Kogo alias Rono v Republic (Criminal Appeal E095 of 2023)
[2025] KEHC 12454 (KLR) (8 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12454 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E095 OF 2023

RN NYAKUNDI, J

SEPTEMBER 8, 2025

BETWEEN

KELVIN KOGO ALIAS RONO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Representation:

M/s Sidi Kirenge for the State

1. The appellant in this case was charged with two counts namely:

    a. First count: Gang defilement with brief facts of the case being that on the night of 14th March 2022 in Soy Sub County within Uasin Gishu County, in association with others not before court intentionally and unlawfully cause his penis to penetrate the vagina of ZJ a child aged 17 years.

    b. Second count: Committing an indecent act with a child with brief facts of the case being that on the night of 14th March 2022 in Soy sub county within Uasin Gishu County, in association with others not before court intentionally touched the buttocks/breast/anus/vagina of ZJ a child aged 17 years with his penis.

2. The appellant was tried in a criminal proceedings involving four witness for the State and in the judgment of the court he was found guilty convicted and sentenced for the offence of gang defilement contrary to section 10 as read with section 2(1) of the *Sexual Offences Act* to a term of sentence of 20 years' imprisonment. As the record shows he is aggrieved with both conviction and sentence necessitating filing of this appeal.

3. The gist of his appeal is based on the following grounds:

a. That the trial court erred both in laws and facts by convicting and sentencing the appellant without observing that my right for a fair trial was infringed contrary to Art 25(c), 47(1) (f), 50(4) of *the constitution* of Kenya 2010.

b. That the trial magistrate erred in both law and fact by denying the appellant his right to recall some of the prosecution witnesses for further cross-examination as provided under section 150 of the Criminal Procedure Code and section 146(4) of the *evidence act* cap 80 Laws of Kenya.

c. That the learned trial magistrate erred in both law and facts by imposing an illegal and unsafe sentence of 20 years, which is manifestly excessive in the circumstance of the case.

d. That the trial court erred in both law and facts while relying and basing its judgment on the prosecution evidence, which was inconsistent, contradictory and incredible to sustain a safe conviction in a court of competent jurisdiction.

4. The duty of an appellate court is well settled in the case of Okeno vs. Republic [1972] EA 132 held as follows:

> "The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Uwala vs. R [1957] EA 570). 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 finding and conclusion, it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. I doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness."

5. In addition, the court in Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR held that:

> "An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

6. As a matter of procedural law it is now well settled that the three critical characteristics herein under restated dominate the jurisdiction of an appeal court;

a. On first appeal the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions

b. In reconsidering and re-evaluating the evidence the first appeal court must bear in mind and give due allowance for the fact that the trial court had the advantage of seeing and hearing the witness

c. It is not open to the first appellate court to review the findings of a trial court simply on the basis that it would have reached a different conclusion had it been hearing the matter for the first time.

7. The judgment of the trial court dealt extensively with the two counts but settled on the one of the charge of gang defilement contrary to section 2(1) of the *Sexual Offences Act* No. 3 of 2006. The offence of gang defilement in Kenya, a form of gang rape on a child requires proof that penetration of a child

under 18 occurred, with the involvement of two or more penetrators acting in concert, under *Sexual Offences Act* No. 3 of 2006.

8. Key elements include the lack of consent from the child, the presence of two or more offenders acting as a group, and the penetrative sexual act itself, which is strictly defined by the statute.

