REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL NO. 20 OF 2016

WILSON SITOYA &

NCHARO OLE NEMANTARI…….....APPEALLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants herein WILSON SITOYA & NCHARO OLE NEMANTARA were arraigned before Senior Principal Magistrate S. MBUNGI at Kajiado Law Courts faced with 4 offences. In count 1 they were charged with the offence of Gang Rape Contrary to **Section 10** of the Sexual Offences Act No.3 of 2006. The particulars being that on the 21st April 2015 at 1900 hours in Isinya District of Kajiado County the Appellants intentionally and unlawfully caused their penis to penetrate the vagina of GMP without her Consent.

In Count II, the Appellant were charged with causing indecent Act Contrary to **Section 6(a)** of the sexual Offences Act No.3 of 2006. The particulars of the offence are that on the 21st April 2015 at 1900 hours in Isinya District at Kajaido County the Appellants intentionally and unlawfully caused an indecent act by touching the breasts and vagina of GMP using their penis an act which was indecent against her will.

In Count III, the Appellants were charged with Assault causing actual bodily harm Contrary **section 251** of the Penal Code. Particulars are that on the 21st day of April 2015 at 1900hours in Isinya District within Kajiado County the Appellants jointly assaulted GMP thereby occasioning her actual bodily harm.

In County IV, the Appellants were charged with Assault causing actual bodily harm contrary to **Section 251** of the Penal Code. Particulars are that on the 21st day of April 2015 at 1900hours in Isinya District within Kajiado County the Appellants jointly assaulted Caleb Ombasa thereby occasioning him bodily harm.

The appellant pleaded not guilty to both counts as a result of which the prosecution was forced to marshals' evidence from 6 witnesses. At the close of the prosecution case, the appellant was found to have a case to answer and was put on his defence. He gave sworn evidence in which he denied committing the alleged offences. After hearing all the evidence from both the prosecution and the defence, and after carefully considering and evaluating the said evidence, the learned trial Magistrate was satisfied that the evidence adduced by the prosecution against the appellant was so overwhelming that there was no other option left for the court but to find the appellants guilty and sentenced them to 20 years imprisonment in County I (one) and two years in Count III (three) and County IV (Four).

The appellants were dissatisfied with the entire judgment and sentence of the learned trial magistrate at Kajiado Criminal Case (S.O) no. 23 of 2015, and filed this appeal which is premised on three grounds as couched in the petition of appeal as follows;

> ***1. THAT, the Learned Trial Magistrate erred in law and fact in failing to appreciate that the circumstances at identification by the complainant were not favorable for a positive identification.***
>
> ***2. THAT, the Learned Trial Magistrate erred in law and fact by disregarding the defences of the Appellants and more particularly the alibi defence of the 2nd Appellant.***
>
> ***3. THAT, the Learned Trial Magistrate erred in law and fact by conducting the trial in a manner that violated the appellant's constitutional rights enshrined under Article 50(2) (c) & (j) of the Constitution.***

This being the first appeal, the appeal is entitled to a fresh close reconsideration and this Court will scrutinize, re-evaluate and analyses the evidence on record and arrive at its own conclusions, thus this Court will either uphold or reverse the findings of the Learned Trial Magistrate. In doing so, this Court shall bear in mind the fact that it had no benefit of seeing and hearing the witnesses testify during the trial. This entails that any issues raised in this appeal touching on the demeanor of witnesses must rest on the considered opinion of the Learned

Trial Magistrate who had the singular privilege of hearing and seeing the witnesses.

Findings and Determination

The Appellants challenged the prosecution evidence of identification citing that the circumstances at the scene of crime where not favorable for a positive identification of the assailants. To elaborate their contention, they challenged the evidence of PW1 which is of the effect that she had been seeing the 2nd appellant within Isinya. The Counsel for the Appellants C.O.Omburo pointed out that PW1 claimed that she had a torch but the same was never produced as evidence before court.

Counsel further argued that dork identification is worthless with an earlier identification parade as was the case in ***HCCRA No.93 of 1983 Owen Kimotho v Republic.*** Further that the record has no proper description of the appellants or the clothes worn by the appellants at the time of the attack.

It was also contended that the prosecution gave no explanation as to why PW6 never visited the home of the 1st Appellant on the same night or any other day after the complainant was recorded. Counsel placed reliance on the case of Turnbull (1976)3 ALL ER 549 at page 552 and **Abdalla Bin Wendo vs Republic 20 EAC** 166 at page 169 in support of their argument.

