

KENYA / JUDGMENT

Rono & another v Republic [2026] KEHC 11523 (KLR)

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COURT

High Court

BEFORE

PN Gichohi

CASE / FILE NUMBER

Criminal Appeal E007 of 2023

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Rono & another v Republic (Criminal Appeal E007 of 2023 & E090 of 2024 (Consolidated)) [2026]
KEHC 11523 (KLR) (17 July 2026) (Judgment)

Neutral citation:

[2026] KEHC 11523 (KLR)

Republic of Kenya

In the High Court at Nakuru

Criminal Appeal E007 of 2023 & E090 of 2024 (Consolidated)

PN Gichohi, J

July 17, 2026

Between

Hillary Kipngetich Rono

1st Appellant

Robert Kiprotich Rono

2nd Appellant

and

Republic

Respondent

(Being an appeal from the conviction and sentence of Hon A. Mukenga delivered on 13th January, 2022, in Chief Magistrate's Court at Molo Criminal Case (Sexual Offences) No. E017 of 2023)

Judgment

1.The background of this Appeal is that Hillary Kipngetich Rono, Robert Kiprotich Rono (Appellants) and another not in this Appeal, were on the 25th day of January 2021 charged with the offence of Gang Rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.

2.The particulars of the offence were that on the 25th day of January 2021 at [Particulars Withheld] village, Elburgon location in Molo Sub-County within Nakuru County in association with Joseph Kiptonui Rono and another, not before Court, intentionally and unlawfully caused their penis to penetrate the vagina of PC without her consent. They also faced an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No. 3 of 2006.

3.The Appellants were also charged with the offence of assault causing bodily harm contrary to Section 251 of the Penal Code. The particulars are that on the 25th day of January 2021 at [Particulars Withheld] village Elburgon location in Molo Sub-County within Nakuru County jointly with another not before Court, unlawfully assaulted P.C thereby causing her actual bodily harm.

The Prosecution's case

4.On 25th January, 2021, at 7.00 p.m., PC (PW1) was headed to the shops while in the company of Vincent. Upon reaching a point with no houses nearby but only a forest with potatoes, Dickson, who was a neighbour, caught up with them. He threw her on the ground, tore her skirt and raped her. She struggled with him and screamed. Vincent tried to help her, but he was thrown on the fence by Kiptanui (1st accused).

5.Three people arrived, that is the 1st accused, and the Appellants and instead of helping her, they also raped her in turns and then beat her. She reported to the police and was issued with a P3 form and was treated e.

6.In cross-examination by the 1st Appellant, she stated that she was injured on the eyes and that she knew the appellants as neighbours. That she grew up in the area and left while still young, but had come back. She added that she could not go to the hospital on the same day, as her brother was not available to take her to the hospital. The 2nd accused had a torch, and the 1st accused had a knife. The 1st Appellant held her legs while the others were hurting her.

7.In cross-examination by the 2nd Appellant, she stated that she screamed and they ran away. That she identified them since they were neighbours, and that she had schooled with the 2nd Appellant up to class 7 when she moved out.

8.The OCS Elburgon Police Station CIP Were (PW2), conducted the identification parade on 7th for the three suspects in the case. Regarding the parade for the 1st Appellant herein, the parade was between 2.22- 3.08 pm. There were ten members in the parade, and the first time, the 1st Appellant chose to stand between the 2nd and 3rd members, the second and third times, he chose to stand between the 5th and 6th members. In all three instances, the complainant identified him by touching him.

9.The 2nd Appellant's parade was done between 2.00 and 2.45 pm and consisted of ten members. The first time he chose to stand between the 6th and 7th persons, the second time, between the 4th and 5th persons and the third time between the 6th and 7th members. In all three instances, the Complainant identified him by touching. PW2 confirmed not knowing the Appellants prior. In cross-examination, he stated that the complainant never hesitated.

10.PW3- Dr. George Biketi testified that the complainant's clothes were muddy and dirty, the left side of her head was swollen, tenderness on the chest and abdomen, and the swollen elbow joint had lacerations on the thighs. Her genital organs were bruised and tender. She had smelly whitish discharge. There were pus cells in the urine, an indication of infection. She produced the P3 from P.Exh 1 and PRC Form as P. Exh 2. The Appellants were also tested, and P3 forms were produced as P.Exh 7 and P.Exh 8.