9. The elements of key of gang defilement can be summarized as follows:

    a. The penetrators: There must be two or more individuals involved in the act. the term "gang" implies a collective effort rather than an individual act

    b. Child victim: The victim must be a person under the age of 18, as defined by the *Sexual Offences Act* 2006

    c. Penetration: The act must involve the penetration of a child's genital organs by a person's genital organs or object

    d. Lack of consent: The act is unlawfully regardless of whether the child consented, making consent an irrelevant factor in establishing the offence

10. This appeal would be tested within the scope of the above elements. First and foremost is to delve into the summary of the case of the prosecution based on the following witnesses.

    a. PW1 ZJ herein the victim of the offence told the court that on the material day 14th March 2022 she was going about a normal duty at her kiosk in Bakule Centre. It happens that a group of men including the appellant in this case who was known to her prior to this incident. The men were in need of fresh vegetables and being part of her business portfolio, she readily accepted to receive the money and headed to Kachibora purchasing the vegetables worthy 200 shillings. The chain of the events of that day never ended at buying and selling of the vegetables as the appellant and his friends proceeded to another site which was a stationary vehicle and locked her inside as they sought permission that they have gone to withdraw money from the mpesa account and what followed was a company of four men and the lorry at Tuigoen was driven to Ziwa shopping center where she was asked to alight and board a different lorry which terminated its journey at Kuinet where the appellant and his gangsters are domiciled. In the testimony of the victim first to the driver of the appellant made sexual advances to her but in a short while he entered the house as the driver step out. There was then a series of conversation with the victim including enticing her with a promise to marry which was turn down. The appellant did not stop there, he proceeded to solicit for sex from PW1 which she declined but the enticement continued including offering her money which was also rejected. According to the victim PW1 the appellant pursued his intention relentlessly and ultimately committed unlawful act of defilement. The following day PW1 came in contact with the wife of the appellant and listening to her story advised her to report the matter to Kuinet police station. She later went to undergone treatment at MTRH after Kuinet health center clearly captured in the patient book and the P3.

    b. The other evidence relied upon by the trial court was that of PW2 who happened to be the biological father of the victim PW1. In his circumstantial evidence, PW2 informed the court that on inquiry it was established that her daughter PW1 had been defiled by three men including the appellant in this case. The medical evidence in support of the prosecution case was produced by PW3 doctor Irine Simiyu who confirmed that PW1 was defiled. That was also the findings made by PW4 Corporal Leonard Chumba the investigating officer of the alleging offence.

11. Given this background the appellant gave his defense which was rejected by the learned trial magistrate in the impugned judgment. This forms the basis of this appeal but first and foremost is to deal with the grounds as premised by the appellant.

12. Ground 1- That the trial court erred both in laws and facts by convicting and sentencing the appellant without observing that his right for a fair trial was infringed contrary to Article 25(c), 47(1) (f), 50 (4) of *the constitution* of Kenya 2010. The right to a fair trial conferred by *the constitution* in Article 50 is broader than even the list of the specific right which are set out in the entire provisions. It embraces a concept of substantive fairness which is not to be equated with that might have passed muster in our criminal courts before *the constitution* came into force. Whether there is irregularity, illegality or departure from the formalities rules and principles of procedure, the burden is on the appellant under section 107 (1), 108 & 109 of the *Evidence Act* to discharge it that the trial was tainted and this appeal courts must set it aside. The record shows that witnesses were summoned by the prosecution and the appellant had an opportunity to cross examine each one of them to test the credibility and reliability of each statement stated on oath. The judgment sheds light on what evidence the trial court took into consideration and even gave indication on how much weight was accorded to each of the witnesses. There is no evidence that the appellant was ambushed by the trial court at any stage of the proceedings. When the ruling on admissibility of evidence may it be documentary evidence, the appellant had an opportunity to adduce and challenge such evidence within the trial or during the opportunity given to state his defense. From the record the appellant was made aware by the prosecution what the case against him was all about. This grounds therefore fails.

