



**Manyur & another v Republic (Criminal Appeal E027 of 2023)
[2024] KEHC 4872 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4872 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E027 OF 2023**

JR KARANJA, J

APRIL 26, 2024

BETWEEN

JOSEPH KIBET MANYUR 1ST APPELLANT

NELSON KIPSANG TOO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from conviction and sentence of Hon. J. Orwa, Principal magistrate
in Kapsabet Sexual Offence Case No. 55 of 2020 delivered on 30th May 2023)*

JUDGMENT

1. The Appellants, Joseph Kibet Manyur and Nelson Kipsang Too, appeared before the Chief Magistrate at Kapsabet charged with separate acts of gang rape, contrary to Section 10 of the [Sexual Offences Act](#). They also faced separate counts in the alternative, Contrary to Section 11(1) of the [Sexual Offences Act](#).
It was alleged that on the 13th March 202 at Underit Village Kapsirant Nandi County, the Appellants committed an act causing penetration against a girl described as S.J, aged fourteen (14) years or in the alternative, they committed an indecent act against the same girl.
2. Upon their respective plea of not guilty, the Appellants were tried, convicted and sentenced to a term of fifteen (15) years imprisonment each.
Being dissatisfied with the conviction and the sentence the Appellant preferred this joint appeal on grounds set out in their petition of appeal dated and filed on 30th June 2023.
3. They both complain that they were convicted on the basis of the prosecution evidence which was insufficient and uncorroborated, hence incapable of establishing the material ingredients of the charge against them.



The Appellants also complain that the burden of proof was shifted to them and that the sentence imposed upon them was excessive.

The Appellants urged this court to allow the appeal quash the conviction and set aside the sentence.

4. The hearing of the appeal was by written submissions. Both sides filed their respective submissions.
Both Appellants appeared in person and relied on their submissions. The Learned Prosecution Counsel, M/s. Oduor, appeared for the State/ Respondent which opposed the appeal.
The appeal, the supporting grounds and the rival submissions were duly considered by this court whose duty was to reconsider the evidence and draw its own conclusions having in mind that the trial court had the benefit of seeing and hearing the witnesses (See, *Okeno v. Republic* (1972) EA 32).
5. In that regard, the prosecution case was that on the material date at about 11:00am the Complainant SJ (PW1) was in school when they proceeded to another school for games. They finished at about 3:00pm after which she decided to walk to her home. Along the road, she met the first Accused (Appellant). He greeted her and continued walking. He followed her upto a nearby shop where he invited her to his home. She declined but he held her hand and took her to his home.
6. At the house, the First Appellant and the Complainant found nobody. The house was locked. They returned to the shop where the First Appellant pushed the Complainant into one of the rooms in the shop. There was a bed in the room which she sat on. Thereafter, the shopkeeper entered the room. He was the Second Appellant. He removed her inner wear and proceeded to have sex with her before he returned to the shop. Thereafter, Appellant one returned to the room and also had sex with her and left.'
7. At 9:00pm, the Second Appellant closed his shop. He bought Kale (*Sukuma*), maize flour and eggs and then went to bed with the Complainant. They again engaged in sex. In the morning at about 6:00am, the Second Appellant handed the Complainant a sum of Kshs. 100/- and told her to leave. She left and proceeded to the nearby centre where she found a person to whom she explained her ordeal. The person reported the matter to the Area Chief even after taking her to a certain lady.
8. The Chief, Benjamin Koech (PW5), arrived at the scene and took the Complainant to the hospital from where he called her parents and notified the police. He later apprehended the two Appellants when they were brought to his office.
The Complainant's teacher, JS (PW2), confirmed that his school proceeded to another school for games. Thereafter, the students were released to go home, but he later received a call from the Complainant's parents and was informed that the Complainant had not arrived home.
9. The teacher was on the following day called and informed that the Complainant had been traced and found. He proceeded to the hospital where he found the Complainant in the company of the chief and her parent. The matter was reported to the police and he (PW2) recorded a statement.
The Complainant's Aunt, SC (PW3), learnt of what befell the Complainant and went to the hospital where she found her before they all proceeded to the police.
10. On 16th March 2020, the Complainant was examined by a Clinical Officer at Kapsabet, Patrick Kenei (PW4) who thereafter compiled and signed the necessary medical report P3 form (P. Exhibit 1(c)). He also assessed the Complainant's age and placed it at between 13 and 14 years. Corporal Tecla Tuwei (PW6), investigated the matter after it was reported to the police and later preferred the present charges against the Appellants.



11. The defence case was generally a denial by each of the Appellants with the First Appellant (Joseph) contending that he was never found with the Complainant at the shopping centre where she had been found after disappearing.

The Second Appellant (Nelson) indicated that he met the Assistant Chief who took him to his office where the First Appellant was availed. The two were then led to a police station where they found the Complainant recording a statement. He was later taken to court.

