



**Lopetet & another v Republic (Miscellaneous Criminal Appeal  
E122 of 2023) [2024] KEHC 5847 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5847 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
MISCELLANEOUS CRIMINAL APPEAL E122 OF 2023**

**RN NYAKUNDI, J**

**MAY 22, 2024**

**BETWEEN**

**SAMUEL LOPETET ..... 1<sup>ST</sup> APPELLANT**

**JAMES ESIBITAR ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against Sentence and Conviction meted by the trial court to the accused person Samuel Lopetet in E022 of 2022 at the Resident Magistrate Court at Lodwar by Hon. I.K. Rono)*

**JUDGMENT**

1. The appellants was charged with the offence of gang rape contrary to section 10 of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on the 30<sup>th</sup> day of October, 2021 at [Particulars Withheld] in Turkana west sub-county within Turkana County, the appellant jointly with another intentionally and unlawfully in turns caused their penises to penetrate the vagina of RA and adult aged 45 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars were more or less similar to those in the first charge.
2. The appellants was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment.  
Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:
  - i. That the learned trial magistrate erred in law and facts by convicting the appellant who is disabled and couldn't wrestle the victim as recorded in the prosecution evidence.



- ii. That the learned trial magistrate erred in law and facts by relying on shoddy and immaterial evidence of the medical practitioner.
- iii. The learned trial magistrate erred in law and facts by harshly convicting the lame appellant for 15 years for a crime he never committed.
- iv. That the learned magistrate absolutely erred in law and facts as the exhibit of the victim clothing were tidy compared to the p3 which indicated the presence of blood in the victim's vagina.

**The prosecution in support of its case called three witnesses.**

3. PW1 was the complainant. She testified that she lives in Natirwan village and trades in firewood. She stated that on October 30, 2021 at around 4:00pm she was from the Kakuma Refugee Camp heading home. She noted that there were no persons on the road, save for the 2 accused persons. She stated that when she reached Tarach Lagga, she met the 2 accused persons. She told the court that she knew the accused persons who hail from the same village as her, and stated that she knew their names. She testified that she has known the accused persons for 1 year and that her home and their respective homes are however far away from each other. The witness testified that both accused persons started beating her with bottles and stoned until she fainted whereupon the two accused persons dragged her to the bush and raped her.
4. She stated that the accused persons removed her clothes and committed sexual intercourse with her. She stated that the accused persons both inserted their penises and even bottles into her vagina. She stated that she then left the scene and went to the hospital at Clinic 7 then later reported the incident at Kakuma Police Station. She informed the court that a P3 form was filled, PRC form and a discharge summary. She stated that she was admitted in hospital for three weeks. She testified that her clothes were taken from the hospital to the police station. The cloth was a maasai *lesso* which she had used to tie herself after the incident. She noted that she obtained the *lesso* from a good Samaritan. She finalized by stating that she had never had a grudge with either of the accused persons.
5. PW2, Dr. Esha Suleiman testified that she is a medical doctor with three years working experience, working with IRC hospital. She presented the P3 form, PRC form and discharge summary form on behalf of her colleague Dr. Innocent Irungu who was on leave. The accused persons raised no objection to this. The witness testified that they received the patient on October 30, 2021. She noted that the patient's state of clothing was torn and there were marks of strain on the *lesso* and dress. She also stated that the patient complained of pain on the face on both eyes, and on her back as well. The witness noted that the patient had bruises on the face and her eyes were swollen. She had not used drugs or alcohol. The witness noted that the patient had bruises on the chest and back as well as bruising on the inner thighs. The approximate age was classified as "hours" and probable type of weapon used was hands. The degree of the injury was classified as harm and the nature of the offence was concluded as being rape. The patient's estimated age was 42 years. As for the genitalia, the witness noted that that the patient had signs of forced penetration i.e. bruises on the labia majora and minora as well as lacerations on the vagina. There was presence of vaginal bleeding as well as semen on the vagina. There were no signs of venereal infection on the genitalia or body externally. The hymen was broken. The witness noted that the patient was tested for HIV and started on PEP drugs. The patient was admitted for 10 days at the facility. She concluded that there was evidence that the patient was physically and sexually assaulted and that there was penetration.
6. PW3, 91234 PC Pauline Loswat testified that she is the investigating officer in the matter. She stated that she is currently attached to Lokichoggio police station, performing general duties. She testified that



