REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 32 OF 2018

CONSOLIDATED WITH CRIMINAL APPEALS

NO. 33 OF 2018, 34 OF 2018, 35 OF 2018, 36 OF 2018 & 37 OF 2018

LOLI LOUYONGOROT

LOSIRU *alias* HASSAN.........................1ST APPELLANT

EJEM ELEMAN LOPOKIO...............2ND APPELLANT

LOSIKE MARIAAO ALOTO.............3RD APPELLANT

ALEX EKIRU LOTIANGA.................4TH APPELLANT

PHILIP LOKAALE AKOPE..............5TH APPELLANT

ESOKON KUYA EDUKON................6TH APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentence in Criminal Case No. 239 of 2017

by the Senior Resident Magistrate – Hon. J.M. Wekesa delivered

on 5th September, 2018 at Lodwar)

JUDGEMENT

1. The Appellants were jointly charged and tried of three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and alternative charges of handling stolen property contrary to **Section 322(2)** of the **Penal Code** while the 1st and 2nd Appellants were charged with two additional charges of gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3** of **2006** and two counts of being in possession of a fire arm and ammunition without a firearm certificate contrary to **Section 89(1)** of the **Penal Code** and **Section 4(2)** as read with **Section 4(3)(b)** of the **Firearm Act Cap 114 Laws Of Kenya**.

2. They pleaded not guilty, were tried, convicted of all the charges against them and sentenced to death on the counts of robbery with violence, on the count of handling stolen property to serve seven (7) years imprisonment and on the count of gang rape to serve fifteen (15) years imprisonment with the imprisonment count being in the abeyance.

3. Being dissatisfied with the said convictions and sentences each of the Appellants filed individual appeals which appeals were on 4/10/2018 consolidated for purposes of trial and determination having each raised the following identical grounds of appeal:-

> ***(a) They were not properly identified.***
>
> ***(b) They were convicted on contradictory and hearsay evidence.***

(c) The prosecution case was not proved beyond reasonable doubt.

SUBMISSIONS

4. When the appeals came up for hearing before me, the Appellants who were unrepresented each filed written submissions which they relied upon while the State opposed the appeals and supported the conviction and sentence. On behalf of the 1st Appellant it was submitted that there was contradictions on the evidence of **PW1** as regards to the stolen items and the time of the attack. It was contended that there was contradiction between **PW3** and **PW4** on the number of the attackers. It was stated that he was not properly identified and the source and strength of the lighting was not indicated and therefore it was not safe to convict him for which the case of **ANJONONI v REPUBLIC [1980] KLR 59** was submitted in support. It was stated that the offence of rape was not proved.

5. On behalf of the 2nd Appellant it was submitted that he was falsely accused and charged. He contended that he was not properly identified and no description was given by the complainant to the police in their first report. The conditions prevailing at the time of the alleged attack was not suitable for identification. It was stated further that the identification parade was not properly conducted. On behalf of the 3rd Appellant it was submitted that there was contradiction on the prosecution case and that he was not properly identified. The 3rd, 4th, 5th and 6th Appellants' submissions were identical.

6. On behalf of the State it was submitted that the Appellants were properly identified at an identification parade in which they were satisfied by the conduct thereof. It was stated that there was no contradiction on the prosecution cases and that the Appellants were convicted on the evidence of more than one eye identifying witness corroborated by the recovery of stolen items of which they could not given an account on how they came into possession of the same.

7. 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

8. It was the prosecution case that on 25/07/2017 while **PW3 AAI** was asleep at 2.00 a.m. he was woken up and saw a Turkana man together with six men in his room one who was armed with a gun while the rest had *rungus* and *pangas* who demanded for money from them. In cross-examination by the 1st Appellant he stated that he did not see the faces of the attackers. **PW1 YUGAS ISAAC BULE** responded to the call for help from his cousin only to be hit by the attackers and robbed of Kshs,1000 and mobile phone valued at Kshs.15,000/=. It was his evidence that through the use of solar lamps in their rooms they were able to identify the attackers since the attack took about fifteen minutes. He attended identification parade on two occasions and each time he was able to identify three of the Appellants. He confirmed in cross-examination that the Appellants were six in number.