11.PW4 PC Veronica Chepngeno was the Investigating Officer. She was informed of this case by the OCS on 29th January, 2021. She accompanied the victim to the hospital. She found out that the victim was raped by four people and that she identified one by face and the other three by name. They therefore arrested three, but one had already escaped. The OCS did an identification parade, and she produced the forms as P.Exh 3(a)-(d), 4(a)-(d) and 5(a)-(d).

12.In cross-examination, she told the court that the fence on the roadside had been pulled down. There were footsteps at the scene of the crime. The houses nearby belonged to the first accused, and the neighbours feared him a lot and refused to testify against him. The only eyewitness was threatened, and his relatives took him away

Defence Case

13.In his unsworn statement in defence, the 1st Appellant stated that he was at home on 25th January, 2021, when he heard screams from chai moto, but he did not respond since his father was unwell. On 26th January, 2021, while at home, the complainant arrived with her brother alleging that Nicholas had slapped the complainant and demanded money to take her to hospital. They said they did not have the money since their father was unwell, and the complainant's brother left in anger.

14. On 28th January, 2021, police officers went to his house demanding to be told of Nickson's whereabouts. They threatened to arrest him if he did not produce him. They went to the 2nd Appellant's, who also did not know Nickson's whereabouts, and they were both arrested. He stated that he and the complainant were neighbours and that their parents had been having a boundary dispute, which he believes led to the case. He added that he was already in prison on the date of the offence.

15. After hearing both the Prosecution and the Defence, the trial magistrate convicted the Appellants on both charges and sentenced each to serve Fifteen (15) years imprisonment on Count 1 and Two (2) years imprisonment on Count 2 vide Judgment delivered on 13th January, 2022. The sentences were to run concurrently.

16. Aggrieved by the said conviction and sentence, each of the two Appellants separately preferred an appeal to this Court, that is, Petition dated 17th January, 2023, in Criminal Appeal No. E007 of 2023 by Hillary Kipngetich Rono and Petition dated 31st November, 2024, in Criminal Appeal No. E090 of 2024 by Robert Kiprotich Rono.

17. The grounds of appeal in Criminal Appeal No. E007 of 2023 are summarised as follows:- 1. That the Learned Trial Magistrate erred in law and in fact by convicting the 1st Appellant on insufficient medical evidence 2. That the Learned Trial Magistrate erred in law and in fact by pronouncing an excessive sentence that was far from the weight of the evidence 3. That the Learned trial Magistrate erred in law and in fact by giving undue weight on the prosecution's evidence and convicting the 1st Appellant on evidence full of gaps, contradictions, inconsistencies and was uncorroborated. 4. That the Learned Trial Magistrate erred in law by failing to note that a key witness, one Vincent, had not testified despite recording a statement with the police 5. That the Trial Magistrate erred in law and in fact by failing to note that he was not in this case as per the complainant.

18. In Criminal Appeal No. E090 of 2024, the grounds were:- 1. That the Learned Trial Magistrate erred in law and in fact by convicting the 2nd Appellant on insufficient medical evidence that could not sustain such a conviction and sentence. 2. That, the Learned Trial Magistrate erred in law and in fact in convicting the 2nd Appellant by failing to note that the identification of the culprits was not properly proved by the prosecution. 3. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the prosecution's case was marred with contradictions which greatly vitiated the credibility of the prosecution's evidence.

19. Each prayed that his conviction be quashed, sentence set aside, and he be set at liberty.

20. These appeals were consolidated and heard together by way of written submissions, and although the Appellants filed separate submissions, the arguments presented were largely identical in substance.

Appellants submissions

21.The Appellants contended that the medical evidence did not link them to the offence. They argued that since the complainant was found to have had an infection and the doctor testified that she could not determine which of the Appellants was responsible, the evidence was insufficient to sustain a conviction.

22.As to whether the identification of the assailant was properly proved, the Appellants relied on the Judgment in Nakuru Criminal Appeal No. E010 of 2022 - Joseph Kiptonui Tonui vs Republic field by their co- accused, to submit that the identification parade was not necessary if the complainant was well known to the assailants. The Appellants also referred to the finding in Nakuru Criminal Appeal No. E010 of 2022 (supra) to submit that the Court therein observed that it was not informed how long the offence had taken place to gauge whether the complainant had sufficient time to identify or recognise the assailants.

23.They further relied on James Okello v Republic [2022] eKLR, where the Court observed that a witness may sometimes be mistaken even on the identification of a close relative. It was further argued that a crucial witness, Vincent, was never called to testify to draw an inference of the default of occurrence of the offence.

