



**Chepkwony & 3 others v Republic & another (Criminal Appeal
E015 of 2023) [2025] KEHC 51 (KLR) (13 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 51 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E015 OF 2023
RL KORIR & RL KORIR, JJ
JANUARY 13, 2025**

BETWEEN

**VINCENT KIPLANGAT CHEPKWONY 1ST APPELLANT
VKC 2ND APPELLANT
NICKSON KIMUTAI KIGEN 3RD APPELLANT
NKK 4TH APPELLANT**

AND

**REPUBLIC 1ST RESPONDENT
REPUBLIC 2ND RESPONDENT**

*(From the Conviction and Sentence by Resident Magistrate Hon. Wamae E. in
the Magistrate’s Court at Bomet in Sexual Offences Case Number 045 of 2022)*

JUDGMENT

(From the Conviction and Sentence by Resident Magistrate Hon. Wamae E. in the Magistrate’s Court at Bomet in Sexual Offences Case Number 045 of 2022).

JUDGEMENT

1. The Appellants were charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 13th July 2022 at Singorwet Village, Singorwet Location in Bomet Central Sub-County within Bomet County, in association intentionally and unlawfully caused their penises to penetrate the vagina of C. C without her consent.
2. The Appellants 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. The particulars of the charge were that on



13th July 2022 at Singorwet Village, Singorwet Location in Bomet Central Sub-County within Bomet County, they intentionally touched the vagina of C.C with their penises.

3. The Appellants pleaded not guilty to both charges. The case went to full trial in which the prosecution called five (5) witnesses in support of its case. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellants and they were accordingly put on their defences.
4. The 1st Appellant gave sworn testimony and the 2nd Appellant gave unsworn testimony. Both Appellant closed their cases without calling any witnesses.
5. At the conclusion of the trial, the Appellants were convicted on the charge of gang rape and were each sentenced to serve 15 years imprisonment.
6. Being dissatisfied with the conviction and sentence, the 1st Appellant, Vincent Kiplangat Chepkwony appealed on to this court on 26th April 2023 and relied on the following grounds which are reproduced verbatim:-
 - i. That the learned trial Magistrate erred in law and in fact in convicting me on evidence which did not meet the required standard of proof in accordance with the law.
 - ii. That the learned trial Magistrate erred in law and in fact by relying on extrinsic evidence that was not adduced in court during the trial.
 - iii. That the learned trial Magistrate erred in law and in fact by depending on evidence which was based on the theory of conspiracy between me, the complainant (PW1) and PW2 that was not proved beyond reasonable doubt by the prosecuting witnesses.
 - iv. That the learned trial Magistrate erred in law and in fact by convicting me on charges that were not tallying and favourable.
7. The 2nd Applicant, Nickson Kimutai Kigen filed his Appeal to this court on 26th April 2023 and relied on similar grounds as raised by the 1st Appellant above.
8. As a first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court. This duty was succinctly stated by the Court of Appeal for Eastern Africa in *Pandya Vs. Republic* (1957) EA 336 where it stated:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

The Prosecution’s/Respondent’s case.



9. It was the Prosecution's case that the Appellants gang raped C.C (PW2) on the 13th July 2022 at around midnight. C.C (PW2) testified that she was gang raped by the Appellants and when she screamed for help, Nickson Kiprotich Mutai (PW3) came to her rescue. PW3 testified that he found the 1st Appellant lying on top of the victim (PW3) who was naked. PW3 stated that he called police officers who came and arrested the Appellants.
10. Geoffrey Chemiyot Kirui (PW1) who was a clinical officer testified that he examined PW3 on the material day and found injuries on her labia majora, discharge from her vagina and the presence of spermatozoa. PW1 further testified that upon conducting high vaginal swab, he found epithelial cells which indicated friction. It was PW1's conclusion that PW3 had been forcefully penetrated as she also had assault injuries (head and neck bruises and signs of strangulation on the neck).

The Appellant's case

11. The 1st Appellant, Vincent Kiplangat Chepkwony (DW1) denied committing the offence. He testified that the charges were false and that the complainant (PW3) was not known to him. DW1 further testified that he was arrested on the material day in his home.
12. The 2nd Appellant, Nickson Kimutai Kigen (DW2) also denied committing the offence. He testified that the complainant was his neighbour and that the charges were fabricated. DW2 further testified that on the material day, he was arrested in his house.