9. PW2 DAN DAHIR ADOMOW stated that the attackers took his school bag which they used to carry away assorted clothes in. He was able to identify his stolen clothes. He was asked to lie down so was unable to see the faces of the attackers. **PW4 YIS** testified that the attackers broke into her house while one of them was armed with a gun. It was her evidence that they beat up her husband, took away her husband's items and gang raped her daughter. She did not see the faces of the two attackers.

10. PW5 CIP PETER LABON conducted three identification parades in respect of the three witnesses where the 1st Appellant was identified by a touch on the right shoulder, the 2nd Appellant on the left and right shoulder. He produced parade forms signed by the Appellants. **PW6 CORPORAL FRANCIS MUIGAI** went to the home of **ABDIRASHID DHAHIR ADOMO** in the course of investigations where he obtained the information on the attack. They thereafter conducted operation in Nabek village where they arrested the 1st and 3rd Appellants, 4th and 5th respectively and recovered an AK 47, mobile phone and other stolen items. In the process of the operation the 1st Appellant took them to the house of the 2nd Appellant where further recovery was made. **PW7 EMMANUEL NUPALIA** a clinical officer at Kakuma Mission Hospital produced P3 form in respect of **PW1** while **PW9 DR. HARRY MUGUN** produced P3 form on **PW8** who confirmed that she was gang raped.

11. When put on their defence the 1st Appellant denied committing the offence and stated that on 25/7/2017 he sold beads upto 6.00 p.m. when he went home. The following day he went to meet a customer at 8.00 a.m. when at 10.00 a fight broke between people and he was arrested by the police who responded to the fight. The 2nd Appellant stated that on 28/7/2017 he was selling charcoal within Kakuma Phase 2 and while waiting for payment was arrested by the police who demanded a bribe. The 3rd Appellant stated that on 22/7/2017 he had taken his sister to Kakuma Mission Hospital. The following day he met the police who arrested him.

12. The 4th accused stated that on 24th while assisting his uncle watering livestock he became ill and was later on taken to hospital in Kakuma. On 26th July while leaving the hospital the police thought he was drunk and arrested him. The 5th Appellant stated that on 25th of July 2017 he sold firewood then went to town to buy food stuff when he was arrested by the police for no reasons. The 5th Appellant also denied involvement in the commission of the offence.

13. In convicting the Appellant the trial court had this to say at page 24 of the judgement:-

"I find the prosecution to have proved its case against all six accused persons herein for the offences levelled against them for the following reasons:-

- *They were able to establish that the suspects herein were armed with dangerous or offensive weapons. While the 1st accused was armed with an AK 47 assault rifle that was found inside his manyataa on the day of his arrest, and which was later taken to Nairobi to a ballistic examiner for examination, the rest were armed with pangas and rungus on the fateful day they raised and terrorized the victims herein.*
- *The 1st accused herein was in company of five other suspects during the said attack as evidenced by the testimony of PW3 herein who informed the court she saw a total of six suspects inside her room. One of them was armed with a rifle.*
- *The suspects herein beat and wounded the victims herein i.e. PW1 who sustained injuries as evidenced by the testimony of PW7 and the medical report in support of the same. PW8 was raped in turns during the robbery by the 1st accused herein who was followed by the 2nd accused herein as evidenced by her testimony and the medical report on record filled by PW7 who treated her and concluded she was raped due to her vulva lacerations.*
- *The defences raised by the accused persons herein are mere denials which have not in any way challenged the prosecution evidence on record which I find to be cogent, precise, well corroborated and unchallenged.*
- *The items recovered from the accused persons herein were stolen i.e. assorted clothes were recovered from the 3rd accused herein, a greenish brownish mattress was found at the 1st accused's house, the blue mattress was recovered from the 2nd accused's house and all these items were positively identified by some of the complainants herein as theirs and that they had been stolen.*
- *The above recovered items had been stolen in a short period prior to the possession. The robbery took place on the 25/7/2017 between 2.00 a.m. – 3.00 a.m. and police rushed to the scene about ten minutes after the assailants had left. They conducted a joint operation of both AP, Regular police and the ATPU (Anti-Terror Police Unit) the following day that led to the arrest of the 1st, 3rd, 4th and 5th accused persons herein from Nabek village and recovered the stolen items. The 1st accused led the police to the 2nd accused's house where a blue mattress was recovered. The stolen items herein therefore were essentially recovered a day after the robbery. The said period is very recent which makes this court to draw an inference that the accused persons herein stole the items.*
- *The accused persons did not give any explanation to the court as to what they were doing with the said items.*
- *The 1st and 2nd accused persons herein raped PW8 in turns during the incident, they used solar lamps for light and she saw them clearly. She was able to identify them during the identification parade which was free from any error whatsoever. I hold that both the 1st and 2nd accused persons herein had a common intention to rape the victim, since as soon as the 1st accused herein finished his turn, he called on the 2nd accused to rape the victim as well.*
- *The prosecution evidence has squarely put all the six suspects herein at the scene of crime which is at Kakuma 1 within the Kakuma refugee camp. They entered the compound of PW3 herein, an old aged woman and terrorized her and her family, they beat her up one of her sons, stole from her sons and daughter-in-law then raped her granddaughter.*
- *The 1st accused herein did not produce any certificate authorizing him to possess a rifle.*

