



REPUBLIC OF KENYA



KENYA LAW
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**Christopher v Republic (Criminal Appeal 9 of 2020)
[2026] KEHC 1544 (KLR) (12 February 2026) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL 9 OF 2020
WM KAGENDO., J
FEBRUARY 12, 2026**

BETWEEN

SAMWEL MWITA CHRISTOPHER APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein and his co-accused in the lower court were on 29th February 2010 charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* no. 3 of 2006.
2. The particulars were that on 23rd July 2010 at Mnazi Mmoja in Kongowea area in Mombasa District of the Coast Province in association with another not before the court intentionally and unlawfully caused their penises to penetrate the vagina of MN (Name withheld) in turns.
3. The appellant and his co-accused also faced an alternative charge of committing an indecent act with an adult contrary to Section 11 (6) of the *Sexual Offences Act*, 2006. The matter proceeded for hearing where the prosecution called 4 witnesses in support of their case. The appellant herein and his co-accused gave an unsworn testimony in support of their case. They were convicted of the main charge and sentenced to serve 24 years' imprisonment.
4. The appellant was not satisfied with the trial court's judgement and thus sought this appeal.
5. The appellants' grounds of appeal are summarized as follows;
 - a. That the learned hon magistrate erred in law and facts in convicting and sentencing me without considering that the whole trial process was not fair as required by the law hence a prejudice to me.



- b. That the learned trial magistrate erred in law and fact in basing my conviction and sentence on the evidence of identification without humbly considering that the was not free from possibilities of error hence mistaken of identity might have occurred.
 - c. That the learned trial magistrate erred in law and facts that he convicted and sentenced me while relying on the adduced medical evidence without kindly considering that the same total failed to prove this case against me beyond any reasonable doubt as required by the law.
 - d. That the learned trial hon magistrate erred in law and fact in convicting and sentencing me without humbly considering that my source of arrest has got no connection with the matters in question.
 - e. That the learned hon trial magistrate erred in law and sentence in giving me a harsh and excessive sentence, he even failed to consider the four years I had served while undergoing trial.
 - f. That it was improper for the learned trial magistrate to have failed to consider my defence evidence and the mitigation that I gave in court before the sentence.
6. The duty of this court as a first appellate court is well settled in the case of *Okeno v Republic* [1972] EA 32 at 36 where the court held that: -

“...an appellant on a first appeal is entitled to expect the Evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Rep* [1957] EA 336 and to the appellate court’s own decision on the Evidence. The first appellate must itself weigh conflicting evidence and draw its own conclusions. (*Shentilal M. Ruwala v R* [1957] E.A 570. It is not the function of the first appellate court to merely scrutinize the Evidence to see if there was Some evidence to support lower court’s findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses, See *Peters v Sunday* [1958] E.A 424.”

Prosecution’s case

7. PW1 M.N the complainant testified that she stays with her husband. That on 23/7/2010 at about 3am she was at Shauri yako area attending a relative’s funeral. When she was done she went home which is not far from where she was. On her way, she saw three people walking ahead of her. As she passed one step ahead of them one person grabbed her neck from behind and two of them came and tore her pant and one held her neck and blocked his mouth.
8. One of them raped her and another stepped on her. She did not know them. As one raped her others blocked her mouth. When he was through another one also raped her. She could not see them because it was next to the road and it was dark. The first one lowered his zip and the second one also raped her as her mouth was blocked. The third one also raped her and each of them did one round. None of them had condoms.
9. She was injured in the process and each one of them ejaculated into her. They said they should repeat, came again ad held her, she started screaming and pleaded with them not to kill her. People responded to her screams and the community police came and arrested two of them but one of them ran away.
10. They were taken to the police. She went to the hospital for treatment. She was issued with P3 and PRC form. She then identified the people who raped her as the ones in the dock.



11. On cross examination by accused 1 she states that he raped her in turns as others were blocking her mouth and holding her. She took the pant home as it was full of blood and the police could not keep it. That she saw the 1st accused clearly after arrest as she was not drunk.
12. On cross examination by accused 2nd accused she stated that she did not know him and came to know him after he raped her. She reported the matter at Nyali Police Station. She was taken to the hospital and examined.
13. When Hon Ombura took over the matter from Hon Ruguru the accused opted to have the matter started de novo. On 26/2/2013 the matter was re-allocated to Hon Kimanga. On 26/3/2013 Section 200 was complied with and the accused persons opted to have the matter to start afresh. On 24/5/2013 the accused persons agreed to have the matter proceed with the evidence record as PW1 could not travel to Mombasa because of her health conditions.
14. PW2 Dr L. Ngone stated that he has the p3 formr Mercy Nelima history of gang rape on 2/7/2010 seen on the same day. On examination she had tender neck bruises on her legs/lower limbs. Genitals were hymen not intact and had bruises/laceration on her vaginal organs. She was HIV positive. He produced the p3, prc form as exhibit 2 and 3 respectively.
15. On cross examination by the 1st accused he stated that he has documentary evidence upon examination. The cause of the injury was blunt object. On cross examination by the 2nd accused person he stated that he did not examine him and he doesn't know them.
16. PW3 Ramadhan Mamba from Kongowea Community policing stated that he remembers the material day it was about 2am when he heard cry form a woman saying "nitombeni tu lakini msiniue". He found his neighbor already out, they found the accused and a 3rd person.
17. The 1st accused held the woman by her shoulders and the 2nd held her legs. They were carrying the woman towards a water hole. They arrested the 1st accused while on their way to the police station they met the 2nd accused person. they stopped him and found him wearing his t-shirt inside out and the same had blood stains. They took them both to the police station.
18. On cross examination he stated that he saw the 1st accused person carrying the victim towards the water hole. He stated that they were taking the 1st accused to the station and met the 2nd accused on the way. His t-shirt had blood stains and his trouser had mud o the knees. He failed to explain where he was going. He stated that he did not see the 2nd accused committing the offence. But he ran away and they chased him. That he was also carrying the victim to the water hole.
19. PW4 Cpl. Maurice Wafula stated that on 23/7/2010 he was in Nyali Police station at about 6.40am he found the complaianat lying on thebench at the police station. She told him she had been raped that night. She interrogated her, booked her and took her to Coast Genral Hospital. Witnesses recorded statemnts and he charge the two I the dock.
20. On cross examination by the 1st accused person he stated that he had been arrested by the public. He ws told by witnesses that the public arrested him. He did not vst the scene. On cross examination by the 2nd accused he state that he found him in the cells.

Defence case

21. 1st accused Samwel Mwita Christopher gave an unsworn testimony that on 23/7/2010 at Maweni he was going to work at 5 am when he met village elders and many people who stopped him and interrogated him and asked him for money. He did not have any. They took him to Nyali Police and charged him.



22. 2nd accused Lewis Mugendi Muguna gave an unsworn testimony that on 23rd July 2010 at 4am he was on his way to his business place. He met people talking and they were women and when he reached where they were, he was taken to Nyali Police Station and charged of this offence.

Analysis and Determination

23. The offence of gang rape is provided for under Section 10 of the *Sexual Offences Act* (hereinafter referred to as 'the Act'). The said section states 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.
24. Under Section 10 of the Act, the key ingredients of the offence of Gang Rape include:
- a. Proof of rape or defilement;
 - b. Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

Was the offence of rape committed?

25. Section 3 of the Act defines 'rape' as follows:
1. A person commits the offence termed rape if –
 - a. he or she intentionally and unlawfully commits an act which cause penetration with his or her genital organs;
 - b. 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.
 - (2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act."
26. Section 2 of the Act defines 'penetration' as:
- "the partial or complete insertion of the genital organs of a person into the genital organ of another person."
27. This position was fortified in the case of *Mark Oiruri Mose vs R (2013)eKLR* when the Court of Appeal stated thus:
- "...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...." (emphasis mine).



28. In light of the above, it is clear that as long as there is evidence that there was even a partial penetration, only on the surface, the ingredient of the offence is demonstrated.
29. In the instant matter, the complainant stated that she was gang raped by three men. The incident happened at around 3am. They had no condom and all ejaculated in her. After the first round they wanted to do it again but she screamed and PW3 came to rescue together with other vigilantes.
30. PW3 stated in his evidence that he saw the appellant and his co-accused. They ran but the appellant was arrested. While taking the appellant to the station they met his co-accused on the way and they took them both to the station and they supported the victim to the station as she was bleeding.
31. The Dr produced the P3 and PRC form and stated that the victim had tender neck, bruises on her legs/lower limbs and she had a laceration on her vaginal organs. This evidence corroborates the victims story. I am persuaded that penetration has been proved beyond reasonable doubt.
32. On whether there was consent, from the above narration inference can be made that the penetration was not consensual. If at all the consent had been obtained voluntarily the victim would not scream for help. I therefore find that that no consent had been obtained hence the prosecution proved that the victim was raped.
33. Since the appellant is facing the offence of gang rape, I will now consider the other limb as to whether there were joint assailants and if so if they had common intention in the commission of the offence. The victim testified that she was gang raped by three men. She narrated that after the first round they left her for a short while and then they said they should rape her once again. They got hold of her but she screamed for help.
34. This was corroborated by the testimony of PW3 that he saw three men at the crime scene. I therefore find that the circumstances of the instant case indicate that the perpetrators had a common intention in the commission of the offence.
35. On identification I find that there is more than sufficient circumstantial evidence to connect the appellant to the commission of the offence he was charged with. The incident occurred at wee hours of the night. PW3 arrested the appellant after the victim had screamed for help, and when the vigilantes came they saw the appellant who tried to run but was arrested and taken to police station. For this I am convinced that the prosecution proved beyond reasonable doubt that the appellant was one of the 3 men who gang raped the victim.
36. On whether the sentence meted out against the appellant was harsh or excessive. The appellant was sentenced to 24 years' imprisonment. The minimum sentence for gang rape is 15 years which can be enhanced to life imprisonment. I find no reason to interfere with the sentence of the trial court as the same was issued judiciously.
37. In line with Section 332 (2) the sentence of the CPC, the appellants sentence shall be effective from 29th July 2010 when he was first arraigned in court.
38. The appeal succeeds only to the said extent.
39. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF FEBRUARY 2026.

WENDY KAGENDO JUDGE

IN THE PRESENCE



The Appellant In Person

Mr Ngiri For The State

Bebora Court Assistant

Signed By/for:

HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.

