



**Kibet v Republic (Criminal Appeal E018 of 2024)  
[2025] KEHC 5274 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5274 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CRIMINAL APPEAL E018 OF 2024  
RPV WENDOH, J  
APRIL 30, 2025**

**BETWEEN**

**KELVIN KIBET ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Kelvin Kibet, the appellant herein, was convicted by SRM Kapenguria for the offence of Gang Rape Contrary to Section 7 of the Sexual Offences Act.
2. The particulars of the charge are that on 30/4/2024, at xxxxx Location in West Pokot County, with another not before the court, willfully and unlawfully caused his penis to penetrate the vagina of MC without her consent.
3. The case proceeded to full trial with the prosecution calling a total of six witnesses. The appellant was placed on his defence and gave unsworn evidence. He did not call any other witness. He was convicted and sentenced to fifteen (15) years imprisonment.
4. The appellant is dissatisfied with the said conviction and sentence and preferred this appeal. The grounds of appeal are as follows;
  1. That the trial court erred by relying on evidence of a single witness without warning itself of the dangers of relying on such evidence;
  2. That the trial violated Articles 27,28,47,49 and 50 of the Constitution;
  3. That the evidence was full of contradictions;
  4. That the offence of gang rape was not proved to the required standard;
  5. That the trial court failed to consider the appellant's defence.



5. The appellant therefore prays that the appeal be allowed, conviction be quashed and sentence set aside and the appellant be set at liberty forthwith.
6. The court directed that the appeal be canvassed by way of written submissions. Both the appellant and the respondent complied.
7. This is a first appeal and it is required of this court to exhaustively examine the evidence tendered before the trial court, analyse it and arrive at its own findings and conclusions. This court has to
8. however, bear in mind that it neither heard nor saw the witnesses testify. This court is guided by the decision of *Okeno -V- Rep.* (1972) EA 32.

### **The Prosecution Case;**

9. PW1 introduced herself as Mama MC and her name is TLA . She recalled that she was drinking alcohol with accused whom she knew as a resident of her village; that the appellant wore a condom and raped her in the presence of his father who told him to wear a condom. She recalled seeing the appellant being beaten by members of public. In cross examination, she said that accused also gave the father a condom to rape her and they were found and he was beaten by members of the public.
10. PW2 MP recalled the 30/4/2024, he was at home and PW1, his mother, left in the morning. By 9.00p.m. she had not returned and he went with his brother, JS (PW3) to look for her at xxxxxxx centre. They got information that she was on another street and they split in different directions to look for her. He went towards the side with a field where he found the appellant and Kanyari who escaped; that he saw the appellant on top of PW1; that appellant was caught and beaten by members of public.
11. PW3 JS recalled the 30/4/2024, he came home and found his brother PW2 looking for their mother, PW1. They went to xxxxxxx Centre, went different directions and where he went there is a field. He found the appellant on top of PW1 and one person ran off. That the appellant stood up but was still wearing the condom. They took the appellant and PW1 to the Police Station. PW3 said that PW1 has had a mental issue since 2010.
12. PW4 IB recalled 30/4/2024 at night. He reached home and found PW2 and 3 looking for their mother at the xxxxxxx Centre. He joined them and when they reached a field, he saw PW1 on the ground the appellant was on top of PW1; that when the appellant stood up, they arrested him while another person ran off. PW4 said that the appellant was wearing a condom then.
13. PW 5 Sylvester Kimaiyo a Clinical Officer at Kapenguria County Referral Hospital produced a P3 form on behalf of one Jackson Kisang who examined the complainant. He treated the complainant on 1/5/2024 and found that the complainant was fifty-nine (59) years old and mentally challenged. He found that the complainant's vagina had a whitish discharge with bruises, showing force was used; that the outer vagina had a shiny like ointment which was applied and he suspected a condom was used; the pant was missing and the clothing on the backside was dusty. Those with her came with used condoms. PW1 was found to have an infection. He put her on treatment. He filled and dated the PRC forms; that on the same date, the perpetrator was taken to the Hospital while still wearing a condom; it was removed and handed over to the police.
14. PW6 Cpl. Monica Chelimo of Kapenguria police station recalled the 1/5/2024 when she was at the Police Station when the complainant was taken there with a complaint of rape. PW6 was given three (3) sachets of condoms and one used one; That the appellant was still wearing one, and that the police removed the condom from the appellant which was kept as an exhibit which he produced as P.Exh.4(a) used condom and (b)-(d) unused condoms



