REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 25 & 26 OF 2014

GEOFFREY KINYANJUI……..……1ST APPELLANT

FREDRCIK KINYUA……..2ND APPELLANT

VERSUS

REPUBLIC……...……..RESPONDENT

(Being an appeal from original conviction and sentence contained in the Judgment of Hon. C.C. Oluoch (Principal Magistrates) in the 2012 Chief Magistrates Court at Kiambu Criminal Case No. 2981 of delivered on 16th January 2014.)

JUDGMENT

The Appellants were charged with two counts of offences of robbery with violence contrary to Section 296(2) of the Penal Code. In the first count, the particulars of the offence were that on 6th October 2012, at KM in Kahawa West within Nairobi County, jointly with others not before court, while armed with weapons namely, a toy pistol and whips, robbed J C her mobile phone, make LG valued at Ksh, 2,500/- and immediately before or immediately after the time of such robbery, used actual violence to the said J C.

In the second count, it was alleged that the Appellants, jointly with others not before court robbed J W a mobile phone, make Sony, an amplifier and Ksh.5,500/- all valued at Ksh.19,500/- and immediately before or immediately after the time of such robbery, used actual violence to the said J W.

In addition, each of the Appellants faced a charge of gang rape contrary to Section 10 of the Sexual Offences Act, as particularized in the third and fourth counts respectively. In the particulars, it was alleged that on 6th October 2012, at KM in Kahawa West within Nairobi County, the Appellants, unlawfully and intentionally in association, caused penetration of their penis to the vagina of J W.

The trial Court found the Appellants guilty on all counts as charged. They were sentenced to suffer death for the offences of robbery with violence. The trial court further sentenced the Appellant each to 15years imprisonment for the offencesof gang rape which sentences were to be held in abeyance in light of the death sentences.

A summary of the prosecution's case is that on the night of 6th October, 2012, at about midnight, PW1 (J W) while in the company of PW3 (J Ch) were walking home from work when they were accosted by about six men. The attackers ordered them to surrender their possessions. The two were also beaten. The

men asked who among them was N's (PW4) girlfriend. When PW1 answered that she was the one, she was ordered to take them to PW4's house because they wanted to take money and a laptop. Two of the attackers accompanied PW1 while the others were following closely behind with PW3. Along the way, PW1 was blindfolded using a scarf she had worn. When they got to PW4's house, they searched the house and stole some money, an amplifier and a phone. The two attackers then tied up PW1, forced her to lie down and raped her in turns. While this was going on, PW4 came in together with the other attackers. The attackers left shortly thereafter, upon which PW1 went to call for help.

Both Appellants advanced defences of alibi. The 1st appellant in his sworn statement in defence indicated that on the material night, he was in the company of his girlfriend at a pub in Kahawa Sukari where they stayed the whole night until 6.00 in the morning. He denied knowing PW1, PW3, or PW4. He also denied committing the offence. DW4, G W N gave evidence in support of his defence, stating that she was in the company of the 1st Appellant on the material night.

The 2nd appellant stated in his sworn testimony that on the material night, he was at home with his mother, recovering from an ailment. He stated that before his arrest, PW4 had gone to the plot where he lived and warned the 2nd appellant that they were spoiling his wife's name and that he had lost some items. The 1stAppellant also stated that he knew both PW1 and 3 and that the two knew him as well. He denied committing the offence. DW3 testified in support of the 2ndAppellant's defence. She testified that the 2nd Appellant was at home on the material night as he was sick. She stated that she knew both PW1 and 3, adding that PW4 had demanded some property form the 2nd Appellant.

Aggrieved by the trial court's decision, the Appellants filed their respective appeals which were consequently consolidated. In their grounds of appeal, the Appellants challenged that the charges against them were not proved beyond reasonable doubt. They faulted the trial court for relying on uncorroborated, insufficient and contradictory evidence of the prosecution and for holding that the identification of the appellant was proper without appreciating the circumstances were unfavourable to warrant a positive identification. The Appellant's further faulted the trial court for shifting the burden of proof to the Appellants with respect to the defences of alibi and for disregarding their defences and mitigation without justifiable reasons.