24.In this case, the Appellants argued that the complainant's testimony was inconsistent in that she initially stated that when she screamed, three people came and raped her, but under cross-examination, she said they ran away. Further, she told the court that there were no houses there, just a forest with potatoes. However, in cross-examination, she stated that there were houses nearby. The Appellants, therefore, submitted that such contradictions rendered her evidence unreliable and incapable of sustaining a conviction.

25.The Appellants further submitted that they suffered injustice and prejudice because they were never supplied with prosecution documents. They further argued that since the hearing was conducted in their vernacular language and they are illiterate, they could not properly understand the procedure or appreciate the seriousness of the charges, particularly in the absence of access to the prosecution's evidence.

26.It was further argued that a crucial witness, Vincent, was never called to testify; they cited Bukenya v Republic 1972 EA549, to draw an inference that the said default was because his evidence would have been adverse to the Prosecution on the occurrence of the alleged offence. They therefore contended that the identification was not solid.

27.They therefore urged the Court to allow their appeal in its entirety and set them at liberty.

Respondent's submissions

28.The Respondent opposed the appeals, and while emphasising what constitutes the offence of Gang Rape under Section 10 of the Sexual Offences Act, it was also submitted that the Appellants and the first accused had a common purpose.

29. In support, reliance was placed on the case of *Roba Galma Wario v Republic* [2015] KCA 521 (KLR), where the Court cited *Dickson Mwangi Munene & Another v Republic* CR. NO. 314 of 2011 [2014] eKLR to underscore the principle of common intention.

30. Further, reliance was placed on *R v Tabuyalenka s/o Kirya* [1943] EACA 51, where the Court held that common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault.

31. Regarding penetration, it was submitted that the P3 Form and PRC Form produced in court indicated bruised and tender genitalia. The Victim had also sustained other injuries, that is, a swollen right eye, chest, and left elbow, which was inflamed and tenderness on the left thigh with a laceration, which was indicative of forceful penetration.

32. Regarding identification and whether the identification parade was properly conducted, it was submitted that Robert (2nd Appellant) was well known to the Victim as she had schooled with him up to standard 7 and was also a neighbour before she left the area.

33. It was submitted that the Victim maintained that the three of them raped her and that the 2nd Appellant also assaulted her. The Respondent argued that the issue of assault was not challenged. It was therefore submitted that pursuant to Section 124 of the Evidence Act, there was no doubt as to who raped the complainant.

34. Regarding failure to call Vincent as a witness, it was submitted that the prosecution has the discretion to call a witness or dispense with it altogether, as was held in *Julius Kalewa Mutunga vs Republic* [2006] eKLR. It was therefore submitted that any contractions did not mar the Prosecution case.

35. On the issue of witness statements, it was submitted that there is nothing to indicate that the Appellants were not issued as the proceedings do not disclose it. Further, the Appellants did not seek or protest before the trial court about the non-issuance and in the circumstances, it was submitted that it can be presumed that they were issued with the same. As they told the court that they were ready.

36. Regarding the Appellant's defence, the Respondent submitted that the evidence was unsworn and there was no witness to support it, and there was no evidence as to why the Complainant would have implicated them.

37. In conclusion, the Respondent termed the trial court's findings as sound and therefore, it should not be disturbed. On sentence, it was submitted that the offence was gruesome and should have attracted a stiffer sentence and therefore, with the Appellants' lack of remorse, the sentence was lenient.

38. Hence, the Respondent urged the Court to uphold the conviction and the sentence be enhanced if this Court finds it appropriate.

Analysis and determination

39.This Court has considered both records of Appeal, and as a first Appellate Court, its duty is to re-evaluate the evidence afresh and arrive at its own independent conclusions while bearing in mind that it neither saw nor heard the witnesses as they testified. – See *Okeno v Republic* [1972] E.A, 32.

40.In doing so, the broad issue for determination is whether these appeals have merit.

41.Regarding the contention that the defence was prejudiced as it did not understand the language used, the record is to the contrary. They indeed understood and proceeded well and participated fully.

42.On failure to be supplied with documentary evidence, the Court record does not indicate the same, yet both the trial court and the Prosecution had a duty to ensure that the Accused persons were supplied as required under Article 50 of the Constitution regarding an accused's right to a fair trial.

43.On the merit of this appeal, the law defines the offence of rape and prescribes the elements that must be proved, while also setting out the aggravated form of the offence where it is committed in association with others.

44.Section 3 (1) of the Sexual Offences Act provides:-(1)A person commits the offence termed rape if-(a)he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.