For the above reasons, I find that the prosecution evidence on record is capable to sustain a conviction against all the six accused persons herein for the offences levelled against them. I also find the prosecution to have proved its case against all accused persons herein beyond reasonable doubt. In the circumstances therefore, I find all the six accused persons herein guilty as charged in all the offences against them and they are convicted accordingly under Section 215 of the Penal code." (Emphasis added)

14. From the proceedings and submissions herein I have identified the following issues for determination in this appeal:-

1) Whether the Appellants were properly identified.

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

3) Whether the trial court was right in convicting the Appellants both on the main charge of robbery with violence and the alternative charge of handling stolen property.

4) What order should the court make in regards to this appeal.

15. I will start with an issue which I have handled as regards to this trial court, as it is unfortunate that she keeps on making the same mistake as regards determination where an accused before her is charged with both main and alternative charge. In convicting the Appellants the trial court once again had this to say, ***"I find all the six accused herein guilty as charged in all the offences against them."*** She proceeded to sentence them as stated herein:-

"I hereby proceed to sentence all six accused persons herein as follows:-

For the first count of robbery with violence contrary to Section 296 (2) of Penal Code, all six accused persons herein are hereby sentenced to death as provided for under Section 296 (2) of the Penal Code.

For the second count of robbery with violence against the accused persons herein, I hereby sentence all six of them to death as provided for under Section 296 (2) of the Penal Code.

For the third count of robbery with violence against six accused persons herein, I hereby sentence all six of them to suffer death

as provided for under Section 296 (2) of the Penal Code.

For the alternative charge to count I herein in respect of the 1st, 2nd, 4th and 5th accused persons herein, I hereby sentence each one of them to serve 7 years imprisonment.

For the alternative charge to count II herein in respect of the 1st and 3rd accused persons herein, I hereby sentence each one of them to serve 7 years imprisonment . . ."

16. In the case **JOSEPH EKULAN v REPUBLIC, HIGH COURT CRIMINAL APPEAL NO. 2 OF 2018 LODWAR** by the same trial court, I had this to say:-

"12. I will start with the issue of whether the court was right in convicting the Appellant on both the main and the alternative charge as this is a legal issue that goes to the foundation of the decision appealed against. In her judgment the trial court had this to say:-

". . . for the above reason I find the prosecution to have proved its case against the accused herein on <u>both</u> charges against him as they have demonstrated the ingredient forming both charges against the accused herein beyond reasonable doubt. In the circumstances therefore, I find the accused herein guilty as charged in both the main and alternative charges against him respectively and convicted . . ."

13. In so holding the trial court 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 M.B.O. –VS- REPUBLIC, CRIMINAL APPEAL NO. 342 OF 2008, this Court held,

'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.'"

14. The charge is alternative to and not addition to and therefore once the trial court had found that the prosecution had proved the main charge of robbery with violence she had no business in proceeding to convict the Appellant on the alternative charge. . ."