13. Ground two- That the trial magistrate erred in both law and fact by denying the appellant his right to recall some of the prosecution witnesses for further cross-examination as provided under section 150 of the Criminal Procedure Code and section 146(4) of the *Evidence Act* cap 80 Laws of Kenya. In our jurisdiction there are variety of cases giving guidelines on witness recall like Mutunga v Republic Criminal Appeal E010 of 2023 and Samwel v Republic Miscellaneous Criminal Application E024 of 2023. These decisions often refer to the fundamental right to a fair trial and the broader powers of the court under the CPC as per section 145(1) which allows the court to recall a witness to clarify evidence or if it's necessary for justice. The guideline is that the accused can request the recall of a witness, and the court may grant it to clarify the doubts or if the witness's testimony is vital to the case, ensuring fair hearing. The key principles on recall of witness includes the following:

    a. Right to a fair trial: a core principle is the accused person's constitutional right to a fair trial, which includes the ability to present their case effectively.

    b. Criminal Procedure Code: section 145(1) of the CPC grants the court the discretion to recall a witness at any stage of the trial. This power is also enshrined in the case law from High Court decisions.

    c. Purpose of Recall: the court may recall a witness for various reasons, including to clarify inconsistences, obtain further information, or resolve any doubts about the evidence

    d. Role of the accused: the accused or their advocate can request the recall of a witness, but the final decision rests with the court.

    e. No prejudice: a key consideration is whether the recall of the witness will cause undue prejudice to any party, especially if the witness is easily traceable.

14. The appellant in this matter was represented by a competent legal counsel and the matter of recalling of witness seems not to have been raised during the pendency of the proceedings. Thus, this grounds also fails.

15. Ground 3- That the learned trial magistrate erred in both law and facts by imposing an illegal and unsafe sentence of 20 years, which is manifestly excessive in the circumstance of the case. This ground of appeal is under pinned on the provisions of section 10 of the *Sexual Offences Act* which reads 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 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 to life."

16. The criminal acts of defilement and rape form part of the sexual violence offences which constitutes exposure, contact and penetration of the assailant against the female victim. The legal requirements for establishing sexual assault in the nature of the particulars of the offence involves intentional unlawful acts of penetration of the genitalia of the victim by a male as the suspect. A sexual assault charge like the one facing the appellant can be proven beyond reasonable doubt primarily from the credible evidence of the victim. In the instance appeal, the trial court processed PW1 testimony who gave extensive details under oath touching on the chains of events covering the night of 14th March 2022 on how the appellant went to her grocery shop pretending they were in need of assistance to purchase some vegetables. As the appellant was well known to, PW1 the victim stepped out of the shop so that she could facilitate that purchase in support and on behalf of the appellant and his companion. It was the evidence of PW1 that she was later to be asked to board a lorry which thereafter transported them to another location where there was a second lorry she was asked to disembark by the appellant to board the second motor vehicle and his request was also complied with and by the end of it all she ended up founding herself in the house of the appellant. The first request of sexual intercourse came from the driver of the lorry which she declined. It was the evidence of PW1 that the appellant and another entered the same house and pursued that request and forcibly without consent, intentionally and unlawfully defiled her severally. In addition to this horrific events, PW1 testified before the trial court that this incident was reported to a police station as confirmed by PW4 who also testified to the effect that the investigations carried out placed the appellant at the scene of the crime. It is also clear from the evidence PW1 she was subjected to medical examination and subsequently a P3 was filled as produced by PW4 collaborating a testimony that she was indeed defiled. The court in Paul Katana Njuguna vs. Republic 2016 eKLR held as follows:

> " In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he cross examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective. In this appeal, the appellant was

fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code."

17. The framing of a charge is an issue which was discussed in the case of Willie (William) Slaney vs. State of Madhya Pradesh, [A.I.R. 1956 Madras Weekly Notes 391] held as follows:

> " We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent...We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be "explained to him", so that he really understands ... but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality. ... The essence of the matter is not a technical formula of words, but the reality. Was he told" Was it explained to him" Did he understand" Was it done in a fair way...Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

18. In my considered view, the director of prosecution under Article 157 (6(7) of *the constitution* framed the elements of the offence facing the appellant in very clear specifics under the *Sexual Offences Act* and therefore the appellant was properly charged, prosecuted, found guilty and convicted of the offence as legislated by parliament as one of our penal laws. The element of penetration was proved beyond reasonable doubt.