Counsel for the Appellants also contended that the evidence of PW1 that her ordeal with the assailants was never corroborated by any other prosecution witness. He also submitted on the source of light, pointing out that the same was never interrogated by both the prosecution and Court despite having not been produced in Court. It was therefore the Appellants' contention that all the foregoing went unanswered during the trial and in the trial court judgements hence the said verdict cannot stand.

The state opposed the Appeal through its Counsel Mr. Meroka. As regards identification, specifically the source of light used by the Complainants to recognise the assailants, he relied on the testimony of PW1 who testified that she had a big torch which she lit towards the Appellants and recognised them well and the same was corroborated by the testimony of PW2. Counsel for the State further stated that PW1 had sufficient time to see the Appellants since the ordeal lasted for about 30 min (thirty) hence the Assailants were positively identified.

As a point of departure, I endeavor to remind myself of the guidelines set out in ***Wamunga Vs. Republic [1989] KLR 424*** the court of appeal called for special caution in use of visual identification. It stated 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 one or more identifications 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…"***

It was also the Court of Appeal's position in the case of **ANJONONI & OTHERS VS REPUBLIC, (1976-1980) KLR 1566,** ***it was held that when it comes to identification, the recognition of assailant is satisfactory, more assuring and more reliable that identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.***

This being a case were the complainants claim that they knew the Assailants before the occurrence of the incident; it is therefore a case of recognition as opposed to identification of a stranger. What this means is that the risk of mistaken identity was rendered very minimal. Even thought that is the case, the court is still required to be cautious in examining the evidence tendered before it because evidence of identification or recognition at night or under difficult circumstances cannot be said to be completely free of risk of mistaken identity. In that respect I wholly associate myself with the decision in **R VS TURNBULL & OTHERS (1973) 3 ALL ER 549,** where the Learned Judge stated that:

> ***"Recognition may be more reliable that identification of a stranger but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

The circumstances of this case are such that the offence was committed around 7:30 pm when it was dark rendering the circumstances of recognition undoubtedly difficult. It is therefore paramount that the conditions that prevailed at the crime scene when the recognition was made be thoroughly interrogated. Thus in ***Mwaura v Republic [1987] KLR 645***, the Court of Appeal held, *inter alia,* that:

> ***"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".***

The prosecution evidence suggests that PW1 had a big torch which the complaints used to recognise the appellants. PW2's testimony elaborated the same position pointing out that they had a very bright solar propelled torch which had a light like that of an electric bulb. Having said all that, the prosecution did not furnish the court with the said torch so that the court could ascertain the brightness and intensity of it. Consequently, the sufficiency of the light at the scene of crime remains unascertained. This court takes the view that in determining the quality of identification using a light, it is essential to ascertain the nature of the light that was available, what sort of light, its size and its position relative to the suspects. It is trite that evidence of identification at night must also be tested with the greatest care bearing in mind the principles in **R v Turnbull (1976) 3 All ER 549** and it must be absolutely watertight to justify conviction.

PW1 has explained the role played by each of the Appellants during the commission of the offence. She told the court that Wilson was the one holding her hand as 2nd Appellant was pulling her hair, that the 1st Appellant pushed her and made her bend, he then removed her pant and biker and inserted his penis into her vagina. After the 1st Appellant had finished having sex with her, the 2nd Appellant then ordered her

to lie down, he laid on her and inserted his penis into her vagina. After they had finished they left. That is when she lit her torch and she claim to have seen them very well. From PW1's evidence above, it is clear that the torch she claimed to have used to recognize the Appellant was off and the whole ordeal she narrated happened in total darkness.

This court was not told at what point was the torch turned off after the assailants had confronted them for flashing it towards them. The evidence on record made it clear that the confrontation happened after the complainants had flashed their torch towards the Assailants. From the time the confrontation started, it is not known whether the torch was still on facing the side assailants were approaching the complainants from. Neither does the evidence on record tell the specific point when the torch was turned on.

According to the evidence on record, there is a very clear gap from the time the confrontation between all the complainants and the assailants started to the time when the assailants had just finished raping PW1 (when she lit the torch). There is no evidence tendered as to whether the said torch was on and directed at the persons of the appellants. It would be very risky to accept the complainants' testimonies as they are because issues as regards the nature, intensity and brightness of the torch were not clearly resolved by the prosecution. The same is further exacerbated by the fact that the said torch which was the only source of light during the commission of the crime was never produced before the trial court.

