**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CRIMINAL APPEAL NO. 45 OF 2015**

**PATRICK MUTHII MUTHONI.....APPELLANT**

**V E R S U S**

**REPUBLIC.....PROSECUTOR**

**JUDGMENT**

The Appellant Patrick Muthii Muthoni was charged before the Principal Magistrate's Court Baricho, Criminal Case No. 589/2014 with the offence of gang rape contrary to section 10 of the Sexual Offences Act. The particulars of the offence are that on 6th/4/2014 at [particulars withheld] Falls in Mwea West Sub-County within Kirinyaga County in association with others not before court intentionally and unlawfully caused their penis to penetrate the vagina of C M W.

The Appellant pleaded not guilty. After a full trial he was found guilty and was convicted. He was sentenced to serve 15 years imprisonment.

He was dissatisfied with the conviction and sentence and filed this appeal raising the following grounds:

**a) Failed to consider his constitutional rights were violated as per article 49 (1)(f) of the Constitution.**

**b) Relied on purported visual identification by recognition which was not made in free atmosphere condition.**

**c) While being impressed with his mode of arrest n light of no description.**

**d) Rejected his defence and shifted burden of proof on his shoulder**

**e) Concluded that appellant had committed alternative offence whereas there was no evidence. That once the main charge failed the alternative charge would automatically fail.**

**f) The alternative count was incurably defective.**

**g) Rejecting the defence of the appellant.**

**h) Disregarded that the complainant was not a credible witness.**

He prays that the appeal succeeds in totality.

This is a first appeal and this court has duty to revisit the evidence which was tendered before the trial Magistrate afresh, evaluate it, analyse it and come to its own independent conclusion on the matter while 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. This was so held in the case of **Okeno –v- R (1972) E. A 32.** This was also held by the Court of Appeal in the case of **Muiruri –v- R (2013) eKLR**. The appellant has a legitimate expectation that the appellate court will look at the evidence afresh and come to its own independent finding. A first appeal becomes a retrial based on the evidence before the trial court safe for the fact that the Judge will not have the advantage of seeing the witness and assess the demeanor. The court has to leave room for that.

I will now analyse the evidence. C M was the complainant. She testified that on 6/4/14 at 4.00 Pm she was at [particulars withheld] Falls with her friend P K when three men confronted them and after slapping her and stealing their phones, the three mem raped her in turns. The last man who raped her was armed with a knife and she managed to take it and injured him. The man bled and she managed to escape. She went to a homestead where she was given a lesso to cover herself as she was naked. The incident took place at 5.00 Pm. She managed to identify two suspects and one was the appellant. The complainant reported the matter to the police. She was treated at Kerugoya Hospital where she was admitted for one week. Later she spotted the suspect and he was arrested then charged. The complainant maintained that she was able to identify the suspect as he had not covered his face. She testified that the appellant had not covered his face. She said he was a person he used to see at Kagio and she was able to recognize him. She lastly stated that she spent time with the two and which gave her an opportunity to observe them and they had not covered their faces.

The witness was candid and maintained her evidence during cross-examination. It was not put to her that she had a grudge with the appellant. This offence was committed in broad day light. The complainant was knocked down and the rapists laid on her in turns. She could not have failed to see the person raping her as it was in broad day light. The circumstances favoured a positive identification. There was no reason to doubt her testimony. In any case medical evidence adduced by John Mwangi, a Senior Clinical Officer (PW4) corroborated the fact of penetration and proves that she was raped. He testified that he examined the complainant on an allegation that she was raped by 3 people. The complainant wore blood stained clothes at time of examination. She was in pain and looked withdrawn. She had a cut wound on the left small finger. On the genitalia the complainant had a tear to the lateral genital region there was abrasion on the vaginal wall, a tear on the cervix on the anterior part. There was profuse bleeding from the vagina and there was retro-peritoneal tear. There was no spermatozoa seen. He produced treatment notes, P.3 form and discharge summary showing she was admitted on 6/4/14 and discharged on 11/4/14 as exhibits 1, 2 & 3.

The evidence of the complainant was corroborated by PW-2 A K G who was with the complainant and confirmed that the appellant was among those who raped the complainant. The evidence was not shaken during cross-examination.

