



**Getugi & another v Republic (Criminal Appeal E079 of 2024)
[2025] KEHC 15152 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E079 OF 2024
JK NG'ARNG'AR, J
OCTOBER 28, 2025**

BETWEEN

JUSTINE GETUGI 1ST APPELLANT

NICHOLUS NYAKUNDI AMWATA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellants were charged with the offence of gang rape contrary to section 10 of the *Sexual Offences Act*. The particulars of the offence were that on 16th July 2021 at 0200hours in Nyangeni village Keumbu sub-county within Kisii County, in association and with common intention, the appellants unlawfully and intentionally caused their penis to penes to penetrate the vagina of CN without her consent. The appellants also faced an alternative count of committing an indecent act with an adult contrary to section 11 (A) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the appellants touched the buttocks/breasts/vagina of CN with their penes against her will.
2. The appellants were arraigned before the trial court to answer to the charges leveled against them. They pleaded not guilty to both the main and alternative counts. After a full trial, the trial court convicted the appellants on the main charge. They were each sentenced to serve ten years imprisonment. It is those findings that have precipitated the present appeal.
3. The appellants filed their joint petition of appeal dated 2nd August 2024. They raised eleven grounds disputing the findings of the trial court. Those grounds are summarized as follows: the ingredients to the offence of gang rape were not proved to the required standard; the trial court convicted the appellants on the basis of extrinsic, contradictory, inadequate and unreliable evidence and unfavourable charges that were not tallying; the aspect of identification was left in doubt since the



offence occurred at night; and the appellants' defences were rejected yet they were unchallenged. For those reasons, the appellants prayed that their appeal be allowed, their convictions be quashed and their sentences be set aside.

4. The appeal was canvassed by way of written submissions on 10th September 2025. The appellants filed their joint written submissions through their firm of Advocates B.N. Ogari & Co. Advocates dated 20th August 2025. They submitted that the prosecution failed to discharge its burden of proof to the required standard. They contended that PW3 did not physically examine the complainant and as such, the medical evidence was cast in doubt. IN their view, PW3 could not therefore testify that PW1 suffered injuries. Furthermore, the age of injuries was not proved beyond reasonable doubt.
5. Lastly, the appellants challenged the evidence of identification of the perpetrators contending that since the offence took place at night, the victim could have mistakenly identified the appellants as the perpetrators. Secondly, voice recognition as set out by PW1 ought to have been condemned to an identification parade. They were emphatic that they were wrongly identified as the assailants. For those reasons, they prayed that their appeal be allowed.
6. The respondent opposed the appeal. Prosecution Counsel Mr. Henry Koima filed written submissions dated 9th September 2025 on behalf of the state. He submitted that all the ingredients to the offence of gang rape, namely the intentional and unlawful penetration of the genital organ of the complainant by the offenders in association with others, the lack of consent and the identity of the perpetrators were proved beyond any shadow of a doubt. he prayed that the appeal be dismissed accordingly.
7. This Court's duty as a first appellate court was enunciated by the Court of Appeal in the case of Mark Oiruri Mose v. Republic [2013] KECA 67 (KLR) in the following words:

“It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that. The well-known case of Okeno v Republic (1977) EA 32 which sets out that principle has been referred to in several decisions of this Court and of the High Court.”
8. The prosecution marshaled 3 witnesses in a bid to establish that the appellants committed the offences that they had been charged with. PW1 CN the complainant herein, testified that on 12th July 2021, she was traveling from Nakuru to Kisii. She alighted at Birongo Centre where she got accommodation. She then left her luggage at her uncle's house. Upon her return, she found that her luggage was missing. On inquiry, she was told that her cousin Nyomenda had taken them.
9. PW1 proceeded to report the matter at Birongo police post. Two days later, that is 15th July 2021, she was at Birongo Centre when she met her cousin Betty. She took her to Nyomenda's place but they did not find him. The two ladies then spent the night at Betty's house. PW1 recalled that Betty's male cousin, known by the name Junior, was also in Betty's house. She was unknown to him.
10. During the night, while PW1 was asleep in Betty's house in the living room, Junior awoke her on that night of 16th July 2021. Betty was not there. The door was open and two men, identified as the appellants, walked in. It was 2:00 a.m. PW1 switched on her phone. She was then told that people were calling her. PW1 shone the light on the two men who demanded to take her phone. The offenders grabbed her phone asking for its password and pulled her outside.



