



**Irungu & another v Republic (Criminal Appeal 18 & 17 of 2020  
(Consolidated)) [2023] KEHC 18668 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18668 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL 18 & 17 OF 2020 (CONSOLIDATED)  
SC CHIRCHIR, J  
MAY 31, 2023**

**BETWEEN**

**MUGENDA MWANGI IRUNGU ..... 1<sup>ST</sup> APPELLANT**

**ZEPHANIA MACHARIA WANJIKU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. P.M Kiama SPM delivered on  
7th July 2020 in SO.35/2018 , at the chief Magistrate's court in Kangema)*

**JUDGMENT**

1. The Appellants herein seek to quash the conviction and sentence in Kangema SPM SO Case 35 of 2018 where they were charged and convicted for the offence of gang defilement of a 16 years old girl contrary to Section 8 (1) & (4) and section 10 of the Sexual Offences Act No 3 of 2006 (The Act) and each handed a sentence of 15 years imprisonment.
2. The particulars of the each of the charge were that on 7<sup>th</sup> Day of November 2018 around 2000 hours at Kangema Sub- county, Murang'a County with another before court intentionally caused their penises to penetrate the vagina of one (GWC), a girl child then aged 16 years.
3. They were also each charged with an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the Act.
4. On count 2 they were charged with the offence of gang rape contrary to section 10 of the said Act with an alternative charge of committing an indecent act with a child contrary to section 10 of the said Act.



5. The Appellants pleaded not guilty to both counts and the alternative charge in the trial court. They were tried, convicted of the offence of gang rape and each sentenced to 15 years imprisonment as aforesaid.
6. Aggrieved by the Judgment of the trial magistrate the 1<sup>st</sup> Appellant filed High court criminal Appeal No 18 of 2020 and the 2<sup>nd</sup> Appellant filed criminal Appeal No 17 of 2020. The two Appeals were later consolidated and the case file in Criminal Appeal No 18 of 2020 was designated as the lead file.
7. Grounds of Appeal.

The Appellants have set out several grounds of Appeal which are hereby combined and paraphrased as follows:

- a. That the learned trial magistrate erred in fact in convicting the Appellants when the evidence on record could not sustain a conviction.
- b. That the learned trial magistrate erred in law and in fact when he convicted the Appellants when the evidence was not corroborated.
- c. That the learned magistrate erred in law by convicting the Appellants on defective charge sheets.
- d. That the learned trial magistrate erred in law by convicting the Appellants on inconclusive evidence.
- e. That the learned trial magistrate erred in law and in fact when he failed give due consideration to the defence of the Appellants.
- f. That the learned magistrate erred on both law and facts when he failed to consider the mitigation of the appellants and consequently imposed a harsher sentence.

#### **1<sup>st</sup> Appellant's Submission.**

8. The 1<sup>st</sup> Appellant has submitted that the trial court relied on the evidence of a single witness and did not warn itself of the danger of convicting on such evidence . He relied on the case of *Matianyi vs Republic* (1986)KLR 198 to buttress his submissions in this regard. He asserts that the trial court failed to comply with the provisions of section 124 of the *Evidence Act* in that the evidence of the complainant was not subjected to strict scrutiny.
9. He further submits that contrary to the finding by the trial court, the complainant did not tell the court that she recognised the Appellant.
10. He further asserts that the complainant was not a credible witness. He referred to her allegation that she did not know the date when the offence was committed; her allegation that the Appellant was arrested on 7/11/2018, yet the report was yet to be made then; and finally, that she allegedly lied about the fact that she made the report to her mother yet evidence show that it is her mother who prodded her to disclosing the incident.
11. The Appellant also faults the Trial court for failing to make any inference on the complainant's refusal to be medically examined.



## **2<sup>nd</sup> Appellants submissions**

12. It is the 2<sup>nd</sup> Appellant submissions that the complainant did not know the Appellant by name prior to the incident and the prosecution did not pry further or produce any evidence to show that she knew the Appellant prior to the incident. He submits that indeed the complainant admitted in her evidence in chief that she did not know the appellant. He claims that the only place that the appellant's name appears was in the P3 form.
13. He further submits that the complainant exonerated him when she stated that she did not know the date the offence was committed. This Appellant further points out while the complainant claims that he was arrested on 7/11/ 2018, there was evidence on record showing that he was arrested on 8/11/2018. He further submits that the complainant lied to the clinical officer who filled the P3 form when she indicated that she was defiled by people known to her as he and his co- accused had demonstrated that the appellant was not known to her. He concludes that in view of the foregoing the credibility of the complainant is in doubt.
14. The Appellant further complains about the fact that the complainant's sister who was reported to be deaf and dumb was not called as a witness.
15. The Appellant further argues that the court failed to consider that the complainant mother lied about the doctor being absent on 8/11/2018.
16. He faults the trial court for dismissing his defence of alibi.

## **Respondent's submission**

17. On whether the charge sheet was defective, it is the Respondent's submission that as against the statutory requirements for a charge sheet as prescribed under section 134 of the Criminal Procedure Code, the particulars of the charge sheets were more than sufficient as they gave the information of the offence of gang rape, and cannot be impugned for any defect. It is further pointed out that the charge sheets had the particulars of the victim, the date and the name of the place at which the crime was committed.
18. On the elements of gang rape, the respondent submits that the prosecution proved that the Appellants committed the offence of defilement and that each committed the offence in association with the other, or while having common intention committed the offence. The charge sheet therefore satisfied the requirements of section 10 of the Act. Reliance was placed on the case of GOO v Republic (2016)e KLR in this regard.
19. On the identification of the 1<sup>st</sup> Appellant, the respondent asserts that both Pw1 and Pw2 were able to identify the Appellant as Mwangi. They knew where he lived; She identified him even before the incident; she was able to see both Appellants while inside her grandmother's house as there was electric light in the house. The Respondent asserts that this was a case of recognition as opposed to mere identification.
20. On identification of the 2<sup>nd</sup> Appellant, the respondent asserts that both Pw1 and Pw2 were able to identify the 2<sup>nd</sup> appellant. It is pointed out that she first saw the 2<sup>nd</sup> Appellant at their gate when the two came to commit the offence; she also saw him as he received a condom from the co- perpetrator and she was able to see both the accused persons inside her grandmother's house as the house had an electric light. The Respondent further submits that the complainant had seen the appellant before the incident. And that this too was a case of identification by way of recognition.



21. The Respondent has relied on the case of *Reuben Taaabu Antonioni & 2others v Republic* ( 1978) eKLR where the court held that

“being night time the conditions for identification of the robbers in this case were not favourable. 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”..

The prosecution has also relied on the case of *Julius Watitu Muthuita v Republic* (Criminal Appeal 229 of 2005 (2006) eKLR to buttress their submissions in this regard.

22. On penetration, the respondent’s submission is that both the complainant’s testimony, which was not controverted, and the medical evidence confirmed the act of penetration
23. On the age of the victim, it is submitted that the complainant’s age was proved by the production of the birth certificate which showed that she was born on 2September 4, 2002
24. On element of association with other persons, the respondent submits that the accused persons were in the company of each other and that the fact that they were together was not controverted at all
25. It is submitted that all the ingredients of the offence of gang rape were proved beyond reasonable doubt.
26. On the defence of alibi by the 1<sup>st</sup> Appellant, it is the respondent submission that that the court considered his alibi evidence and found that it was contradictory to what was pointed out by the 2<sup>nd</sup> Appellant.
27. On the sentencing and the mitigation, it is the respondent’s submission that the offence called for a term of not less than 15 years and hence the sentence was founded in law.

### **Analysis of the Evidence and determination**

28. The role of this court as the first Appellate court is to relook at the evidence, re-evaluate it and arrive at its own independent findings ( see *Onoko vs Republic* (1972) EA 132
29. I have considered the grounds of Appeal, the lower court record, the parties’ respective submissions and the various Authorities relied on.

The following issues lend themselves for determination:

- a). whether the charge sheet was defective
  - b). Whether the offence was proved beyond reasonable doubt;
  - c). Whether the Appellant’s defence were considered
  - d). Whether the sentence was manifestly harsh and excessive whether the charge was defective.
30. Section 134 of the *Criminal procedure Code* (CPC) provides as follows:

“Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged , together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

31. I have perused the charge sheet and am unable to identify any defect in it.



As pointed out by the Respondent, it spelt out the offence, has the victim's name and the date and place of where the offence was committed.

It is also instructive that whereas the Appellants listed this complain as a ground of Appeal the same is conspicuously missing in each of their submissions. This ground of Appeal is unfounded.

Whether the case was proved beyond reasonable doubt

32. The Appellants were charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* which provide 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 the fifteen years but which may be enhanced to imprisonment to life.”

33. Elements of the offence of gang rape or gang defilement as provided for under Section 10 of the *Sexual Offences Act* are: -

- a. The act of defilement
- b. Commission of the offence in association with another person or being in the company of another or others who commit the offence with common intention of committing the offence.

34. It follows that for gang defilement to be proved, the three ingredients of defilement must also be proved. These are: the age of complainant, penetration and identification of assailant.

35. In the case of *Francis Omuroni v Uganda* ; Criminal Appeal No 2 of 2000, the court had this to say regarding the age of the victim:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

36. In this case, the complainant testified that at the time of the offence, she was 16 years and she produced her birth certificate, which showed that the complainant was born on 24<sup>th</sup> September 2002. The age of the complainant was therefore proved.

37. On the element of penetration, Section 2 of the *Sexual Offences Act* defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.” The complainant testified that on the said day, she was cooking supper, when the Appellants entered the house. The 1<sup>st</sup> Appellant held her hand and pulled her to a neighbour's farm. She testified that the Appellant removed her trouser and her panties and had sex with her as she leaned on a tree, while the 2<sup>nd</sup> Appellant kept watch at the gate. He had covered her mouth. When he was done, he called the 2<sup>nd</sup> Appellant, who pulled her to her grandmother's house, took off her trouser and her panties put on the condom and penetrated her vagina with his penis.

38. The complainant further told the court that her elder sister, who is dumb and deaf came to the door and the 1<sup>st</sup> accused also notified the 2<sup>nd</sup> accused that there were people approaching. They fled the scene.



39. The complainant's evidence on penetration was corroborated by PW3, the clinical officer, who confirmed that there was whitish discharge from the complainant's vagina. She testified that her vagina was tender and that could have been as a result of penetration. PW3 produced the P3 form and the treatment notes. Penetration was therefore proved and there is no reason to fault the trial court on this finding.

#### **Identification of the perpetrator.**

40. On the aspect of identification of the perpetrator, the complainant told the court that she could positively identify the 2<sup>nd</sup> Appellant person since there was electric light in the house. She had also seen him the day before while in the company of the 1<sup>st</sup> appellant. Am satisfied that that the 1<sup>st</sup> Appellant was positively identified both at the time of the incident and by way of recognition.

41. The identification of the 1<sup>st</sup> Appellant was by way of recognition. He was known both to the complainant and her mother PW2. They did not live far from each other. Further PW2 told the court that her own mother and the 1<sup>st</sup> Appellant's mother in law were related. It is instructive that the 1<sup>st</sup> Appellant never questioned these two witnesses on the issue of identification during cross-examination. An equally satisfied that the 2<sup>nd</sup> Appellant was positively identified by way of recognition.

On the element of gang rape, the two Appellants were in the company of each other and they were therefore Gang within the definition of the Act

#### **Whether the Appellant's defences were considered.**

42. The 1<sup>st</sup> Appellant told the court that he was in Nairobi at the time of the alleged incident.

43. The 2<sup>nd</sup> Appellant on the other hand told the court that on November 7, 2018 he was clearing his Aunt's farm when he was arrested .He never addressed himself to the events of November 7, 2018.

44. Both Appellants gave unsworn evidence and never called any witness to corroborate their defences. Unsworn evidence require corroboration if it is to carry any probative value. ( see [TMM VS Republic](#) (2018) eKLR). The Appellants' evidence in the present case were not corroborated. Their testimonies therefore had no probative value .

#### **Were the sentences excessive?**

45. Under Section 10 of the [Sexual Offences Act](#) No 3 of 2006 the sentence provided for upon conviction is imprisonment for a term not less than fifteen (15) years but which may be enhanced to imprisonment for life. The sentence is the minimum and mandatory under the [Act](#). I have no reason to interfere with it.

46. Am satisfied that the prosecution case was proved beyond reasonable doubt as against both Appellants and both the conviction and sentence was lawful. The same is upheld and the Appeals dismissed

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF MAY 2023**

**S. CHIRCHIR**

**JUDGE**

**In the presence of:**

Susan- Court Assistant



Appellant – present

Ms. Muriu for the Respondent.