12. Basically, from all the foregoing evidence it was clear that the fact that the Complainant (PW1) was defiled or raped in turn by at least two men on the material date was not disputed by the defence. The only disputes was centered on the identity of the offenders who appeared to have taken advantage of the Complainant's vulnerability, and unfamiliarity with the area where the offence occurred.
13. The Complainant's age as at the material time was placed at between 13 to 14 years meaning that she was a minor at the material time of the sexual assault against her. It was established through her teacher (PW2) and herself that she was actually a school going pupil at the material time. Her evidence indicated that the offence occurred during the daytime and continued during the night time and that she had adequate opportunity to see and identify the offenders who according to her seemed not to be in a hurry and in particular the shopkeeper of the shop where it all happened.
14. The offence of gang rape is reflected in Section 10 of the *Sexual Offences Act*, 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 than fifteen years but which may be enhanced to imprisonment for life.”

15. The aforementioned elements of the offence were sufficiently established through the Complainant's evidence and that of the medical officer (PW4) without any dispute from the Appellants.

As to the identification of the offenders, the Complainant implicated the two Appellants and indicated that they acted in concert to lure or force her into the shop which belonged to the Second Accused and contained a room in which there was the bed which facilitated the entire criminal episode.

16. The Complainant indicated that it was the first Appellant who ignited the whole episode when he approached and took her to his home which they found locked and then took her or “delivered” her to the Second Appellant in his shop. That, the Second Appellant was the first to offend her before he returned into the shop to continue with his business. Shortly thereafter, the First Appellant also re-entered the room and also offended her before going away.
17. The Complainant remained in the room after being defiled by both Appellants. She indicated that the Second Appellant (shop Keeper) after closing his shop at 9:00pm returned to the room with a meal of kale vegetable (*Sukumua*), posho meal (*ugali*) and eggs. Thereafter, they proceeded to spend the night in that room with the Second Appellant continuing to defile her. He dismissed her on the following morning with Kshs. 100/- to take her home.
18. Although both Appellants denied having been involved in the offence they were both clearly seen and identified by the Complainant. There was adequate opportunity and favourable conditions for their identification by the Complainant. She placed them at the scene on the material date and time thereby disproving their defence which indicated that they did not commit the offence and were not at any time



with the Complainant on the material date. It is this courts finding that they were positively identified by the Complainant.

19. Having believed the Complainant and found that the prosecution evidence against the Appellants was generally credible, the trial court convicted both the Appellant for the offence. This conviction was lawful, safe and sound. It is hereby affirmed and upheld.

On the sentence of fifteen (15) years imprisonment, it was lawful. The trial court did not have the option or discretion to impose any other sentence as Section 10 of the [Sexual Offences Act](#) provides for a mandatory minimum sentence of fifteen (15) years imprisonment.

20. However, in recent times most superior courts have frowned upon mandatory minimum sentences and considered them to be unconstitutional and contrary to good sentencing policies.

Our own sentencing policy appreciate that such mandatory minimum sentences fetter the courts discretion, at times resulting in grave injustice even though they serve to reduce sentencing disparities. (See, [Kenya Judiciary Sentencing Policy Guidelines](#))

21. In [Christopher Ochieng v. Republic](#) (2018) eKLR, the Court of Appeal stated as follows: -

“Arising from the decision in *Francis Karioko Muruatetu and Another v. Republic* SC Petition No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed on the offence of murder by Section 204 of the [Penal Code](#) was unconstitutional.....

In this case the Appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the [Sexual Offences Act](#) and if the reasoning in the Supreme Court was applied to this provision, it too should be considered unconstitutional on the same basis.”

22. In this case, it was evident that the Appellants were first offenders. In his mitigation, the First Appellant (Joseph) stated that he was a student at Eldoret National Polytechnic undertaking a training in survey and that he had a sick mother. The Second Appellant (Nelson) stated that he was married with a young family which depended on him.

A pre-sentence probation report was requested by the trial court prior to sentencing and such was availed to the court for each of the Appellants after the necessary social inquiry which indicated that the Appellants had since made peace with their own families, the family of the victim and their community.

23. All the families and the community extended their forgiveness to both Appellants and were ready and willing to accept them back into their fold.

Considering all the foregoing factors and guided by the reasoning in the aforementioned case of [Christopher Ochieng](#) (*supra*), this court deems it fair and just to set aside and hereby sets aside the sentence of fifteen (15) years imprisonment imposed upon the two Appellants by the trial court and substitutes it for a three (3) year non-custodial sentence on probation under the supervision of the Nandi County Probation Officer with effect from this 26th day of April 2024.

24. In sum, the appeal is disallowed on conviction but allowed on sentence.

Ordered accordingly.

DATED AND DELIVERED THIS 26TH DAY OF APRIL 2024

HON. J. R. KARANJAH,



JUDGE

