH, she had first been attended to at Musembe Dispensary, and that her clothes were not brought to MTRH. She stated further that she did not know whether the complainant had engaged in other sexual encounters after the date of the gang rape, and that the healed hymenal tears demonstrated that she had engaged in sexual encounters in the past. She also stated that the incident occurred on 22/03/2021 and the complainant went to the hospital on 26/03/2021, and that from the P3 Form, there is no indication that the complainant was on her monthly periods. In conclusion, she stated that she did not have the Appellants' P3 Forms and thus could not talk about their connection to the offence.

10. PW4 was the Investigating Officer, Roda Kelekha, attached to Lumakanda Police Station. She testified that on 26/03/2021, the complainant (16 years old) went to the station with her father and reported that she had been defiled by 3 people on 22/03/2021. She stated that a Report had been made at Chekalini Police Post and the complainant had been treated at Musembe Dispensary. According to her, the complainant told them that she knew 2 of the assailants by name and she could also recognize the 3rd one by appearance, and that that they took the complainant to MTRH where she was treated. PW4 testified further that in their investigations, they found that the complainant and 2 of the assailants were in the same school and one was actually her classmate and further, that the complainant showed them her certificate of birth which revealed that she was 16 years old and that the Appellants were arrested with the help of Chekalini Police Post. She stated that she visited the scene led by the complainant and that the distance from the scene to where the complainant was abducted is about 1 kilometre.

11. In cross-examination, she stated that she did not have the clothes that the complainant was wearing because the initial Investigating Officer did not give them to her, that the 1st Appellant's house where the incident took place is adjacent to his parents' house, that the complainants' mouth was gagged using a piece of cloth so that she could not scream and that they dragged the complainant through the thicket so they could not have met anybody on the way.

12. PW5 was Police Constable Dickson Kiptoo based at Chekalini Police Station. He testified that on 25/03/2021 he received a call from one Joshua who requested to see PW5 and whom he asked to go over, that Joshua came with a girl who told PW5 that on 22/03/2021 she was walking home when she was abducted by 3 people who were following her, that she knew 2 of them as they were

her schoolmates, that one of them closed her mouth with his hands and they then escorted her to the 1st Appellant's house where they defiled her. PW5 stated that he entered the information in the Occurrence Book and referred her to Lumakanda Police station where there was a gender desk and that later, they arrested the Appellants from their homes after they were identified by the complainant. He stated that the 1st Appellant's house is about 30 metres from his parents' house and that it is the 1st Appellant who led PW5 to the 3rd Appellant's home where he was arrested.

Defence evidence

13. After being placed on their defence as aforesaid, all the 3 Appellants gave unsworn testimony.

14. The 1st Appellant, Moses Chimwani (DW1) stated that he was 22 years old, and that the complainant was known to him as they attended the same school and were friends. He denied committing the offence and claimed that he was arrested about 1 month after the alleged date of the incident.

15. The 2nd Appellant, Alex Aluvisia (DW2), too, testified that the complainant was his schoolmate and a friend. He, too, denied committing the offence and stated that the complainant subsequently asked him for forgiveness claiming that she had been forced to say what she said in Court.

16. The 3rd Appellant, Kevin Ayodi (DW3), too, denied committing the offence and stated that on the material date, he was at home at about 7.00 pm revising for his examination and that his home is about 2/ ½ kilometres from the complainant's home. He stated that he did not know the complainant before this case and did not know how she connected him to this case.

17. DW4 was one Rumina Makuga. He testified that he is the 1st Appellants' father and that he knew all the Appellants. He stated that the 2nd Appellant is a neighbour, that both attend the same school and the 3rd Appellant attended a different school but is also a neighbour. He stated that on 23/04/2021at about 6.00 am, he was at home still in bed when he heard the 1st Appellant calling him and when he went to check, he met police officers who had already arrested the 1st Appellant whom they then took him to Chekalini police station and later to Lumakanda Police Station. In cross-examination, he stated that the 1st Appellant lives in a different house from his.

Hearing of the Appeal

18. The Appeal was canvassed by way of written Submissions. The Appellants, through Messrs Oduor, Munyua & Gerald Advocates filed the Submissions dated 20/05/2024 and also, through Messrs Oyaro J & Associates, the Supplementary Submissions dated 14/10/2024. On its part, the State filed its Submissions, through Prosecution Counsel, Okaka. A Leonard, dated 8/11/2023.