All parties relied on their written submissions. In submissions filed by the firm of Mbiyu Kamau Advocates for the Appellants, it was submitted that the prosecution did not adduce sufficient evidence to prove the alleged offence of gang rape. It was further submitted the allegations of rape were unfounded since PW1 did not reveal to PW4 that she had been raped and further that the clothes she had worn at the time were not produced in evidence. With respect to the results of medical examination, it was submitted that the evidence of PW2, the medical examiner, could not be conclusively relied upon as proof of rape since it was not possible to ascertain when the complainant may have had sexual intercourse before the incident. Furthermore, the Appellants did not flee from their residences following the commission of the alleged offence. PW5's testimony was dismissed as having no evidential value since she did not undertake independent investigations to test the credibility of prosecution witnesses' accounts.

It was submitted further that there was no proper evidence of identification by recognition. This is because the witnesses despite alleging to have recognized the attackers did not disclose such details to the police. Furthermore the trial courtfailed to draw attention to the conditions of lighting at the time of the offence as to determine whether there was a proper identification.The prosecution on its part failed to produce any evidence to show that a report of loss of any items had been made. In addition, the prosecution failed to call any witness to explain the circumstances leading to the arrest of the Appellants. The Appellant further faulted the court casting blame on them for raising alibi in their defence; yet, no opportunity had been presented to the Appellants to raise this defence at the earliest. Lastly, it was submitted that the prosecution evidence was contradictory and uncorroborated to sustain a conviction.

In her written submissions filed on behalf of the Respondent, learned Prosecution Counsel, Ms. Caroline Kimiri submitted that the prosecution had established the charges against the Appellants. She submitted that the offence of rape was proved beyond reasonable doubt from the evidence of PW3 who encountered

one of the Appellants raping PW1. It was further submitted that there was proper identification of the assailants from the evidence of PW1 and PW3. On the question of conditions of lighting, it was submitted that this issue was not challenged during the trial. Further, the identification was by recognition, given the further credence by the 2nd Appellant's acknowledgment that both PW1 and PW2 were well known to him. It is the Respondent's submissions that the offence of robbery with violence was also sufficiently established in that it had been shown that the robbers had stolen items from PW4's house and had used force against PW1. Further, the assailants were more than one. With respect to the Appellant's defence, it was submitted that the trial court had correctly weighed the Appellants' defence against the prosecution case in reaching a conviction. This court was urged to dismiss the appeal and uphold the trial court's findings.

We shall now proceed to determine each of the pertinent issues raised as here under.

Whether the offence of gang rape was sufficiently proved.

It was the Appellants' view that the substitution of the charge from rape to gang rape was not lawfully done since there was no evidence of the substituted charge sheet.With respect to the charges, each of the Appellants was charged with the offence of gang rape in separate counts. This followed an amendment of the charge sheet. The record of proceedings shows that the charges were substituted on 25th March 2013 and the Appellants pleaded afresh to the charges, in all the four counts of offences. Furthermore, the substitution of charges did not affect the charges of gang rape which were also contained in the original charge sheet. The record also contains the original charge sheet dated 22nd October 2012. I therefore find no basis in that submission.

The Appellants submitted that the evidence was insufficient to prove the offence since PW1 had stated that she could not identify the man who attacked her. Furthermore, there was no direct medical evidence to support the charge and that PW1's evidence was not corroborated by any of the other witnesses.

The offence of gang rape is provided for under **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 other who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonmentfor a term of not less that fifteen years but which may be enhanced to imprisonment to life".**

From the above definition, for the offence of gang rape to be complete, there must be two or more persons in action. Back to the evidence, PW1 testified that two men tied her down and proceeded to rape her in turns. This part of her evidence was confirmed by PW3 who witnessed the incident when she got into the house in the company of the other attackers. It was PW3's testimony that when she came into the house with the other attackers, she found one of the attackers raping PW1, while the other one was standing by. We thus find that the evidence of the medical doctor, taken together with the accounts of PW1 and PW3 conclusively established that the complainant was indeed raped. The offence stands proved even though the Appellants were not subjected to a medical examination to show that nexus. The finding as to whether the offence was committed by the Appellants is discussed in our findings on the evidence of identification.

