REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.10 & 15 OF 2014

(An Appeal arising out of the conviction and sentence of HON. T. OKELO - SPM delivered on 5th December 2013 in Makadara CM. CR. Case No.3736 of 2011)

JASTIN LAUZI MWANGI…..……1ST APPELLANT

KELVIN WACHIRA……..2ND APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellants, Jastin Lauzi Mwangi (1st Appellant) and Kelvin Wachira Kamau (2nd Appellant) were charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 26th July 2011 at Umoja II Estate in Nairobi County, the Appellants, while armed with a knife, jointly robbed Mercy Wavinya Kioko (the complainant) of a mobile phone, speakers and Kshs.1,000/- cash and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the complainant. The Appellants were further charged with the offence of **gang rape** contrary to **Section 10** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellants intentionally and unlawfully caused their respective penises to penetrate the vagina of the complainant. In the alternative, the Appellants were charged with **committing an indecent act** with an adult contrary to **Section 11(6)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellants caused their respective penises to intentionally and unlawfully touch the vagina of the complainant against her will. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty the charge. After full trial, they were found guilty of the main charge of **robbery with violence**. They were acquitted of the offences under the **Sexual offences Act**. They were sentenced to death as is mandatorily provided by the law.

The Appellants were aggrieved by their respective conviction and sentence. They each filed a separate appeal challenging their respective conviction and sentence. The Appellants, in their petitions of appeal, raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of the evidence of identification which was not watertight and did not establish their guilt to the

required standard of proof. They were aggrieved that the trial court had failed to take into account the evidence they had adduced in their defence before reaching the verdict that they were guilty as charged. They took issue with the fact that the trial court had failed to consider that there existed a grudge between the 1st Appellant and the complainant that motivated her to lodge the complaint against him. In their further grounds of appeal, the Appellants stated that the convicting court did not accord them their right to fair trial as provided under **Section 200(3)** of the **Criminal Procedure Code.** They were aggrieved that the trial court had failed to properly evaluate the totality of the evidence adduced during trial and thereby reached the erroneous determination that they were guilty as charged. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentences that were imposed on them.

During the hearing of the appeal, the two separate appeals lodged by the Appellants were consolidated and heard together as one. The Appellants had no objection to the consolidation as the appeals arose from the same trial in the magistrate's court. The Appellants submitted to court written submission in support of their respective opposing positions. They further made oral submission in support of the appeal. The Appellants urged the court to properly evaluate the evidence in line with their grounds of appeal and reached the verdict that the prosecution had failed to prove their case to the required standard of proof. On his part, Mr. Murithi for the State opposed the appeal. He submitted that the evidence on record by the prosecution witnesses had indeed proved to the required standard of proof that the Appellants duped the complainant that they were prophets before escorting her to her house where they raped and robbed her. He urged the court to disallow the appeals and confirm convictions and the sentences imposed by the trial court.

Before giving reasons for our decision, it is imperative that we set out the facts of this case albeit briefly. The complainant was at the material time aged nineteen (19) years. She testified that on 26th July 2011 at about 3.00 p.m., while she was going to meet her friend at Umoja Estate, she met with two (2) young men. One of them, the 1st Appellant, introduced himself as Pastor Brother Mark. He requested her if she would give him directions to Banana Orphans Home in Buru Buru. The complainant did not know the place. In the course of the conversation, the 1st Appellant introduced the 2nd Appellant as Njoroge. It is instructive at this juncture to state that it was the first time that the complainant met with the Appellants. According to the complainant, the Appellants told her that they were prophets and would pray for her to exorcise evil spirits. The complainant believed them because they told her that her mother had died in 2009 and that she had three siblings. These facts were true. It was then that the Appellants suggested to the complainant to take them to her house where they would pray for her.

The complainant lived alone. While at her house, the complainant placed her phone, Kshs.1,005/- and keys on the table. The 1st Appellant asked the complainant to transfer money through mobile transfer to mobile phone number 0705-809732 before she could be prayed for. She obliged. It was then that the prayers commenced. In the course of the prayers, the complainant opened her eyes and saw the 2nd Appellant take away her mobile phone and Kshs.1,000/-. The complainant became suspicious. She realized that she had been duped. After the prayers had been concluded, she requested the Appellants to wait for her in her house as she went to buy sodas. She testified that it was then that the 1st Appellant drew a knife and threatened to stab her if she did not comply with what they wanted. They warned her not to raise any alarm. The complainant complied. She was stripped naked before she was raped in turns by the two Appellants. After they were through, the Appellants picked the complainant's speakers and took off. Immediately after the incident, the complainant reported the incident to Buru Buru Police Station. She was advised to seek medical attention. She went to a clinic operated by Medicines Sans Frontier (MSF) at Mathare where she was treated and discharged. Dr. Zephania Kamau who testified as PW4 saw the medical treatment notes when preparing the medical report which was produced in evidence. The trial court however held that the medical evidence produced by the prosecution did not support the charge of rape.

