REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 39 OF 2017

CALVINCE OWIRO HILTER.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. R. K. Langat,

Senior Resident Magistrate in Rongo Senior Resident Magistrates Court

Criminal Case No. 251 of 2017 delivered on 27/09/2017)

JUDGMENT

1. **Calvince Owiro Hilter,** is the Appellant in this appeal. He was charged with one count of **Robbery with Violence**, one count of **Gang Rape** and an alternative charge of **Committing an Indecent Act with an Adult.**

2. The particulars of the charge of robbery with violence and Gang Rape were as follows: -

> ***Count I**: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.*
>
> ***On the 26th night of November 2016 at Awendo town in MIGORI County within the Republic of Kenya, being armed with dangerous weapon namely knife, jointly with another not before court, robbed CAO of her mobile phone make Samsung, alcatel tablet and cash Kshs. 5,000/= all valued at Kshs. 55000/= and immediately before such robbery wounded the said CAO.***
>
> ***Count II**: GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006*
>
> ***On the 26th night of November 2016 at Awendo town in Migori County within the Republic of Kenya, jointly with another not before court, intentionally and unlawfully caused your male genital organs namely penis to penetrate the vagina of CAO without her consent.***

3. The Appellant denied all the charges and he was tried with a total of 9 witnesses tendering evidence in support of the prosecution's case. **PW1** was the complainant one **C.A.O. PW2** was one **Isaac Juma** a *boda boda* rider at Rabuoki Center. **PW3** was **No. 241326 APC Job Mutuku** based at Isebania town. **PW4** was **Moses Kinuno** a Clinical Officer stationed at Migori County Hospital who filled and produced PW1's P3 Form. A business man at Awendo one **Peter Kaliang Odongo** testified as **PW5. No. 2006063276 APC Wilson** Langat who was the arresting officer testified as **PW6. PW7** was **No. 45466 Sgt. Patrick Wandera** attached at the DCI Rongo. The OCS Awendo Police Station **No. 219608 CI Cyprian** Matheka who conducted an identification parade testified as **PW8** and the Investigating Officer who testified as **PW9** was one **No. 91276 Cpl. Pamela Odhiambo** attached at Awendo Police Station. For the purposes of this appeal I will refer to the witnesses in the sequence in which they testified.

4. At the close of the prosecution's case the Appellant was placed on his defence on all the counts and opted to give an unsworn defence. He testified on how he was arrested on 01/06/2017 and a phone planted on him. He stated that he had lost his identity card in 2015 and obtained an abstract at Sukari Industries and that his identity card had been used severally. By a judgment rendered on 27/09/2017 the Appellant was found guilty of the two main counts and accordingly convicted. He was sentenced to suffer death in Counts I and 40 years' imprisonment in Count II.

5. Dissatisfied with the convictions and sentences the Appellant lodged an appeal upon grant of leave by this Court and contended that the defence was not considered and that the proceedings were marred with inconsistencies and contradictions which were not reconciled in his

favour.

6. Directions were taken and the appeal was heard by way of oral submissions. The Appellant expounded on the twin grounds and variously referred this Court to the evidence on record. The Appellant contended that the charges were not proved and prayed that his appeal succeeds.

7. The State opposed the appeal and contended that all the charges were rightly proved and the Appellant placed at the scene of crime as one of the assailants and that the defence was rightly considered. It was also submitted that the sentence was constitutional as mitigation were considered, but pointed out that the term of 40 years is appropriate instead of the death sentence. The State however prayed for dismissal of the appeal on conviction.

8. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

9. In discharging the foregone duty, I have carefully read and understood the proceedings and judgment of the trial court as well as this appeal. I must state that the trial court captured the evidence quite well and I hereby incorporate the same as part of this judgment by reference. I will endeavor to deal with the following issues: -

(a) Whether the Appellant was part of the assailants;

(b) Whether the offences were proved as required in law; and

(c) The sentences.

I will consider each of the above issues singly.