1st Appellant's written submissions (Vincent Kiplangat Chepkwony)

13. In his submissions filed on 1st November 2023, the 1st Appellant submitted that the clinician (PW1) only relied on the complainant's results to establish whether there was sexual intercourse or not. He further submitted that the clinical officer's findings were contradictory and his general behaviour indicated that he had a connection with the complainant.
14. It was the 1st Appellant's submission that the Prosecution failed to take the spermatozoa found in PW3 to the Government Chemist to ascertain if it belonged to the 1st Appellant. It was his further submission that PW3 lied to the trial court as it was not possible for one man to hold off two strong men (Appellants) for half an hour while waiting for the police to arrive.
15. The 1st Appellant submitted that PW3 and PW5 gave contradictory evidence on how they found the victim (PW2). That PW3 testified that he found PW2 sleeping on the floor naked while PW5 testified that he found PW3 sleeping half naked on the mattress on the floor.

2nd Appellant's written submissions (Nickson Kimutai Kigen)

16. In his submissions filed on 29th October 2023, the 2nd Appellant submitted that the clinical officer (PW1) was unable to ascertain the owner of the spermatozoa and further that PW1 gave contradictory evidence.
17. The 2nd Appellant submitted that the victim (PW2) did not explain to the trial court why she came home late at midnight alone and why she left her door unlocked. That there was a possibility that she was being followed before she was raped and thereafter framed him and the 1st Appellant.
18. It was the 2nd Appellant's submission that the victim (PW2) lied to the trial court that the 1st Appellant strangled her while raping her and she screamed. It was his further submission that PW3 lied to the trial court that he was able to identify both Appellants by use of the street lights which were 50 metres apart.



19. The 2nd Appellant submitted that he was not medically examined and thus the medical evidence presented was not concrete. He further submitted that PW1 and PW4 gave contradicting testimonies when PW1 stated that the victim was raped without protection while PW4 stated that he found a used condom.

The Prosecution's/Respondent's Submissions.

20. Through their submissions dated 13th December 2023, the Prosecution submitted that the Appellants were properly identified. That the Appellants and the victim lived in the same plot and the victim was able to identify them with the street light and the electricity light in the house. The Prosecution further submitted that PW3, PW4 and PW5 arrested the Appellants at the scene of crime.

21. It was the Prosecution's submission that the victim was penetrated by the Appellants. That the victim gave a graphic account of how the Appellants raped her in turns on the material night. It was their further submission that PW3 found the Appellants raping the victim.

22. The Prosecution submitted that the clinical officer (PW1) stated that the victim had bruises and signs of strangulation on her neck, bruises on her lower limbs, and redness on her thighs, injuries on her labia majora and minora, discharge from her vagina, epithelial cells, pus cells and spermatozoa. That the clinical officer concluded that the victim had been penetrated.

23. It was the Prosecution's submission that the victim was an adult and she did not consent. That the Appellants penetrated her through the use of force.

24. The Prosecution submitted that both Appellants denied committing the offence and that they were arrested away from the crime scene. That the Appellants' defences were shallow, weak and unsupported. They further submitted that their defences could not challenge their overwhelming evidence.

25. It was the Prosecution's submission that the Appellants' sentences were proper and legal and this court should not interfere with the sentences.

26. I have gone through and considered the trial court proceedings, the 1st Appellant's Grounds of Appeal filed on 26th April 2023, the 2nd Appellant's Grounds of Appeal filed on 26th April 2023, the 1st Appellant's written submissions filed on 1st November 2023, the 2nd Appellant's written submissions filed on 29th October 2023, the Respondent's written submissions dated 13th December 2023. I discern three issues for my determination as follows:-

- i. Whether the Prosecution proved its case to the required standard.
- ii. Whether the Appellants' Defences place doubt on the prosecution case.
- iii. Whether the sentences were harsh and excessive.
 - i. Whether the Prosecution proved its case to the required standard.

27. Gang rape is defined under section 10 of the Sexual Offences Act as:-

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.

