



REPUBLIC OF KENYA



KENYA LAW
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**Murugi v Republic (Criminal Appeal 25 of 2021)
[2023] KEHC 26708 (KLR) (21 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL 25 OF 2021
CM KARIUKI, J
DECEMBER 21, 2023**

BETWEEN

ROBINSON KAMUNDIA MURUGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Conviction and Sentence of Honourable C Obulusta
Chief Magistrate delivered on 17th November 2021 and 10th December, 2021
in the Chief Magistrate Court at Nyahururu S O A CASE No. 111 of 2019)*

JUDGMENT

1. The Accused with eleven (11) others were charged with offence of Gang Rape contrary to section 10 of *Sexual Offences Act* No. 3 of 2006.
2. The accused pleaded not guilty and trial ensued and was convicted and sentenced to fifteen (15) years imprisonment. Aggrieved by the verdict he lodged appeal and listed eight (8) grounds of appeal.
 - i. That the learned Trial Magistrate erred in law and in fact in finding that the prosecution had proved beyond reasonable doubt that the Appellant was an accomplice of others charged as accused No. 1, 2 and 4 and that he assisted accused 1 and 2 to commit the offence of gang rape.
 - ii. That the Learned Trial Magistrate erred in Law and in fact in finding that the prosecution had proved the offence of gang rape as against the appellant.
 - iii. That the Learned Trial Magistrate erred in law and in fact in failing to find that the evidence of the complainant was not corroborated at all and in believing her evidence without a warning.
 - iv. That the Learned Trial Magistrate erred in law and in fact in failing to find that R who had been mentioned by the complainant as having witnessed the commission of the offence was



not called as prosecution witness and that she testified as a defence witness thus weakening the prosecution case.

- v. That the Learned Trial Magistrate erred in law and in fact in finding that the prosecution had proved penetration although the same was not supported by the medical evidence on record.
 - vi. That the Learned Trial Magistrate erred in law and in fact in failing to analyze and consider the defence of by the Appellant and his witness in his judgment.
 - vii. That the Learned Trial Magistrate erred in law and in fact in failing to find that the evidence of the complainant was not supported by all the prosecution witnesses and in convicting on the evidence of a single witness who was not a child of tender age.
 - viii. That the Learned Trial Magistrate erred in law and in fact in dwelling in extraneous matters not adduced in evidence while convicting the appellant for the offence of Gang Rape.
3. The parties were directed to canvass appeal via submission.

4. Appellant Submission

5. The Appellant was with others jointly charged with the offence of Gang Rape Contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006.
6. Particulars were: That the 12 accused persons on the 25th day of July 2019 at [Particulars Withheld] secondary School in Nyandarua North Sub County within Nyandarua County having a common intention to penetrate the vagina of PNM without her consent and in the company of Joseph Kamau Njiu and Geoffrey Thuku Mwangi who intentionally and unlawfully caused their penis to penetrate the vagina of the (sic) PNM.
7. The appellant faced an alternative charge of committing an indecent act with an adult contrary to Section II A of the *Sexual Offences Act* No. 3 of 2006.
8. The prosecution called a total of nine (9) witnesses.
9. The Appellant who was charged as the 11th Accused person in the consolidated Charge Sheet testified as DW4 where he gave sworn evidence and he denied committing the offence.
10. The Appellant was wrongly convicted and sentenced and this can clearly be discerned from the Learned Trial Magistrate's Judgment dated 17/11/2021 and may be the reason why the prosecution has correctly conceded to the appeal.
11. In page 24 of the Judgement found in page 169 of the Record of Appeal, while analyzing the evidence of the complainant who testified as PWI, the Court in lines 16 - 19 of the Judgement stated as follows:

“ as they left, R was chased by the boys away and that is when she was attacked by several boys.
According to her the third and fifth accused persons are the ones who held her first before the 11th accused joined them with the others. The 12th accused person locked the door from inside before gagging her mouth with a paper.” (underlining ours)
12. The 12th accused person from the consolidated Charge sheet was non other than Peter Kariuki Waringa. (See page 6 of the Record of Appeal).



13. The complainant in her evidence referred to above as found in page 34 of the typed proceedings or page 40 lines 7 of the Record of Appeal testified as follows: -

“I returned to collect a calculator and R a pencil. As we left, R was chased by boys. I remained inside the laboratory. Mwangi (1st accused) entered claiming he heard my stories. I pushed him away. 3rd accused (Point at him) entered and held me. I bit him on the hand. He called Robbinson (points at 11th accused) who then entered with all the other accused including Joram Kimani who is missing.

12th accused locked the door from inside and gagged my mouth with a paper. I struggled with them and 4th accused Ibrahim tripped me. I fell down.