The investigations were conducted by PW3 Corporal Grace Wambui. The complainant was instructed by the police to call the 1st Appellant through the mobile number that she had sent money to. The complainant lured the Appellants to meet with her. The Appellants took the bait. They were arrested by

PW2 PC Paul Odawo when they appeared at the place where they agreed to meet the complainant. The complainant positively identified the two appellants as the persons who had robbed her. According to PW3, upon concluding her investigations, she established that indeed a case had been made for the Appellants to be charged with the offences, one of which the Appellants were convicted.

When they were put on their defence, the 1st Appellant testified that the complainant was his girlfriend. He attributed his arrest to a grudge that existed between him and the complainant. He denied committing the offence. On his part, the 2nd Appellant testified that on the material day of his arrest, he had been requested by the 1st Appellant to accompany him to Buru Buru. He was shocked and surprised when he was arrested by the police. He denied the allegation that he had committed the offences that he was charged with.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh evaluation with the ultimate objective of ascertaining whether the conviction of the Appellants ought to stand. In doing so, this court must take cognizance of the fact that it neither saw nor heard the witnesses as they testified and must therefore give due regard in that respect (**See Okeno –vs- Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellants on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

We have re-evaluated the evidence adduced in the trial court, in light of the grounds of appeal and submission made by the Appellants and the prosecution on this appeal. It was clear from the evidence adduced before the trial court that the prosecution relied on the evidence of identification to secure the conviction of the Appellants. In **Maitanyi –Vs- Republic [1986] KLR 198 at P.200** it was held that:

> ***"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***
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> ***"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".***

According to the complainant, she had not met with the Appellants prior to the date of the incident. She testified that she was with the Appellants for a sufficiently long period to enable her be positive that she had identified them when she later met them. The incident took place in broad daylight. It was at 3.00 p.m. The complainant interacted with the Appellants from the time she met with them, when they accompanied her to her house, and while inside her house when they prayed before she was raped in turns by the Appellants. This court is of the view that although there is no evidence to suggest that the complainant recorded the description of her assailants in the first report that she made to the police, there is no doubt in our mind that the complainant related with the Appellants in close proximity and for a long period of time to enable her to be certain as to the identity of the Appellants when the Appellants were arrested on 10th August 2011 approximately two weeks after the incident. The Appellants justifiably argued that in the absence of a physical description made to the police in the first report, their subsequent identification by the complainant is doubtful. In the above cited case of **Maitanyi,** the Court of Appeal required the court relying on the sole evidence of identification to warn itself of the danger of relying on such evidence in the absence of other corroborating evidence, before convicting the accused.

In the pesent appeal, we have warned ourselves of the danger of convicting the Appellants based on the sole evidence of identification of the complainant. We however note that the identification was not made

in circumstances that can be said to be difficult. The conditions favouring positive identification were present. There was sufficient light. The incident occurred during broad daylight. The complainant interacted with the Appellants at close proximity for a sufficiently long period of time. If there was any doubt that the complainant had positively identified the Appellants, then that doubt was removed when the complainant was able to trace the 1st Appellant through the mobile number that the 1st Appellant had given to the complainant to transfer money to. That mobile number is 0705-809732. This was the number that the 1st Appellant was called from that led to his arrest and that of the 2nd Appellant.

The complainant also testified that she was able to identify the voice of the 1st Appellant when she called him on the day of his arrest. Voice identification is good evidence especially where the person identifying the voice is familiar with the voice of the assailant (See **Libambula –Vs- Republic [2003] KLR 683)**. The 1st Appellant did not deny that he was the owner of the particular mobile line. In his defence, he testified that the complainant was his girlfriend. There was no evidence on record to suggest that indeed the complainant knew the 1st Appellant or that they had related intimately before the fateful day. The trial court, correctly in our view, dismissed the 1st Appellant's defence that he knew the complainant prior to the incident as sham. We agree. Similarly too, the defence of the 2nd Appellant was a mere denial and did not dent the otherwise strong evidence adduced by the prosecution witnesses against him.

In the premises therefore, on our re-evaluation of the evidence adduced, we have no doubt that the complainant did positively identify the Appellants during the robbery incident. The ground of appeal put forward by the Appellants challenging their convictions on the basis of the evidence of identification lacks merit and is hereby dismissed. As regard whether the Appellants' right to fair trial was infringed by the trial court's non-compliance with the **Section 200(3)** of the **Criminal Procedure Code,** this court finds no merit with the complaint. We have perused the record of the trial court and note that on 7th August 2013 when the convicting magistrate took over proceedings from the previous magistrate who had been transferred, the court asked the Appellants if they wished to have witnesses who had testified recalled under **Section 200(3)** of the **Criminal Procedure Code**. The Appellants responded that they wished the case to proceed from where it had reached. There is therefore no basis for the Appellants to complain on appeal that the right accorded to them under **Section 200(3)** of the **Criminal Procedure Code** was not complied with. That ground of appeal similarly fails.

Taking into consideration the totality of the evidence adduced before the trial court, we hold that the prosecution did establish to the required standard of proof the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The ingredients constituting the charge were proved. The Appellants were two in number, they were armed with a knife, which they used to threaten the complainant, they then robbed the complainant of Kshs.1,000/- and her mobile phone. The upshot of the above reasons is that the respective appeals lodged by the Appellants lack merit and are hereby dismissed. The convictions and sentences imposed by the trial court are hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF OCTOBER 2015

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE