



REPUBLIC OF KENYA



KENYA LAW
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**LMK v Republic (Criminal Appeal E051 of 2022)
[2023] KEHC 21325 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E051 OF 2022
SC CHIRCHIR, J
JULY 28, 2023**

BETWEEN

LMK APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of Hon. V. Ochanda, SRM delivered on 21st day of April 2022 at the chief Magistrate's court at Muranga in Sexual offences case No.015 of 2021)

JUDGMENT

1. The Appellant was 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 4th day of June 2021 in (.....) in association with others before court intentionally and unlawfully caused his penis to penetrate the vagina of TWN without her consent.
3. He was also faced an alternative charge of committing an indecent Act with an Adult contrary to section 11 (1) of the [Sexual Offences Act](#) no. 3 of 2006.
4. The Appellant pleaded not guilty to the charges and after trial he was convicted of the offence of gang rape and sentenced to 15 years in prison. The appellant was dissatisfied with the outcome and consequently filed this Appeal.



Petition of Appeal

5. The Appellant has set out the following grounds of Appeal:
 1. That the learned trial magistrate erred in matters of law and facts for failing to find that the identification evidence brought forward by the prosecution did not conclusively prove that the appellant had committed the alleged heinous crime as the prosecution alleged.
 2. That the learned trial magistrate erred in matters of law and facts for failing to find that the medical evidence brought forward by the prosecution did not conclusively prove that the appellant had committed the offence.
 3. That the learned trial magistrate erred in matters of laws and facts for failing to find that the prosecution's case was marred with material contradictions especially on the circumstances under which the accused person was arrested.
 4. That the learned trial magistrate erred in matters of law and facts in failing to find the sentence awarded is harsh and excessive whereas section 216 and 329 of the [CPC](#) unfetters the magistrates from giving minimum mandatory sentences.
 5. That the learned trial magistrate erred in matters of law and facts by failing to note that the burden of proof by the prosecution was not discharged and thus the prosecution case was not proved beyond reasonable doubt as provided for under the law, thus the guilty verdict was unsafe and could not be supported having regard to the evidence and that on any ground it was a miscarriage of justice.
6. The Appeal proceeded by way of written submissions

Appellant's submissions

7. The Appellant submits that he was not properly identified; that because it was dark the complainant could not have clearly identified the him.
8. It is further contended that the medical evidence presented did not prove penetration.
9. The Appellant further submits that the prosecution witnesses contradicted each other. He cites the complainant's evidence in which she did not seem to be sure of whether she was raped by one or more persons.
10. It is argued that overall, the prosecution's case was not proved beyond reasonable doubt
11. Finally, it is the Appellant's submission that the sentence was excessive and unconstitutional and urges the court to be guided by the recent decisions from the higher courts that fault the minimum mandatory sentences like the ones provided for under the [Sexual Offences Act](#).
12. The Appellant has relied on several Authorities which I have perused.

Respondent's submissions

13. It is the Respondent's submission that penetration was proved by the testimony of the complainant and corroborated by the evidence of the medical officer.



14. On the question of consent, the Respondent submits that there was ample evidence to show that the act of sex was far from being consensual.
15. On the element of common intention, it is the prosecution's submission that the evidence of the complainant clearly showed that the complainant was attacked and rape by the Appellant and one other person.
16. On identification of the Appellant, the Respondent submits that the identification was by way of recognition as the Appellant is the son of the complainant's brother in law.
17. On the sentence it is the respondent submission that the offence carries a minimum sentence of 20 years and that the trial court exercised her discretion correctly when it sentenced the Appellant.
18. The Respondent has relied on a number of Authorities which I have considered.

