



Case Number:	Criminal Appeal 35 of 2019
Date Delivered:	18 Mar 2022
Case Class:	Criminal
Court:	High Court at Kericho
Case Action:	Judgment
Judge:	Asenath Nyaboke Onger
Citation:	Benard Kibet Yegon & another v Republic [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	E.W. Karani - RM
County:	Kericho
Docket Number:	-
History Docket Number:	Cr. Case No. S.O. 44 of 2019
Case Outcome:	-
History County:	Kericho
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 35 OF 2019

BENARD KIBET YEGON.....1ST APPELLANT

DENNIS KEMBOI MOSESEY.....2ND APPELLANT

- V E R S U S -

REPUBLIC.....ACCUSED PERSON

(Being an Appeal from the conviction and sentence by Hon. E.W. KARANI (RM))

in Kericho Cr. Case No. S.O. No.44 of 2019 delivered on 15/12/2019).

J U D G M E N T

1. Benard Kibet Yegon and Dennis Kemboi Mosesey (hereafter referred to as the 1st and 2nd Appellants respectively) were charged in the lower court with the offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006. The particulars being that on 19/6/2018 at Kisumu Road in Kericho Sub-County within Kericho County, the two Appellants with another not before Court intentionally and unlawfully caused their penis to penetrate the vagina of EWM without her consent.

2. The 1st and the 2nd Appellants were also charged with an alternative count of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act No. 3 of 2006. The particulars being that on 19/6/2018 at Kisumu Road in Kericho Sub-County within Kericho County, the two Appellants with another not before Court intentionally touched the vagina of EWM with their penis against her will.

3. The 1st and 2nd Appellants were subsequently convicted and sentenced to 10 years imprisonment each for the offence of gang rape Contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.

4. A summary of the prosecution case was that on 19/6/2018 at around 7:30 pm the appellants abducted the complainant whilst she was in the company of her friends and proceeded to rape the complainant in turns after which they dropped her in a dark place on the way to Kericho town. The complainant lost her phone in the ordeal.

5. The complainant clearly saw the men who raped her and as such could positively identify them in court.

6. The complainant took down the details of the motor vehicle which was used in the incident, a white Toyota Probox registration number number KBZ 478T, the police used the information to track the car, the appellants were subsequently arrested while travelling to Kericho in motor vehicle registration number KBZ 478T, a white Toyota Probox. The same vehicle that was used by the appellants to abduct and rape the complainant. The appellants were arrested while in possession of the complainant's phone serial number 355522082609069.

7. The Appellants in their statements of defence said as follows: -The 1st Appellant Benard Kibet Yegon told the trial court that on 28/6/2018 he was in Eldoret carrying on with taxi business when received a call from PW5 investigation officer who asked him to come to Kericho. Whilst travelling to Kericho, on 29/6/2018 the following day he met the 2nd appellant at a place called Awasi and offered him a lift. They were arrested at Kipsitet road block.

8. The 2nd Appellant Dennis Kemboi Mosesey told the trial court that on 29/6/2018 he was at Awasi on his way to Kericho when he was offered a lift by the 1st Appellant. At Kipsitet, the vehicle was stopped by the police, they were arrested, after trial he learnt that he had been convicted and sentenced to ten years imprisonment.

9. The Appellants were sentenced to 10 years imprisonment and they have now appealed to this Court on the following grounds: -

(i) THAT the learned trial magistrate erred in law and fact in convicting and sentencing the 1st and 2nd appellants without taking note of the fact that article 49 1 (f) (i) (ii) of the Constitution of Kenya 2010 had been violated and/or infringed by the Respondents. The 1st and 2nd appellants were arrested on 20/6/2018 and arraigned in court on 17/7/2018.

(ii) THAT the learned trial magistrate erred in law and fact in convicting and sentencing the 1st and 2nd appellants without taking note of the fact that article 50 of the Constitution of Kenya 2010 had been violated and/or infringed by the Respondents. The 1st and 2nd appellants were not informed of the charges and the nature of the offence.

(iii) THAT the learned trial magistrate erred in law and fact in convicting and sentencing the 1st and 2nd appellants without ordering for an identification parade, the court merely relied on dock identification.

(iv) THAT the learned trial magistrate erred in law and fact in convicting and sentencing the 1st and 2nd appellants in contravention of section 169 (1) of the Criminal Procedure Code CAP 75 Laws of Kenya, the trial court did not furnish points for determination and reason for the decision.

10. The Appellants and the Respondent filed written submissions which are as follows: - The Appellants submitted that they were not arraigned in court within 24 hours rather that they were arrested on 29/6/2018 and arraigned in court on 17/7/2018.

11. The Appellants submitted that their right to fair trial was violated as they were not informed of the charges and the nature of the offence.

12. The Appellants submitted that the trial court did not order for an identification parade and merely relied on dock identification.

13. The Appellants submitted that the trial court did not furnish points for determination and reasons for the decision when rendering its decision.

14. The Respondent submitted that article 49 1 (f) (i) (ii) was not violated, the appellants were arrested on 29/6/2018 and brought to court on 17/7/2018, the delay in arraigning the accused within 24 hours was sufficiently explained by the investigating officer, the prosecution informed the trial court that the appellants were charged with another offence in Bomet Law Courts, namely obtaining money by false pretence vide CR. Case No. 1093/2018, they were charged and remanded in custody.

