REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCRA NO. 107 OF 2009

AROMAN ELIMLIM …..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

{CONSOLIDATED WITH CRIMINAL APPEAL NO. 109 OF 2009}

STEPHEN LEKATEYA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Original Conviction and sentence by Hon. H. M. Nyagah (Senior Resident Magistrate) in the Senior Principal Magistrate's Court in Criminal Case No. 92 of 2009 dated 2nd July, 2009)

JUDGMENT

In the Lower Court, Stephen Lekiteya was the first accused and Aroman Elimlim, the second accused. They were jointly charged with gang rape contrary to section 10 of Sexual Offences Act of 2006. Particulars of the charge were that on the 21st day of January, 2009, at [particular withheld] village in Baringo District within the Rift Valley Province, jointly gang raped R. L.

Each of the accused filed his appeal separately. The 1st accused Stephen Lekateya, being the Appellant in Appeal No. 109 of 2009, and the second accused Aroman Elimlim, being the Appellant in Appeal No. 107 of 2009. On 3/3/2011, Court ordered that the two appeals be consolidated as both Appellants were jointly charged before the magistrate's Court. For ease of reference to the parties, the Appellant in Appeal No. 107/2009, shall hereafter be referred to as the 1st Appellant and Appellant in Appeal No. 109/2009, as the second Appellant.

The 1st Appellant filed the grounds of Appeal on 30th June, 2011 which I summarize as under:-

1. That the was not properly identified;

2. That the trial court failed to consider that the evidence of P.W.6 was not corroborated and that the witness was a relative of the complainant;

3. That the Court failed to consider that P. Exhibits 2 and 3 had been interfered with;

4. That the trial Court failed to consider that the prosecution witnesses gave evidence that was contradictory and therefore the prosecution did not prove its case beyond all reasonable doubts.

During the hearing of the Appeal, the 1st Appellant informed Court that he intended to rely on written submissions filed in Court on 15th July, 2010. As for the 2nd Appellant, he told Court that he was appealing only against the sentence. He submitted that the imprisonment term of fifteen (15) years was excessive in the circumstances, that he was the bread winner of his family and his mother who is very old and sickly depends on him.

It is now settled law that the duty of the first Appellate Court is to weigh the evidence adduced before the trial Court afresh and come up with its conclusions bearing in mind that it has neither seen nor heard the witnesses and make allowance for that – (see **SOKI =VRS= REPUBLIC 92004) 2 KLR, 21**.)

Back to the 1st Appellant's case, with regard to ground of appeal number 1, he singled out P.W.6 whom he said did not properly identify him. According to him, P.W.6 directed a spot-light (torch) towards him in a rush which was an indication that he (P.W.6) did not have sufficient time to identify him. According to the appellant, P.W.6 did not also state the distance from which he lit the torch which would be indicative of the fact that he was in a position to identify him.

P.W.6 in his testimony stated as follows:-

" On 21/01/2009, at 8.00 p.m., I was at home with my children. I heard the sound of a woman screaming. I listened attentively --- I took a torch and went towards the scene of the noise. As I was rushing there, I met Accused 2. I shone my torch on him. I asked him what was going on. He did not say anything. He just ran in the opposite direction. I went near where the woman who was screaming. I saw a figure that looked like Kateiya's fleeing. He is accused 1. The Complainant was lying on the ground. She told me that Kateiya and accused 2 had raped her. She was covered by dust. She was crying. Just then, Saimellei (P.W.2) came. He said he had seen the assailants as well. I helped the complainant to her ---"

On cross-examination, P.W.6 stated that by help of the torch he saw the 1st Appellant well. He added that he knew him very well. He also stated that he saw him fleeing.

P.W.2 on the other hand testified as follows:-

" On 21/01/2009, at about 6.00 p.m., I was going to fetch water. I had a bicycle. I met the complainant and greeted her. I cycled on ahead of her. On the way, I saw the accused persons sitting under the tree. They were talking. I greeted them and cycled on. I took a bath. As I was finishing, I heard a woman's screams from a distance. I quickly put on my clothes and ran to the direction of the screams. It was getting dark , about 7.00 p.m. As I was running, I met the 1st accused running from the direction where I was headed. I asked him what was wrong. He did not respond. He just ran past me. I reached where the noise came from. I found the Complainant and Jackson (P.W.6). Complainant said Stephen and a Turkana man had raped her ---"

The above testimonies clearly show that P.W. 2, P.W. 6 and the Complainant herself were well known to both Appellants. Although it was dark and P.W.6 did not state from what distance he

directed the torch at the 1st Appellant, it is clear the identification of the 1st Appellant was by recognition. P.W. 6 was well known to the 1st Appellant and he needed not labour in stating who he had seen by help of the torch. This notwithstanding, and in lieu thereof, P.W.2, who was also well known to both Appellants, met with the 2nd Appellant as he ran from the scene. Although he did not see the 1st Appellant, the Complainant confirmed that she had been raped by both Appellants. These events leave no doubts that the 1st Appellant was placed at the scene by the prosecution witnesses.