Summary of the Evidence

19. PW1, was the complainant. She testified on the material day, she was walking home at 8pm. She had just disembarked from a motorbike. The Appellant held her by the neck, she turned around and threw him down. She screamed. He told her he will finish her. Then two men came out of a bush, one held her right hand while the other one held the left. she was still holding on to the Appellant, they then fell on some water. He asked her why she wants to kill him. They struggled inside the water, then they found their way out. One of the other attackers hit her on the head, the other one held her neck. One of them raped her, the next one tried but she hit him, the attacker screamed in pain then they ran away. She further told the court that the Appellant was the one who raped her first. She further told the court that, she has known the Appellant since he was young, that he recognised him through clothes; that it was dark but she had known him before. As the attack went on she kept asking the Appellant, why he would do what he was doing to her yet she was like a mother to him. She further told the court that the attackers hit her with stones on the face, she was bleeding, her clothes were bloody and muddy; people came to the scene, and she went with them to the to the Appellant's home. She testified that there were differences between her husband and the Appellant's father. On cross examination, she denied that she drunk.
20. PW2, was the complainant's husband. He told the court that the Appellant was his brother's son. He told the court that on 4/6/2021 his wife had gone to sell charcoal and came late. That at about at about 9.00 pm, he received a call from his neighbour informing him that his wife had been beaten. He went to the scene with clothes, and she changed clothes. They did not get the means to go to the police, so they went home. The next day they went to the police then to the hospital. He further stated that the police went to the scene then to the Appellant's home. The previous evening, he had found his wife wet, dirty and bloody. she was bleeding from the face. The complainant told her that she had been beaten and raped by mwangi, and that they were 3 men in total.
21. On cross examination, he told the court that it is the complainant who knows the person who called him as he was with her when the call came.
22. PW3 a clinical officer from Murang'a level V hospital. He examined the complainant on 5/6/2021. She had injuries on the face; she reported being raped by 2 men but were 3 in total. On examination, there was a bloody discharge from her vagina, she had infection, evidenced by pus cells. On cross-examination, he stated that the complainant was intoxicated, on the day he examined her.
23. PW4 was the investigating officer. She testified that on 5/6/202, she received a report from the complainant that she had been gang-raped. She recorded her statement; she visited the scene in the



- company of her colleagues. On the scene there was a stagnant water on the road-side. the grass around the area was disturbed,. They then went to the Appellant's house which was 20 metres away from the scene.
24. On cross examination, she told the court that they did not find the Appellant when they visited his home and they therefore left word with his father; that the Appellant thereafter took himself to the police station. They have never found the other two attackers.
 25. The Appellant was put on his defence and he opted to give an unsworn testimony and called three (3) witnesses.
 26. The Appellant (as DW1) told the court that he met a woman at the junction; that the woman fell inside the water; He denied that he beat her; that he was later called by his uncle to ask about the issue but then they did not want to see him.
 27. DW2, testified that he was the Appellant's brother. He told the court that his brother had taken him home at about 9.00 a.m(?), then went back to sagana. He later heard screams about 750 m away; he went to check and found a drunk woman inside the water. On asking her what the problem was she told him that they should tell her what " vijana wa kiragu" want from her.. That he called the Appellant and when he came the complainant accused him of having beaten her.
 28. Dw3, told the court that he was a boda boda operator, that on the material day at about 8.30- 9 pm when he was told by pw2 that the complainant was accusing the Appellant of having beaten her, he confirmed to PW2 that he had left the Appellant in town.

Analysis and determination.

29. As the first appellate Court, this court is duty bound to review and re-evaluate the evidence adduced during trial and come to its own conclusions. (See *Okeno v Republic* [1973] EA 32; *Pandya v R* [1957] EA 336, *Ruwala v R* [1957] EA 570.)
30. I have considered the grounds of Appeal, the parties' submissions and the evidence tendered in the lower court. The following issues arise for determination:
 - a). whether the appellant was properly and clearly identified as the perpetrator.
 - b). Whether the offence of gang rape was proved.
 - c). whether the sentence was excessive.

whether the Appellant was identified

31. The offence was committed at night. Generally, identification at night time is not obvious and it must be proved that the circumstances allowed for identification of the attacker. However, PW1 told the court that she conversed with the Appellant. She testified that at some point he asked her why she wants to kill him while at some point he also told her "Am going to finish you" She told the court that he had known the Appellant since he was young, that he was the son of her brother- in-law. PW2 also testified of the relationship, as he told the court that the Appellant was the son of his brother. She knew him as M and he addressed him as such. Thus, even though the light at that time of the night (between 8.30 and 9pm) may not have provided have guaranteed proper identification, the Complainant obviously identified him by the voice. On identification by voice. Voice recognition is a valid way of identifying a perpetrator as long certain specific words were uttered by the attacker (see the court of Appeal decision in *Vura Mwachrumbi v Republic* [2016] eKLR) . The words uttered by the accused are as indicated above.



32. The Appellant while denying that he attacked the complainant placed himself on the scene, by saying that he found the complainant in the water, looking drunk. He said his uncle summoned him for a discussion but they later changed his mind. Instructively also, the complainant and her husband's relationship to the Appellant was never contested at all during cross-examination. There is no doubt in my mind that the complainant and the Appellant knew each other very well prior to the incident. This was therefore identification by way of recognition

Whether the offence of gang rape was proved

33. Section 10 of the *Sexual Offences Act* provides that: -

“Any person who commits the offence of rape or Defilement under this Act in association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life”,

34. Under Section 10 of the *Act*, for the Prosecution to obtain a guilty verdict in the offence of gang rape, it needs to prove the following three elements:

- a. Positive identification of the perpetrator.
- b. Commission of rape; Penetration as defined by section 2 of the *Sexual offences act* without consent thereof;
- d. In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape

35. I have already addressed the issue of identification of the Appellant and I need not go back to it.

36. On penetration, Section 2 of the *Act* defines 'penetration' as:

“the partial or complete insertion of the genital organs of a person into the genital organ of another person”.

37. The complainant told the court that the Appellant raped her, and when he was done another attacker took his turn. That is when she kicked this 2nd attacker. This attacker screamed and they then ran away. The complainant further told the court in the process of struggling with the Appellant, they fell into a pool of water; they found the way back out of the water, and that was the time she was pinned down by the other two. They kept belting her with stones on her face. The clinical officer confirmed that the complainant had injuries on her face, she was dirty and had blood in her vagina and pus cells. Prosecution exhibit 3(b) indicates that a diagnosis of rape was made.

38. Even if there was no medical evidence to support penetration am satisfied that the testimony of the complainant and the surrounding circumstance did prove that the complainant had been raped. In the case of *Kassim v Republic*[2006] eKLR the court of Appeal held: “the absence of medical evidence to support the fact of rape is not conclusive as the fact of rape can be proved by the oral evidence of the victim of rape or by circumstantial evidence.”

39. What were the other “circumstances” in the present case? The complainant told the court that her attackers belted her with stones; that she fell into a pool of water with the Appellant as they struggled. The clinical officer told the court that indeed the complainant was dirty and had cuts on her face



when he examined her, thus corroborating the complainant's testimony to the effect that the attackers were pelting her with stones. The Appellant placed himself on the scene as earlier stated. Further the investigation officer visited the scene and corroborated the complainant's evidence on the fact that there was a pool of water beside the road. She further added that the grass on the site was disturbed. Thus, even if there was no medical evidence the testimony of the complainant as well as the surrounding circumstances proved the act of rape.

40. The other element of rape is lack of consent. The injuries on the complainant's face as well as the evidence of struggle on the scene demonstrates the fact that the sex was far from being consensual.

Was the Appellant in association with others or with others with common intention?

41. The Act defines a "Gang" as two or more persons. The complainant told the court that when they got out of the water, two people emerged from the bush and held her hands each on either side. The Appellant first raped her. When he was done, the 2nd one took over but she kicked him. He screamed from pain and they ran away. I have no reason to doubt the complainant in this regard. This piece of evidence was not contested at cross-examination. The investigation officer told the court that they have never traced the other two.
42. I have considered the Appellant's defence. His evidence was that he was going home when he found the complainant inside a pool of water. His witness, DW2 told the court that he heard screams from the road and when he went to check, he found the complainant who wondered loudly what "the kiragu sons" wanted from her. He decided to go back home and called the complainant and they came back to the scene. However according to his witness No. 3, the appellant was supposed to have been in "town" which town according to DW2 should have been Sagana. The contradictions in the defence testimonies renders their testimonies incredible and I dismiss them
43. Am satisfied that the offence of Gang rape was proved beyond reasonable doubt and I have no reason to fault the decision of the trial court.

Sentence

44. The Appellant has challenged the evidence on grounds of being harsh and excessive. He was sentenced to 15 years in prison. The Act prescribes a minimum mandatory sentence of 15 years for the offence of gang rape and which may be enhanced to life imprisonment. The sentence is mandatory, and thus neither the trial court nor this court had or has the mandated to mete out any lesser sentence. The appeal on this ground equally fails.
45. In conclusion, the entire appeal is unmerited. It is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 28TH DAY OF JULY 2023.

S. CHIRCHIR

JUDGE.

In the presence of :

Susan- Court Assistant

Appellant- present in person

Ms. Muriu for the Respondent

