REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 46 OF 2018

Consolidated with

CRIMINAL APPEAL NOS. 45 & 47 OF 2018

(Being an Appeal against conviction and sentence of the Senior Principal Magistrate Hon. B.M. Kimemia in Runyenjes SPM Court's Criminal Case No. 9 of 2016)

ELIAS NJIRU NYAGA.....1ST APPELLANT

EMMANUEL WAWERU NYAGA.....2ND APPELLANT

ERICK MUGAMBI MURIITHI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. The appellants were jointly convicted in count I with the offence of gang rape contrary to Section 10 of the Sexual Offences Act and each sentenced to life imprisonment. In count II, the appellants were convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code and sentenced to suffer death as by law established.

2. The said convictions and sentences gave rise to this appeal instituted vide separate petitions of appeal being **Criminal Appeal No. 45 of 2018- Elias Njiru Nyaga -vs- Republic**; **Criminal Appeal No. 46 of 2018- Erick Mugambi Muriithi -vs- Republic** and **Criminal Appeal No. 47 of 2018- Emmanuel Waweru Nyaga -vs- Republic.** The three appeals were subsequently consolidated vide the orders made on 2/09/2020 with No. 46 of 2018 being the lead file.

3. The petitions of appeal in the three appeals were later amended by filing amended grounds filed contemporaneous with the submissions of each of the appellants. A careful perusal of the amended petitions of appeal reveal one main ground that the prosecution failed to discharge the burden of proof and that the convictions were unsafe.

B. Submission by the Appellants

4. The 1st appellant in support of his five (5) amended grounds of appeal submitted that the evidence by the prosecution did not prove the case against him for the trial court relied on evidence of a single witness which required to be treated with caution. It was further submitted that the complainant was drunk at the time of the offence and thus the identification of the appellants was difficult in the circumstances in that her drunken state made it hard for her to know what was done to her.

5. Further that crucial witnesses mainly the customers or waiters in the bar alleged to have been taking beer were never called to testify. Further that there was no inventory made in regard to the phone allegedly stolen and as such there was no evidence to the effect that PW4 recovered the phone from the 1st appellant. Lastly that the trial court failed to acknowledge that there existed a grudge between the appellant and PW4 the investigating officer over PW1 who was the 1st appellant's girlfriend and former lover of PW4.

6. The 2nd appellant submitted that PW1 never mentioned the 2nd appellant's name when making the report at the police station but only at the dock a fact that watered down the evidence of recognition and that the dock a fact identification was an afterthought. The exhibits recovered at the scene were never linked to the 2nd appellant and further that crucial witnesses were never summoned to testify in court and

which failure was fatal to the prosecution's case. Reliance was made on **Bukenya –vs- Republic EACA (1972), Peter Mutiria Mitambo – vs- Republic (Criminal Appeal No. 28 of 2018)** and **JMN –vs- Republic (Criminal Appeal No. 39, 140 and 141 of 2012**) to the effect that prosecution must call crucial witnesses even if their evidences is not fatal to the prosecution's case. It was further argued that his alibi defense was never considered and that PW1's evidence, being that of a single witness who was drunk ought to be disregarded.

7. The 3rd appellant submitted that the complainant was drunk at the time of the offence and thus it was difficult for her to make positive identification of the appellant. Further that as it was dark, the circumstances were not conducive to positive identification. He reiterated that 1st appellant's position to the effect that crucial witnesses were never summoned and that was fatal to the prosecution's case. Further that there was no identification parade conducted after the arrest but the identification by the complainant was only at the dock and finally that his defense was never considered.

C. Submission by the Respondent

8. The respondent in opposing the appeal submitted that the evidence on record was sufficient to prove the ingredients of the offences in the two counts beyond any reasonable doubts. Reliance was made on the case of **Johana Ndungu –vs- Republic (CRA 116/1995)** and **Dima Denge Dima –vs- Republic Criminal Appeal No. 300 of 2007.** It was further submitted that the prosecution evidence was corroborative and the witnesses consistent and non-contradictory. that that the trial court duly complied with Section 169(1) of the Criminal Procedure Code and further the court duly considered the appellants' defences of alibi before rejecting them. The respondent concluded that the appeals were unmerited in so far as they were against the conviction.

9. The Respondent however conceded to the appeal on sentence in reliance to the petition of **Francis Muruatetu Supreme Court Case No. …**to the effect that the mandatory nature of death sentence was unconstitutional.

D. Issues for determination

10. This being the Appellants' first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze 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 give allowance for that. Further the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (S *ee* **Gunga Baya & another v Republic [2015] eKLR).**

11. Hon. V.G Odunga J **Alex Nzalu Ndaka v Republic [2019] eKLR** while quoting with approval the Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR** held that in re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depends on the circumstances of each case and the style used by the first Appellate Court. What matters in the analysis is the substance and not its length.