on October 31, 2021 a report of an incident of gang rape was made at Kakuma police station where she was stationed at the time. The report was made by one Jane Adong concerning the rape of her neighbor, RA, PW1. She stated that it was reported that the complainant was heading on home on the said date when she met the accused persons who assaulted and raped her until she lost consciousness and regained in the following day where she found herself lying naked on the road. A good Samaritan met her and took her to clinic 4 IRC Hospital and later transferred to Clinic 7 where she was admitted from October 30, 2021 to November 9, 2021, 8 days later. She then recorded statements and the accused persons were arrested by members of the public from Kakuma Refugee Camp. She testified that the complainant identified the accused persons by name. The witness confirmed that before this case she did not know the accused persons. On cross examination, the witness noted that the good Samaritan who rescued PW1 at the scene was afraid to record her statement with the police as he hails from the same village as the accused persons.

7. At the close of the prosecution case, the trial court found that the accused persons had a case to answer and placed them on their defence. They elected to give unsworn testimony and did not avail any witnesses.
8. The 1<sup>st</sup> accused person, DW1, Samuel Lopetet, testified that he lives in Natirwan and used to carry firewood for a living. He stated that on September 29, 2021, he had gone to Kakuma 2 and slept there. He noted that he had gone to meet his wife, who had lost her father, and slept there for three days. On the fourth day, he stated that he left for Kakuma 1 to look for work. At around 3:00pm, he was arrested and kept at the police station until October when he was brought to court and charged with the current offence.
9. The 2<sup>nd</sup> person, DW2, namely James Esibitar testified that he hails from Natirwan village and traded in firewood. He testified that on September 29, 2021, he came to Kakuma 1 refugee camp to search for work. He noted that he got work to fetch water and was paid up to Kshs. 250, which he used to go to a hotel to eat. It was at this time that the police vehicle came, he was arrested and placed in custody for 14 days and charged with this offence. He noted that he met the 1<sup>st</sup> accused person in custody.

### **Analysis and Determination**

10. I have considered the appeal and the evidence adduced at the trial court. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanour of the witnesses. See *Okeno vs. Republic* [1972] E.A 32.

The issues that arise for determination in this appeal are;

- i. Whether the prosecution proved its case to the desired threshold;
- ii. Whether the sentence meted upon the appellant was lawful.

### **Elements of the offence of gang rape**

The appellant was charged with the offence gang rape contrary to section 10 of the *Sexual Offences Act* which provides as follows:

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

The provisions of section 10 of the [Sexual Offences Act](#) have capture the elements of gang rape as follows:

- i. Commission of rape; Penetration as defined by section 2 of the [Sexual Offences Act](#) without consent thereof;
  - ii. 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
  - iii. Positive identification of the perpetrator.
11. The key element then is rape or defilement that is committed in the association of others with a common intention notwithstanding the fact that the accused may not have defiled the victim. Therefore, it matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist.
12. The key ingredients of the offence of rape created in section 3 (1) of the [Sexual Offences Act](#) include intentional and unlawful penetration of the genital organ of one person by another, without consent. In the case of [Republic vs. Oyier](#)[1985] KLR 353 the Court of Appeal held that;
- " 1. The lack of consent is an essential element of the crime of rape. The *mens rea* in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
  2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
  3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”

Evidence was adduced by PW 2 that the patient had signs of forced penetration i.e., on the Labia Majora and Minora as well as lacerations on the Vagina. There was presence of vaginal bleeding as well as semen on the vagina.

13. Further, PW1 testified that the accused persons started beating her with bottles and stones until she fainted. It is my considered view that once she lost consciousness, it could be impossible for her to tell or narrate the ordeal but the medical doctor’s evidence came to her rescue confirming that indeed she was raped.
14. It is therefore evident that the complainant did not consent to the sexual act. The evidence she gave was corroborated by evidence of the Clinical Officer who examined her and confirmed that she had bruises on the face and her eyes were swollen. The medical evidence also confirmed that the patient had bruises on the chest and back as well as bruising on the inner thighs. The probable type of weapon used was hands. The degree of the injury was classified as harm and the nature of the offence was concluded as being rape.



15. The issue however is whether the appellant penetrated the complainant. From the evidence of the complainant, the accused persons were well known to her. Even before she lost consciousness, it was her testimony that she was beaten with bottles and stones until she fainted and the accused persons dragged her to the bush and raped her. In such circumstances, the accused persons were positively identified and so the appellant. In the cases of *R vs Turb and Others* (1976) 3 ALL ER 549. Lord Widgery C.J had this to say:-

" First , wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witness can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation " At what distance" In what light" was the observation impeded in any way, as for example by passing traffic or press of people. Had the witness ever seen the accused before" How often" if only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance."

16. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of gang rape were proved beyond doubt. The conviction was therefore proper.

### **On sentence**

The appellant argued that the sentencing was harsh for a crime he never committed. 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,

The court in *D W M vs. Republic* (*supra*) held that:

" As for the sentence the 1<sup>st</sup> appellate court properly addressed its mind to the operative words in Section 20(1) of the *Sexual Offences Act* that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence



was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion.”

In the “*Muruatetu Case*”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

- “(a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaption of the offender;
- (h) any other factor that the Court considers relevant.”

17. In my considered view, the accused mitigation ought to count in sentencing. The objectives of sentencing should be considered in totality. In this regard, section 10 of the *Sexual Offences Act* gives room for the exercise of judicial discretion.

Further, the sentencing objectives in Kenya have been captured in the *Sentencing Guidelines 2023* to be the following: -

- 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
- 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
- 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- 5) Community protection: to protect the community by incapacitating the offender.
- 6) Denunciation: to communicate the community’s condemnation of the criminal conduct.
- 7) Reconciliation: To mend the relationship between the offender, the victim and the community.
- 8) Reintegration: To facilitate the re-entry of the offender into the society.

18. Therefore, mandatory minimum sentences place a bar on the trial court’s ability to set a sentence lower than the one prescribed by the statute. It kind of stripes the Judge or Magistrate’s power to exercise judicial discretion on a case-to-case specifics. Sometimes I consider it as an intrusion by the legislature with regards to the sentencing discretion of Judges and Magistrates. The courts merely become rubber



stamps. It would seem in this case discretion was fettered for the appellant to be sentenced to the very minimum period of fifteen (15) years imprisonment. In contrast to the above given the guidelines in the *Benard Kimani v Republic*

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

19. The trial court while sentencing the accused persons noted that the accused persons were young adults but they must serve as an example to deter future would be offenders. The court recognizes that the circumstances surrounding the individual offences can vary greatly and that is so even before one comes to consider the circumstances of the individual offender. There are just too many variables in terms of the circumstances of individual offences that must be considered to arrive at a particular verdict. In this appeal, the record show that this was a gang rape against a victim aged 45 years old. That to me categorizes this offence as comprising an aggravating factor of the upper limit. The infliction of serious injuries targeting the vulnerable victim particularly of the female gender without due regard to her privacy, dignity, security, and the determinants to enjoyment of her right to life. The gravity of this offence is even made worse by the two appellants with unlawful intention committed the offence of gang rape bringing the offence within the gender based violence. There are no compelling circumstances to justify reduction of sentence particularly where the evidence was very strong and overwhelming.
20. The upshot of it all the appeal on sentence lacks merit so does the order on conviction. This appeal is lost as against the grounds canvassed by the Appellant

**DATED AND SIGNED AT LODWAR THIS 22<sup>ND</sup> DAY OF MAY, 2024.**

**R. NYAKUNDI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