11. PW1 gave them the wrong password. This prompted the appellants to beat her up continuously until she gave the correct password. They then asked for her MPESA PIN to which she declined to give. She was then hit by the 2nd appellant. During the ordeal, PW1 heard them calling each other Obed Baba D (referring to the 2nd appellant), Jutin (referring to the 1st appellant) and Junior who was Betty's cousin. After being hit severally by the appellants, PW1 gave the correct PIN.
12. Later on, the 1st appellant pulled her to the river with the sweater she was wearing. At this point, the trial court noted that the witness broke down in tears. On reaching the river, the 1st appellant directed the 2nd appellant to cover her head with her sweater. The 2nd appellant then removed her clothes. Junior also accompanied them. The 2nd appellant then held her hands to the ground paving way for junior to sexually assault her. She was lying on her back. She was then raped by the 1st appellant and a fourth man in turns. PW1 recognized the appellants as persons she had seen before the incident at Birongo Centre. She was familiar with them. The court noted that the witness was overwhelmed with emotion.
13. Later, the 2nd appellant inserted his hand into her vagina. She screamed in pain. This caught the attention of two men who asked why they were killing her. It was here that she got the opportunity to flee the scene. In the same vein, the four perpetrators vanished. She went home at 4:00 a.m. where she found a feast. She found a good Samaritan who allowed her to sleep in her house till morning. The next morning, PW1 went to Birongo police station. She was then taken to Keumbu sub-county Hospital. She was examined and treated. She thereafter traveled back to Nakuru. She was later informed that the appellants had been arrested.
14. PW2 PC Charles Ondera, based at Birongo Police Station, recalled that he received the complaint from PW1 on 16th July 2021 at 9:30 a.m. He took the complainant's testimony and caused her to be escorted to Keumbu Hospital by a police woman. Thereafter, PW2 prepared her witness statement and issued her with a P3 form for its filing. PW2 later arrested the appellants who went under. They were arrested on 27th August 2021 and 29th April 2022. PW2 was however unable to arrest the other suspects.
15. PW3 Erick Abisi a clinical officer attached to Keumbu sub-county Hospital testified that he filled the PRC form dated 16th July 2021 in respect to the complainant. On observation, it was noted that PW1 had a swollen face with red eyes, cut wound on the upper lip, bruises on the labia, swollen clitoris, white foul-smelling discharge and her clothes were stained with mud. He formed the conclusion that PW1 was penetrated with signs of a struggle. He produced her appointment card, P3 form and PRC form all in evidence.
16. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellants. They were placed on their defence. DW1 the 2nd appellant testified that on 15th July 2021 he was at his home in Birongo herding cattle throughout the day and spent the night with his mother and sister. He therefore denied committing the offence and further denied knowing Betty. He was later arrested and escorted to Birongo Police Station. He also denied knowing his co-appellant.
17. DW2 the 1st appellant testified that on 15th July 2021 at 6:00 p.m., he was at home with his mother Grace Misiani. He denied that he committed the offence that he was charged with. He also denied that he was with the 2nd appellant or anyone mentioned by PW1 for that matter. He maintained that he had never seen the complainant before. He was later arrested and brought to court.