Penetration and the absence of consent are also necessary ingredients for the offence of rape **PW2**, Solela Ahmed Aboud who examined the complainant testified that the examination revealed presence of spermatozoa. She concluded that this was an indication of rape. PW6, Dr. Maundu examined the complainant on 9th October 2012. He produced her P3 form in this regard. He observed that the complainant did not have any external injuries, and that she had a white foul smelling discharge while her broken hymen was old. Although PW1 admitted to having sex on 3rd October 2012, our main concern is whether or not she was gang raped on the 6th October,2012. This was adequately demonstrated as illustrated above.

From the onset, this court notes that the failure by PW1 to disclose to PW4 that she had been raped cannot form the basis for dismissing the claims. Failure to immediately disclose this fact does not negate its occurrence, and could be a result of many factors including trauma. The real issue is whether the evidence produced by the prosecution proved the charges ofgang rape to the required standard.

In order to establish a nexus between the offence and the Appellants, the entire thread of evidence must be considered, as it was rightly submitted by the prosecution, citing the case of ***Dan MellyMaganga alias Omwabi&Ano. v Republic*** **Criminal Appeal No. 23A of 2012.**This shall be considered further in the next two issues for determination.

Whether the offence of robbery with violence was proved beyond reasonable doubt

The Appellants also challenged the findings of the court regarding the offence of robbery with violence.The ingredients of the offence of robbery with violence are provided under Section **296 (2)** of the Penal Code. The act qualifies to be robbery with violence where ***"the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person."***

The offence is proved when any of the above circumstances is shown to exist.It was alleged that the Appellants robbed PW3 of mobile phone, make LG valued at Ksh, 2,500 and a mobile phone make Sony, an amplifier and Ksh 5,500/- all valued at Ksh. 19,500/- from PW1. PW1 and PW3 testified that they were accosted by six men. Along the way, the attackers beat them and ordered them to surrender their valuables. PW3 gave them her phone while PW1 did not have any valuables on her. PW1 stated that when they got to PW4's house, the attackers searched the house and took an amplifier, a phone and money. This fact was confirmed by PW4 when he got to the house after learning of the robbery. He stated that hefound some items missing in his house: namely Ksh. 5,500/-, an amplifier, and a phone make Sony Ericson. He also stated that his television set was placed on a seat. PW1 had noted that the attackers had attempted to take the TV set but had put it back. PW1 and PW4 confirmed that the attackers were armed. PW3 stated that when they were accosted, the attackers had a gun, and a whip. Both PW1 and PW4 were beaten during the incident. PW1 added that one of the two attackers had a gun while the other had a knife. She was assaulted and thereafter raped. We accordingly find that more than one of the ingredients of the offence of robbery with violence was met.

We note, however, and as pointed out by the Appellants that the items said to have been taken from PW1 were in fact taken from PW4's house. Whether the items indeed belonged to PW4 is immaterial to the substance of the charges. The issue of particulars of ownership of the items said to have been stolen does not render the charge defective. See **Section 137(c) (i)** of the Criminal Procedure Code regarding the description of property in a charge. It provides thus;

> **"the description of property in a charge or information shall be in ordinary language, and shall indicate with reasonable clearness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property" (*Emphasis ours).***

Whether the identification was water tight to justify a conviction.

The offences in question are said to have taken place in the night. Both PW1 and PW3 indicated that they were able to see the attackers and recognized them as persons known to them. Nevertheless, this being evidence of recognition, the court is enjoined to carefully consider such evidence to justify a conviction. See the case of ***Warungu vs. Republic*** **[1989] KLR 424:**

> **"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied**

that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction".

With respect to the 1st Appellant, PW1 stated that she recognized him by appearance. PW1 had been blindfolded by the assailants but she indicated that her eyes were not fully covered. She stated that she saw the 1st Appellant when they reached a place that had security lights at a shop and recognized him because she had seen him before at her place of work. The identification by the 1st Appellant in this respect needs to be treated with caution. This is because the said identification happened at night, when the witness had been blindfolded. In this case, this piece of evidence needs to be viewed holistically with other evidence to support a solid positive identification.