12. Following the principles in **Okeno v. Republic (supra)** and re-stated in **Kiilu and another vs. R (supra)),** the amended grounds of appeal and the written submissions. It is my considered view, that the main issue for determination is whether the prosecution proved its case to the required standards pursuant to the duty bestowed upon it under the provisions of Section 107(1) of the Evidence Act and the dictum in the cases of **Woolington v DPP 1935 AC 462** and **Miller v. Minister of Pensions 2 ALL 372-273.**

E. Analysis of Evidence and Determination

13. Gang rape is provided for under **Section 10 of the *Sexual Offences Act*** which states: -

> ***"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.***

14. The essential element of gang rape is that rape must have been committed in association with two or more persons or committed in the company of another or others who commit the offence of rape with common intention.

15. Rape is defined under **Section 3(1) of the *Sexual Offences Act, 2006*** in the following terms: -

A person commits the offence termed rape if –

> ***a) He or she intentionally or unlawfully commits an act which causes penetration with his or 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.***

16. *The prosecution, in order to prove rape as an element of the offence of gang rape was therefore under a legal duty to prove the above elements.*

17. As to whether there was penetration, that is defined under Section 2 of Sexual Offences Act as *"the partial or complete insertion of the genital organs of a person into the genital organs of another person"* (See **Mark Oiruri Mose –vs- R (2013) eKLR**).

18. PW1 testified that the three appellants offered to take her home using a motor bike. However, they did not drop her at her home upon reaching there despite her pleading that she be dropped. That when the appellants herein stopped the motor bike, alighted and started pulling the complainant and tearing up her clothes. She was raped by the three appellants in turns from 11.00 pm to 12 midnight. She testified that each of the appellants raped her twice starting with 1st appellant followed by 2nd and then the 3rd appellant. PW1 explained that the appellants unzipped their trousers and then inserted their genital organs into her sexual organ in turns.

19. PW5 the medical officer who testified that he examined the complainant who complained of pain on the throat, thighs and private parts. That on examining her private parts she found a minor tear on the left vulva with a painful touch with tenderness being evidence of use of force or friction. The witness testified that he formed the opinion that PW1 had penetrative sex through force. In defence, the appellants gave alibi defences saying they were not at the scene at the material time. This defence was disapproved by the overwhelming evidence of the prosecution including that of PW5 as regards penetration and being present at the scene of crime.

20. Section 43(1) of the Sexual Offences Act provides that an act is intentional and unlawful if it is committed either in any coercive circumstance; or under false pretences or by fraudulent means; or in respect of a person who is incapable of appreciating the nature of an act which causes the offence. Under sub-section 2, it is provided that: -

> ***"The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is –***
>
> ***a) use of force against the complainant or another person or against the property of the complainant or that of any other person;***
>
> ***b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or***
>
> ***c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.***

21. PW1 testified that the appellants pulled PW1 and when one of them was raping her, the others would hold her legs, mouth and throat. Further that when they alighted from the motor cycle, they pulled her and tore her clothes. PW2 further testified that when the complainant was screaming, there was a man's voice telling her to keep quiet or else soil be put in her mouth. This corroborated PW1's testimony to the effect that the appellants were threatening her to shut up or they fill her mouth with soil. This evidence is clear that the assailants used force and threats of harm on the complainant. In my view, the act of penetration was intentional and unlawful within the meaning of Section 42 of the Sexual Offences Act.

22. Section 42 of the Act provides that a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. **Sections 43, 44** and **45** of the Act go into great detail in describing instances where one's consent cannot be said to have been obtained. From the evidence on record and the circumstances of the case, PW1 had her clothes torn in the struggle. These were the said clothes that is a pair of pants, blouse and white camisole which were produced as exhibits by PW6. PW1 was threatened with soil being put in her mouth in the event that she shouted for help. The injuries on PW1's private parts according to PW5 were evidence of forced penetration ruling out the possibility of consent having been obtained.

23. This case is based on identification by a single witness who is the complainant. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court held as thus: -

> ***"...First, wherever the case depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for caution before convicting the accused and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly the Judge should direct the jury to examine closely the circumstances in which the identification by such witnesses came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"*** *Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." (See* ***Wamunga vs Republic (1989) KLR 426, Nzaro vs Republic (1991) KAR 212, Kiarie vs Republic (1984) KLR 739)***

24. In **Maitanyi –Vs- Republic [1986] KLR 198 at 200**, the Court held as thus: -

> ***"…….Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the***

evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

25. Further it was stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that: -

"when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other."