19. The other grievance by the appellant was on sentence. The *Sexual Offences Act* provides for a sentence of not less than 15 years' imprisonment. The learned trial magistrate sentenced the appellant to 20 years' custodial sentence. This is why the sentence is a contentious issue in this appeal. This is an appeal courts and for it to review sentence it must abide with the following principles settled in the following cases; S vs. Malgas 2001 (1) SACR 469 (SCA) held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

20. Similarly, in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court over looked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

21. The emphasis of sentence and its objectives in the administration of criminal justice was well articulated in the case of R vs. Scott (2005) NSWCCA 152 where the court stated:

> " There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender."

22. This is an offence where a common intention under section 21 of the penal code was properly manifested and executed by the appellant with others not before this court. The direct evidence from the victim PW1 and circumstantial evidence as traceable in the night of the offence captured as 14th March 2022 is very telling on how this heinous crime was committed. In Kenya, circumstantial evidence is proven when the court can infer from established basic facts that further facts exist, such circumstances point solely to the accused's guilt, with no other reasonable hypothesis. The process involves the court finding basic facts then concluding from those facts exist, and finally determining if these further facts unequivocally implicate the accused. This requires the evidence to be compelling and exclude all other innocent explanations for the crime. See Ahamad Abolfathi Mohammed & Another v Republic (2018) eKLR and Abanga alias Onyango v R Cr. App. No. 32 of 1990. The examples of circumstantial evidence include motive or plan, knowledge, capacity, opportunity, suspicious behavior, lies, preparatory acts, previous conduct, possession of incriminating articles, absence of explanation, failure to give evidence or call a witness, finger prints, bodily samples, DNA tests and tracker dogs. For our case here, the cogent evidence on the motive, plan, capacity, preparatory acts of the appellant are properly manifested in the testimony of PW1 and the admissible evidence from PW2, PW3 and PW4 which incriminate him with the crime of gang defilement.

23. The precise evidence on the edge of the victim was never and has to date not been controverted by the defence. The appellant was positively identified by the victim having been known prior to the commission of the offence. By analyzing the entire evidence, the elements of penetration and age were proved beyond reasonable doubt. The soundest one is on positive identification placing the appellant at the center in all the wrongs in which the victim PW1 was defiled. Perhaps the applicant could have kissed the victim and left and therefore the grievance of 20 years' imprisonment may not have arisen. From the following discussion, it can only be concluded that the appellant was properly found guilty, convicted and sentenced for the offence of gang defilement contrary to section 10 as read with section 2(1) of the Sexual Offence Act.

24. Justice is defined as conformity in conduct or practice to the principles of right or of positive law; regard for or fulfillment of obligations, rectitude, honesty, the moral principle by which actions are

determined as just or unjust, adherence to truth of fact or impartiality. It has also been defined as fairness or reasonableness, especially in the way people are treated or decisions are made.

25. In criminal cases involving unlawful violence particularly from the other gender or sex by literal definition male or man ought to be frowned against and once proven beyond reasonable doubt punished appropriately as per law the established. There must be no fear or favor to any particular accused or convict in the manner of response of the courts be either the trial or appeal courts in sustaining the momentum of protecting and guarantee the women rights. It is through justice that individual human beings set for themselves an orderly society complying with the rule of law to attain the good life and justice is regarded as a moral value by members of the human community from creation. Where there is injustice there is no peace, no human being enjoys the Economic, Cultural, Social and Political rights envisioned in our constitutional democratic society. Where there is injustice, human beings experience acrimony, anguish, trauma, a sense of hopelessness, psychological and emotional distress and above all the abuse of their entitlement to human rights. In my view, these are some of the negative impacts of violent sexual crimes committed against the victim by the appellant.

26. As aforementioned above all those queries raised by the appellant in the memorandum of appeal have not met the threshold for this court to rule in his favor by allowing the appeal. This appeal is dismissed in its entirety. The applicant is persuaded to try a second bite at the cherry at the court of appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF SEPTEMBER 2025

.....

R. NYAKUNDI

JUDGE

In the presence of:

M/s Sidi Kirenge for the State

The Appellant