45.Further, Section 10 of the Sexual Offences Act under which the Appellants were charged and convicted provides that:-Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.

46.In the present case, for a conviction under Section 10 of the Sexual Offences Act to stand, the prosecution was required to establish beyond a reasonable doubt that:i)There was intentional and unlawful penetration of the complainant's genital organsii)Such penetration occurred without her consent, or consent was obtained by force, threats, or intimidation;iii)The act must be committed in association with another person or persons, with a common intention to commit the rape.

47.In addition to proving the ingredients of the offence of Gang Rape, the Prosecution bore the further burden of establishing the identity of the perpetrators beyond a reasonable doubt.

48. On proof of penetration, it is well established that penetration in sexual offences is primarily proven by the testimony of the victim. Indeed, in the case of *Kassim Ali v Republic* [2006] KECA 156 (KLR), the Court of Appeal held that proof of penetration alone is sufficient to establish the offence of rape if the victim's testimony is credible. Medical evidence serves as corroboration.

49. Section 124 of the Evidence Act recognises the unique nature of sexual offences, where corroboration may not always be available, thus allowing a conviction on the sole evidence of the victim if the Court is satisfied that the victim is truthful.

50. PW1 gave a graphic account of how she was raped by the three accused persons. Upon being examined by PW3, her genitalia were found to be bruised and tender with smelly whitish discharge. There were also pus cells in the urine, an indication of infection. She also had lacerations on the thighs.

51. The medical evidence and doctors' opinion confirmed injuries and genital trauma consistent with sexual assault, thus corroborating PW1's account. This Court is satisfied that penetration was sufficiently proven.

52. The Appellants' submissions were that the presence of infection without a direct link to either of them meant the medical evidence did not connect them to the offence. However, the Court of Appeal in *Robert Mutungi Muumbi v Republic* [2015] KECA 584 (KLR) stated: "Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

53. It was therefore not mandatory for the Appellants to be medically examined or for the said infection to provide a link between them and the offence. What the Prosecution needed to prove was penetration. The infection, though not traceable to the Appellants, did not negate the evidence of sexual assault.

54. On the Appellant's contention that the Prosecution failed to call Vincent, hence attracting the inference that his evidence would be adverse, the Court of Appeal in *Bukenya & Others v Uganda* (supra) held that: "...Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them, but without success. In the present case, we think the Chief Justice should have considered calling the two persons. We are, however, not prepared to say that his failure to do so was necessarily fatal to the convictions. He warned himself of the danger of relying on the evidence of a single witness and, after doing so, was fully satisfied that the evidence was sufficient."

55.This Court is alive to Section 143 of the Evidence Act, which provides that no particular number of witnesses shall, in any case, be required for the proof of any fact. In addition, Section 124 of the Evidence Act provides that in sexual offences, the Court can convict if satisfied that the victim was speaking the truth.

56.In addition, Section 124 of the Evidence Act provides that no particular number of witnesses shall, in any case, be required for the proof of any fact. The prosecution is therefore not bound to call every witness, provided the evidence adduced is sufficient to establish the charge.

57.This Court notes that, indeed, going by the PW1's evidence, Vincent was the only eyewitness. According to the Investigating Officer (PW4), Vincent was her nephew and had allegedly been threatened, and his relatives took him away.

58.It was not disclosed which relatives threatened him and what action the Investigating took on that issue. The Complainant did not disclose in her evidence that Vincent was her nephew. She just referred to him as a young man. The fact that he was allegedly threatened and taken away by his own relatives, who are also the complainant's relatives, gives the inference that his evidence would have been adverse to the prosecution's case based on the holding in *Bukenya & Others* (supra).

59.Regarding the identity of the appellants, the Court of Appeal in *Kabimba v Republic* [2025] KECA 42 (KLR) observed thus:- "In *Wamunga Vs. Republic* [1989] eKLR, this Court described the circumspection with which a court must treat identification evidence thus:"It is trite law that where the only evidence against a defendant is evidence on 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."

60.The complainant's evidence is that she recognised the Appellants as neighbours. The first person was Nickson, whom the PW4 said was unable to apprehend, as he had escaped. The three other individuals, being Kiptanui and the Appellants herein, came after she screamed, and instead of helping her, took turns in raping her.

61.It is noted that the Appellants relied on the finding in *Nakuru High Court Criminal Appeal No. E010 of 2022 Joseph Kiptonui Tonui vs Republic*, where the first accused charged and convicted alongside them was released on appeal. In their view, the Prosecution's weaknesses that led to the 1st accused's release should equally apply to their case.