26. The evidence of PW1 was that she had known the appellant for a period of three (3) years which was admitted in defence. It is the 1st appellant who called her to where he was seated in the bar at a corner with the 2nd and 3rd appellants whom he introduced to her as his twin brothers. PW1 had gone to the bar to take some chips to another customer upon his request. She said she sells chips at Ena market where the Holiday inn bar is also situated.

27. PW1 agreed to join the appellants for a drink and they stayed together for some time with each taking more than one drink before they left for home on one motorbike. The time spent together in the bar which was lighted with electricity was sufficient for PW1 to know the 2nd and 3rd appellants well though she had met them for the first time. They all left for home together before PW1 was gang raped by the three men. I am of the considered view that the identification by PW1 of the three appellants was positive and there was no possibility of a mistaken identity.

28. The prosecution have a duty to establish rape as an element of gang rape, that the rape was committed in association with two or more persons or committed in the company of another or others with common intention. It was PW1's testimony that the appellants herein raped her in turns and each of them raped her twice as those on the waiting queue held her legs. The appellants did not raise any defence in rebuttal of that the prosecution that the three of them were in association when they committed the offence. As such it is my opinion that the evidence tendered was sufficient to prove that indeed the three appellants gang raped the complainant.

29. I find that the elements of gang rape were proved against the appellants to the standards required in a criminal case.

30. The trial court convicted the appellants of the offence of robbery with violence contrary to Section 296(2) of the penal Code relying on the doctrine of recent possession. It is imperative to note that when the 1st appellant borrowed the phone from the complainant, the 2nd appellant was not present in the bar. The 1st appellant was to use PW1's phone to call him to come. According to PW1, she was introduced to the 2nd and 3rd appellants by the 1st appellant as his twin brothers.

31. From the evidence on record, there is none to connect the 2nd and 3rd appellants with the stealing of the phone. In my view, the conviction of the 2nd and 3rd appellants of the offence of robbery with violence of PW1's phone was not supported by any evidence. As for the 1st appellant, PW1 said he borrowed her phone in the bar to call the 2nd appellant and did not return it until it was recovered by PW4 a few days later.

32. The issue for determination herein is whether the prosecution proved the offence of robbery with violence beyond any reasonable doubt against the 1st appellant.

33. There is no doubt that PW1 handed over her phone to the 1st appellant on his request to use on the understanding that he was to return the same later. The 1st appellant did not live up to his promise and the fact that he went home with it, means that he did not intend to return the phone to the complainant.

34. Section 268 of the Penal Code defines stealing as follows: -

(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

35. The 1st appellant took PW1's phone which is a thing capable of being stolen and fraudulently converted it to his own use with intent to permanently deprive PW1 of the said phone as is supported by the evidence on record.

36. In defence, the 1st appellant did not give any defence against the offence of robbery or stealing. He denied having been at the scene and alleged that there was a grudge between him and PW4 and also that the complainant who was his former girlfriend framed her.

37. During cross-examination of the complainant and of PW4, the 1st appellant did not put any question to any of the witnesses about the alleged grudge. The defence was therefore an afterthought meant to derail the court from giving due consideration to the evidence of the prosecution.

38. The appellants argued that the complainant was too drunk to identify them. It is noted that PW1 gave her evidence in such a detailed and clear way without breaking the chain of events. She told the court of how she was pulled by the appellants, how they tore up her clothes and how they raped her in turns as two who were disengaged from the act of rape for the moment held her legs, mouth and throat. This is evidence of consciousness at the scene of offence which she described with a lot of clarity. This state of consciousness demonstrate that the complainant was not too drunk as not to know what was happening.

39. It is imperative to note that PW1 told the court that she stayed with the three appellants in the bar enjoying drinks for over one hour. There was light in the bar and she saw each one of them clearly as they socialized together before leaving for home. The four (4) used one motor bike as they rode home before the rape ordeal.

40. The complainant knew the 1st appellant before incident and stayed with the 2nd and 3rd appellant long enough that the possibility of mistaken identity can be ruled out. Considering the prevailing circumstances, I have no doubt that the complainant identified each of the appellants positively.

41. In regard to the offence of robbery with violence, it is my view that there was no evidence from PW1 or any other witness of violence against the 1st appellant. The mobile phone was given in peace and in a friendly atmosphere in the bar. The 1st appellant used no violence or threats against the complainant immediately before, at or after the taking of the phone.

42. The charge of offence of robbery was therefore misplaced and not supported by any evidence. Similarly, the doctrine of recent possession was not relevant to the facts of this case because PW1 gave direct evidence on how the 1st appellant stole her phone.