28. The same Act defines gang as:-



means two or more persons

29. 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.
30. In the present case, for the offence of gang rape to be established, the following elements must be demonstrated:-
- i. Whether the victim (PW2) was penetrated separately by more than one male organ.
 - ii. Whether she consented to the penetration.
 - iii. Where the Appellants were positively identified.
31. With respect to penetration, penetration can be proved by the victim's testimony and the medical evidence tendered. However, an offence of this nature can be proved solely on the victim's testimony. This position was fortified by the holding of the case of Martin Nyongesa Wanyonyi vs. Republic Criminal Appeal No. 661 Of 2010, (Eldoret), citing Kassim Ali vs Republic Criminal Appeal No. 84 of 2005 (Mombasa) where the Court of Appeal stated that:-
- “The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence.”
32. In the present case, there was testimony from the victim and medical evidence tendered by the clinical officer (PW2). I shall proceed to analyse the victim's testimony and the medical evidence in the subsequent paragraphs.
33. C.C (PW2) testified that on the material day, the Appellants raped her in their house. That the 2nd Appellant removed her clothes and raped her as the 1st Appellant was seated on the bed. PW2 further testified that when the 2nd Appellant finished, the 1st Appellant raped her. When PW2 was cross examined, she reiterated that the Appellants raped her in their house.
34. It was PW2's testimony that she screamed for help and Nick Kiprotich Mutai (PW3) came to her rescue. PW3 testified that when he came to PW2's rescue, he found the 1st Appellant lying on PW2 while the 2nd Appellant sat on the bed. PW3 further testified that he found the victim (PW2) naked. When PW3 was cross examined, he stated that he found the victim naked.
35. Geoffrey Chemiyot Kirui (PW1) who was a clinical officer at Bomet Health Centre testified that he examined the victim on the material day and found that she had injuries on her labia majora and minora, discharge from her vagina, epithelial cells and spermatozoa. It was PW1's professional opinion that there had been penetration. He produced P3 Form, PRC Form and Lab Report as P.Exh 1, P.Exh 2 and P.Exh 3 respectively. I have considered the exhibits and I have noted that the contents mirrored the testimony of PW1.
36. The Appellants submitted that the clinical officer failed to take the spermatozoa for forensic analysis to determine if it belonged to them. Section 36(1) of the Sexual Offences Act provides that: -



Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

37. In expounding Section 36(1) of the Sexual Offences Act, the Court of Appeal in the case of Robert Mutungi Mumbi vs Republic (2015) eKLR, held that: -

“Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. 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.”

38. It was not therefore not mandatory for the Appellants to be medically examined or the spermatozoa examined to provide a link between them and the offence. What the Prosecution needed to prove was penetration.

39. Furthermore, the law does not require the presence of spermatozoa as proof of penetration. The Court of Appeal in the case of Mark Ouiruri vs Republic (2013)eKLR, expressed itself on this matter as follows:-

“..... and the effect that the medical examination was carried out on her on 16th November 2008, five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl’s organ....”

40. Flowing from the above and in light of the victim’s (PW2) and the medical evidence tendered by the clinical officer (PW1), it is my finding that the victim was penetrated on the material day and she was penetrated by more than one male genital organ.

41. The Prosecution also had to prove that the victim did not consent to the penetration. Consent is defined in Section 42 of the Sexual Offences Act as:-

For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

42. In the case of Republic vs Oyier (1985) eKLR, the Court of Appeal held as follows:-

“The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.



To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.”

43. Similarly, in the case of Peter Wanjala Wanyonyi vs Republic (2021) eKLR, Kimaru J. (as he then was) persuasively held that:-

“The burden of proof lies upon the prosecution to prove that the sexual intercourse was without the consent or against the will of the complainant. A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power, to act in a manner that she wants. Consent may be either expressed or implied depending upon the nature and circumstances of the case”.

44. PW2 testified that on the material day, the 1st Appellant raped her while strangling her. PW2 further testified that she tried to resist by kicking back and screaming for help. Nick Kiprotich Mutai (PW3) who was a watchman nearby, testified that he responded to the screams and came to the Appellants’ house and found the Appellants in their house and PW2 naked.

45. The clinical officer (PW1) testified that he found that the victim has bruises on her neck and lower limbs and signs of strangulation on her neck. These findings were also captured in the P3 Form (P.Exh 1) and PRC Form (P.Exh 2). These findings and the clinical officer’s (PW1) findings corroborated the victim’s testimony that she was strangled.

46. Based on the evidence above, it was clear that there was no consent. The 1st Appellant strangled her as she raped her and the 2nd Appellant stood by and watched. The victim screamed for help and the Appellants stopped when PW3 came to PW2’s rescue. This chronology did not depict a person who had consented to sexual intercourse but rather one who was forced into it and left with no option other than endure it. It is therefore my finding that there was no consent from PW2.