(a) **On whether the Appellant was part of the assailants:**

10. The alleged incident took place at around 06:30 pm and PW1 stated that it was still day time with clear visibility. Since PW1 did not know any of the two attackers then this Court is under a legal duty to weigh PW1's evidence with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence of identification. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** stated as under:

> ***It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.***

11. It was also held in **Nzaro vs. Republic (1991) KAR 212** and **Kiarie vs. Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

12. In **R vs. Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***.....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 with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? 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? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

13. I have carefully addressed my mind to the facts and the law in this case alongside the defense tendered. PW1 was picked by two people who were on a motor cycle at Awendo stage as she waited for transport to Uriri. PW1 thought that one of the two people was a pillion passenger and boarded. She sat between the rider and the other person. Although PW1 did not see the registration number of the motor cycle she however saw an implant affixed at the front of the motor cycle christened '*Buddah*'. They left Awendo and shortly thereafter arrived at Lwala stage where the motor cycle instead branched into a sugarcane plantation. PW1 protested and the motor cycle fell. The two assaulted PW1 and one of them removed a knife and placed it on PW1's neck. PW1 was overpowered and complied with the instructions she was given. They again boarded the motor cycle and rode inside the sugar cane plantation whose cane was fully mature. It was by then raining and after a distance they stopped and ordered PW1 to alight and lie on the footpath. PW1 obliged at the sight of the knife. The two had sex with her in turns. They ransacked her bag and took away her valuables including Alcatel tablet, Samsung phone and an ATM Card.

14. PW1 observed the two carefully as one of them used PW1's phone to call several people and forced PW1 to tell them that she had been kidnapped and to ask them to send money into her phone. It was PW3 who sent Kshs. 5,000/= into PW1's phone and which money was transferred by one of the two assailants (on forcing PW1 to give her PIN) to Calvince Hilter.

15. They then took PW1 to a pool of water and washed the mud off her body and clothes and rode back to the road. They dropped PW1 at the road and warned her from taking any motor cycle as they left riding towards Awendo. PW1 stopped another motor cycle and narrated her ordeal. She boarded the motor cycle and the rider headed to Awendo. On reaching at the stage the rider informed other motor cycle riders of PW1's ordeal. PW1 gave a description of the assailants and the riders agreed to pursue them. After a while they saw them at Jamaa Filling station opposite Awendo stage. PW1 confirmed that they were the attackers and the riders moved in. One of them escaped while one was arrested and taken to the AP Camp and handed over to PW6 who took him to Awendo Police Station.

16. PW1 reported the matter to the police and gave all the details of the attackers more so the one who had fled. On the arrest of the other person PW1 confirmed that he was the other assailant who is the Appellant herein. Given that PW1 first met the assailants during daytime, by considering the time PW1 spent with the assailants and the perfect descriptions by PW1 that fitted the assailants, this Court find and hold that the prevailing conditions were favourable for PW1 to properly and rightly identify her attackers.

17. PW1's evidence on identification was corroborated in several ways. **First,** there was the evidence of the identification parade conducted by PW8. Out of the descriptions and other evidence which was already with the police, the Appellant was arrested and a parade conducted. PW1 attended the parade and identified the Appellant as one of the assailants who had fled at Awendo. PW8 narrated how he fully complied with the requirements of a parade and that the Appellant did not raise any objection and willingly signed the Parade Form. I have as well reviewed the evidence of PW8 on how the parade was conducted and perused the Form. I agree with PW8 that the parade was conducted fairly. I note that despite the Appellant having a deformed hand that was taken care of as the members of the parade put their hands in the back leaving their faces and chests forward such that the hands could not be seen.

18. **Second**, there was the evidence of the MPESA money transfer. In the course of the ordeal PW1 was forced to talk to some people through her phone and call for ransom money. It was PW3 who sent Kshs. 5,000/= into PW1's phone. PW3 used his phone with SIM No. XXX to transfer to PW1's phone SIM No. XXX. The assailant then forced PW1 to disclose her PIN and he used it to transfer the money to SIM No. XXX in two transactions being KKQ2CPESDK for Kshs. 60/= and KKQ2CPESDK for Kshs. 4,900/=. The SIM No. XXXX was registered in the name of **Calvince Hilter**. The Appellant herein bore such similar names. This information was verified by PW1's MPESA statement produced as Exhibit 8a. The Appellant contended that his phone was lost and had reported to Sukari Industries. It is not clear whether Sukari Industries was a police station. However, the Appellant's assertion lacks credibility in that it is unreasonable for one to send money to a SIM line that is lost.