19. As is apparent above, it is not clear which law firm between Messrs Oduor, Munyua & Gerald Advocates and Messrs Oyaro J and Associates is on record for the Appellants as both law firms have filed respective pleadings in the matter. As stated however, Messrs Oyaro J & Associates Advocates filed a Notice of Change of Advocates on 14/12/2023 and I also note that since then, it is Mr. Oyaro Advocate who has been appearing in Court. However, in the interest of justice and so as not to prejudice the Appellants, I will consider the pleadings from both law firms.

Appellant's Submissions

20. In the first set of Submissions filed by Messrs Oduor, Munyua & Gerald Advocates, Mr. Oscar Oduor Opondo Advocate, basically reiterated the grounds listed in the Memorandum of Appeal. He then cited Article 50(2)(q) of *the Constitution* on the right to a fair trial and urged the Court to allow the appeal as it is merited. He also cited Article 25(c) and urged the Court to order for a retrial. He cited

several authorities and maintained that the trial was defective as key evidence and crucial facts were not taken into consideration. Counsel then urged that from the testimony of PW3, it was apparent that the complainant had healed hymeneal tears barely 3 days from the date of the alleged gang rape. According to him, this demonstrated that she had sexual encounters in the past which means it could have been caused by other encounters other than the alleged offence. He cited several more cases and urged that the Appellants should be discharged.

Appellants' Supplementary Submissions

21. In the Supplementary Submissions filed by Messrs Oyaro J & Associates Advocates, Counsel submitted that there was breach of Article 50(2)(g)(h)(j) of *the Constitution* which imposes an obligation on the trial Court to inform the accused person of his right to Counsel promptly so that the accused can make an informed decision whether to procure the services of an Advocate or whether he may qualify to apply for legal representation from the Committee on Legal Aid. He submitted that by dint of Article 25, this right cannot be limited. He cited several cases and submitted that in this case, the trial Court did not inform the Appellants of their right to Counsel and which therefore rendered the trial a nullity. He, too, urged that this Court should order for a retrial.

Respondent's Submissions

22. Prosecution Okaka A. Leonard, on his part, urged the Court to uphold the trial Court's findings on the ingredients of the offence of gang rape. He submitted that the complainant testified on how she was penetrated by the Appellants and gave details on how she met the Appellants who led her into a house and forced her to have sex with them, and that the medical report, prepared upon examination of the complainant 3 days later, bore findings consistent with defilement. On the issue of consent, he submitted that on account of minority, there was no consent on the part of the complainant to engage in sexual intercourse and the certificate of birth exhibited proved that she was 16 years old. He also submitted that there were 2 or more people involved in the rape, that it is the Appellants who committed the act and whom the complainant recognized as the 1st and 2nd Appellants were her classmates, that the 1st Appellant led the police to the 3rd Appellant whom the complainant identified. According to him therefore, all the ingredients of the offence were proved beyond reasonable doubt.

23. On the issue of the right to legal representation, Counsel urged that the same is not absolute, and was not raised at the trial, that what should be instructive is the Appellants' active participation during the trial, that the Appellants duly cross-examined witnesses and tendered their defences and that therefore, no substantial injustice was occasioned. He cited the case of Julius Kitsao Manyeso v R [2023] KECA 827 (KLR). On the allegation of non-compliance with Section 211 of the *Criminal Procedure Code*, he submitted that the record betrays this grievance and insisted that all procedural and substantive aspects were complied with. He cited the case of Kennedy Ngetich alias Tiondo v Republic [2023] KECA 451 (KLR). On the issue of supply of Statements, Counsel urged that the Court, before hearing commenced, acknowledged compliance, that when hearing commenced, at no instance did the Appellants indicate to the Court that they did not have the witness statements. He cited the Supreme Court case of Hussein Khalid & 16 Others v Attorney General & 2 others [2019] eKLR and also the case of Wycliffe Samita v R [2024] KECA 948 KLR. On the issue of age, Counsel submitted that the 1st Appellant testified that he was 22 years old, the charge sheet bore their apparent ages to be 22, 20 and 18, respectively, and the trial Court found no reason to question the same. On the sentence meted out, he urged the Court to appreciate the jurisdictional shift on Sexual Offences and cited the case of Benard Kimani Gacheru v R (2002) eKLR. He submitted that the Appellants were sentenced to the minimum 15 years instead of the maximum imprisonment for life provided under Section 10 of the *Sexual Offences Act*.