47. In respect to identifying the Appellants, it was evident that the offence occurred at around midnight. The Court of Appeal in the case of Nzaro vs Republic (1991) KAR 212 held that:-

“Identification/recognition at night must be absolutely watertight to justify conviction”.

48. The victim (PW2) testified that on the material day, she went to her house which was unlocked and found the 2nd Appellant in her house. PW2 further testified that the 2nd Appellant dragged her to a house the Appellants shared and the Appellants raped her.

49. It was PW2’s testimony that the Appellants were her neighbours as they all lived in the same plot. It was PW2’s further testimony that she was able to identify the 2nd Appellant when he dragged her out of her house with the street light which shone at her door and was also able to identify both Appellants in their house by using light from the electricity bulb.

50. Nick Kiprotich Mutai (PW3) testified that he knew the Appellants and that he found them in their house together with the naked victim. PW3 testified that he called the police while at the scene. No. 82791 Sgt Albert Jilloh (PW4) who was the arresting officer testified that he found the Appellants, PW3 and the victim in one house within the plot and that the victim lay naked on the floor. PW4 further testified that after interrogating the victim, he arrested the Appellants.

51. No. 2480354 PC Kevin Towett (PW5) who was the investigating officer testified that he went to the scene and found PW3, the Appellants and the victim who was half naked. PW5 further testified that after interrogating the victim, they arrested the Appellants.



52. In their defences, the 1st Appellant stated that he did know the victim and that he only met her at the police station. However, when the 2nd Appellant was cross examined, he testified that the victim was her neighbour.
53. From my analysis above on identification, it was clear that the Appellants and the victim were neighbours and were familiar with each other. The Appellants were also placed in the scene of crime by the victim, PW3, PW4 and PW5 as they were arrested in their house. It is my finding that the Appellants were positively identified as the perpetrators and there was no chance of mistaken identity.
54. Flowing from the above, it is my finding therefore based on the evidence on record that the Prosecution satisfied the ingredients of gang rape and proved their case beyond reasonable doubt.
- ii. Whether the Appellants' Defences place doubt on the Prosecution case.
55. The 1st Appellant (DW1) denied committing the offence. He testified that he did not know the victim and that he was arrested in his home. When he was cross examined, he testified that he met the complainant for the first time at the police station and that the complainant had framed him.
56. I have analysed this defence and I have found it to be shallow and very weak. Firstly, the 1st Appellant admitted that he was arrested in his home and this corroborated the arresting officer's (PW4) and the investigating officer's (PW5) testimonies that they arrested the 1st Appellant in their house. It also came out during the victim's testimony that the 1st and 2nd Appellants shared one house. On the issue of being framed up, it is my view that it was an afterthought as the 1st Appellant failed to cross examine PW2, PW3, PW4 and PW5 on the same.
57. The 2nd Appellant (DW2) also denied committing the offence. He testified that the charge was fabricated and he was arrested in his house. I have also analysed this defence and I have found it wanting for the same reasons stated above. The 2nd Appellant also failed to cross examine PW2, PW3, PW4 and PW5 on the issue of being framed up.
58. Flowing from the above, I am satisfied that there was nothing in the Appellants' defences that could place doubt on the Prosecution' case.
- iii. Whether the sentences were harsh and excessive
59. The Appellants prayed that their convictions be quashed, their sentences set aside and that they be set at liberty.
60. In *Bernard Kimani Gacheru vs Republic* (2002) eKLR, the Court of Appeal stated that:-
- “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 states is shown to exist”.
61. The trial court upon conviction, sentenced the Appellants to 15 years in jail.
62. Section 10 of the Sexual Offences Act provides:-



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.

63. I have considered the circumstances of the case where the Appellants forcefully penetrated the victim without her consent. The Appellants used force by strangling her which aggravated the offence. The trial court meted out the minimum sentence as provided by the law and it is my finding that it was proportionate to the offence. I see no reason to interfere with the sentence as meted by the trial court.
64. In the end, I uphold both conviction and sentence. The 1st Appellant's and 2nd Appellant's Appeals have no merit and are dismissed. The Appellants have 14 days right of appeal to the Court of Appeal.

Orders accordingly.

Judgement delivered, dated and signed this 13TH day of January, 2025.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellants, Mr. Ayieka holding brief Mr.Njeru for the Respondent and Siele (Court Assistant).

CRIMINAL CASE NO. E015 OF 2023 - JUDGEMENT	0
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