REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 16 OF 2018

EBEI LOROT LOKONYA........................1ST APPELLANT

NGITIRA NAKUA NAKOCHIL.............2ND APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentence in Criminal Case No. 15 of 2017 by the Senior

Resident Magistrate - Hon. J M Wekesa delivered on 11th January, 2018 at Kakuma)

JUDGMENT

1. The appellants **EBEI LOROT LOKONYA** and **NGITIRA NAKUA** were charged with the offence of gang defilement contrary to section 10 of the sexual offences Act No.3 of 2006 the particulars of which were that on 14th day of January, 2017 at [particulars withheld] village Turkana West sub-county within Turkana County intentionally and in turns caused their penis to penetrate the vagina of AL a girl aged 15 years.

2. They faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 of intentionally touching the vagina of AL a child aged 15 years.

3. They pleaded not guilty to the charges and were tried convicted on both the main and alternative charge and were sentenced to serve fifteen (15) years on the main charge and ten (10) years on the alternative charge respectively with the sentences running concurrently.

4. Being dissatisfied by the said conviction and sentence both appellants filed their individual appeal which appeals were consolidated for the purposes of trial and determination by the court. The appellants in their home grown grounds raised the following summarized grounds of appeal.

> **a) There was no eye witnesses called by the prosecution and its case was based on hearsay evidence.**
>
> **b) The prosecution case was marred by incurable irregularities in that PW3 and PW4 testified on behalf of witnesses who were not called.**
>
> **c) The age of the complainant was not proved.**
>
> **d) The appellant therefore sought for retrial.**

5. When the appeals came up for hearing before me, the appellants who were not represented filed written submissions while Mr. Mongare from the State opposed the said appeals and made oral submission thereon.

6. on behalf of the 1st appellant it was submitted that he was implicated in the cause as a cover up by PW1 and that her evidence was not consistent since if she was assaulted at 7.00pm as alleged there could not have been sun light to enable her identity that appellants and therefore the conditions prevailing were not suitable for identification and recognition. It was further stated that the age of the complainant was not proved beyond reasonable doubt as the complainants evidence was that she was aged 12 years in class three while in the P3 form her age was assessed to be 15 years. It was stated that the doctor who filed the said age assessment report and the medical report were not called to testify.

7. Mr. Mongare for the DPP submitted that this being a sexual offence there was no need for an eye witness and that the evidence of PW1

needed no corroboration but was corroborated in material particulars by the evidence of the Clinical Officer and the investigating officer. It was submitted that what the complainant was doing outside her home at 4.00pm was immaterial to the particulars of her offence and that the evidence of PW3 and PW2 were properly admitted by the court.

8. This being a first appeal the court is under a legal duty to reevaluate the evidence tendered by the trial court while giving allowance to the fact that unlike the trial court it did not have other advantage of sing and long hearing witnesses as was stated in the case of **OKENO – V – R [1972] EA 32, 36**

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal Mruwala – V – R[1957] EA 570) it is not the function of a first appellate court to merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See Peters V Sunday post [1958]EA 424"**

9. On behalf of the prosecution the court having conducted a voire dire found the complainant PW1 intelligent enough to testify under oath and testified that the appellants together with the 1st accused at the lower court who was placed on probation and two others who were not charged attacked her and defiled her. She stated that it was one Anoo who attacked her and defiled her first; he was then followed by the 2 nd appellant and the 1st appellant coming in last. She reported to her father PW2 on the attack and gave the names of the attackers including appellants herein who were later arrested.

10. PW3 PC W CAREN NYABONYI ONDARI testified on behalf of the initial investigating officer who recorded statements from PW1 and PW2 and took the complainant for age assessment while PW4 Dr. **GODFREY OBALA** testified on behalf of Dr. Musau and produced age assessment report and P3 form which confirmed that there were bruises on the outside and inner part of the vagina with a foul smelling whitish discharge.

11. When put on the defence the 1st appellant stated that he was a boda boda operator. On 14/2/2072 while on his way near the river met three people who accosted him and beat him up, arrested him and took his bicycle. He was taken to the police station and later on charged. The 2nd appellant stated that on 15/1/2017 while at home saw two men and two women approaching him and was told that he had done something bad to the complainant he was asked to accompany them to the police station and was later on charged with the offence.

12. From the proceedings and submission herein the following issues have been identified for determination.

> **a) Whether the court was right in convicting the appellants on both the main and the alternative charge.**
>
> **b) Whether the prosecution case against the appellants was proved beyond reasonable doubt thereby making their conviction safe.**
>
> **c) Whether the appellants are entitled to a retrial**.