17. It is clear that once again the trial court fell into error in convicting and sentencing the Appellants on the main charges of robbery with violence and the alternative charges of handling stolen property thereby making the conviction of the Appellants unlawful for which reason I shall partially allow the appeal and set aside their conviction on the main charge of robbery with violence and the alternative charge of handling stolen property.

18. That said and done, I am alive to my role as the first appellate court under **Section 354 (3)** of the **Criminal Procedure Code** which requires the court to come to its own conclusion upon evaluation of the evidence tendered. The issue therefore to be determined is whether the Appellants were properly identified and whether their conviction on the main charge of robbery with violence was safe. The law on identification in Kenya is now well settled and no amount of judicial precedents and citation of authorities can overrun the position stated in **WAMUNGA v REPUBLIC [1989] KLR 424**, thus:-

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

19. With this in mind the issue for determination is whether the Appellants were properly identified. From the evidence on record I am satisfied that the Appellants were properly identified. **PW3** was able to identify one of the Appellants who was armed with a rifle, there was adequate light which enabled the witnesses to identify the Appellants. They were able to pick the same from a properly organized identification parade whose purpose as was stated in the case of **KINYANJUI & 2 OTHERS v REPUBLIC [1989] KLR 60:-**

"Is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion. It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."

20. In addition to the identification of the Appellants, they were connected to the offence through the recovery of the items stolen from the complainants which were positively identified. I therefore find and hold that the prosecution case against the Appellants on the main charge of robbery with violence and the counts of gang rape and offences under the Firearms Act was proved beyond any reasonable doubt and that their conviction thereon was safe.

21. In the final analysis I allow the appeal against the convicts on the alternative counts but confirm the Appellants' conviction on the count of robbery with violence, gang rape and being in possession of firearm and ammunition without a firearm certificate.

22. On the sentence on the count of robbery with violence and being alive to the Supreme court decision on the mandatory nature of death sentence and the Court of Appeal determination thereon, in sentencing the Appellants the trial court had this to say:-

> ***"The six accused persons herein attacked and terrorized a family that had retreated to sleep. The six accused persons herein while armed with crude weapons namely pangas and rungus and being presumably under the command and lead of the 1st accused herein namely LOLI LOUYONG'OROT who was armed with an AK 47 rifle stormed into the compound of PW3, an elderly woman and engaged her sleepy family members to an orgy of terror, intimidation and brutality that lasted for a whole hour, while the six assailants herein alternating and breaking into smaller groups to visit rooms, catching all their victims unaware and in surprise. The orgy of the said violence was characterized with victims herein being mercilessly beaten up, tormented and intimated by use of the offensive weapons in the custody of the assailants. They went on a looting spree whereby they demanded and took valuables that they found without any lots of shame, the 1st and 2nd accused persons went on to rape PW8 a young girl who was sitting for her KCSE examination at the time."***

23. Sentencing Policy Guidelines requires the court to take into account the gravity of the offence and in particular whether the same had an element of gender based violence. From the holding of the trial court herein it is clear that the same had this in mind while passing death sentence against the Appellants and sentence being a discretion of the court, I am unable to find fault with her ruling thereon which I hereby enforce.

24. In the final analysis I hereby affirm the trial court's conviction of the Appellants on the charges of robbery with violence, gang rape and having firearm and ammunition without certificate and the sentences thereon with the sentence on the count of gang rape and having firearm and ammunition without certificate being put in the abeyance in view of the death sentence issued herein.

25. I further direct the Deputy Registrar of this court to place a copy of this judgment to J.M. Wekesa P.M. for record purposes and to draw her attention on the law as regards main and alternative counts.

26. The Appellants have right of appeal and it is so ordered.

Dated, delivered and signed at Lodwar this 5th day of June, 2019.

....

J. WAKIAGA

JUDGE

In the presence of:-

.....................................for the Respondent

.................................for the 1st Appellant

.... for the 2nd Appellant

................................for the 3rd Appellant

.... for the 4th Appellant

.... for the 5th Appellant

................................for the 6th Appellant

All 6 accused persons ________________

_____________________ - Court assistant