The testimony of the complainant was also corroborated by the testimony of PW-3- Gabriel Gitonga Kango who confirmed that she went to his house while screaming and alleging she had been raped by two people who also stole from her. She was given a leso as she was naked. PW-3- then recovered the clothes of the complainant and took them to the police station.

PW-5- Police Constable James Kemboi of Kiamiciri Police Post received the report from the complainant who was accompanied by her friend. He referred her to hospital and also received her clothes which were left at the scene. Later the complainant spotted the appellant at Kagio town and she reported to the police. The appellant was arrested and charged.

Having considered the evidence, I find that the evidence was cogent, straight forward and proves that the appellant was one of the perpetrators of this beastly crime. He was identified in circumstances which favoured a positive identification.

The defence of the appellant was a mere denial. Though he called a witness he testified on matters which were not in the defence of the appellant. The testimony of defence witness did not corroborate the defence of the appellant. The evidence of the defence witness did not have any probative value to the defence. As stated by the trial Magistrate in his Judgment, the defence of an alibi which was given by DW-2- was an afterthought which even the appellant did not talk about. Based on the evidence tendered before the trial court, I am of the view that the conviction of the appellant was safe. The evidence was well corroborated and left no doubt on the guilt of the appellant. Despite that the appellant has faulted the conviction and raised several grounds, I will deal with these grounds:-

**1. <u>The appellant states that he was kept in police custody for more than 24 hours.</u>**

The court has to consider whether this entitles the appellant to an acquittal despite the fact that the prosecution adduced sufficient evidence to prove the charge. The issue is based on the Constitutional provision that the arrested person has to be produced in court within 24 hours of his arrest.

**Article 49 (f) of the Constitution** states;

*An arrested person has the right— to be brought before a court as soon as reasonably possible, but not later than—*

*i) twenty-four hours after being arrested; or*

*ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;*

The appellant was arrested on 27/05/2014 and taken to court on 29/05/2014, the delay was for only 1 day which was not inordinate.

Where an arrested person is not taken to court within 24 hours, it does not affect the trial for which he was arrested and charged in the first place. Failure to produce the appellant in court within 24 hours is a violation of his rights which does not entitle him to an acquittal but to damages once it is proved. The criminal trial is distinct from that violation and failure to arraign him in court within 24 hours does not bar the prosecution from proceeding with the trial. The provision is a safeguard to ensure that arrested person are not detained at the police station for a far too long a period before being taken to court it does not bar the prosecution from proceeding with the trial on merits.

In a ***<u>Peter Otieno Odiyo –v- R (2017)eKLR</u>*** the Court stated:-

> **Noteworthy is the fact that there is no law which expressly bars the prosecution of an accused person brought to court after the expiry of the 24 hours as provided under Article 49(f)(i) of the Constitution. The right to be arraigned in court within 24 hours of arrest was not designed to avoid trials on the merits, but rather, to deter the unconstitutional extra judicial**

**detention of suspects by the police. It is a right to be taken to court as soon as it is reasonably practicable.**

**Guided by this reasoning, it is the view of this Court that to allow this appeal on the grounds of arraignment after 24 hours will be disproportionate and inappropriate. The delay in the arraignment of the Appellant in this case was not so long and extended as to lead to an outright negation of his rights to a fair trial as provided under Article 50 of the Constitution. The Appellant further failed to adduce any evidence to support his claims of being denied a fair trial in accordance with Article 50 of the Constitution. From the record of the trial court, the appellant was fully aware of the proceedings. The appropriate remedy for the appellant in this case is as prescribed by the Constitution under Article 23(3). The Appellant would be entitled to a declaration and an award of damages in the form of monetary compensation from the person or authority in breach of this right.**

This is a persuasive decision which I am in agreement with as that is the law. The appellant did not raise the issue before the trial court for it to make an inquiry and the prosecution to be given a chance to explain the delay in arraigning the appellant in court. It cannot be a valid ground for seeking an acquittal. His remedy lies in a claim for damages for violation of his constitutional right in a different forum but not in this appeal. This ground must fail.

