



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 46, 47 AND 48 OF 2012

BEN EKUTAN}

ALETIA EKIRU}

LOTERE EBUYA} APPELLANTS

VERSUS

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. E. K. Mwaita - PM, in Lodwar Senior Resident Magistrate's Court in Criminal Case No. 287 of 2011)

J U D G M E N T

The three appellants, **Ben Ekutan**, **Aletia Ekiru** and **Lotere Ebuya**, appeared before the Principal Magistrate at Lodwar charged with robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the 24th April 2011 [particulars withheld] in Turkana Central District, jointly robbed H A of her mobile phone make Samsung valued at Kshs. 5,000 and cash Kshs. 1,500.

Each of the appellants faced a separate count of gang rape contrary to Section 10 of the Sexual Offences Act. It was alleged that they gang raped the said H A on the same 24th April, 2011.

After a full trial, the three appellants were convicted on both counts and sentenced to death in count one and life imprisonment in count two respecting the first and third appellants (third and second accused in the lower Court).

The second appellant (first accused in the lower Court) was sentenced to detention in prison at the pleasure of the President after it was determined that he was a child under the Children Act.

Being dissatisfied with the conviction and sentence, the three appellants filed separate appeals which were herein consolidated and heard together. The appeals are based on the grounds contained in the respective petitions of appeal.

At the hearing of the appeals, the appellants appeared in person and relied on their respective written submissions in support of the appeals.

Mr. Chelashaw, the Learned Prosecution Counsel, appeared for the State Respondent and opposed the appeals by submitting that the appellants were properly identified when they attacked and raped the complainant (Pw 1). That, the complainant saw and identified them as she had known them previously. That, the complainant helped in tracing and having them arrested. That, the conditions for identification

were favourable due to the presence of sufficient light from nearby welding shop. That, the evidence by Pw 1 and Pw 3 was corroborative and that Pw 2 confirmed that the complainant was raped.

The Learned Prosecution Counsel contended that the complainant availed sufficient evidence to convict the appellants in the second count of gang rape which evidence could be relied upon even without corroboration but was in any event corroborated by the evidence of Pw 3.

The Learned Prosecution Counsel urged this Court to dismiss the appeals contending that their conviction on both counts was proper.

Having considered the submissions by both sides, our duty is to re-visit the evidence and draw our own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

Briefly, the Prosecution case was that on the material date at about 5.00 am, the complainant **H A (Pw 1)**, left a disco club in Lodwar town heading to her home. She arrived at a place near Mums Hotel and was confronted by a group of six men and one woman. They took her mobile phone after it fell down when her left hand was hit. She was strangled on the neck and pinned down. Five of the six men raped her in turns in an ordeal which lasted for about 30 minutes. Thereafter, **G A (Pw 3)**, a young girl aged 11 years old went to her (Pw 1's) rescue. The two reported to the Police after which they proceeded to Lodwar District Hospital where the complainant was examined.

She (complainant) indicated that at the scene of the offence there was electric light from nearby welding shop. She said that she identified her attackers and that the appellants were among them. She said that the first appellant was the one who took her money and also removed her clothes while the second appellant was the one who threatened and hit her on the left hand. She also said that the third appellant was the one who took away her mobile.

A (Pw 3) confirmed that the complainant was raped by a group of six men. She said that she was heading towards Turkwell Lodge and on arrival at the scene of offence found the six men sexually assaulting the complainant. She indicated that there was moonlight which helped her identify the offenders. She said that the appellants were part of the offenders and that they were previously known to her.

A Clinical Officer at Lodwar District Hospital, **Simon Akundunyang (Pw 2)**, produced a P3 form prepared by his colleague Sammy Lorot after the complainant was medically examined.

The P3 form indicated that the complainant was indeed raped.

P. C. Pius Ochieng (Pw 4), investigated the case after it was brought to his attention. In the process, he recorded necessary statements from the witnesses and issued the P3 form for completion by a Medical Officer. On completion of his investigations, he preferred the present charges against the appellants.

In their respective defence, the appellants denied the offences. The first appellant (Ben) stated that on the 30 April 2011 he went to a place called Salama in Lodwar town in search of a child who was under his care. He found the child sleeping at a verandah. At that juncture, Police officers arrived and arrested him. He was later arraigned in Court.

The second appellant (Aletia), indicated that he was a fisherman and that he arrived in Lodwar town on 29th April, 2011 and while off-loading his fish catch was approached by a person who mistook him for another called Shogira. He was told to enter a motor vehicle which took him to the Police Station where he was locked in the cells for five days before being arraigned in Court.

The third appellant (Lotere) said that he was at Kalokol from the 1st April 2011 to 29th April 2011. He travelled back to Lodwar to attend school on the 29th April 2011. He was on that date standing outside a hotel when he was arrested and taken to the Police Station where he was held for five days before being

arraigned in Court.

From all the foregoing evidence, we are satisfied that there was sufficient evidence from the Prosecution showing that the complainant (Pw 1) was indeed robbed and raped by a group of about six (6) men on the material date and time. The ingredients of the charge of robbery with violence as well as the charge of rape were established without any particular dispute from the defence.

The basic issue that fell for determination by the trial Court was whether the appellants were positively identified as having been part of the group of six or seven people who offended the complainant. They all denied the charges and indicated that they were separately arrested and later charged in Court without good cause.

It was without doubt, that the offences were committed in the hours of darkness at about 5.00am. It was therefore incumbent upon the Prosecution to lead sufficient and credible evidence of identification which could leave no doubt in the mind of any Court that indeed the appellants committed the offences as alleged. Such evidence would render the possibility of mistaken identity quite remote.

Herein, the Prosecution evidence of identification came from the complainant (Pw 1) and A (Pw 3).

Both stated that they identified the three appellants and that they were able to do so with the help of electric light coming from a nearby welding shop in the case of the complainant and with the help of moonlight in the case of Akiru (Pw 3). However, none of them came out clearly with regard to the intensity of the light, the distance between the welding shop and the actual scene of the crime. Most importantly, it was intriguing that whereas the complainant (Pw 1) talked of electric light, A (Pw 3) talked of moonlight yet they both indicated that they saw and identified the appellants at the same time.

We are of the view that the short falls in the evidence of identification by the complainant and A rendered it doubtful and unreliable and unworthy of belief. This is confirmed by the fact that at the time of her medical examination soon after the fact, the complainant was found to have been intoxicated as per the evidence of the Clinical Officer (Pw 2). How then was she in a position to identify her assailants while in such condition and in difficult circumstances?

We do not agree with the Learned Trial Magistrate that the appellants were positively identified as the assailants whether by recognition or otherwise.

Favourable conditions for identification of the assailants did not exist at the time such that the possibility of error or mistaken identity could not be overruled.

It is therefore our ultimate finding that the conviction of the appellants by the Learned Trial Magistrate in both counts was not proper and safe and is hereby quashed.

The three appellants shall be set at liberty unless otherwise lawfully held.

Ordered accordingly.

(Delivered and signed this ...26th..... day of ...November.... 2013)

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellants:
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Respondent:

Court Clerk: