



**Mutai v Republic (Criminal Appeal E010 of 2022)
[2024] KEHC 15230 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E010 OF 2022
JM NANG'EA, J
NOVEMBER 19, 2024**

BETWEEN

JOSEPH KIPTONUI MUTAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the Chief Magistrate's Court at Molo
(Hon. A. Mukenga - SRM) delivered on 13/1/2022 In S.O Case No. E017 of 2021)*

JUDGMENT

1. The appellant is dissatisfied with the judgement of the above stated lower court before which he was charged with two (2) others with a main offence of Gang Rape Contrary to Section 10 of the [Sexual Offences Act](#) No. 3 of 2006 and in the alternative Committing an Indecent Act with an Adult Contrary To Section 11(A) of the same Act as well as Assault causing actual bodily harm contrary to section 251 of the Penal Code.
2. The particulars of the main charge are that on 25/1/ 2021 at Molo Sub County, within Nakuru County the appellant, in association with his co-accused and another not before the court, intentionally and unlawfully caused his penis to penetrate the vagina of P.C. without her consent. It is alleged in relation to the alternative charge that during the same date and at the same place the appellant, in association with his said accomplices, intentionally and unlawfully touched P.C's vagina using his penis.
3. It was alleged in respect of the assault charge that on the same date and at the same place, the appellant jointly with his co-accused and another not before the court, assaulted the same complainant thereby causing her actual bodily harm.
4. The appellant refuted the charges.



5. After a full hearing, the trial court convicted all the accused persons of the charges of Gang Rape and Assault pursuant to Section 215 of the Criminal Procedure Code and sentenced each of them to 15 years and 2 years imprisonment respectively. No order was made regarding the alternative charge to the offence of gang rape.
6. The grounds of appeal as per Grounds of Appeal filed on 21/1/2022 may be condensed as follows:
 - a. That the learned trial magistrate erred in law and fact by convicting the appellant against the weight of the evidence.
And
 - b. That the learned trial magistrate erred in law and fact by meting out an excessive sentence against him.
7. The appellant prays that his conviction be quashed and sentence set aside.
8. It is trite law that a first appellate court has the duty of re-assessing or re-evaluating the evidence presented before the trial court and arrive at its own conclusions on both matters of fact and law while being mindful of the fact that unlike the lower court it did not have the advantage of watching the demeanour of witnesses {see the case of Okeno V. Republic (1972) EA 32}.
9. The prosecution evidence is that on 25/1/2021 at around 7p.m. the complainant was heading home from the shops in the company of one Vincent. When they got to a forested area, her neighbour called Nickson who was behind them caught up with them. Nickson grabbed the complainant, threw her to the ground and tore her skirt. The attacker then proceeded to rape her as she screamed for help. Vincent was pushed away when he tried to restrain the assailant. Three men she knew as Robert, Kiptonui and Hillary appeared, but instead of rescuing her they beat her up and also allegedly raped her in turns. The three were also her neighbours.
10. The complainant reported the incident to Elburgon Police Station and obtained a medical examination form which was filled out at Elburgon Sub County Hospital where she was treated the following day. The complainant's genital organs were found to be bruised and tender indicating signs of forceful penetration according to the medical findings. The left thigh was lacerated while the right eye, chest, abdomen and left elbow joint were swollen. The examining medical officer (PW3) produced the examination report dated 26/1/2021.
11. According to the Investigating Officer (PW4), the complainant stated that she knew one of her attackers by name and a second one by his physical appearance. PW4 and other police officers went to Chai Moto area and arrested three (3) of the suspects. A fourth suspect called Nickson escaped. The said Vincent who is said to have witnessed the incident later complained to the police that he was assaulted by the suspects' relatives to intimidate him not to testify. He relocated from the area and could not be found to record a statement with the police.
12. After the arrests the police organized an Identification Parade on 7/1/2021 at which the complainant is said to have picked out the all the three arrested persons as among her attackers. All the accused persons were put on their defence upon the close of the prosecution case.
13. The appellant who was the 1st accused person in the lower court gave and sworn statement confirming that the complainant knew him well as they were neighbours. He told the court that on the material date at around 7.15 pm he was at Chai Moto Shopping Centre with his son. He thereafter parted with his son who left for home and he remained at the Shopping Centre. At about 7.30p.m. he was alerted about screams near his home and he rushed in the direction to find out what was happening. The appellant further stated that he caught up with his son with whom he proceeded to the place from



which the screams emanated. They came upon some women and children near his home. There was also a young lady who was screaming. The crowd that had gathered there started beating her up for screaming and he restrained the mob after which the lady left. The appellant added that he then left the scene and went back to the Shopping Centre. The appellant further stated that the complainant falsely reported to the police the following day that he was among her rapists. He denied committing the offence.