**2. <u>Visual Identification:</u>**

The appellants submits that the visual identification and recognition were not proved beyond any reasonable doubts. This issue has been dealt with by the Court of Appeal in a binding decision in ***<u>Peter Kirera –v- R (2014) eKLR</u>*** where the court in dismissing the appeal had this to say:

**Recognition is more reliable than identification of a stranger. As this Court stated in case of *ANJONONI V R, KLR 1 [1976-1980] at 1566 to 1568* this is because:**

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

**Although the conviction was based on the evidence of a single witness, we are satisfied that both the trial court and the High Court properly directed themselves on the question of identification of the appellant. Both courts made concurrent findings of fact that the appellant was known to PW1 for several years before the day of the attack.**

Further the Court of Appeal in ***<u>Peter Musau Mwanzia –v- R (2008) eKLR</u>*** where it dealt with the issue of recognition had this to say:

**In the well known case of R vs. Turnbull (1976) 3 ALL ER 549 at page 552, it was stated:** *"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."* **We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger…….**

**Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.**

As I have already pointed out above PWI was with PW-2- when the incident occurred. According to PW-1- the complainant, the appellant

was not new to her as she had seen him on several occasions within Kagio Township. It is noteworthy that the PW-I- is the one who spotted the appellant and called the police who went and arrested him. To crown it all PW-2- who was with the complainant testified that he could identify the two youths who raped the complainant and he could recognize one of them who was known as Muthii. It is therefore clear that the two witnesses PWI & 2, saw the appellant in favourable circumstances as it was in day light and recognized him. PW5 confirmed the name of appellant – Muthie was given when the report was made to him.

Such recognition is reliable as any possibility of mistake is eliminated. The trial Magistrate stated as follows at Page 33 from line –

> ***"The complainant stated that she was raped by two youths who she could identify. PW-2- stated that he knew the accused by the name Muthie and he was among the rapists. The suspect was identified to the police before he could be arrested. The complainant further stated that she used to see the accused at Kagio before the incident of gang rape. The complainants also on her first information were clear that they knew two suspects who had not covered their face".***

This shows that the identity of the appellant as one of the rapist was never in doubt. The trial Magistrate came to the inevitable conclusion that the charge against the appellant was proved beyond any reasonable doubts. The evidence was sufficient and credible and did prove the charge against the appellant contrary to what the appellant has submitted. The case of ***Cleophas Otieno Wamunga Cr. App. No. 20/1989*** is distinguishable as it dealt with identification whereas the appellant in this case was recognized. I find that as submitted by the prosecution, the evidence implicating the appellant was cogent, reliable and without contradictions hence overwhelming against the appellant. I find that this ground must fail.

Thirdly, the appellant states that if the main charge failed the alternative charge would automatically fail. The appellant was charged with committing an indecent act with an adult as an alternative charge. This is under ***Section 11(a) of the Sexual Offences Act.*** The trial Magistrate found that the complainant did not say she was indecently assaulted. He found that no indecent act was committed on her. I find that the trial magistrate was right in convincting the appellant on the main charge. Where a person is charged with a main charge and an alternative charge, the trial court considers the evidence and convicts on the main charge. Where the main charge is not proved and there is sufficient evidence to prove the alternative charge, the trial Magistrate is supposed to convict on the alternative charge. In **MBO -v- Republic** – It was stated:

> ***"…if the main charge is not proved, either because it is defective or because the evidence on record does not support any element of the offence, the evidence does not evaporate into the air! It may be examined to see if it supports a minor cognate offence and if it does prove such offence beyond doubt, a conviction shall follow…"***

In this case the appellant was convicted on the main charge. The ground is without merits:

**1. Burden of proof**

It is trite law that in Criminal Cases the burden of proof always lies with the prosecution to prove their case beyond any reasonable doubts.

