



**Chepsergon v Republic (Criminal Appeal 34 of 2019)
[2023] KEHC 21278 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL 34 OF 2019
RB NGETICH, J
JULY 27, 2023**

BETWEEN

KENNETH KIBET CHEPSERGON APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. P.C. Biwott – SPM delivered on 16th May, 2019 in Kabarnet SPMC CR. Case No. (S.O) No. 41 of 2018)

JUDGMENT

1. The Appellant, Kenneth Kibet Chepsergon, was charged with two counts of offences and an alternative charge. Count I is the offence of rape contrary to Section 3(1) (a) (c) as read with Section 3(3) of the *Sexual Offences Act*. The particulars of the offence were that on the 17th day of November, 2018 in Baringo North Sub- County within Baringo County intentionally and unlawfully caused his penis to penetrate the vagina of KC by use of force.
2. In the alternative, the Appellant was charged with committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*. The particulars of the offence being that on the 17th day of November, 2018 in Baringo North Sub- County within Baringo County the accused intentionally touched the vagina of KC with his penis against her will.
3. Count II was the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code, the particulars of the offence being that the accused on the 17th day of November, 2018 in Baringo North sub-county within Baringo County unlawfully assaulted KC thereby occasioning her actual bodily harm.
4. When the Appellant was arraigned before the trial magistrate’s court, he pleaded not guilty to both charges and alternative charge to count I. The prosecution availed 7 witnesses in support of the charges



against the accused and after full trial, the Appellant was convicted in both counts. He was sentenced to serve twelve (12) years imprisonment in count I and three (3) years imprisonment for count II. The sentences were to run concurrently. The Appellant being aggrieved by convictions and sentences imposed and filed appeal to this court on the following grounds:-

- i. The trial court erred in law and fact by failing to hold that recognition and identification was not conclusively proved.
 - ii. The trial court erred in law and fact by failing to acknowledge that all evidence adduced by the witnesses was hearsay.
 - iii. The learned trial magistrate erred in law and fact by failing to hold that the evidence tendered by all witnesses was uncorroborated.
 - iv. The trial magistrate erred in law and facts by failing to hold that this matter was never accorded a fair trial.
 - v. The learned trial magistrate erred in law and facts as he neglected the appellants defence evidence.
 - vi. The trial court erred in law and facts by failing to hold that the medical evidence did not connect the appellants to the complainant.
5. The Appellant filed supplementary grounds of appeal pursuant to section 350 (2) (v) of the Criminal Procedure Code and Article 49 h of [the Constitution](#) of Kenya, 2010 on the 20th January, 2023 as follows:
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- i. That the trial court erred in law and fact as it failed to observe that the evidence of identification and recognition in this case was not conclusive.
 - ii. That the trial court erred in law and fact as it failed to hold that the witnesses' evidence was full of inconsistencies and contradictions.
 - iii. That the trial court erred in law and fact as it failed to hold that the circumstantial evidence in this case did not point out at the accused as the exclusive perpetrator.
 - iv. That the trial court erred in law and in facts as it failed to hold that the prosecution did not prove its case beyond any reasonable doubt.
 - v. That the trial court erred in law and fact by failing to hold that the medical evidence did not connect the Appellant to commission of the offence.
 - vi. That the trial court erred in law and fact as it failed to appreciate and consider the appellants defence evidence.
6. The appeal was canvassed by way of written submissions by the appellant and oral submissions by the state.
7. When the matter came up for hearing on the 29.05.23, the appellant informed the court that he was not challenging conviction and urged this court to reduce the sentence.
8. The appellant stated that was sentenced to 12 years imprisonment and has served 5 years and while in prison, he has done several courses which will help him in life. He said if released, he will build himself and be useful to the community and family. He said since he was jailed, he has not spoken to his family members. He sought a non-custodial sentence.



Determination

- 9. The appellant having abandoned appeal on conviction. He seeks reduction of sentence. The appellant said he was imprisoned to 12 years and has served 5 years. I wish to consider whether the sentence imposed is harsh and excessive and whether this court has jurisdiction to interfere with the sentence imposed by the trial court.
- 10. In the case of Shadrack Kipchoge Kogo vs. Republic Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”
- 11. The appellant herein was sentenced to 12 years imprisonment for count I. Section 3 (3) of the Sexual Offences Act provides minimum sentence of 10 years for the offence of rape. The appellant urged this court to reduce the sentence. He stated that he has served in prison for a period of 5 years. He said while in prison, he has done several courses and he prays for non-custodial sentence so that he can rebuild himself within the community. The trial court never gave explanation for imposing sentence above the minimum for count I. In view of the above, I am inclined to set aside sentence imposed and imposed sentence of 10 years imprisonment in respect to count I.
- 12. **Final Orders:** -
 - 1. Sentence of 12 years imposed for count 1 is hereby set aside.
 - 2. Appellant is sentenced to 10 years imprisonment.
 - 3. Period served in remand from the date of arrest to be reduced from sentence in order 2 above.

JUDGMENT delivered, dated and signed in Open Court at **Kabarnet**

This 27th Day of **July** 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Appellant present.