19. **Third,** how the Appellant was arrested. PW7 stated that the DCI Rongo had received a lot of complaints from women who were kidnapped, raped and forced to solicit ransom money from their people. PW7 was assigned the task of tracking the gang members whose mode of operation was similar. PW7 managed to arrest the Appellant at Oboya Trading Centre and searched him. He recovered from the Appellant a Nokia phone with serial number XXX bearing SIM No. XXXX that had recently been used to solicit ransom money from another kidnapped victim. PW7 was trailing the said SIM number. The phone and the SIM number were also produced as exhibits. The Appellant was hence a member of the said gang. This Court find and hold that the defence was rightly rejected by the trial court.

20. **Fourth**, the confirmation that PW1 truly saw and used the motor cycle christened *'Buddha'*. PW2 testified that he was the owner of the motor cycle in issue which had been borrowed by one **Tony Odhiambo Kibere** in the morning of 26/11/2016 but was not returned as expected by the evening. Instead PW2 learnt that the motor cycle was at Awendo Police Station having been used to commit offences. That, he went to the station with his ownership documents and found the said Tony Odhiambo Kibere in police custody. Tony Odhiambo Kibere was the one who had been arrested at the Jamaa Filling Station where his companion escaped.

21. From the foregone, the evidence of identification was well corroborated and left no doubt that the Appellant was properly placed at the scene of crime as one of the assailants and therefore his identification was without error.

(b) <u>Whether the offences were proved as required in law:</u>

22. The Appellant was convicted on the count of robbery with violence and that of gang rape. The offence of robbery with violence is a creation of **Sections 295** and **296(2)** of the Penal Code. For clarity purposes I reproduce the sections as tailored: -

> ***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***
>
> ***296(2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

23. From the foregone legal provisions, it can be seen that the offence of robbery with violence is made up of two parts. The first part is the **robbery** and the other part is the **violence**.

24. **Robbery** is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: **<u>Theft</u>** and **<u>the use of or threat to use actual violence.</u>**

25. On the other hand, the offence of **robbery with violence** is committed when robbery is proved and further if any one of the following three ingredients are established: -

> ***(a) The offender is armed with any dangerous or offensive weapon or instrument, or***

(b) The offender is in the company of one or more other person or persons, or

c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

26. In this case there is credible evidence that the Appellant was in the company of another person who was arrested at Awendo. The Appellant and the other person hence executed a common intention. (See **Section 21** of the **Penal Code** Chapter 63 of the Laws of Kenya, the case of **Njoroge v. Republic (1983) KLR 197** and that of **R v.Tabulayenka s/o Kirya (1943) EACA 51).**

27. The attackers were also armed with a knife and threatened to use violence on PW1. Infact according to PW1 she only complied with the demands of the assailants after they produced the knife and threatened to injure her. PW4 who attended to PW1 when she went to the hospital for the first time stated that PW1 looked sick and her clothes were wet and soiled with mud allover. PW4 also noted bruises on the hands and on the lower limbs. The P3 Form which was produced as an exhibit vouched for that. I find that the knife was a dangerous weapon in the circumstances of this matter.

28. As to whether there was theft, there is as well evidence to that end. PW1 lost a total of Kshs. 4, 960/=, a Samsung mobile phone and an Alcatel Tablet. The items were never recovered. It is therefore reasonable and believable that PW1 lost her items in the attack and that constitutes theft.

29. The upshot is that all the ingredients of the offence of robbery with violence against the Appellant were proved. The Appellant was hence rightly found guilty and convicted.