PW3 who was accompanying PW1 stated that they were attacked when they reached a place which was dark. The attackers beat them and asked for their valuables. PW3 who was left behind with some of the attackers was thereafter led to a house where she found PW1 being raped. She stated that there was light in the house and that she was able to see the Appellants. Her evidence in part reads as follows:

"…one of the boys had no clothes and was on top of Wangechi raping her. One of them was standing. They started arguing. The one who was inside told the one I had come with to eject me to avoid chaos. I was taken outside. The lights were on in the house. I had seen one of them in the bar. I also saw the other one. The one who had been to the bar was the 2nd accused. The one who was standing is the 1st accused. The one who was in the act of raping her is the one with an Islamic robe **(points at 2nd accused)."**

From this account, it is apparent that PW3 had a clear view of the attackers. This is because she vividly described what was going on with clarity. She did not indicate that she was blindfolded. She stated that the attackers accompanying her beat her and ordered her to face downwards. She stated that the 1st Appellant was the one standing while the 2nd Appellant was raping PW1 when she got in. This evidence indeed supports the account given by PW1. PW1 had testified that the two attackers raped her in turns. She stated that she did not know or see the 2nd Appellant, but only identified him when the 1st Appellant called him by a nickname 'N.' According to PW1, there was only one person known by that name in the village. She then added that the other attackers came in with PW3 when the said N was still assaulting her. This corroborates the account by PW3 who was able to clearly see the two attackers; the 1st Appellant who was standing, whilst the 2nd Appellant was caught while still raping her. We also note that there was sufficient time for the witness to observe what was going on at the scene. She stated that the assailants even argued when they found the Appellants. Even though the actual condition of lighting was not described, we think that the two witnesses were able to give a vivid account of what happened.

The evidence of identification of the attackers by both PW1 and PW3 must also be looked at in the light of reporting to the police. PW1 stated that she saw the 1st Appellant and recognized him as one of the patrons of the bar where she worked. With respect to the 2ndAppellant, she stated that she only recognized him by the name used by the 1st Appellant, N, a nickname she knew was only attributable to the 2nd Appellant. PW3 testified that she did not know the 2ndAppellant by name, but that she had recognized him from his appearance. PW3 stated that she described the attackers in her recorded statement.From the evidence of PW1 and 2, both Appellants were identified by recognition. PW1 stated that she had seen the 1st Appellant at the club, while PW3 indicated that she had seen the 2nd Appellant before at the club where she also worked. PW2 recognized the 2nd Appellant by a name referred to by the 1st Appellant. PW3 was able to see the 1st and 2ndAppellants.

With respect to the circumstances leading to their arrest, the Appellants challenged that no information had been given since the arresting officers were called to testify. Further, they challenged the fact that the date of arrest conflicted with the date the Appellants were arraigned in court. According to the charge sheet, the Appellants were arrested on 20th October 2012 while the Appellants were arraigned in court on 22nd October 2012. This allegation therefore does not have any basis.

We also observe that both PW1 and PW3 gave details regarding the arrest of the Appellants. PW1 stated that she recorded a statement the following morning when she told the police that she identified the persons who attacked her. She however stated in cross-examination that she did not know how the Appellants came to be arrested. PW5 who was the investigating officer did not arrest the Appellants. She stated in her testimony that the Appellants were arrested by her colleagues on 21st and 23rd October 2012. On this part, PW5 contradicts the other available evidence on the arrest of the Appellants as indicated in the charge sheet. She further stated that the complainant gave out nick names of two suspects in the statement and that the suspects were identified by PW1when they were arrested. Again, this part of her testimony contradicts the accounts by PW1 and 3.PW1 testified that she only mentioned the nickname of one of the attackers. They both also stated that they did not go to the police stations to identify the suspects.It seems to us then that the descriptions of the attackers given by PW1 and PW3 were not the basis for the arrest of the Appellants. However, the testimony of PW4 gives some light on the circumstances leading to their arrest. He stated that on the evening of the incident he reported to the police that when the Appellants came to his housethe 2ndAppellant threatened him while the 1st Appellant told him that they had accomplished their mission. That led the police to arrest them.