14. The aforesaid excerpts are a clear demonstration on what role it was alleged accused 11 Robinson Kamundia Murugi the Appellant herein and Accused 12 Peter Kariuki Waringa are said to have played.
15. Now in convicting Accused No. 1, 2, 4 and 11, the Trial Court held as follows in page 32 of his Judgement: -

“The court is satisfied that the prosecution has proved the case against the 1st and 2nd accused beyond reasonable doubt. They in that caused their penis to penetrate the vagina of the complainant after the 4th accused person tripped her before her biker and pant were removed with the 11th accused having locked the door to allow them to do the same. The 4th and 11th accused though not having inserted their penis into the vagina of PNM were accomplices having assisted the 1st and 2nd accused do so by respectively tripping her and locking the door in order for the 1st and 2nd accused to do the act.”

The other remaining accused, 3rd 5th, 6th and 12th did not participate in effecting the sexual assault and are acquitted under Section 215 of the Criminal Procedure Code.” (underlining ours)

16. It is clear beyond peradventure that the Court intended to convict the accused who entered the laboratory and locked the door and that was Accused No. 12 but it inadvertently referred to he accused as Accused No. 11 the Appellant herein. The error resulted to the appellant who as supposed to be acquitted being convicted and sentenced to 15 years imprisonment.
17. The Appellant did not participate in the commission of the offence and was to be acquitted with others after the Court correctly held so but a slip of the pen sent him to prison where he is serving someone else's sentence.
18. The Court to allow the appeal.

Respondent's Submissions

19. The Appellant was charged with 11 others for the offence of Gang Rape Contrary to Section 10 of the [Sexual Offences Act](#) No. 3 of 2006.
20. The particulars of the charge are that on the 25th day of July 2019 at [Particulars Withheld] secondary school in Nyandarua North Sub County within Nyandarua County having a common intention to penetrate the vagina of PNM without her consent was in the company of Joseph Kamau Njiu and Geoffrey Thuku Mwangi who intentionally and unlawfully caused their penis to penetrate the vagina of the said PNM.



21. The Appellants also faced an alternative charge committing an indecent act with an adult Contrary to Section 11(A) of the [Sexual Offences Act](#) No. 3 of 2006.
22. The Appellants pleaded not guilty after the substance of the charge and every element thereof were read to them in the language they understood.
23. The prosecution called a total number of nine (9) witnesses and at the close of its case, the appellants were placed on their defence and they all gave sworn defence and did not call any witnesses.
24. The court after the close of the defence case did analyze critically the entire evidence and convicted the appellant and sentenced him to 15 years imprisonment.
25. Being dissatisfied with the whole of the said judgement, the Appellant filed his Petition of Appeal wherein he enumerated 8 grounds of appeal.
26. Under Section 10 of the [Sexual Offences Act](#) No. 3 of 2006 and as stated in the case of [Daniel Kaberu -v- Republic](#) (2021) Eklr the following four elements must e proved in a case of gang rape: -
 - a. Commission of Rape: penetration as defined by Section 2 of the SOA without consent.
 - b. 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.
 - c. Positive identification.

(a)Commission of Rape: Penetration as defined by Section 2 of the [Sexual Offences Act](#) No. 3 of 2006.

27. PW I testified that on the 25/7/2019 at around 4.30 Pm after the chemistry exam, the teacher sent them to take apparatus to the store, she returned to collect a calculator and one R a pencil. As they left, R was chased by boys. She then remained inside the laboratory. The 3rd accused entered and held her. She bit him on the hand. He called the appellant by his name as Robinson who then entered with all the other accused including one Joram Kimani who is missing. The 12 accused Peter Kariuki Waringa locked the door from inside and gagged her mouth with a paper. She struggled with them and the 4th accused (Ibrahim) tripped her. She fell down.
28. 2nd and 1st accused pushed down her skirt. She resisted and it tore. 1st accused removed her biker and pant as the others watched. He then unzipped and took his penis and put inside her vagina. The 2nd accused (Thuku) pulled him aside and put his penis inside her vagina.
29. They then left when a person shouted the name 'Principal'. She bled profusely and a fellow student Pascaline who passed by helped her with a pad and held her tie her skirt and she told her what happened.
30. PW8 a clinical officer at Ndaragwa indicated that the complainant had reported and her history was that she was raped. Upon examination, the physical examination was normal, there was normal external genitalia. The hymen was broken not fresh. She had presented herself after 6 days, hence a broken hymen would heal within 5 days. He confirmed that there was a sexual activity.
31. Thus, submit that penetration was sufficiently proved in that PWI testified how she was gang raped by Accused 1 and Accused 2 in the lower court.
32. However, she did mention that the Appellant only came when he was called and entered with the other accused persons, but did not actively participate in the gang rape ordeal.



(b) In association with another or others or any other with common intention is in company of another or others who commit the offence of rape.

33. PW 1 testified that on the fateful day, the 5th accused entered the room claiming he heard her stories. She pushed him away. 3rd accused entered and held her. She bit him on the hand. He called the Appellant by his name who then entered with all the other accused including one Joram Kimani who is missing.
34. She further testified that it's the 12th accused who locked the door from inside and 4th accused tripped him. She was then gang raped by the 1st and 2nd accused person while the others watched.

(c) Positive Identification

35. Regarding this question, the complainant testified that the 3rd accused called the Appellant after he had been bitten by PW 1 by his name as Robinson and that they both schooled at Mwihanga in form 4 hence she knew him well and did not indicate that he gang raped her.
36. When placed on his defence, the Appellant gave sworn testimony and denied committing the offence and said he came to learn of the offence when he had gone to record his Statement at the police station.
37. Also noted that in the Trial Magistrate's judgement dated 17 November 2021 Page 32 of 32 which is in page 177 of the record, has indicated that he is satisfied that the prosecution has proved the case against the 1st and 2nd accused beyond reasonable doubt.
38. Then in turns caused their penis to penetrate the vagina of the complainant after the 4th accused person tripped her before her biker and pant were removed with the 11th accused having locked the door to allow them do the same. The 4th and 11th accused though not having inserted their penis into the vagina of PNM, were accomplices having assisted the 1st and 2nd accused do so by respectively tripping her and locking the door in order for the 1st and 2nd accused do the act.
39. He then proceeded to acquit accused 3rd, 5th, 6th and 12th respectively, indicating that they did not participate in effecting the sexual assault.
- However, it was PW I's statement as indicated in Page 34 and Page 40 of the record that it was the 12th accused who locked the door from inside and gagged her mouth with a paper.
40. To that extent, the appeal is thus conceded for the trial magistrate ought to have convicted the 12th Accused and not the 11th accused based on the evidence presented before the trial.

41. Issues Analysis and Determination

42. The sole issues for determination is whether the court wrongly convicted appellant who was 11th in lieu of accused 12?
43. The Appellant who was charged as the 11th Accused person in the consolidated Charge Sheet testified as DW4 where he gave sworn evidence and he denied committing the offence.
44. The Appellant contended that he was wrongly convicted and sentenced and this can clearly be discerned from the Learned Trial Magistrate's Judgment dated 17/11/2021 .
45. In page 24 of the Judgement found in page 169 of the Record of Appeal, while analyzing the evidence of the complainant who testified as PWI, the Court in lines 16 - 19 of the Judgement stated as follows:

“ as they left, R was chased by the boys away and that is when she was attacked by several boys.



According to her the third and fifth accused persons are the ones who held her first before the 11th accused joined them with the others. The 12th accused person locked the door from inside before gagging her mouth with a paper."

46. The 12th accused person from the consolidated Charge sheet was non-other than Peter Kariuki Waringa. (See page 6 of the Record of Appeal).

47. The complainant in her evidence referred to above as found in page 34 of the typed proceedings or page 40 lines 7 of the Record of Appeal testified as follows: -

"I returned to collect a calculator and R a pencil. As we left, R was chased by boys. I remained inside the laboratory. Mwangi (1st accused) entered claiming he heard my stories. I pushed him away. 3rd accused (Point at him) entered and held me. I bit him on the hand. He called Robbinson (points at 11th accused) who then entered with all the other accused including Joram Kimani who is missing.

12th accused locked the door form inside and gagged my mouth with a paper. I struggled with them and 4th accused Ibrahim tripped me. I fell down. "

48. The aforesaid excerpts are a clear demonstration on what role it was alleged accused 11 Robinson Kamundia Murugi the Appellant herein and Accused 12 Peter Kariuki Waringa are said to have played.

49. Now in convicting Accused No. 1, 2, 4 and 11, the Trial Court held as follows in page 32 of his Judgement: -

"The court is satisfied that the prosecution has proved the case against the 1st and 2nd accused beyond reasonable doubt. They in that caused their penis to penetrate the vagina of the complainant after the 4th accused person tripped her before her biker and pant were removed with the 11th accused having locked the door to allow them to do the same. The 4th and 11th accused though not having inserted ttheir penis into the vagina of PNM were accomplices having assisted the 1st and 2nd accused do so by respectively tripping her and locking the door in order for the 1st and 2nd accused to do the act. "

50. The other remaining accused, 3rd 5th, 6th and 12th did not participate in effecting the sexual assault and are acquitted under Section 215 of the *Criminal Procedure Code*."

51. It is clear beyond reasonable doubt that the Court intended to convict the accused who entered the laboratory and locked the door and that was Accused No. 12 but it inadvertently referred to the accused as Accused No. 11 the Appellant herein. The error resulted to the appellant who as supposed to be acquitted being convicted and sentenced to 15 years imprisonment.

52. The Appellant did not participate in the commission of the offence and was to be acquitted with others after the Court correctly held so but a slip of the pen sent him to prison where he is serving someone else's sentence.

53. The prosecution concedes that, the 12th Accused was one convicted by the trial court and not the 11th accused based on the evidence presented before the trial. This court after reviewing the record agrees that there was an error resulting to conviction of the appellant thus the court makes orders;

- i. The conviction against appellant is quashed and sentence set aside.
- ii. The appellant shall be set at liberty forthwith unless otherwise lawfully held.



DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 21ST DAY OF DECEMBER 2023

.....

C KARIUKI

JUDGE