Determination

24. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32)

25. Some of the issues raised in the Memoranda of Appeal are outright non-issues as the record proves them so. One is the allegation that Section 211 of the *Criminal Procedure Code* requiring the trial Court, after making a finding of a case to answer, to explain to accused persons their rights and choices on the manner of conducting their defence was not complied with. To the contrary, the record is clear that this requirement was sufficiently complied with. The second is the allegation that the Appellants were not informed of the substance and importance of mitigation upon conviction. The record reflects that the Appellants were given the opportunity to mitigate and each made representations thereon. The third one is the allegation that the Appellants were minors at the time of the commission of the offence. Again, the charge sheet and the record both indicate that all 3 Appellants were of age. Further, at no time during the trial did any of the Appellants claim that he was a minor. These 3 grounds are clearly nothing but red-herrings and afterthoughts with no foundation. In any event, I notice that these matters were never seriously revisited or urged in both sets of written Submissions filed by the two respective law firms acting for the Appellants.

26. The remaining issues for determination, in my view, can be summarized as follows:

    a. Whether there was a failure by the trial Court to inform the Appellants of their right to legal representation, and if so, the effect thereof.

    b. Whether the gang rape charge against the Appellants was proved beyond reasonable doubt.

    c. Whether the sentence imprisonment was justified.

27. I now proceed to analyze and determine the said issues

Whether there was a failure by the trial Court to inform the Appellants of their right to legal representation, and if so, the effect thereof.

28. In respect to the Appellants' allegations that they were not informed of their right to legal representation, I agree that the right to fair trial is not only a fundamental principle of law, but is also one of the 4 rights that are recognized under Article 25 of *the Constitution* as being non-derogable. Departure therefrom amounts to violation of an accused person's right to a fair trial as prescribed under Article 50 of *the Constitution*. A grievance of this nature was interrogated by the Court of Appeal in the case of Julius Kitsao Manyeso v R [2023] KECA 827 (KLR) and answered in the following terms:

> " 19. This court (Kairu, Mbogholi-Msagha and Nyamweya JJA) held in William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) *v Republic (Criminal Appeal 49 of 2020*) [2022] KECA 23 (KLR) that the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the Constitution* demands it. However, in the present appeal, the appellant did not raise the issue of legal representation either in the

trial court and the High Court, and the record of the trial court shows that the appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, we do not find any merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and 50(2)(h) of *the Constitution* were violated."

29. Like in the Court of Appeal case above, in this case, too, the Appellants did not at anytime raise the issue of legal representation before the trial Court, they participated in the trial and cross-examined witnesses and even called 1 witness of their own. It has also not been demonstrated that they suffered any or any substantial injustice. I cannot therefore find any evidence that the Appellant's rights to a fair trial under Articles 50(2)(g) and 50(2)(h) of *the Constitution* were violated.

30. On the allegation that the Appellants ought to have been provided with legal representation, in Kenya, provision of an Advocate to an accused person at the expense of the State is only mandatory in capital offences in which death is a possible sentence, which gang rape is not. I therefore agree with Prosecution Counsel Mr. Okaka that such right to representation is not absolute (see the Supreme Court decision in Petition No 5 of 2015, Republic -vs- Karisa Chengo & 2 Others [2017] eKLR and also the Court of Appeal case of David Njoroge Macharia v Republic [2001] eKLR).

Whether the gang rape charge was proved beyond reasonable doubt.

31. 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 other 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 than fifteen years but which may be enhanced to imprisonment for life"

32. The same Act in Section 2 provides that "gang" "means two or more persons".

33. As has been held in several authorities, it is therefore generally agreed that under Section 10 aforesaid, for the Prosecution to obtain a guilty verdict in the offence of gang rape, it needs to prove the following elements:

    i. Commission of rape; Penetration as defined by section 2 of the *Sexual offences act* without consent thereof;

    ii. 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

    iii. Positive identification of the perpetrator.

34. The ingredients of "rape" which the prosecution must prove are set out in Section 3(1) of the Act as follows:

> " A person commits the offence termed rape if –
>
> a. He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.
>
> (b) The other person does not consent to the penetration; or

(c) The consent is obtained by force or by means of threats or intimidation of any kind."

35. Regarding "penetration", from the evidence of PW3, it is indicated that the complainant was examined on 26/03/2021, 4 days after the incident took place. The examination revealed that she had hymeneal tears and a whitish discharge and had injuries in her private parts caused by penetration by a blunt object. Dr Taban, who prepared and filled the P3 form concluded that the findings were consistent with defilement. Although Counsel for the Appellants pointed out that the medical evidence showed that the hymen had healed within 4 days of the alleged incident and alluded that this was unlikely, no evidence was presented to show that it was impossible. On the Appellants' contention that from the medical evidence, the complainant must have had previous sexual encounters, they did not explain how this affected the gang rape case facing them or how it exonerated them.