Further in cross-examination, PW4 stated that he knew the suspects but did not give their names to the police, but only gave descriptions according what he was told by PW. He indicated that from the conversation with the suspects, he suspected that they had committed the offence since they had threatened him. Therefore, even though the arresting officers did not testify, we nevertheless find that the reason behind the arrest was closely connected to the events of the previous day when PW1 had been attacked. We also conclude that the arrest was made on the basis of a description of known persons. In addition, PW4 stated that he knew Appellants very well. Therefore, the failure of the arresting officers to testify is not fatal to the case.

Taking this evidence cumulatively, it is safe to find that the identification of the Appellants was properly done. It was by recognition and an identification parade would not have been necessary.

We further examine PW4's disclosure of additional information in cross-examination by counsel for the Appellants. He denied that they attempted to exhort money from the 2nd Appellant. He added that the parents of the 2nd Appellant had come to his house with a group of persons. When PW1 was recalled, she also denied asking for Ksh. 70,000/ from the 2nd Appellant's mother, adding that it was the Appellant who was pursuing reconciliation. This piece of evidence, we find, is consistent with the other facts linking the Appellants to the charges herein, and is relevant to buttress our conclusion that the identification of the Appellants was safe to justify a conviction.

Whether the Appellants'' defence was properly considered.

The Appellants challenged the trial court for not considering their defence and for shifting the burden of proof with respect to the defences of alibi advanced. The trial court observed in its finding that the defence of alibi was raised for the first time defence hearing and that therefore the prosecution could not have had a chance to test its credibility. The court cited the case of ***Wangombe v Republic*** **[1976 -80] 1 KLR** where it was observed that unreasonable burden is placed on the prosecution or the police when a defence of alibi is pleaded for the first time in an unsworn statement at the trial.

The duty to test the credibility of defence of alibi of rests on the prosecution and never shifts to the defence. This goes in line with the duty of the prosecution to prove its case against an accused person. Ideally, and as observed by the trial court, the defence of alibi ought to have been raised at the earliest opportunity to give the prosecution a chance to test its truthfulness. Nevertheless, it does not suffice to say that when that does not happen that the defence stands dismissed. This is because the prosecution has an opportunity to deal with new evidence during the trial under **Section 212** of the Criminal Procedure Code which provides that

> **"If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may**

allow the prosecutor to adduce evidence in reply to rebut that matter".

Further, as stated in the case of ***Kiarie v. Republic*** **(1984) KLR 739**:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."***

However, the consideration of when the defence of alibi is raised is a relevant consideration. Where the alibi has not been tested by other means when it is raised, the court may also take recourse to other evidence available before it and weigh it against the alibi. It follows then that the trial court was under a duty to consider the defence against the prosecution evidence to determine whether it could stand the test of credibility.

The 1st Appellant indicated that on the material night he was in the company of his girlfriend who testified as DW4. The 2nd Appellant on his part indicated that he stayed home the entire night with his mother, who testified as DW3. In this case, the Appellants indicated that they did not have an opportunity to raise this defence at the earliest. That said, we find that the evidence of the prosecution on identification when cumulatively considered, displaces the defence of alibi. Both PW1 and PW2 recognized the two Appellants as persons who had visited the bar where they worked. The 2nd Appellant also indicated that he knew both PW1 and PW3 well. Further, PW4 who was threatened by the Appellants in relation to the subject incident indicated that the two were well known to him. In all, we conclude that the Appellants' alibi defences lacked merit.

In the end on our evaluation of the evidence on record, we find that the prosecution discharged its burden in proving the case to the required standards; beyond all reasonable doubts. This appeal lacks merit and the same is dismissed in its entirety. We so order.

DATED and **SIGNED** this **22nd** day of **OCTOBER**, **2015**.

L. KIMARU

JUDGE

G. W. NGENYE – MACHARIA

JUDGE

In the presence of;

1. Mathenge holding brief for Mbiu Kamau for the Appellants.

2. M/s Aluda for the Respondent.