



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO. 1 OF 2014

LEORNARD KIBET KOROS.....APPELLANT

VS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 2 OF 2014

LEORNARD KIPROTICH KEMOI.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal From the conviction and sentence by Hon. E.M. AyukaRM in S.O. No. 19 and 20 of 2013 on 27th December 2013)

JUDGMENT

1. **Leonard Kibet Koros** and **Leonard Kiprotich Kemoi** have filed Criminal Appeals Nos. 1 and 2 of 2014 against their conviction and sentence in S.O. Case No. 70 of 2013 in which they were charged with the offence of gang rape. The record indicates that they both pleaded guilty to the offence and were sentenced to fifteen years imprisonment.
2. The appellants have filed similar petitions of appeal dated 6th January 2014. In his Grounds of Appeal dated 6th January 2014, the 1st appellant, Mr. Leonard Kibet Koros, states that the trial court erred in law and fact by failing to consider his instant plea of guilt; that it failed to consider the failure of the prosecution to take him to court in time; that it failed to consider his health in that he had been subjected to mob justice; and that it erred by using a language that he did not understand. He prayed that both his conviction and sentence be set aside.
3. In his oral submissions, he told the Court that he was arrested on 24th December 2013, and that he was beaten by the police who arrested him. He further stated that he was told that if he admitted guilt, he would be released and taken to hospital. That he admitted the crime and was jailed for 15 years, and that this was the first time that he was in jail.
4. The 2nd appellant, Leonard Kiprotich Kemoi, informed the Court that he had filed written grounds and had nothing further to add. In his Grounds of Appeal, he states that the trial magistrate erred in failing to consider his instant plea of guilty; failing to consider that the prosecution failed to take him to court in

time; and failed to consider his state of health as he had been subjected to mob justice. He also alleges that he was not aware of the nature of the offence he was charged with.

5. In response, Ms. Keli for the state opposed the appeal. She submitted that the appellants were charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act, and an alternative charge of committing an indecent act with an adult contrary to section 11 of the Sexual Offences Act.

6. She further stated that when the appellants appeared in court, the charges were read to them. They responded in Kiswahili, which they stated they understood, that it is true that they had raped the complainant. The facts of the charges were read to them and the exhibits and documents in support of the charge were produced by the prosecution. Both appellants confirmed that the facts were true as read.

7. Ms. Keli further submitted that both appellants were given a chance to mitigate, and thereafter the sentence was meted out by the Magistrate in accordance with the law.

8. The state further discounted the 1st appellant's argument that he was not conversant with the language used. Its argument was that it was clear from the proceedings that he was able to respond in Kiswahili, a language that he understands. He had also not brought up the issue of the language before the trial court, and to bring it up now was in bad faith.

9. The state further noted that the appellant ought to have brought up his allegation that he was beaten before the trial court, which he had not.

10. To the appellants' claim that they were not brought to court in time, it was the state's case that the appellants were arrested on 24th December 2013 and taken to court on 27th December 2013, and the intervening days, between 25th and 26th December 2013, fell over the Christmas break. They were therefore taken to court within the period set in Article 49 (f) (ii) of the Constitution.

11. Finally, it was the state's contention that this is an appeal on a plea of guilt and can only touch on the sentence, and further, that there was no mistrial that would warrant a retrial. The appellants were also given the appropriate sentence under section 10 of the Sexual Offences Act which sets out the period as 15 years imprisonment, which can be enhanced to life. In conclusion, it was the state's submission that the sentence and the proceedings were legal, and it prayed that the appeals should be dismissed and the sentence passed by the trial court upheld.

12. I have considered the appellants' appeal and the record of proceedings before the trial court. The appellants were charged in court on the 27th of December 2013. They were charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act. They also faced an alternative charge of committing an indecent act with an adult contrary to section 11(1) of the Sexual Offences Act. The charge was that the appellants jointly committed the offence on the 21st of December 2013. The record indicates that the charges were read to the accused, and they both stated that "It is true we raped the complainant." A plea of guilty was entered as a result.

13. The record indicates that at 2.30 p.m on 27th of December 2013, the facts of the case were read to the accused, the appellants before me. Exhibits on which the state was relying were also produced. Both appellants again admitted the offence. They were given a chance to mitigate, which both did.

14. The appellants have three grounds of appeal, essentially. One relates to the time they were taken to court. I note that they were arrested on 24th of December 2013, which was Christmas Eve, and taken to Court on 27th of December 2013. The prosecution therefore complied with the requirements of Article 49(1)(f) of the Constitution, which provides that an arrested person has the right:

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twentyfour hours after being arrested; or

(ii) if the twentyfour hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

15. This ground of appeal, in my view, therefore has no merit.

16. The 1st appellant has alleged that the court used a language that he did not understand. I note that the plea was read and explained to the appellant, and that he responded, in Kiswahili. The facts of the case were read to him later in the afternoon, and he again admitted the offence. He was asked to mitigate, which he did, stating that he apologised, that his father was deceased, and he was the sole breadwinner. Nowhere in the record is it indicated that he raised the issue of language, and I am inclined to agree with the respondent that this ground of appeal is an afterthought.

17. I take a similar view of the allegation by both the appellants that they had been beaten and the trial court did not take their state of health into account. This is an issue that the appellants could have raised on the morning when they were first charged in court and entered a plea of guilty, or in the afternoon when the facts were read to them. They pleaded guilty and were sentenced after mitigation. It seems to me that this claim is also an afterthought and cannot be given any credence.

18. Finally, the 2nd appellant has alleged that he was “*not aware of the nature of the offence herein.*” The appellant did not elaborate on this ground. However, he did admit to the facts that were read to him, which disclosed the offence of gang rape under section 10 of the Sexual Offences Act. This section provides as follows:

10. 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 fifteen years but which may be enhanced to imprisonment for life.

19. The appellants were sentenced in accordance with the law as set out above. Section 348 of the Criminal Procedure Code provides that

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

20. I note that the trial court followed the procedure outlined in the case of **Adan vs Republic [1973] EA 445** with respect to a guilty plea. The appellants pleaded guilty to the charge against them, and though they had the opportunity to change their plea when the facts were read to them, they did not. Having been convicted on their own plea of guilty and been sentenced to the term permitted under the Sexual Offences Act, I am satisfied that the appellants’ appeal has no merit. The sentence imposed upon them was merited in the circumstances, and there is no basis for interfering with the decision of the trial court. I therefore order that the appellants’ appeals be and are hereby dismissed in their entirety.

Dated, Delivered and Signed at Kericho this 14th day of July 2016

MUMBI NGUGI

JUDGE