15. The Respondent submitted that the appellants were afforded a fair trial before the lower court as espoused in article 50 of the Constitution of Kenya, 2010, the charges were read out in a language they understood, namely Kipsigis and that they responded by pleading not guilty in Kipsigis language. The appellants were granted a bond of Kshs. 200,000 with one surety of similar amount each.

16. The Respondent submitted that an identification parade was not necessary in light of additional evidence that connected the appellants with the offence charged.

17. Firstly, the complainant gave the police a description of her assailants.

18. Secondly, the complaint gave the police the motor vehicle registration number which was used in the incident, the police used the information to track the appellants who were arrested while travelling to Kericho in motor vehicle registration number KBZ 478T, a Toyota Probox. This is the same vehicle that was used by the appellants to abduct and rape the complainant.

19. Thirdly, the appellants were arrested while in possession of the complainant's phone serial number 355522082609069. The Respondent submitted the fact that the appellants were found to be in possession of the complainant's phone this essentially connected

them to the offence they were being charged with, namely gang rape. The Respondent whilst relying on the doctrine of recent possession to support its case cited the case of *David Mugo Kimunge vs. Republic (2015) eKLR*

20. The Respondent submitted that section 169 (1) of the CPC on contents of a judgment was not violated, the trial magistrate formulated the issues for determination, analyzed and evaluated the evidence, gave reasons why she dismissed the defence case and proceeded to convict the appellants. The judgment was delivered and dated in open court.

21. The Respondent submitted that in the proceedings before the trial court the prosecution had proven its case beyond reasonable doubt, the conviction was safe and the appellants' appeal ought to be dismissed.

22. This being a first appeal, the duty of the first Appellate Court is to re-evaluate the evidence adduced before the Trial Court and to arrive at its own conclusion where or not to support the findings of the Trial Court while bearing in mind that the said Court had the advantage of seeing the witnesses.

23. The role of the appellate court at first instance is well settled it was held in the case of *Okeno vs. Republic (1977) EALR 32* and the Court of Appeal case of *Mark Oiruri Mose vs. R (2013) eKLR* a court of appeal at first instance is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion of the matter bearing in mind that the trial court had the advantage of observing the demeanor of witnesses.

24. The issues for determination in this appeal are as follows:-

(i) *Whether the Appellants were properly identified.*

(ii) *Whether the prosecution proved the charge of gang rape.*

(iii) *Whether the sentence of 10 years was excessive.*

25. On the issue of to whether the Appellants were properly identified, I find that there is sufficient independent evidence linking the appellants to the offence, furthermore, PW 1, the complainant engaged with the appellants from 7:30 pm to midnight, she spent more than 6 hours with the appellants and she was able to identify them at the police station and in court during the hearing.

26. On the issue as to whether the prosecution proved its case to the required standard, I find that the elements of gang rape were proved.

27. The court in the case of *Dominic Ochieng Odoyo & Anor vs. Republic (2015) Eklr* outlined the elements of gang rape as follows;

“This court will first deal with the ingredients of the offence of gang rape... The key ingredients of the offence of gang rape include the following: (a) Proof of rape or defilement; and (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.”

28. Similarly, in the High Court case of *Daniel Kaberu v Republic [2021] eLKR* Gikonyo J. stated as follows; *“Under Section 10 of the Sexual Offences Act, for the Prosecution to obtain a guilty verdict in the offence of gang rape, it needs to prove the following four elements: (a) Commission of rape; penetration as defined by section 2 of the Sexual Offences Act without consent thereof; (b) In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape (c) Positive identification of the perpetrator.”*

29. From the foregoing penetration is a key element in proving that there was rape, penetration has been defined as follows in section 2 of the Sexual Offences Act;

“...the partial or complete insertion of the genital organs of a person into the genital organ of another person.”

30. Case law has explained penetration sufficiently, the Court of Appeal case of *Mark Oiruri Mose vs R (2013)eKLR* stated the following; “... *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...*”

31. In the instant case the treatment notes produced by the prosecution witnesses in court indicate that there was penetration.

32. Following the chronology of events on 19/6/2018 it is clear that the Appellants had a common intention and indeed went ahead and jointly raped the complainant.

33. On the issue as to whether the sentence was excessive, I find that the sentence is not excessive, the penalty for gang rape is prescribed in section 10 of the Sexual Offences Act which provides for imprisonment a minimum of fifteen years which can be enhanced to life imprisonment.

34. The sentence meted was illegal since the law provides for a term of not less than fifteen years imprisonment which can be enhanced to life imprisonment.

35. I find that the Appeal lacks in merit and I accordingly dismiss it.

36. I uphold the conviction and enhance the sentence to fifteen (15) years imprisonment each. The Appellants need not be served with the notice to enhance sentence since the sentence meted was illegal.

37. The period the Appellants have been in custody to be taken into account in the computation of the 15 years.

Delivered, dated and signed at Kericho this 18th day of March, 2022.

A. N. ONGERI

JUDGE



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)