36. Regarding "consent", a certificate of birth was produced and which indicated that the complainant was born on 10/10/2004. The alleged incident having been alleged to have been committed on 22/03/2021, it means that the complainant was about 16 years old and 5 months, thus clearly a minor, at the time of the offence. For this reason, it follows that she could not, in law, have had the capacity to consent to the act. The element of consent is therefore dispensed with.

37. Regarding the "use of force" in the commission of the offence, the complainant described how she was waylaid by the Appellants, how one held her by the hands and instructed him to accompany them, how one bound her mouth using a piece of cloth, how they led her through a thicket up to the 1st Appellant's house, lay her on the bed and had sex with her in turns. She also described how while one was raping her, another would her hands and the third one would hold her legs. There was therefore evidence of use of force before the trial Court.

38. As for "identification", the complainant's stated that both the 1st and 3nd Appellants were her schoolmates and the 1st Appellant was in fact her classmate. As for the 3rd Appellant, she said that she had also been seeing him around. The Appellants did not dispute this claim. In any event, the 1st and the 2nd Appellants both confirmed that they were indeed schoolmates with the complainant and even claimed that she was their friend. According to the arresting police officer (PW5), it is the 1st Appellant who led him to the 3rd Appellant. There is therefore no dispute that the complainant knew and was familiar with all the Appellants. I therefore find this to be a case of "recognition" rather than identification of a stranger. Such "recognition" evidence is clearly more reliable and believable in "identification".

39. In respect thereto, in the case of Reuben Tabu Anjononi & 2 Others v Republic [1980] eKLR, the Court of Appeal guided as follows:

> "..... This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).
>
> We consider that in the present case the recognition of the appellants by Wanyoni and Joice to whom they were previously well known personally, the first appellant also being related to them as their son-in-law, was made both possible and satisfactory in the two brightly-lit torches which two of the appellants kept flashing about in Wanyoni's bedroom in such a manner that the possibility of any mistake was minimal. In addition, immediately after the

robbers left, Wanyoni reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him.

We are satisfied that there was no mistake as to the identity of the three appellants and they were properly found guilty of the offence with which they were charged in count 1."

40. In light of the foregoing, I am satisfied that the trial Magistrate correctly found that the Appellant had been positively identified. This ground of Appeal also therefore fails.

41. It is not lost on this Court that the complainant was the only witness to the alleged commission of the incident. What was before the trial Court could therefore be categorized as "single witness evidence". I may state that in respect to an allegation of this nature, the proviso to Section 124 of the *Evidence Act* permits a trial Court, in cases involving sexual offences, to convict on the evidence of a sole witness without the need for corroboration, where such witness is the victim of the sexual offence.

42. The Court of Appeal tackled the issue of "single witness evidence" in the case of Kiilu Vs Republic (2005) 1 KLR 174 in which the Judges quoted the following statement made in the earlier case of Abdalla bin Wendo and Another v. R [1953], 20 EACA.166:

> " subject to certain well-known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error." See also Abdalla Wendo & Another Vs Republic (1953) 20 EACA (166) KLR 198."

43. Further, the Court of Appeal in the case of Rajab Iddi Mubarak v Repulic [2018] eKLR, while analyzing the ratio decidendi in its earlier case of Maitanyi Vs Republic (1986) KLR 198, stated as follows:

> " 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
>
> 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.
>
> 3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made."

44. In her Judgment, the trial Magistrate stated that in as much as the complainant was the only witness to testify as to the identity of the perpetrators of the offence, he believed her evidence in totality since no reason was advanced as to why the complainant would come up with such wild allegations against the Appellants if the Appellants did not commit the offence. He also found that the complainant's

testimony was very detailed that it could not have been made up. It is therefore clear that trial Magistrate properly warned himself of the danger of relying upon a single witness before reaching his finding. For this, he cannot be faulted.

45. The next question is whether the rape "was committed with others and with the common intention". Section 21 of the *Penal Code* provides that:

> " Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such persons an offence is committed of such nature that its commission was a probable consequence of such purpose, each of them is deemed to have committed the offence."

46. In the case of R v Cheya (1973) EA, the Court held that:

> " The existence of common intention being the sole test of total responsibility, it must be proved that the common intention was and that the common act for which the accused were made to be made responsible was acted upon in furtherance of a common intention ....."

47. Similarly, in the case of Njoroge v Republic [1983] KLR 197 where the Court of Appeal stated that:

> " If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavors to effect the common assault of the assembly ..... Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."