62.A perusal of the said Judgment shows that the High Court, in allowing the 1st accused's appeal, observed:- (22) In *James Okello vs Republic* [2022] eKLR, it was observed that sometimes a witness may be mistaken even on identification or recognition of close relatives or friends if the conditions are unfavourable. As per the evidence the evidence took place at 7.pm or thereabouts. The complaint told the Court that the 2nd Accused in the trial Court file had a torch but is not stated if the same was flashed during the incident and if so at who or which direction vis-a-vis the Appellant..... (23) The Court was also not told how long the incident took for the Court to gauge if

the complainant had sufficient time to recognize the assailants. It is not further explained why it was necessary to conduct a police identification parade when the complainant was well known to the suspects including the Appellant as confirmed in Court. Such parades are usually arranged in cases where a witness is not previously known to the suspect but says he saw the suspect's physical appearance and could identify him. Could it be that the complainant herein was not certain of the Appellant's complicity hence the parade where she was obviously going to pick him out as a person well known to her? it is further doubtful that the complaint recognized the Appellant as PW4 stated that she saw only one of the attackers by name and his accomplices by their facial appearance. The Court was not told who among the assailants was recognized by name.(23)Clearly therefore the learned Trial Magistrate did not properly analyze the evidence to ensure that the appellants conviction was without error. I find that his conviction was unsafe in the circumstances as the Court is unable to affirm that the complainant spoke the truth implicating the appellant/”

63.This Court accepts that parity of reasoning is important where co-accused are tried on the same evidence. The law nonetheless requires this Court to examine whether the record discloses distinct or stronger evidence against the remaining accused persons, the Appellants herein.

64.The Court of Appeal in *Kabimba v Republic* [2025] KECA 42 (KLR) observed thus:-“In *Wamunga Vs. Republic* [1989] eKLR, this Court described the circumspection with which a court must treat identification evidence thus:“It is trite law that where the only evidence against a defendant is evidence on 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.”

65.In this case, PW4 testified that PW1 knew three of the assailants by name and one by face, yet the record does not disclose which of the four assailants was known by face and which by name, nor does it clarify who was to be identified in the parade as being known only by appearance.

66.In cross-examination, she stated that the 1st Appellant was identified by name, but beyond that, the evidence remained vague.

67.Further, PW4 asserted that no one heard the incident happening, whereas PW1 testified that the complainant screamed, that people came, and that the assailants ran away, after which those who came beat her for screaming without cause.

68.The offence is alleged to have occurred at about 7:00 p.m., a time when natural light would have been fading or had faded, and visibility diminished. The record is silent on the lighting conditions at the scene, but the trial court held on its judgment:“...the incident occurred at night when conditions may not have been favourable for positive identification.”

69.The Court of Appeal in *Wamunga v Republic* [1989] KECA 47 (KLR) outlined specific factors a trial Court must consider when weighing the reliability of identification evidence.

70. It is common ground that the victim and the appellants are neighbours, but according to PW1's evidence, the incident occurred at a place where there were no houses nearby.

71. Although she claimed to have recognised the assailants by name, it is not clear whether she did so because they spoke or whether she saw their faces sufficiently to distinguish one from another.

72. Though she claimed to have attended school with Robert until Std 7, she told the court that she left the area when she was still young and that she had come back to the neighbourhood. She did not say when she came back to recognise him at night. Further, there was mention of a torch at the scene. However, the record is silent on whether the torch was shone on the assailants to illuminate their faces or whether it was directed elsewhere.

73. Courts have consistently cautioned that identification at night must be approached with the greatest care, and where the circumstances are not explained, the possibility of error cannot be excluded.

74. In the present case, while the fact of sexual assault and physical assault upon the complainant is not in doubt, what remains unclear is the identity of the assailants. With that uncertainty, the conviction cannot be said to be safe.

75. Though, unfortunately, the complainant suffered indignity and violence, the Court must uphold the principle that doubt must favour the accused. In conclusion, this Court makes the following Orders:- 1. The Criminal Appeals No. E007 of 2023 and No. E090 of 2024 are allowed. 2. The conviction is quashed and the sentence set aside. 3. The Appellants are set at liberty unless otherwise lawfully held.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF JULY, 2026. PATRICIA
GICHOHI JUDGE DELIVERED AT NAKURU THIS 28TH DAY OF JULY 2026..... DR.
JOSEPH SERGON JUDGE

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