Moreover, the testimony of the complainant (P.W.1), in corroborating that of P.W.2 and 6 clearly demonstrates that it is the Appellants who raped her. She stated:-

> **"I know the 1st accused person. Accused 1 is from my village. Accused 2 was not very familiar with me. …. I met Saimeli who was going to fetch water from the river' --- After some distance, I met the accused persons sitting beside the path. Accused 1 greeted me. I responded. Accused 2 was with him. He also greeted me and I also responded. I walked past them --- I heard someone running behind me. I turned and saw it was Stephen**
>
> **(Accused 1). I stepped aside to give him way. Instead of passing me, he grabbed me by the waist. I started screaming. Just then, accused 2 then came and joined accused 1. They wrestled me to the ground. They tore my clothes and removed my pants. They got torn in the process. They are the torn black pants (MFI 1). This is the purple petticoat I had. (MFI - 2). It is soiled. The two men told me to keep quiet. Stephen (Accused 1) then proceeded to rape me first. Accused 2 held me by throat to stop me from screaming. He also beat me telling me to keep quiet. He then covered my mouth. I felt the 1st accused ejaculate inside me. He then rose and held me as accused 2 also raped me. He also ejaculated. I felt him do so. It was getting dark now. They took 30 minutes or so to rape me ---"**

This testimony was not rebutted on cross-examination. The same was a clear indication that both Appellants were previously known to P.W. 1 (albeit the 1st Appellant not so well). P.W. 1 therefore identified them by recognition having been known to her previously. Therefore, the 1st Appellant could not have been mistaken for any other reason. He was a principle offender and participated in raping P.W.1 in equal measure as the 2nd Appellant.

On the second ground of appeal, the 1st Appellant submitted that the trial Court ought to have disregarded the testimony of P.W.6 as not having been corroborated and not being credible as P.W.6 was a relative of the Complainant.

No doubt, P.W.6 was a relative of P.W. 1 . In his testimony, he stated that the Complainant was her in-law. But no iota of evidence was adduced that by virtue of this relationship, the prosecution evidence was negated as lacking in credibility. P.W. 6 walked to the scene upon hearing screams of a woman. He did not have prior knowledge of who this woman who was screaming was. It just happened that it was his in-law. He was acting as a good samaritan.

Moreover, when the 1st Appellant was given an opportunity to cross-examine P.W.6, he did not raise the issue of this relationship and more particularly how he thought it prejudiced the prosecution's case to his detriment. Further, it cannot be gainsaid that P.W.6's evidence was well corroborated by that of P.W. 1 and P.W.2 who placed the 1st Appellant at the scene of crime. That testimony remained consistent and the 1st Appellant did not shake it in his favour both on cross-examination of the various witnesses and in his own defence.

With regard to ground of appeal number three, the 1st Appellant stated that the three exhibits produced in court had been interfered with. He however failed to submit or demonstrate in which manner the said exhibits were interfered with.

P. Exhibits 1 and 2 were the Complainant's torn black pants and purple petticoat produced by the investigating officer, P.W. 4. Prior to their production, P.W. 1 identified them as the clothes she wore at the time of rape but which the Appellants tore so as to execute their heinous crime. They were produced

in the state in which they were recovered.

P. Exhibit 3 is the P.3 form (medical examination report) produced by P.W.5, the Clinical Officer who examined P.W.1. He noted that P.W. 1 presented herself with a history of having been raped by two men known to her. She appeared distressed, had tenderness on the neck, lower abdomen and upper limbs. She had bruises on upper limbs and tenderness on her thighs.

On examination of her genitalia, P.W.5 noted hyperenia (redness) of the vaginal walls with tenderness and swelling and tender thighs. He formed the opinion that P.W.1 had been raped.

Although the 1st Appellant raised an eyebrow that the exhibits may have been interfered with, evidence on record demonstrates the contrary. Indeed the state in which P. Exhibits 1 & 2 were produced did prove that they were torn due to the force with which the Appellants applied against the Complainant so as to rape her. Corroborative of this fact is the physical injuries P.W. 1 sustained as she laboured, though fruitlessly, to fight off the assailants. And to cap it all, medical evidence leaves no doubts that she was raped. As earlier noted elsewhere in this judgment, the assailants were none other than both Appellants.

The third ground of appeal, in the circumstances, has no basis and I dismiss it in its entirety.