48. From the complainant's testimony, the Appellants, working together as a team, in conjunction or in association with one another, co-ordinated the complainant's abduction and the rape. They forced her through a deserted field and led her to the 1st Appellant's house where they took turns in raping her. In view of this testimony, I agree with the trial Magistrate that the existence of a common intention by the Appellants to commit the offence was established.

49. Regarding the defence presented by the Appellants, the trial Magistrate stated that he found the same to be too weak to displace the storms and well corroborated prosecution case. He found the defence to have been mere denials and that DW4 was not even with any of the Appellants on the evening of 22/03/2021 when the offence was committed and thus his testimony was irrelevant. He accordingly dismissed the Appellants' defence as lacking credibility. I could not agree more. Considering the state of the evidence presented, I have no doubt in my mind that the trial Magistrate reached the correct conclusion in the circumstances.

50. In the premises, I find no grounds to fault the trial Court for finding that the offence of gang rape was proved to the required standard.

Whether the sentence was excessive

51. Regarding interference with sentence at the appellate stage, the applicable principles were restated by the Court of Appeal in the case of Bernard Kimani Gacheru v Republic [2002] eKLR, as follows:

> " It is now settled law, following several authorities by this Court and the high Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with

sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already stated is shown to exist".

52. As already stated, under Section 10 of the *Sexual Offences Act*, a person convicted for the offence of gang rape "is liable ..... to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment to life."

53. In view of the above, it is clear that the sentence imposed by the trial Court, although the minimum prescribed, was within the law. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should be discouraged and that Courts should retain the discretion to depart from such sentences. In connection to this, the Supreme Court in the case of Francis Karioko Muruatetu and Another vs Republic [2017] eKLR, while dealing with a case of murder, stated as follows:

> "(66) It is not in dispute that article 26(3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

54. On the strength of the Murautetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum sentences imposed on convicts for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR, the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), and also the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR. I may also mention the oft-cited decision of Odunga J (as he then was), in the case of Maingi & 5 others *v Director of Public Prosecutions & another (Petition E017 of 2021*) [2022] KEHC 13118 (KLR). However, by the clarification made by the same Supreme Court in its subsequent directions given in Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences.

55. Recently, the Supreme Court reiterated and restated the above directions when dealing with an Appeal emanating under the *Sexual Offences Act*. This was in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment). In setting aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside the mandatory minimum sentence of 20 years

imprisonment imposed on an Appellant for a defilement offence, the Supreme Court stated, inter alia, as follows:

> " 57. In the Muruatetu case, this Court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.
>
> ....."

56. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting ultra vires were it to set aside the sentence of 15 years imprisonment on the sole basis that the same, being a mandatory minimum sentence stipulated by statute, is unconstitutional. As clearly spelt out by the Supreme Court, Muruatetu is not applicable to cases under the *Sexual Offences Act*.

57. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh. In view thereof, I cite Majanja J, in quoting the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR) in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, in which he stated that:

> " The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ....."

58. The Court in the Muruatetu Case also guided that, in re-sentencing, the following mitigating factors would be applicable; (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; and (h) any other factor that the Court considers relevant.

59. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> " With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ....."

60. Applying the above principles to the facts of this case, I may repeat that the Appellants were each sentenced to 15 years imprisonment, which coincidentally is the minimum prescribed by statute. The trial Court did not expressly state that it meted out that sentence because it was the minimum. It is not in dispute that the Appellants were given the opportunity to mitigate, and each made representations

thereon. I also consider that sexual offences, especially where there is use of force and even worse, committed in terms of gang rape are treated as serious offences under Kenyan law and the society at large and must always be severely punished. In this case, the Appellants committed a heinous crime on a young Form 3 schoolgirl. This is totally unacceptable.

61. I do not find any "mitigating factors" that would justify the extension of any sympathy to the Appellants who have not even shown any remorse. Although all the Appellants are themselves relatively young in age, the gravity of the offence they committed outweighs this factor. It was upon the trial Court to impose a sentence that is proportionate to the offence committed. The Appellants violated the complainant in the cruellest of manners. Considering the horror that the complainant went through, she will definitely be traumatised for the rest of her life. She will no doubt bear the scars of the assault by the Appellants for the rest of her life. Considering the above circumstances, I agree that the Appellants merited a stiff sentence and I find that the 15 years prison term, though the minimum sentence provided by statute, was proportionate and justified. In fact, I dare say that the trial Court was quite lenient. For the said reasons, I find no reason to interfere with the sentence.

Final Order

62. In the circumstances, the Appeal fails on both limbs of conviction and sentence, and is dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 25TH DAY OF APRIL 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Oduor for 2nd and 3rd Appellant

Mr. Okaka for the State

Court Assistant: Brian Kimathi