



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kipkemboi v Republic (Criminal Appeal E088 of 2023)
[2025] KEHC 1737 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E088 OF 2023
JR KARANJA, J
FEBRUARY 21, 2025**

BETWEEN

JULIUS KIPKEMBOI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of Hon. S.M. Mokuu delivered on
13th day of September 2023 on CMCR S.O. CASE NO. E111 of 2021)*

JUDGMENT

1. This appeal is against the decision and judgment of the Chief Magistrate in Kapsabet SPMC No. S.O. E111 of 2021 in which the Appellant, Julius Kipkemboi, was convicted and sentenced to twenty [20] years imprisonment for the offence of gang rape, Contrary to Section 10 of the *Sexual Offences Act*.
2. It was alleged that on the 15th January 2021 at [Particulars Withheld], Nandi County in association and company of another not before the court, the Appellant had sexual intercourse with CS without her consent. Alternatively, it was alleged that he committed on indecent act with an adult person against her will, Contrary to Section 11[A] of the *Sexual Offences Act*.
3. Being dissatisfied with the conviction and sentence on the main count the Appellant preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on 28th November 2023, in which he generally complains that the trial court erred in both law and fact by convicting him on the basis of the prosecution evidence which was insufficient, incredible, inconsistent and which failed to prove the ingredients of the charge.
4. On sentence, the Appellant contended that it was harsh and excessive and stated that the trial court failed to comply with Section 333[2] of the *Criminal Procedure Code*.



The State/ Respondent opposed the appeal and submitted that the prosecution proved its case beyond reasonable doubt. That, on identification, the incident occurred in broad day light and the Appellant was a person previously known to the Complainant, who did not consent to the unlawful act.

5. The Respondent further submitted that all the ingredients of the charge were proved, that the victim was confronted by two people inclusive of the Appellant who acted as a distractor by using his phone after which the victim was raped by his accomplice. That, the Appellant alerted the accomplice that people were approaching the scene thereby facilitating the accomplice to take off.
6. The Respondent submitted that the Appellant was an accomplice to the offence, hence a principle offender even though the victim was raped by his accomplice only.

On sentence, the Respondent submitted that it was lawful and in accordance with Section 10 of the [Sexual Offences Act](#) which provides for a term of imprisonment of not less than fifteen [15] years, but the Appellant was given twenty [20] years.

The Respondent called for the dismissal of the appeal.

7. The Appellant appeared in person at the hearing of the appeal and relied on his written submissions. The Respondent was represented by the Learned Prosecution Counsel, Ms. Asiyo, who presented her submissions orally.

The role of this court was to revisit the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. [See *Okeno Vs. Republic (1972)EA 32*].

8. In that regard, the evidence availed by the prosecution through the Clinical Officer, Tom Kipkosgei Kilel [PW1], the Complainant CS [PW2] and the Investigating Officer, CPL. Andrea Agiza [PW3] was given due consideration against that of the Appellant, Julius Kipkemboi [DW1] and his sister, Rebeccah Jepleting [DW2].
9. The trial court after considering the evidence arrived at the conclusion that the prosecution had tendered credible evidence that the Complainant was gang raped by the Accused Person [Appellant] and another. That, the prosecution case was thus proved beyond reasonable doubt.
10. In arriving at its conclusion the trial court took into consideration the provisions of Section 10 of the [Sexual Offences Act](#) which provides that: -

“ 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 than fifteen years but which may be enhanced to imprisonment for life.”

and held that there was penetration of the Complainant’s genital organ with the genital organ of a male person.

11. This holding was supported by the evidence of the Clinical Officer [PW1] and the Complainant [PW2].

The Complainant testified that she was confronted by two people at about 5:00pm while collecting firewood.

One of the two people was previously known to her. She fell down after being kicked by one of them while the other kept a look out. She refused to remove her clothes as ordered resulting in her clothes



being torn and her underpants being pulled down. She was then raped even after pleading with the assailants to use a protective sheath [condom].

12. With that evidence of the Complainant as corroborated by that of the Clinical Officer, the necessary ingredient of the offence of gang rape were duly established and proved. In any event, there was no particular dispute from the defence that the offence was actually committed against the complainant. What was disputed was the allegation that the Appellant was one of the two offenders.

13. In his defence, the Appellant contended that he did not commit the offence and was at work as a “boda-boda” rider on the material date.

He raised an alibi that he was not at the scene of the offence on the material date and time as he was at a place called Chemase. He also implied that he was a stranger to the Complainant who could not tell the person who raped her.

14. The Appellant’s sister [DW2] implied that the Complainant attempted to solicit a sum of Kshs. 10,000/- from her in order to drop the case against the Appellant. She however, admitted that she was not with the Appellant on the material date and could not therefore know what he might have done.

15. The factors foregoing as disseminated by both the prosecution and the defence clearly show the bone of contention in this matter or the crucial point for determination was the alleged identification of the Appellant as having been one of the two offenders. The defence in that regard was a denial based on the contention that the Appellant was not at the scene of the offence when it occurred. It was therefore incumbent for the prosecution to debunk the contention by necessary evidence. The burden of proving that the Appellant committed the offence lay with it [prosecution]. There is no duty placed upon an Accused Person to prove his innocence [See, Kioko Vs. Republic[1983] KLR 289].

16. The basic identification evidence availed by the prosecution against the Appellant was that of the Complainant [PW2]. She was the sole witness in that regard, of course, being the victim of the offence.

The Appellant vehemently denied that he was in anyway involved in the offence whether on his own accord or in cahoot with another.

It was therefore the word of the Complainant against that of the Appellant.

17. In the circumstances, the truthfulness of either one of them as observed by the trial court was the determinant factor on the question of the alleged identification of the Appellant as one of the Offenders either directly or indirectly as it was apparent that as one of the Offenders actively and sexually offended the Complainant, the other kept a look out for any interruption from all and sundry.

18. It was clear that the issue of identification turned on the credibility of the witnesses and in that regard the trial court was better placed than this court as it had the benefit of seeing and hearing the witnesses. It would appear that the trial court believed the Complainant and determined that the Appellant was responsible for the offence in association with another.

19. In so determining, the trial court stated in its judgment that: -

“The incident took place during broad daylight. The Complainant was with her attackers especially the Accused Person. In my considered view, the defence by the Accused Person doesn’t dismantle the credible prosecution evidence.

In conclusion, the prosecution had tendered credible evidence that the Complainant was gang raped by the Accused Person and another.



It's case is proved beyond reasonable doubt, the Accused Persons [sic] are found guilty and convicted Contrary to Section 10 of the *Sexual Offences Act.*"

20. The Complainant in her evidence, which was not corroborated as there appears to have been no other person at the scene except herself and her tormentors, stated that two people stopped her and she identified one of them as the Appellant. She did not know the other person thereby implying that the Appellant was a person previously known to her. She said that it was about 5:00pm when the incident started unfolding. This was an indication that conditions favourable for positive identification existed at the time as it was during daytime.
21. The Complainant also stated and implied that the Appellant and his accomplice were on a motor cycle when he stopped it and asked her to assist him check his phone as his colleague hanged around before the colleague kicked her. She fell down even as the Appellant stood near a road to keep a look out as she was being raped by his colleague.
22. Considering that there existed favourable conditions and opportunity for identification of the Appellant by the Complainant, it would follow that this court cannot interfere with the findings of the trial court on the credibility of the Complainant vis-à-vis that of the Appellant. In the circumstances, this court must also hold that the Appellant was positively identified by the Complainant[PW2] as one of the two people who sexually offended her. He was not a stranger to her. She knew him previously as the person who used to take her daughter to school on his motor cycle.
23. The reasons foregoing renders the Appellant's conviction by the trial court proper and lawful and is hereby affirmed thereby resulting in the dismissal of grounds one [1] to five [5] of the appeal.

As regards grounds six [6] and seven [7] on sentencing, the sentence of twenty [20] years imprisonment imposed by the trial court was lawful and in tandem with the provisions of Section 10 of the Sexual Offence Act.
24. However, considering that the Appellant was a first offender and the pre-sentence report was favourable to him, the twenty [20] years imprisonment was rather excessive in the circumstances and is hereby set aside and substituted for a lesser sentence of fifteen [15] years imprisonment with the time spent in custody by the Appellant before his release on bond [approximately 11 months] being taken into account in computation of the sentence and in accordance with Section 333[2] of the *Criminal Procedure Code.*
25. Other than the alteration in the sentence, the appeal is dismissed.

Orders accordingly.

DELIVERED AND DATED THIS 21ST DAY OF FEBRUARY, 2025

**HON. J. R. KARANJAH,
JUDGE**