30. I will now consider if the offence of gang rape was proved. The offence of gang rape is provided for under **Section 10** of the **Sexual Offences Act** (hereinafter referred to as '**the Act**'). The said section sates as follows: -

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 of not less fifteen years but which may be enhanced to imprisonment for life.

31. The key ingredients of the offence of **Gang Rape** therefore include proof of rape or defilement and proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not *per se* commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

32. In this case PW1 testified that she was 36 years old, a[*Particulars Withheld*] and holder of identity card number XXX. That evidence was not controverted. Penetration is defined in **Section 2** of the **Act** and has also been a subject before the Court of Appeal. (See **Mark Oiruri Mose vs R (2013) eKLR**, **Erick Onyango Ondeng v. Republic (2014) eKLR** among others).

33. From the evidence of PW1 who narrated how she was carnally known by the two attackers in turn and the evidence of PW4 coupled with the contents of the P3 Form and the treatment notes which were produced as exhibits there is no doubt that penetration of PW1 's vagina by the assailants' penis' was proved. For clarity purposes, PW4 who examined PW1 confirmed that PW1's *labia minora* and *labia majora* were reddish and there was whitish matter on the vagina and the anus. He also noted pus cells in PW1's urine. PW4 concluded that PW1 had recently engaged in a sexual activity. Further, the Government Chemist Report produced as Exhibit 9b confirmed that the DNA profiles generated by the stains from the underpants of PW1 and that other person was a mixed DNA profile of PW1 and that other person. It hence goes without say that the two had recently been together and had engaged in an act that left each with the DNA profile of the other on their private parts. Penetration was hence proved.

34. From the circumstances of this case as described, it is unlikely that PW1 consented to the sexual act. She was forced, beaten and threatened with a knife into submission. I find and hold that PW1 did not freely consent to the sexual activities with the two assailants.

35. Since it has already been proved that the Appellant was in the company of the other attacker and had carnal knowledge of the PW1 in turns, the offence of gang rape was therefore proved. The Appellant was as well rightly found guilty of the offence of gang rape.

36. I must state that in arriving at the foregone findings I have also considered the Appellants' submissions and found that none of the contentions holding. Indeed, the allegations on contradictions did not reach the required standard of creating any reasonable doubt. They were of such minor nature and did not interfere with the convictions. The Appellant was rightly found guilty in both counts.

(c) The Sentences:

37. The Appellant was sentenced to suffer death on the count of robbery with violence. The sentence for gang rape was 40 years' imprisonment. I have also carefully perused the sentencing proceedings. The court considered the mitigations and the circumstances under which the offences were committed and sentenced the Appellant to the mandatory death sentence for the offence of robbery with violence. The trial court in exercise of its discretion handed a 40-year imprisonment term on the offence of gang rape after it found that the Appellant tortured PW1 and exposed her beastly and exposed her to great danger and sexual diseases.

38. By the time the court rendered the sentences the offence of robbery with violence attracted a mandatory death sentence on conviction. The offence on gang rape attracted a minimum sentence of 15 years which could be enhanced to life imprisonment. The trial court was hence

right in the sentences. However, due to a change in law courtesy of the Supreme Court decision in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR** sentencing courts now have discretion on conviction of capital offences.

39. I have considered the submissions of the Learned Prosecution Counsel on sentencing. I do agree with him that a custodial sentence is instead ideal in this case. I therefore set-aside the death sentence and substitute it with a sentence of 20 years' imprisonment. For avoidance of doubt, I will not interfere with the sentence on the offence of gang rape.

40. In conclusion this Court makes the following final orders: -

> **(a) The appeal against the convictions is hereby dismissed, but the appeal against the death sentence succeeds. The death sentence is hereby set-aside.**
>
> **(b) The Appellant is hereby sentenced to 20 years' imprisonment for the offence of robbery with violence and the sentence of 40 years' imprisonment rendered by the trial court on the count of gang rape is upheld. The sentences shall run concurrently.**

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 7th day of May 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Calvince Owiro Hilter, the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Pubic Prosecutions for the State.

Evelyne Nyauke – Court Assistant