14. The 2nd accused person also made an unsworn statement in his defence. He told the court that the police only arrested him and his brother (the 3rd accused) when they failed to tell them the whereabouts of one Nickson they were looking for.
15. The 3rd accused supported the 2nd accused person's account.
16. Both sides filed written submissions which I have perused against the record. I will consider both grounds of appeal together. The appellant does not appear to dispute that the complainant was raped, save that he denies complicity. Medical evidence tendered, in any event, shows evidence of penetration owing to the injuries observed in the complainant's genital organs. The issues for determination are, firstly, whether the appellant was identified or recognized as one of the assailants. Secondly, if the court determines that the appellant was lawfully convicted, whether the sentence meted out against him was lawful.
17. In her judgement, the learned trial magistrate noted that the appellant placed himself at the scene of crime and that the incident occurred near his home. The trial court reasoned that the complainant would not have implicated him if indeed he went to her rescue. The court believed the complainant's evidence and convicted the appellant and his co-accused.
18. The appellant in his submissions took issue with the prosecution's failure to call the alleged eye witness called Vincent and urged the court to draw an inference that the default was because his evidence would have been adverse to the prosecution case. In support of this submission, the court was referred to the case of *Bukenya vs Republic* (1972) EA 549 where the court held that in such circumstances such adverse inference may be made. The appellant therefore expresses his innocence saying that he only went to the scene in response to the complainant's alarm.
19. The prosecution Counsel submitted in reply relying inter alia on Section 143 of the *Evidence Act*, which provides that;

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact”.

The court was told that even the evidence of a single witness may be sufficient to prove guilt (see case law in *Julius Kalewa Mutunga vs Republic* and a Ugandan Court of Appeal case of *Okwang Peter vs Uganda* cited in the prosecution submissions). The prosecution Counsel thus supported the trial court's judgement convicting the appellant.

20. The prosecution Counsel correctly stated the law that no particular number of witnesses are required to prove a fact. This is the established legal position as held in the cases cited by the prosecution as well as in many other decided cases including the case of *Benjamin Mbugua Gitau vs Republic* [2011] eKLR. Indeed evidence is not counted but rather it is weighed and therefore the evidence of one witness may be sufficient to convict depending on the strength or credibility of that evidence.
21. It is common ground that the complainant and the appellant knew each other well as neighbours. In the absence of evidence of an eye witness, determination of this appeal turns on whether the prosecution showed that the complainant spoke the truth implicating the appellant in terms of the



proviso to section 124 of the Evidence Act. This statutory provision dispenses with the requirement for corroboration of the evidence of a victim of a sexual offence, if the court is satisfied that the victim has spoken the truth regarding complicity of an accused person. The case of JWA vs Republic [2014] eKLR among many other judicial determinations has reiterated this position.

- 22). In James Okello vs Republic [2022] eKLR it was observed that sometimes a witness may be mistaken even on identification or recognition of close relatives or friends if the conditions are unfavourable. As per the evidence, the incident took place at 7 p.m. or thereabouts. The complainant told the court that the 2nd accused in the trial court's file had a torch but it is not stated if the same was flashed during the incident and, if so, at who or in which direction vis-a-vis the appellant. As per the judicial determination in the case of Warunga vs Republic [1989] KLR 424, it was also underscored that the trial court is required to satisfy itself that the circumstances of identification of an offender were favourable and free from possibility of error. The intensity of any light used for the identification and the position of the light relative to the suspect needed also to have been interrogated by the court (see case law in Wandanyi vs Republic [1986]KLR 1998).
- 23). The court was not also told how long the incident took for the court to gauge if the complainant had sufficient time to identify or recognize the assailants. It is not further explained why it was necessary to conduct a police Identification Parade when the complainant was well known to the suspects including the appellant as confirmed in court. Such parades are usually arranged in cases where a witness was not previously known to the suspect but says that he saw the suspect's physical appearance and could identify him. Could it be that the complainant herein was not certain of the appellant's complicity hence the parade where she was obviously going to pick him out as a person well known to her? It is further doubtful that the complainant recognized the appellant as PW4 stated that she said she knew only one of the attackers by name and his accomplices by their facial appearance. The court was not told who among the assailants was recognized by name.
- 24). Clearly, therefore, the learned trial magistrate did not properly analyze the evidence to ensure that the appellant's conviction was without error. I find that his conviction was unsafe in the circumstances as the court is unable to affirm that the complainant spoke the truth implicating the appellant.
- 25). Ground (a) of the appeal succeeds. In light of the court's determination, it is unnecessary to consider whether or not the sentence imposed against the appellant was unlawful.
- 26). The upshot is that the appeal is allowed and the trial court's judgement convicting and sentencing the appellant in respect of the offence of Gang Rape Contrary to Section 10 of The Sexual Offences Act No. 3 of 2006 is set aside and substituted with an order acquitting him of the offence pursuant to section 215 of the Criminal Procedure Code. Consequently, it is directed that he be forthwith set at liberty unless otherwise lawfully held.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NAKURU THIS 19TH DAY OF NOVEMBER, 2024.

J.M NANG'EA,

JUDGE

In the presence of:

The Prosecution Counsel, Ms Sang

The Appellant

The Court Assistant (Jeniffer)