**In Stephen Nguli Mulili v Republic [2014] eKLR**

The Court of Appeal stated:

**On the issue of whether the prosecution discharged its burden of proof, it is not in doubt that the burden of proof lies with the**

**prosecution. The *locus classicus* on this is the case of *DPP V WOOLMINGTON, (1935) UKHL 1* where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case……**

**In reference to this Lord Denning in *MILLER V MINISTRY OF PENSIONS, [1947] 2 ALL ER 372* stated:**

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

**Section 10 of the Sexual Offences Act No. 3 of 2006**

*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.*

**In the Dominic Ochieng Odoyo & another v Republic [2015] eKLR**

The appellant was convicted of gang rape and the Court stated;

**The key ingredients of the offence of Gang Rape include the following:**

> **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.**

The question is whether this case satisfies the ingredients of gang rape;

**1. Proof of rape or defilement;**

The complainant testified on the fact of gang rape as I have stated above.

The medical evidence confirmed that the complainant was raped.

**2. Proof that the assailant was in association with another or other persons**

The appellant was in the company of another youth who raped the complainant.

Looking at the whole evidence adduced, the prosecution has proven his case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant together with another raped the complainant in the manner described. The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion.

The guilt of the appellants was proved beyond reasonable doubt by overwhelming evidence on record.

The prosecution submitted that when the appellant filed his submissions, he sought to rely on **Section 350 (-v-) of the Criminal Procedure Code** and sought leave to substitute his earlier grounds of Appeal and without such leave being granted proceeded to write down his submissions. He submits that an application for leave to amend a petition of Appeal shall be made either at the hearing of the appeal, or, if

made previously, by way of motion in open court. That the applicant ought to have made his application on 21/06/2016 and proceed to submit as he did. The prosecution urges the Court to find that the new introduced grounds are not properly on record and ought to be expunged.

***Section 350 (v) of the Criminal Procedure Code*** provides:-

**350. (1) An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the Judgment or order appealed against.**

**(v) Notice in writing of an application for leave to amend a petition of appeal shall be given to the Registrar of the High Court and to the D. P. P not less than three clear days, or such shorter period as the High court may in any particular case allow, before the application is made: and an application for leave to amend a petition of appeal shall be made either at the hearing of the appeal or, if made previously, by way of motion in open court.**

I have considered the submission. On 13/3/2017, the appellant applied for leave to add more grounds. The prosecution counsel did not object. The appellant was granted leave to file additional grounds. He did not however file more grounds. He filed memorandum grounds of Appeal. I am in agreement that the memorandum Grounds of Appeal (sic) filed on 20/7/2017 are not properly before this Court and ought to be expunged from the record as the appellant did not comply with section ***350 (v) of the Criminal Procedure Code.***

The state urged the Court to find that the sentence was very lenient in view of the circumstances of this case. He urged the Court to exercise its discretion under ***Section 354 (3)(a)(ii) of the Criminal Procedure Code*** and enhance the sentence of 15 years to life imprisonment**.** ***Section 354 (3) (a) (ii) of the Criminal Procedure Code*** provides:

> **(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may –**
>
> **(a) in an appeal from a conviction -**
>
> > **(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence.**

The trial Magistrate sentenced the appellant to the minimum sentence provided under the Act. The circumstances of this case were serious. It borders on a capital offence of robbery with violence. Though PW-5- Police Constable James Kemboi received a report that when the incident happened the complainant lost cash and phones as well as the fact that the assailants were armed and beat the complainants, he totally ignored the evidence and only charged the appellant with gang rape and indecent assault. The circumstances called for a more severe sentence and not a bare minimum. Though the trial Magistrate found that the appellant was remorseful, justice is two ways and ought to be done equally to all irrespective of status as provided under Article 159 (2)(a) of the Constitution.. The complainant in this case was traumatized and will live with this harrowing experience for the rest of her life. The trial Magistrate ought to have taken this into consideration when passing sentence. I find that this is a proper case where the appellate court should exercise its discretion and enhance the sentence. Indeed ***Section 10 of the Sexual Offences Act*** under which the appellant was charged and convicted provides that the minimum sentence maybe enhanced to imprisonment for life.

**In Conclusion:**

- I find that this appeal is without merits.

- I dismiss it and uphold he conviction by trial Magistrate.

- On the sentence, I enhance the sentence of life imprisonment.

**Dated at Kerugoya this 27th day of September 2018**

**L. W. GITARI**

**JUDGE**