



**Kipyego & 2 others v Republic (Criminal Appeal E039 of 2021)
[2023] KEHC 24779 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E039 OF 2021
JR KARANJA, J
OCTOBER 25, 2023**

BETWEEN

MESHACK KIPYEGO 1ST APPELLANT

HILLARY KIPROTICH 2ND APPELLANT

JOSEPH KIPCHUMBA 3RD APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The three Appellants, Meshack Kipyego, Hillary Kiprotich and Joseph Kipchumba (Appellants one, two and three respectively) together with two others appeared before the Senior Principal Magistrate at Kapsabet charged with two counts of gang defilement, Contrary to Section 10 of the *Sexual Offences Act*, in that or diverse date between 16th and 17th November 2019 within the County of Nandi jointly with others defiled SJ a child aged 15 years and BO, a child aged 16 years.
2. In the alternative, the Appellants were charged separately with indecent act with a child, Contrary to Section 11(1) of the *Sexual Offences Act*, in that they each caused their male sexual organ to come into contact with the female sexual organ of each of the two children.

After pleading not guilty to all the charges, the Appellants were tried and convicted on the Main Counts for which they were sentenced to twenty (20) years imprisonment on count one and thirty (30) years imprisonment on count two. Both sentences were to run concurrently.
3. Being dissatisfied with the conviction and sentence, the Appellant filed separate appeals which were apparently consolidated for hearing together. The grounds of appeal are set out in the petition filed herein on 8th December 2022. The supplementary grounds of appeal are dated 22nd September 2022. All these are contained in the record of appeal filed herein on 6th December 2022 by the firm of



Cheruiyot Kirui & Company Advocates. The appeal was canvassed by way of written submissions which were filed on behalf of the Appellants on 16th June 2023. Learned Counsel, Mr. Kirui appeared for the Appellants.

4. The Learned Senior Principal Prosecution Counsel, Ms. Brenda, appeared for the State/ Respondent and opposed the appeal on the basis of the grounds/ arguments contained in her written submissions filed herein on 4th May, 2023.

This court, having considered the appeal on the basis of the supporting grounds and in the light of the rival submissions was obligated to reconsider the entire evidence and arrive at its own conclusion bearing in mind that the trial court had the benefit of seeing and hearing the witnesses. This principle was enunciated by the (Court of Appeal in) Okeno Vs. Republic (1972) EA 32.

5. In that regard, the prosecution case was briefly that on the material dates, the two Complainants (PW1 and PW2) both school going minors left their home in Western Kenya in search of manual maize harvesting jobs within the Nandi County. In the process, they arrived at Kaiboi and took a motor cycle taxi to Saniak. The operator of the taxi was the first Appellant. (Fifth Accused). He took them (Complainants) to Saniak but diverted and indicated that he was heading to his house to pick a jacket.
6. On arrival at the house at about 2:00pm three other people emerged and pushed the Complainants in to the house, two of them were putting on sunglasses to disguise their faces. The house contained two rooms. The two Complainants were separately taken to each of the two rooms where they were each defiled in turns by the first appellant and his comrades in crime.
7. The episode continued into the night up to the following morning at 8:00am when the group left the house leaving the Complainants locked inside. They returned in the night and took the Complainants to a trading centre where they were abandoned. A good Samaritan came to their rescue and took them to Mosoriot Police Station. Apart from the first Appellant, the Second Complainant (PW1) also identified the second Appellant (fourth Accused) as being part of the group of men who sexually offended her. The two Appellants were also identified by the first Complainant (PW2) in addition to the third Appellant, (Second Accused).
8. After being alerted by the good Samaritan, the Second Complainant's Father, PLW (PW3), proceeded to Mosoriot Police Station and later Mosoriot Hospital where he found his daughter being treated. He found her together with the first Complainant at the Mosoriot Police Station. A sister to both Complainants Ruth Chepkorir (PW4) also proceeded to the said police station.
9. At the Mosoriot Sub-County Hospital, the two Complainant were examined by a Clinical Officer, Daniel Keitany (PW5), who thereafter completed and signed the necessary medical examination reports (P3 forms) (P. Exhibit 5 and 6) indicating that the two Complainants were defiled.
PC. Christine Achieng (PW6), investigated the matter after which she prepared the present charges against the Appellants and others. In the course of investigations, a birth certificate respecting the Second Complainant were obtained by her and produced in court (P. Exhibit 2).
10. The defence case for all the Appellants was effectively a denial of having sexually offended the Complainants. The first Appellant indicated that he was at Timboroa at the material time undertaking his job of masonry. The Second Appellant indicated that he was at Kamagut at the material time of the offence and Appellant three indicated that he was at Kaptumo at that time. They all implied that they could not have offended the Complainants as they were not at the scene of the offence when it occurred on that material date/ dates.