43. It is my finding that the evidence on record proves the offence of stealing under Section 275 as read with Section 268(2) of the Penal Code against the 1st appellant. I find him guilty of the offence and convict him accordingly.

44. As for the 2nd and 3rd appellant there was no evidence to connect them with the offence of stealing of PW1's phone. Consequently, I find the 2nd and 3rd appellants not guilty of the offence of stealing under Section 286(2) of the Penal Code and acquit them accordingly.

45. Although the complainant said that cash of Kshs. 1,360/= was stolen from her, she did not explain at what stage and in what circumstances the case was stolen and by who. The investigating officer did not recover any cash from any of the appellants. In my considered view, there was no evidence to support the allegation of stealing of the said cash.

46. I note that it was a common ground of appeal amongst the three appellants herein that the prosecution did not call crucial witnesses to wit the waiters and the customers in the bar. The charges against the appellants were offences of gang rape and robbery with violence. The prosecution's evidence was that the incident of gang rape and theft of the phone occurred far from the bar as the appellants and PW1 were going home. As such, the waiters and the customers present in the bar did not have any evidence in regard to the said offences. Further, it is trite law that there is no fixed number of witnesses the prosecution must call in order to prove its case unless the law so requires (see *section 143* of the Evidence Act Cap 80 Laws of Kenya (See ***Benjamin Mbugua Gitau v Republic*** **[2011] eKLR**).

47. It is the duty of the prosecution to call witnesses it deems necessary to prove its case and whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless for example, it is shown that the prosecution was influenced by some oblique motive (*see* ***Julius Kalewa Mutunga v Republic*** **[2000] eKLR).** The appellant did not prove that the prosecution was influenced by oblique motives in failing to call the said waiters and customers. In my opinion, the witnesses presented before the trial court tendered sufficient evidence to warrant the conviction. As such the said ground ought to fail.

48. The appellants further raised the ground to the effect that their defense was never considered by the trial court. However, a perusal of the trial court's record reveals that the appellants simply raised a defense of alibi. However, in **R. vs Sukha Singh s/o Wazir Singh & Others [1939] 6 EACA 145**, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated: -

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

49. In the instant case, the appellants' belated alibi defence raised is not credible when weighed against the unshaken testimony of PW1, which puts the appellants at the scene of the crime. In my opinion, the defense of alibi was merely a convenient way by the appellants of removing guilt themselves from the scene. The alibi was an afterthought.

50. The 1st appellant further claimed that upon his arrest and search, no inventory form was filled on the items recovered from him. As was held in **Leonard Odhiambo Ouma & Another V. R. C.A. Nakuru Cr. Appeal No. 176 of 2009 (UR)** the question of inventory of items recovered and produced is a procedural issue failure to carry out an inventory is therefore not fatal to the trial process. In the instant case, there was no prejudice which was proved to have been suffered by the 1st appellant by failure to produce the said inventory.

51. The convictions of the three appellants in count I are hereby declared safe and are accordingly upheld.

52. As for the sentence, in count I Section 10 of the Sexual Offences Act provides: -

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.

53. Although the law allows enhancement of the sentence of fifteen (15) years imprisonment to life, the court must include aggravated circumstances and previous record of the offender as well as other factors. The trial magistrate noted that the appellants were not remorseful and that the offence committed were heinous. The trial magistrate also called for the victim impact report and the pre-sentencing report which she considered.

54. The offence of gang rape is a very serious offence that traumatizes the victim to a great extent. I believe this effect impacted negatively on the complainant for the victim impact report shows that she suffered psychological and emotional trauma after the incident. She also lost a six (6) months pregnancy as a result of the impact of the sexual assault.

55. The evidence showed that the appellants gang raped the complainant in turns and two held her legs as one of them raped her.

56. In my considered view, I find that the trial magistrate correctly assessed the circumstances of the case and the impact on the victim as far reaching and devastating on the complainant. I come to the conclusion that the circumstances of the offence were aggravating and that this justified enhancement of the sentence.

57. However, considering that the accused persons were first offenders, I am of the considered view that enhancement to life imprisonment was excessive and harsh. For this reason, I set aside the sentence in count I in respect of all the appellants and substitute it with thirty (30) years imprisonment.

58. As for the offence of stealing under Section 268(2) as read with Section 275 of the Penal Code, I hereby sentence the 1st appellant to two (2) years imprisonment.

59. This appeal is only partly successful.

60. It is hereby so ordered.

DELIVERED, DATED and SIGNED at EMBU this 26th day of October, 2020.

F. MUCHEMI

JUDGE

Judgment delivered through video link in the presence of Ms. Mati for the Respondent and all the three (3) appellants