13. In her judgment the trial court having assessed the evidence tendered had this to say at page 8 of the judgment.

> "**For the above reason, I find that the prosecution has proved its case against the three accused persons herein beyond reasonable doubt in both the main and alternative charges against the three accused persons herein respectively. In the circumstances therefore, I find the three accused persons herein guilty as charged in both the main and alternative charges against them respectively and they are convicted accordingly under section 215 of criminal procedure code"**

14. In sentencing the appellants the trial court had this to say

> **"With regard to the second and third accused person herein, they are sentenced as follows;-**
>
> **For the main charge each of them is sentenced to serve 15 years in jail. For the alternative charge each of them (i.e 2nd and 3rd) is sentenced to serve 10 years in jail. Both sentence to run concurrently"**

15. In so holding as I stated in the case of **JOSEPHAT EKULAN – V – REPUBLIC LODWAR CRIMINAL APPEAL NO. 2 of 2018** an appeal against the decision of the same Judicial officer, the same fell into error as it is trite law that a conviction cannot be made on both the main charge and the alternative charge. This position was stated by the Court of Appeal at Nyeri in criminal Appeal No.272 of 2012 reported in (2013) eKLR thus

> "**On the issue of the alternative charge we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In MBO – V – R CRIMINAL APPEAL NO. 342 of 2008 this court held**
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> **"The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge".**

16. As stated herein, the charge is alternative to and not addition to and therefore once the trial court found as in the cause appealed from that the prosecution had proved the main charge of gang rape, the learned Magistrate had no business in proceeding to convict and sentencing the applicants on the alternative charge of committing indecent act with a child and for that reason even though the appellants did not take up this line in their submission and ground of appeal, I will allow the appeal on both conviction and sentence which I hereby set aside.

17. this being a first appeal as stated herein and being a live to my role under section 354 (3) of the CPC, I will therefore proceed to evaluate whether the prosecution proved its case against the appellants on the main charge of gang rape which is defined as follows:

> **S 10 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 others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term not less than fifteen years but which may be enhanced to imprisonment for life.**

18. From the evidence on record, the complainant properly identified the appellants by recognition; she gave their names to her father PW2 which led to their arrest. She was very clear in her evidence of what happened and how the gang defiled her in turns. She lived with the appellants in the same village and therefore there was no mistaken identity of the appellants. The issue before the court is not where the complainant was coming from or what she was doing at that time but whether the appellants defiled her in turns. The medical records produced before the trial court confirmed and corroborated her evidence and therefore find that their conviction on the main charge was safe.

19. The appellants have raised a constitutional issue which I must deal with at this stage to wit – they were not given adequate time and facilities to prepare a defence and to be informed in advance of the evidence the prosecution intended to rely on and to have reasonable access to that evidence as provided for under Article 50 (2) (c) and (j) of the constitution of Kenya 2010 in that they were not provided with witness statements in good time. I have looked at the proceedings and note that on 27/2/2017 the trial court made the following order:

> “**Court all the accused persons to be supplied with witness statements on payment of the requisite amount”.**

20. On 13/3/2017 the following order was made:

> **“Court hearing 5/4/2017 mention 27/3/2017. Be given statement at own costs” and on 26/4/2017 the following was recorded.**
>
> **“Accused 1 I have just been given witness statements today. I need more time.**
>
> **Accused 2, same**
>
> **Accused 3, same**
>
> **State counsel. They have been given sufficient time to go through the witness statement. It is in the interest of my client that the complainant witness be taken today. The complainant is a pupil adjourning now will mean another date in August which will be long**
>
> **Court – I have considered the State counsel’s sentiments as well as those adduced by all the three accused persons herein. The court concurs with the prosecution that the complainant evidence should be taken today as she is in school. She was in court yesterday and has come back today even though the hearing lapsed (sic) yesterday. The trial magistrate is also proceeding on annual leave after next week. So since the accused persons have statements already, we will place matter aside so they go through them”.**

21. I have noted that the constitution only requires that the accused be given reasonable time and have set out the proceedings herein above I find that the appellants were given reasonable time to prepare on their defence and were able to cross examine the witnesses effectively. That right of the accused must be balance with their right to have the matter tried without reasonable delay under article 50 (2) (e). I therefore find no merit on the grounds of appeal.

22. on sentence I have noted that the trial court gave the sentence is lawfully provided for under the law and therefore find no faulty with the sentence.

23. In the final analysis I find no merit on the appeal herein. On their conviction and sentence on the main charge of gang rape which I hereby dismiss and affirm the trial courts judgment thereon on both conviction and sentence. The appellant have right of appeal.

Dated and delivered at Lodwar this 2nd day of April, 2019

J WAKIAGA

JUDGE

In the presence of:-

Mongare for Respondent

Ebei Lorot Lokonya - 1st appellant

Ngitira Nakua Nakochil - 2nd appellant

Richard - Court assistant