The evidence of PW1 also shows that she had known the 1st Appellant since childhood and he is known as a thief in their area. This piece of evidence as adduced by PW1 tickled my mind and made curious to make a comment on it. To some extend this portion of evidence is tainted with some kind of bias. The 1st Appellant is considered a thief in the complaints' area and that alone constitutes labelling. Labelling is very dangerous in the sense that it is capable of causing grave injustice to its victims. This is because our society has accepted that some people are criminals even though they haven't been arrested, their cases heard and determined by a court of competent Jurisdiction. Too many people have been arrested, detained and some even convicted simply because they were perceived as criminals in their society and for that reason, whenever an offence is committed within their area of abode, they are normally the first suspects. In my view, this portion of PW1 carries with it a considerable amount of bias and makes the prosecution case to be doubtful and having found the evidence of identification of the assailants scanty, this further weakens the prosecution case.

Further, the testimonies of PW1 and PW2 suggest they mentioned the names and gave description of the assailants upon reporting the matter to the police.

As regards the foregoing, nowhere does the investigation diary state or confirm that indeed the complainants gave such descriptions as they claim they did. The trial Court confirmed that the OB read no such description. If indeed the complainants knew the assailants, they ought to have given their names, description and the clothes they were wearing for purposes of organizing an identification parade. However, in this case Identification parade maybe not applicable since it was a case of recognition. ***(Ajode v Republic (2004) 2 KLR 81)***. It is instructive to note that for cases which require utmost caution with regards to Identification and or recognition, the police diary must be able to demonstrate that the complaints gave such description of the assailants upon reporting commission of an offence.

I have also noted some inconsistencies within the prosecution's evidence that this Court cannot ignore. The evidence of PW1 suggest that PW5 was the first to run away from the crime scene after the assailants had been beaten PW2 with a Rungu. He went to a nearby home and brought him people to the crime scene. He found Caleb and G having been beaten by the men. On the other hand the evidence of PW2 and PW5 suggests otherwise. PW2 says he ran home where he found her children and sisters. This disparity in the prosecution cannot be taken lightly, and the trial court ought to have interrogated the same closely so as to ascertain the truth of the matter.

In light of the above, I'm of the view that the evidence on record regarding identification cannot be held to be sufficiently clear to sustain a conviction. In the premises I hold the view that the Appellants were not positively identified as the perpetrators of the offence they were charged with in the trial court.

On the second issue for determination, the Counsel for the Appellants contended that the learned trial Magistrate erred in law and in fact by disregarding the defences of the Appellants and more particularly the 2nd Appellant. On this limb it was argued in behalf of the 2nd Appellant that he was not at the scene of crime as alleged by the prosecution witnesses. Further that the onus of proof is always on the prosecution to dislodge the alibi defence. The Appellants stated that that the prosecution did not investigate the defence of the 2nd Appellant and neither did the trial court labour on the same issue. The 2nd Appellant said that he worked as a loader in Techno Company Ltd and that he was in Kieni Kui at home when the offence was committed. Counsel contended that there ought to have been evidence adduced by prosecution to challenge the aforesaid alibi defence in rebuttal. This is the even where the defence of alibi is made in an unsworn statement in Court. He referred the court to the decision in ***Wangombe v Republic (1980) KLR 149***.

As regards the Appellant's defence herein, it is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case. ***(SSENTALE V. UGANDA[1968] EA 365).*** The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution ***(WANG'OMBE V. REPUBLIC [1976-80) 1 KLR 1683). The prosecution always bears the burden of disproving the alibi and proving the appellant's guilt (Wang'ombe v. Republic [1976-80) 1 KLR 1683).***

In the Court of Appeal decision in ***VICTOR MWENDWA MULINGE VS REPBLIC [2014] eKLR,*** the court held that even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with **Section 309** of the Criminal Procedure Code to rebut the appellant's defence.

Section 309 of the Criminal Procedure Code provides:-

> ***"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."***

In the case of ***KIARIE VS REPUBLIC [1984] KLR*** the Court of Appeal held:-

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons".***

Further, the Supreme Court of Uganda, in ***FESTO ANDROA ASENUA V. UGANDA, CR. APP NO 1 OF 1998*** made a similar observation when it stated:

> ***"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."***

It is true in this case that the Appellant raised his alibi defence late in the trial but the same does not warrant the trial court to ignore his defence. The correct approach is to consider the defence against the evidence adduced by the prosecution. That is the position taken in ***GANZI & 2 OTHERS V. REPUBLIC [2005] 1 KLR 52,*** where the Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence.