On the last ground of appeal, in which the 1st Appellant submitted that on the whole, the prosecution's evidence did not prove the charge against him, the contrary is factual. All the prosecution witnesses gave consistent and corroborative evidence which when collated together proved the case against the 1st Appellant beyond all doubts.

His unsworn defence which was to the effect that on the material day, the 2nd Appellant went to his home and wanted him to accompany him to his home which he declined is baseless. Although the elasticity of the defence could not be tested by way of cross-examination as he gave an unsworn statement, being an alibi defence, ought to have been corroborated. That corroboration lacked. His defence was therefore mere denial without basis. His further assertion that P.W. 1 used to drink at a local den lacked nexus with the fact that he and the 2nd Appellant raped her. The assertion lacked credibility and could not bail him out.

The second Appellant prays for leniency indicating that he has a family, who include his mother to take care of. In addition he stated in his memorandum of appeal that he was compelled to do the beastly act due to intoxication. That as a result of the intoxication, he raped P.W.1 due to circumstances beyond his control.

Hitherto the enactment of the Sexual Offences Act No. 3 of 2006, intoxication was a defence pursuant to section 13 of the Penal Code. The same provides as follows:-

Sec. 13 "(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -

(a) The state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) The person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission. Where the defence under (3) Subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this code and of the Criminal Procedure Code relating to insanity shall apply.

(3) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he should not be guilty of the offence;

(4) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs."

However, the transition clause under the Sexual Offences Act no longer avails the defence of intoxication to Sexual offenders. Specifically Section 2 of the First Schedule (Transitional Provisions) provides that "**For greater certainty, the provisions of this Act shall supercede any existing provisions of any other law with respect to sexual offences**."

Even if this Court were to find that the defence of intoxication exists, it is expected that an appellant raises such defence during the trial as an appellate Court does not admit fresh evidence save to evaluate what was adduced before the trial Court. This notwithstanding though, the 2nd Appellant has admitted having committed the offence. Court would only therefore evaluate whether the sentence imposed was legal and that the Court considered all circumstances of the case before imposing it.

Section 10 of the Sexual Offences Act provides that, " **any person who commits the offence of rape or defilement under this Act in association with others is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for term of not less than fifteen years but which may be enhanced to <u>imprisonment for life.</u>"**

Clearly, the law sets the minimum sentence for the offence of gang rape. The trial Court properly evaluated evidence before it in arriving at a finding that both Appellants committed the offence. I uphold that finding as they raped P.W.1 in turns each aiding the other in turns to execute the act.

Whereas sentence is a matter of discretion of the Court, where the law sets the minimum sentence, in my view, the Court cannot vary it unless for extremely good reasons.

In observing the factors to be considered in sentencing, the Court of Appeal in **<u>SHADDRACK KIPKOECH KOGO -VS- REPUBLIC, CRIMINAL APPEAL NO. 253 OF 2003</u>** – Court of Appeal sitting in Eldoret said;

"Sentence is essentially an exercise of discretion by the trial Court and for this Court to interfere, it must be shown that in passing the sentence, the sentencing Court took into account an irrelevant factor or failed to take into account a relevant factor or that a wrong principle was upheld or that short of those, the sentence itself is so harsh and excessive that due error in principle <u>must be inferred</u>"

And **<u>OMUSE -VS- REPUBLIC (2009) KLR, 214</u>**, <u>the Court held;</u>

"**The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence**"

In passing the sentence, the trial Magistrate noted:-

"The accused persons' action need to be countered with a severe sentence. They could easily have infected her with veneral disease or even AIDS. Each accused is sentenced to 15 years imprisonment".

In this regard, the trial Court addressed itself as to the severity of the offece and the possible attendant consequences. It also gave the minimum sentence provided for by the law. Given the circumstances of the case, the severity of the attack meted on P.W.1 by the Appellants, the injuries she

suffered, the humiliation she has had to bear in the face of her husband and children and the likely possibility of contracting sexually transmitted diseases, it is my view that the sentence imposed was not lenient but most reasonable.

Both Appellants being young and the 2nd Appellant claiming to be a family man, ought to be more responsible and morally upright upon whom the younger generation can look up to. Instead of protecting the society and especially the most vulnerable, they have become the wild beasts. That is why the law sets the minimum sentence so as to deter the would be offenders from committing this most grave offence.

Effectively, I find no reasons that would compel me to vary the sentences.

In the result, both appeals are dismissed. As for the 1st Appellant, I confirm both the conviction and the sentence and as for the 2nd Appellant, I equally confirm the sentence. Both Appellants will continue to serve the jail terms imposed on them unless they are otherwise set free.

DATED and DELIVERED at ELDORET this 30th day of July, 2013.

G. W. NGENYE - MACHAIRA

JUDGE

In the presence of:-

1st Appellant in person

2nd Appellant in person

Mr. Mulati for the State/Respondent