15. In his unsworn defence, the appellant denied raping the complainant; that on 1/5/2024, the people found him at the farm and asked him to go to xxxxxxx Centre where something had happened. He denied having been at xxxxxxx that day.
16. The charge indicates that the appellant was charged with offence gang rape contrary to section 7 of the Sexual Offences Act. The trial court in its judgment observed that the appellant was charged under the wrong section and that he should have been charged under 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 fifteen years but which may be enhanced to imprisonment for life.
17. On the other hand Section 7 of the Sexual Offences Act provides as follows;- A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.
18. The trial court went on to find as follows at paragraph 18

“The wrong section was used, the proper section ought to have been section 10. The offence was framed as gang rape yet the wrong section was used. Section 7 used is where acts of penetration or indecent acts are done within the view of a mentally challenged person. This is not detrimental to the Accused as the particulars of the offence outline the offence of gang rape.”
19. The court went ahead and convicted the appellant of gang rape. The section was not cited.
20. However, in the trial court’s ruling on sentence, at paragraph 1 the court said

“The accused herein is charged and has been convicted with one count of gang rape contrary to section 7 of the Sexual Offences Act”.
21. As had been properly observed by the court in its judgment, the offence of gang rape is provided for under section 10 of the Sexual Offences Act not section 7. Under Section 7, it is an act of rape or defilement committed within the view of a family member, child or person with disabilities. It therefore means that the appellant was charged under Section 7 of the Sexual Offence Act but convicted under Section 10 of the Sexual Offence Act. Later, he was sentenced pursuant to Section 7 of the Sexual Offences Act. The question is what offence was the appellant charged with and which one was he convicted for. This is a serious error on the part of the court and in my view, it has prejudiced to the appellant.
22. Although neither the state nor the appellant noticed the error, this court has and I find that the error renders the trial defective and a nullity.



### **Should the court consider a retrial?**

23. Generally, the court will order a retrial where the interests of justice require it and where no prejudice will be occasioned to the accused. In the case of *Fatehali Manji -V- Republic (1966) EA 343*, the Court of Appeal gave the following guidelines in ordering a retrial;

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up the gaps in the evidence at the first trial; even where a conviction a conviction is initiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests if first require it.”

24. In *Mwangi -V- Republic (1983) eKLR 522* the court said

“we are aware that a retrial should not be ordered unless the appellate court is of the opinion that, on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.”

See CRA. C 020/2023 Paragraph 40. *Mohammed Osman Haji -V- Republic*.

See also *Ahmed Sumar -V- Republic (1964) EA 481*.

25. In this case, the trial was defective. However, the trial involves a very serious offence of gang rape. The potentially admissible evidence on record is likely to result in a conviction.
26. Accused was sentenced to fifteen (15) years imprisonment on 24/12/2024. He has only served four months of the jail term which is not a substantial part of the sentence and hence will not suffer any prejudice if a retrial is ordered. The Court hereby orders a retrial.
27. Consequently, the conviction and sentence are hereby set aside. The Appellant is released to Kapenguria Police Station to be produced before the SPM Kapenguria on 5.5.2025 for plea and fresh trial. Being a retrial, the case should be expedited. The case be tried by any other Magistrate other than Hon. Kenei who had Conducted the earlier trial. It is so ordered.

**DATED, SIGNED AND DELIVERED ON THIS 30TH DAY OF APRIL, 2025.**

**HON. R. WENDOH**

**JUDGE.**

Judgement read in open court in the presence of

Mr. Majale for State /Prosecution Counsel

Appellant- present

Juma/Regina-Court Assistants

