REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 45 OF 2017

JOSEPH EKIRU *alias* KUDI...............1ST APPELLANT

ETABO EKALALE..............................2ND APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentence in Criminal Case No. 283 of 2015 by

the Senior Resident Magistrate – Hon. C.M. Wekesa delivered

on 31st August 2017 at Lodwar)

JUDGEMENT

1. The Appellants were tried of multiple counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** the particulars of which were as follows:-

COUNT I:-

On the 30th day of July, 2015 village in Turkana West District within Turkana County, jointly with another not before court while being armed with dangerous weapons namely a knife and a club robbed **BEE** of her mobile phone make Techno valued at Kshs.4,000/= and immediately before the time of such robbery used actual violence to the said **BEE.**

COUNT II:-

On the 30th day of July, 2015 at the same village while armed with dangerous weapons robbed **EA** of her mobile phone make Nokia valued at Kshs.5,000/= and immediately before the time of such robbery used actual violence to the said **EA.**

2. They were also tried of the offence of rape and gang rape the particulars of which were as follows:-

COUNT III:-

Rape contrary to **Section 3 (1)(a)(c) (3)** of the **Sexual Offences Act No. 3 of 2006:- JOSEPH EKIRU** *alias* **KUDI** on 30th day of June 2015 at in Turkana West District within Turkana County, intentionally caused his penis to penetrate the vagina of **EA** without her consent.

COUNT IV:-

Gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2010 JOSEPH EKIRU** *alias* **KUDI** on 30th day of June 2015 at the same village with another not before the court intentionally caused his penis to penetrate the vagina of **BEE** without her consent.

3. They were convicted on all the counts but sentenced to death on the first count with the rest of the sentences being held in abeyance.

4. Being dissatisfied with both conviction and sentence both filed individual appeals and raised the following consolidated grounds of

appeal:-

*a) **The prosecution case was based on mere suspicion and not proved beyond reasonable doubt.***

*b) **The prosecution case was full of contradictions.***

*c) **Their identification was not safe.***

*d) **Their defence was rejected without cogent reasons.***

5. These appeals were consolidated for purposes of trial and determination and at the hearing thereof the Appellants who were unrepresented filed written submissions which they relied upon while Mr. Mongare for the State opposed the appeals and supported the conviction and sentence.

SUBMISSIONS

6. On behalf of the Appellants it was submitted that the conditions prevailing was not suitable for identification and failure by the police to conduct identification parade was fatal to the prosecution case. It was submitted further that vital prosecution witnesses who alleged came to the rescue of the complainants were never called to testify and therefore adverse inference should be made against the prosecution case. It was further submitted that weapons allegedly used upon the complainants were never produced in court and that the evidence of the prosecution witnesses were contradictory. It was submitted further that the charge of rape was not proved.

7. On behalf of the prosecution it was submitted that the Appellants were properly connected and that the defences of the Appellants were properly considered and rejected by the trial court. It was submitted that identification parade was not necessary since the same is only conducted where there is reasonable cause to believe that the circumstances were not favourable for identification.

8. This being a first appeal the court is legally required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as was stated in **OKENO v REPUBLIC [1972] EA 32:-**

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own 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."***

PROCEEDINGS

9. The prosecution case against the Appellants was that on 30th July 2016 the complainants who were sisters were coming from hospital at 11.00 p.m. when three people who had covered their faces attacked them. It was **PW1's** evidence that the 1st Appellant attacked **PW2** first before grabbing her neck. The 1st accused remained with her while the 2nd accused together with someone not before the court took **PW2** to the lagga where they raped her while the 1st accused raped **PW1** having threatened her with a knife. She screamed and ran to one Narion who came and identified the 1st Appellant. In the process they were robbed of mobile phones. She confirmed that the 1st Appellant was arrested and found with the mobile phone belonging to **PW2**.

10. PW2 EA corroborated **PW1's** evidence and stated that the Appellants instilled fear upon them by beating them up before separating them to different sites where they were raped. It was her evidence that the 2nd Appellant raped her first and thereafter the one not before the court using a white plastic nylon paper which they improvised as a condom. It was her evidence that the people who rescued her knew the Appellants very well. The Appellants were later arrested and they identified them and her phone recovered. It was her evidence that she did not know the 2nd Appellant before the said date.

11. PW3 CHRISPUS WANGWE BARAZA produced P3 forms in respect of the complainants and in respect of the 1st complainant stated that there was scanty evidence of rape while in respect of the 2nd complainant there was swelling of labia. **PW4 PATRICK EKIRU NAKWAWI** arrested the 1st Appellant who was pointed out by the **PW2** who allegedly admitted having committed the offence and a mobile phone recovered from the Appellants. It was his evidence that he only knew the 1st Appellant by appearance. **PW5 PC JENIFFER KAMAU** testified on behalf of the investigating officer.

12. When put on their defence the 1st Appellant stated that he was working as a waiter in a hotel and was on the material day arrested by four people who took him to the police station before being charged in court. The second Appellant stated that he was coming from Nakoyo when he was arrested by five people.

ANALYSIS AND DETERMINATION

13. From the proceedings and submissions herein I have identified the following issues for determination:-

*1) **Whether the identification of the Appellants was safe.***

2) Whether the prosecution case was proved beyond reasonable doubt.

14. On the issue of identification there is no doubt that the offence herein was committed at night. The evidence on record is that the person who attacked the complainants had covered their faces. The only source of lighting was moon light which enabled the 1st complainant to see the face of the 1st Appellant. The evidence of **PW1** was contradicted by that of **PW2** her sister who stated that they met three people who stopped them and started talking to them before instilling fear in them by beating them. I have looked at this against the prosecution account on how the Appellants were arrested and note that those who arrested the Appellants were not called to testify and further since no identification parade was conducted upon the arrest of the Appellants and this being a criminal case where proof is required beyond reasonable doubt, I would agree with the submissions by the Appellants that their identification was not safe and the conditions prevailing were not suitable for identification.

15. In this holding I find support in the case of **REPUBLIC v TURNBULL & others [1976] 3ALL ER 549** where it was stated by Lord Widgery CJ thus:-

> ***"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"***

16. It is clear from the evidence on record that the attack took place at night the complainants were under threat and the strength of lighting is not indicated. There is also contradiction on the evidence of **PW1** and **PW2** which I have weighed against the fact that the two boys who allegedly recovered them were never called compiled with the fact that no identification parade was conducted upon the arrest of the Appellant and have come to the conclusion that their conviction was not safe.

17. I therefore find merit on the appeal herein which I hereby allow. The conviction is set aside and the sentenced quashed. The Appellants should be set free forthwith unless otherwise lawfully held. The state has right of appeal.

Dated, delivered and signed at Lodwar this 3rd day of April, 2019.

....

J. WAKIAGA

JUDGE

<u>In the presence of:-</u>

__________________________ *for the Respondent*

__________________________ *for the 1st Appellant*

__________________________ *for the 2nd Appellant*

Accused 1 - _______________

Accused 2 - _______________

____________________ *- Court assistant*