18. For a conviction to sustain in a charge of gang rape, the prosecution must establish the following conjunctive elements as set out in 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 the offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than 15 years but which may be enhanced to life imprisonment.”
19. Under section 3 (1) of the [Sexual Offences Act](#), a person commits the offence termed rape if he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; the other person does not consent to the penetration; or (c) the consent is obtained by force or by means of threats or intimidation of any kind.
20. The evidence that was led by the prosecution in respect to the offence was that of PW1. She recalled that on the night of 16th July 2021 at 2: 00 a.m., she was sleeping in her cousin Betty’s house, when Junior, a man unknown to her, informed her that two men were looking for her. Though it was dark, PW1 shone the torch from her phone and was able to see her would be assailants. She recognised them as persons she had seen at Birongo Centre. These were the appellants.
21. Imploring harassment and physical assault tactics, they forced her to give them her password to her mobile phone and her MPESA PIN. They were however not done with her. They later took her to a nearby river by drugging her. They then took turns raping her. PW1 was able to identify the 1st appellant as one of the people who inserted his genitals into her vagina. Junior also raped her but he was never arrested. She recalled that three of the assailants raped her while the 2nd appellant inserted his hands into her vagina causing her to feel pain.
22. During her evidence taking at trial, PW1 broke down in tears and was filled with emotion. She must have been in some serious form of trauma that has left her wounded, the physical injuries aside. Speaking of the injuries she sustained, medical evidence was led to demonstrate that on that same morning, PW1 was observed to have suffered the following injuries: swollen face with red eyes, cut wound on the upper lip, bruises on the labia and swollen clitoris. She also had a white foul-smelling discharge.
23. The above evidence can only lead to the conclusion that indeed the ingredients to the offence of gang rape had been proved beyond reasonable doubt as against the 1st appellant. The 1st appellant caused penetration by inserting his genital organ into the complainant’s genital organ. He caused this penetration without the consent. This was visible from the complainant’s injuries as captured in the medical report; evidence of force. Furthermore, the 1st appellant was in the company of Junior, a fourth man and the 2nd appellant with common intention to commit that offence. PW1 had seen the 1st appellant before at Birongo Centre and there was no case of mistaken identity. His defence did not dislodge the evidence of the prosecution. I therefore find that the conviction against the 1st appellant is safe and will certainly not disturb those findings.
24. Turning to the 2nd appellant, it is instructive to note that PW1’s evidence was absolutely believable and met the threshold standard of proof. In the case of the 2nd appellant, PW1 testified that he inserted his fingers into her vagina. Certainly, this proves that there was no penetration. However, the 2nd appellant indeed committed the offence of indecent assault against an adult contrary to section 11(A) of the [Sexual Offences Act](#). Again, the assailant was known to PW1 whom he had seen at Birongo Centre. His



defence was not cogent and consisted of mere denials. Accordingly, I find that the conviction on the alternative charge against the 2nd appellant is merited.

25. On sentence, the appellants were both sentenced to serve 10 years imprisonment. The trial court considered the sentencing report and that they were first offenders. For the offence of gang rape, a person convicted shall be liable to imprisonment for a term of not less than 15 years but which may be enhanced to life imprisonment. The 1st appellant was sentenced to 10 years. The offence carried out on the victim was heinous and egregious. The complainant was tortured before being gang raped. The sentence given by the trial court was in actual sense illegal since it fell below the legal threshold. However, since the prosecution failed to file a notice of enhancement of sentence, I have no option but to dismiss the appeal on sentence.
26. Turning to the 2nd appellant, section 11A provides that any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years. In this case however, the 2nd appellant was in the company of three other persons when committing this offence. He also participated in assisting the other offenders commit the offence of gang rape. In my view, these were aggravating factors as to cause the trial court to properly convict the 2nd appellant to 10 years imprisonment. Accordingly, his appeal on sentence similarly fails and is hereby dismissed.

It is so ordered.

JUDGEMENT DELIVERED, DATED AND SIGNED VIRTUALLY THIS 28TH DAY OF OCTOBER, 2025.

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HON JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:

Siele/Kipchirchir (Court Assistants)

Kimaiyo for the Appellant

Koime for the Respondent

