



the Court to sustain the conviction and sentence.

4. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing, this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **NJOROGE VS. REPUBLIC [1987] KLR 19**. I now wish to set out, albeit briefly the evidence that was before the trial court which led to the conviction and sentence of the appellant. The prosecution's evidence that led to the conviction of the appellant was principally led by R.N., **PW1** who was also the complainant in this case.

5. PW1 testified that on 17<sup>th</sup> February, 2009, at about 3.00 p.m. she was walking to her home after attending to her day's business of selling charcoal at K[...][ town. When she reached the junction between K[...] 1 and K[...] 11 near a cemetery, she was accosted by the 1<sup>st</sup> and 2<sup>nd</sup> appellant. The 1<sup>st</sup> appellant held the complainant at the back while the 2<sup>nd</sup> appellant held her hands from behind. They carried the complainant to the bush and when she attempted to scream, the 2<sup>nd</sup> appellant drew a knife and ordered her to keep quiet. The complainant was stabbed on the right side of forehead and on the right thigh. The 2 appellants placed the complainant on a thorny and they gang raped her. Thereafter they walked away towards the refugee camp.

6. The complainant recollected herself. Her clothes had been torn and she was bleeding from the injuries inflicted by the two appellant and also the thorns from the thicket where she was raped. The complainant reported the matter to her husband who advised her to report the matter to one **E.** so that she could get money to go to hospital but she did not find **E.** so she spent the night at a neighbor's house. The following morning the complainant's husband met with her and while they were walking to a place called U[...] wa N[...] area, they spotted the 2<sup>nd</sup> appellant **Chritopher Eken**. PW2 testified that the complainant reported to him that she was raped by **Christopher Eken** and **Erupe Napao**. He reported the matter to K[...] police station but he was advised to take the complainant.

7. The following day, PW2 testified that he went to N[....] village to look for the appellant. On the way he met his wife and as they were going to U[...] wa N[...] village, they spotted the 2<sup>nd</sup> appellant who began to run away. PW2 ran after the 2<sup>nd</sup> appellant and apprehended him. The 2<sup>nd</sup> appellant confirmed that they raped the complainant with the 1<sup>st</sup> appellant. PW2 took the 2<sup>nd</sup> appellant to K[...] police station and continued to search for the 1<sup>st</sup> appellant. It was not until 7<sup>th</sup> March, 2009, when we located the 1<sup>st</sup> appellant at K[...]. They apprehended him and took him to K[...] police station. This matter was investigated by Cpl. Ann Wanjiru, PW3. She testified that on 18<sup>th</sup> February, 2009 the complainant came to the police station accompanied by her husband and the 2<sup>nd</sup> appellant. She reported that on 17<sup>th</sup> February, 2009 at about 3.00 p.m. she was gang raped by the 2<sup>nd</sup> appellant. PW3 referred the complainant to Kakuma Mission Hospital for treatment.

8. PW3 interrogated the 2<sup>nd</sup> appellant and he confirmed that he was with the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant was also arrested in the help of PW2 on 7<sup>th</sup> March, 2009. The complainant was examined by **Joseph Chebii Kaino**, clinical officer based at Kakuma Mission Hospital. The complainant was referred to the hospital by the OCS Kakuma police station on 17<sup>th</sup> February, 2009. Her clothes were bloodstained and soiled. She had two deep cuts on the head. She had multiple cuts on the back and on the right and left side of the hands. The complainant also complained of having been raped and on examination of her genitalia, PW4 recorded that he found bruises on the labia majora and labia minora.

9. The two appellants were put on their defence. They both gave sworn statements of defence. The 1<sup>st</sup> appellant testified that while herding his goats sometime in February, 2009 he sustained injuries and decided to seek treatment at Kakuma. While at Kakuma he was looking for a friend when a motor vehicle stopped by the side and arrested him on allegations that he had stolen a camel but when he was taken to court he was charged with the offence of rape which he denied. The 2<sup>nd</sup> appellant testified that as at the time he was suffering from TB and he had lost his wife and sent the children to school so he was looking

for work as a casual labourer in Kakuma. On 14<sup>th</sup> February, 2009, he saw a police motor vehicle pass by. The occupants asked for his name and then he was asked to board the motor vehicle and was placed in police custody. He was surprised when he was charged with the offence of rape which he denied.