11. The trial court after having considered the evidence in its totality arrived at the conclusion that with respect to the first count involving the second complainant, (PW2) the offence of gang rape rather than gang defilement was established on account of her age. In that regard, the court invoked Section 184 of the Criminal Procedure Code to convict the three Appellants for the offence of gang rape Contrary to Section 10 of the Sexual Offence Act.

On the Second Count involving the first Complainant, (PW1), the trial court apparently concluded that the offence was duly established and proved against all the Appellants.

12. This court on its own analysis of the evidence holds the opinion that the fact that the two Complainants were sexually assaulted was not disputed by the defence. Thus, the only issue that fell for determination was whether indeed the twin offences of gang defilement were established by the prosecution and if so, whether the three Appellants were positively identified as having been the offenders.
13. A person who commits an act which causes penetration with a child is guilty of the offence of defilement (See, Section 8(1) *Sexual Offences Act*) and a person commits the offence of rape if he/she intentionally and unlawfully commits an act which causes penetration with his or her genital organs without the consent of the other person or with consent obtained by force or by means of threats or intimidation of any kind (See, Section 3 of the *Sexual Offences Act*).
14. In this case, there was sufficient and credible evidence from the prosecution through the two Complainants (PW1) and (PW2) establishing and proving that an act of penetration was committed against each of the Complainants by a gang of about five male adults.

The *Sexual Offences Act* defines the word “gang” to mean two or more people.

The medical evidence provided by the Clinical Officer (PW5) confirmed and corroborated the Complainants’ evidence that they were indeed sexually assaulted in the manner of being raped/ defiled by a gang of male persons. Whereas defilement connotes as an act of penetration with a child, rape relates to such act with an adult. Both instances qualify for a charge of gang rape under Section 10 of the *Sexual Offences Act*.

15. Thus, a person who commits the offence of rape or defilement 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.

The evidence by the prosecution revealed that the two Complainants had boarded a motor cycle taxi (boda-boda) to be taken to a specific destination, but the boda-boda operator diverted towards his house on the pretext that he was to pick his jacket and “delivered” the two Complainants to the Offenders who were seemingly waiting for them.

16. The evidence also revealed that the boda-boda operator joined his “comrades in crime” to torment and sexually assault the two Complainants through the night and part of the day before they were hauled to a trading centre where they were abandoned and rescued by good Samaritans.

At the material time, the first Complainant (PW1) as per the birth certificate (P. Exhibit 2) was aged sixteen (16) years old while the second Complainant (PW2) as per the age assessment report (P. Exhibit 4(a)) was more than eighteen (18) years old.

17. The first Complainant was a child at the time but the second Complainant was already an adult. The circumstances under which the offences were committed left no doubt that the second Complainant was forcefully and violently assaulted sexually thereby overruling any remote possibility that she may have consented to the unlawful act of penetration by her tormentors. She was, simply raped.



The age of the Complainants notwithstanding, the offence of gang rape under Section 10 of the [Sexual Offences Act](#) was duly established and proved by the prosecution.

It was therefore, a misdirection by the trial court to invoke Section 184 of the Criminal Procedure Code to find that the offence was established with respect to the first Count involving the second Complainant (PW2) on account of her age. A need did not arise for that provision of the Criminal Procedure Code to be invoked.

18. Be that as it may, having established the necessary ingredients of the charge of gang rape the prosecution was next required to establish and prove that the three Appellants were in the group of people who committed the offence, that they were positively identified as being part of the offenders.

In their respective defence, the three Appellants denied responsibility for the offence and raised alibis.

However, their respective alibis were disproved by the Complainants evidence which placed them at the scene of the offence at the material time.

19. As the execution of the offences started in broad day light at about 2:00pm and continued into the night, the Complainant had adequate time to see and visually identify some of the offenders.

The conditions were favourable for identification and in that regard the Complainant were able to positively identify the three Appellants as having been part of those who offended them. In so doing, they disproved and shattered the alibi defence raised by the three Appellants and show that they were not the offenders who were disguising themselves by wearing sun glasses. The first Appellant was pointed out as the boda-boda operator who ignited the entire criminal transaction against the Complainants.

20. It would therefore follow that with regard to conviction all the grounds of appeal preferred by the Appellants were unsustainable together with the submissions in favour thereof. The conviction of the Appellants by the trial court on both counts was thus sound and proper and is hereby upheld.

As regards the sentence, Section 10 of the Sexual Offence Act provides for a minimum sentence of fifteen (15) years imprisonment and a maximum sentence of life imprisonment.

21. In count one, the Appellants were sentenced to twenty (20) years imprisonment while in Count Two they were sentenced to thirty (30) years imprisonment. Both sentences were to run concurrently. These were lawful sentences but rather excessive for first offenders. In that regard, the sentences are hereby set aside and substituted for fifteen (15) years imprisonment on each of the two counts to run concurrently.

Otherwise the appeal is devoid of merit and is hereby dismissed.

Ordered accordingly.

DELIVERED AND DATED THIS 25TH DAY OF OCTOBER, 2023.

J. R. KARANJAH

JUDGE