The prosecution in the appeal before me did not apply to the Court to obtain evidence to rebut the alibi defence of the 2nd Appellant. This puts the prosecution in doubt considering that the evidence of identification or recognition in this case was not watertight.

In light of the foregoing evidence of the prosecution and the cases relied upon by the Appellants, I am of the view that the trial court ought to have given the Appellants' defence adequate attention. And for that reason, the Appellants contention on this ground is merited.

On the last ground, Counsel for the Appellants contended that the trial court erred in law and in fact by conducting the trial in a manner that violates the Appellants Constitutional rights guaranteed under **Article 50(2), (c), & (j)** of the Constitution. The same provides as follows:-

> ***"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***
>
> ***(2) Every accused person has the right to a fair trial, which includes the right—(a) to be presumed innocent until the contrary is proved;***
>
> ***(c) to have adequate time and facilities to prepare a defence;***
>
> ***(j) to be informed in advance of the evidence the prosecution intends sorely depend on, and to have reasonable access to that evidence."***

It was therefore argued that the Appellants requested to be supplied with prosecution evidence on 27th August 2015, 10th September and 23rd October 2015 but were never supplied with any. Further, Counsel stated that when the matter was fixed for hearing, the record shows the Appellants were absent and would not confirm whether the time allocated was sufficient to prepare their defences. Further that the trial record has nothing to show that the Appellants were supplied with evidence relied upon by the prosecution before commencement of the hearing. The Appellants also cited the case of ***George Ngodle Juma & Others vs Attorney General (2003) eKLR*** to advance the contention that the Trial Court's decision and medical evidence adduced in court which were never supplied to the Appellants was a gross violation of the right to fair hearing as per article 50 of the Constitution. It was therefore humbly submitted that the conviction and sentencing of the Appellants was unlawful and ought to be set aside. The counsel for the state had a chance to rebut but he did not address this contention in his submissions and it remains uncontroverted.

The above cited constitutional provision imposes a duty of disclosure of all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This is the position that was taken in the Landmark decision of ***R v Stinchcombe [1991] 3 S.C.R. 326***, where the Supreme Court of Canada concluded that, in criminal cases, the state has a constitutional duty to disclose to the defence all evidence in its possession and control that could be relevant to the case. This duty does not depend upon whether the state will call that evidence at trial, whether the state thinks a witness is not worthy of credit, or whether the evidence helps or hurts the state's case.

It was also observed in the same case the obligation to disclose is a continuous one, arising pre-trial and continuing throughout the trial and is to be updated whenever additional information is received. ***In R v Ward [1993] 1 WLR 619, 674B-C,*** the Court of Appeal in England was unanimous that***:-***

> ***"The prosecution's duty at common law is to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution was under a duty, which continued***

during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution was required to make available the records of all relevant experiments and tests carried out by expert witnesses." (See also Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR)

The purpose and the intent of **Article 50** on the duty to disclose all relevant information and witness statements to the accused person in advance is absolutely clear as a minimum to the rights to a fair trial. One of the key complaints in this appeal by the appellant was that they were not accorded full disclosure of which they are entitled before the commencement and during the trial of their case. Our criminal justice being an adversarial in nature it would be imperative that there is no derogation or limitation of this right.

I have evaluated the prosecution and the prosecution's defence, I hold the view that the credibility of the evidence on identification does not turn on the manner and demeanor of witness to sustain a conviction. The material evidence and the surrounding circumstances depict the level of inconsistences and contradictions are such that there is uncertainty as to the identity and culpability of the appellants.

It follows that the trial court acted on the evidence of identification which was not strong enough to establish ingredients of the offence beyond reasonable doubt. This court therefore cannot ignore the legal principles on the dangers of identification by a single witness, particularly at night as stated in the cases of **Abdullahi Bin Wendo v Republic 1953 20 EACA 166** and **Roria v Repubic EA 583**.

Accordingly, the judgment of the trial court is hereby interfered with by setting it aside on both conviction and sentence. The Appellants are at liberty unless lawfully held.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT KAJIADO THIS 7TH JUNE 2019.

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R. NYAKUNDI

JUDGE

Representation:

Mr Ochieng for the appellant

Mr Meroka for the DPP