10. The learned trial magistrate considered the above evidence. He was satisfied that the prosecution proved the case to the required standard. The defence by the 1<sup>st</sup> and 2<sup>nd</sup> appellant was found to lack credibility. The appellants were convicted and sentenced to 25 years imprisonment each. The issue for determination in this appeal as it was before the learned trial Magistrate is whether the prosecution proved the case against the appellants. I have re-evaluated the evidence before the trial court, against the backdrop of the defence offered by the appellants. Firstly, the appellants were not obliged to give a defence, however they opted to offer sworn statement of defence thus the court has to evaluate the defence as well.

11. I have noted in the 2<sup>nd</sup> appellant's defence, he claimed in his defence that he was arrested on 14<sup>th</sup> February, 2009 when he had travelled to Kakuma to look for casual work. This is in sharp contrast with the evidence of PW1, PW2 and PW3. PW3 is the arresting officer; I do not see any justifiable reason why he would mislead the court that the 2<sup>nd</sup> appellant was arrested on 18<sup>th</sup> February, 2009 if indeed he was arrested on the 14<sup>th</sup> February 2009 even before the offence was committed. For this reason I agree with the learned trial magistrate that the defence by the 2<sup>nd</sup> appellant lacked credibility.

12. The complainant gave to PW2 and also PW3 immediately she made the first report the name of the 2<sup>nd</sup> appellant as one of the two people who gang raped her, he was arrested the next day and when he was taken to the police station both the complainant and PW2 were present. I am in concurrent finding with the learned trial Magistrate that the conviction of the 2<sup>nd</sup> appellant is without error as the complainant who was the victim of rape was able to identify her attacker; she was attacked in a solitary place, drugged into the bushes where she was raped. The ordeal took place during the day and she immediately gave the name of the 2<sup>nd</sup> appellant to PW2 and also to PW3 who received the first report at the police station on the 18<sup>th</sup> February 2009

13. As regards the conviction of the 1<sup>st</sup> appellant, PW2 and PW3 said that his name was mentioned by the 2<sup>nd</sup> appellant. This was evidence by an accomplice which must be treated with utmost care. The principles to guide the court on how to deal with evidence of an accomplice have been settled in a long line of authorities by the Court of Appeal, Key among them is the case of;

**Wanja Kamau Vs Republic {1965} EA 502** in which the East Africa Court of Appeal held;

***“While a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who merely acquiesces in what is happening or who fails to report a crime is not normally an accomplice but the weight to be given to such person's evidence should vary according to the reason for the acquiescence; if the acquiescence was based on approval of the crime, the evidence should be treated as no better than that of an accomplice; if, however, the acquiescence was based on indifference, the evidence should be treated with considerable caution; but if the acquiescence was a result of fear then there is no reason why the evidence should not be relied upon.”***

14. Apart from the 1<sup>st</sup> appellant having been an accomplice, that is going by the evidence on record by PW3, The 1<sup>st</sup> appellant was arrested on 7<sup>th</sup> March, 2009, I am of the opinion that the police should have mounted an identification parade for the complainant to identify her second attacker. My reservation is compounded by the fact that when the complainant made the first report to PW3 on 18<sup>th</sup> February 2009, she did not mention the name of the 1<sup>st</sup> appellant. This is the evidence of PW3

***“I am the investigating officer on the 18<sup>th</sup> February, 2009 at about 11.00 a.m. I was at Kakuma police station when one R.N. (PW1) came to the police station while in the company of her husband***

***L.K. PW2 and Christopher Eken the 2<sup>nd</sup> accused person. She reported that on the 17<sup>th</sup> February, 2009 at about 3.00 p.m. she was from Kakuma Refugee Camp on her way home and when she reached the N[...]Community Area two men appeared, caught and dragged her to a neighbor where she was raped. She told me that Christopher Eken the second accused person was one of the men who raped her ... In the course of interrogation the said accused person mentioned the first accused person”.***

15. Going by the above evidence, there is doubt whether the 1<sup>st</sup> appellant was properly identified. For that reason the appeal in respect of the 1<sup>st</sup> appellant succeeds, the conviction is quashed and the sentence of 25 years is hereby set aside. As regards the appeal by the 2<sup>nd</sup> appellant, the appeal lacks merit, it is hereby disallowed. The conviction and sentence are to remain in force.

Judgment read and signed on this 3<sup>rd</sup> day of June, 2011.

**MARTHA KOOME.  
JUDGE.**