REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.52 OF 2015

(An appeal from original conviction and sentence of Kilgoris PM'S Case No. 789 of 2013 by

Hon. R.A. KITHINJI (SPM) – Senior Principal Magistrate dated 30th June, 2015)

JULIUS MUCHABI.....1ST APPELLANT

BENARD HEZRON.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellants herein **JULIUS MUCHABI** and **BENARD HEZRON** were jointly charged before the Principal Magistrates Court at Kilgoris with the 1st count of Robbery with Violence Contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that on 26th August 2013 at 2 a.m. at Lolgorian Area in Transmara West District of Narok County jointly with others not before the court while armed with a rifle, pangas and rungus, robbed A K cash money of Kshs. 10,000/=, one Tecno phone, 2 Nokia phones C2, one Nokia 2700, one inverter and a pair of safari boots all valued at Kshs. 50,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on **A K**.

2. They also faced the second count of gang defilement contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 26th August 2013 in Transmara West District of Narok County jointly in association with others not before the court had their penises penetrate the vagina of P N (*particulars withheld*) a girl aged 15 years in turns.

3. They faced the alternative charge to the 2nd count, of indecent act to a child contrary to Section 11 of the Sexual Offences Act the particulars being that on 26th August 2013 in Transmara west District of Narok County, jointly with others not before the court unlawfully and indecently assaulted P N (particulars withheld) a girl aged 15 years by touching her private parts namely, vagina.

4. They also faced the 3rd count of gang rape contrary to Section 10 of the Sexual Offences Act. The particulars of the offence were that on 26th August 2013 in Transmara West District of Narok County jointly in association with others not before the court had their penises penetrate the vagina of a woman namely; I L aged 36 years in turns.

5. They faced the alternative charge to 3rd count being indecent act to a woman contrary to Section 11 of the Sexual Offences Act. The particulars of the alternative charge were that on 26th August 2013 in Transmara West District of Narok County jointly with others not before the court unlawfully and indecently assaulted I L a woman aged 36 years by touching her private parts namely, vagina.

6. The prosecution tendered the evidence of 7 witnesses in support of their case while both the appellants gave unsworn statements in their defence and did not call any witnesses. At the close of the case, the trial magistrate found the two appellants guilty on the 1st, 2nd and 3rd counts and convicted them under Section 215 of the Criminal Procedure Code. They were consequently sentenced to death on count 1, 15 years imprisonment on count 2 and 15 years imprisonment on count 3 with a rider that the sentences on count 2 and 3 would be held in abeyance since they could not run concurrently with the death sentence.

7. Aggrieved by both the conviction and sentence, the appellants filed 2 separate petitions of appeal with identical grounds of appeal in which they mainly faulted the trial court for convicting them based on evidence of identification that fell way below the standard required by the law.

8. At the hearing of the appeal, the appellants similarly filed identical written submissions wherein they argued that the provisions of **Article 21 (1), 50 (2) (g) and (h) and Article 49 (a) and (c)** of the **Constitution** were grossly violated during the hearing before the trial court. They

reiterated that their conviction was anchored on evidence of identification that was flawed, unsafe and invalid as the circumstances at the scene of the crime were not favorable for positive identification that was free from error. They maintained that their conviction was based on mistaken identity in view of the fact that they were arrested approximately one month from the time the crime was alleged to have been committed.

9. The appellants contended that the prosecution witnesses (PW1) and (PW2), who testified before the court twice, gave different accounts and contradictory statements on what actually transpired during their attack. They dismissed the identification parade that was arranged and conducted by the police and stated that it was questionable, flawed and amounted to a mockery of justice considering that they were arrested almost one month after the alleged commission of the offence and in the absence of any form of identification by the complainants at the time of their arrest.

10. In his oral submissions in opposition to the appeal, Mr. Otieno, learned counsel for the state, stated that the hearing before the trial court was properly conducted as the appellants were supplied with witness statements and had ample time, after taking the plea, within which to engage the services of an advocate(s) to defend them in the case. He argued that even though the offence took place at night, the appellants were properly identified by the prosecution witnesses who stated that they had torches and were able to see the robbers well since the attackers did not cover their faces. He maintained that the identification parade was properly conducted and added that the appellants were positively identified.

11. This is a first appeal and therefore this court is under a duty to re-analyze and re-evaluate the evidence presented by the prosecution witnesses with a view to arriving at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. (See **Okeno vs Republic (1977) EALR 32).** In the case of **Mark Oiruri Mose vs. Republic (2013) eKLR the** Court of Appeal observed that it was 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.

12. As I have already stated in this judgment, the prosecution presented the evidence of 7 witnesses whose testimonies were as follows:

13. On the night of 26th August 2013 at about 2am, PW1, A K, was asleep in his house at Lolgorian when he was attacked by 2 men who were armed with a gun and a panga. At the time of the attack PW1 was in the same house with his wife PW2, I L, his 15 year old daughter P N (*particulars withheld*) and his sister in-law J N (PW4). PW1 testified that the robbers broke down his door before storming into his house after which they robbed him of cash of Kshs. 10,000/=, two mobile phones and safari boots. One of the robbers, who had a panga, took his wife (PW2) to the sitting room where they raped her and PW3 in turns before leaving the house. He stated that the robbery and rape incident took about 45 minutes. He reported the matter to the police and took his wife and daughter to hospital.

14. On 19th September 2014, PW1 received a call from the police informing him about the arrest of some suspects after which he went to the police station where he was able to identify the culprits in an identification parade. He testified that he was able to identify the appellants by appearance and by talking to them. He identified the 1st appellant as the one who had a panga at the time of the robbery and the 2nd appellant as the one who had a gun. He stated that he was able to identify the 2nd appellant because he had some pimples on his face and was brown. He also stated that he had seen the 2nd appellant earlier, before the robbery. On cross examination, he stated that he saw the 1st appellant, for the first time during the robbery.

15. PW2 testified that she heard a loud bang on her door on the material night and woke up only to find many people (robbers) in the house she shared with PW1, PW3 and PW4. The robbers took their phones before taking her to the sitting room where they raped her and PW3 in turns. She stated that she was able to see 3 of the robbers well because the room was well lit by light from the torches that the robbers placed on the cupboard.

16. She added that was able to identify both the appellants at the identification parades that had 12 different men. She testified that the 1st appellant was the first to rape her and that the whole incident took more than 45 minutes. She stated that she was able to identify the 2nd appellant by his facial appearance and because he was tall, slim and dark.

17. PW3 P N (*name withheld*), a minor aged 15 years and a student at K. Girls school (*particulars withheld*) testified that she was raped by a man who was short, brown and had pimples on his face before another man also raped her. She bled a lot after the ordeal and was taken to hospital for treatment and issued with a p3 form.

18. She was not able to identify the 1st and 2nd appellants at an identification parade conducted by the police. She stated that there were several torches placed on the cupboard and there was light in the room where she was raped.

19. PW4 also testified that she heard a loud bang on the door on the material night and that many people entered the house but only 2 of them, the 1st and 2nd appellant, entered the bedroom that she shared with PW3. She stated that she was able to see and identify the robbers because they had torches which they were shining on them and that the whole incident took about 1 hour. She added that the robbers stole cash of Kshs.10, 200/=, and 4 mobile phones and that they also raped PW3.

20. PW5 was P.C. James Shaun, the investigating officer stationed at Lolgorian Police Station. He received a report from PW1 regarding the said robbery, rape and defilement and visited the crime scene where he found that doors had been broken. He recovered the stone that had allegedly been used to break the door which he produced as an exhibit in court. He recorded statements of witnesses and took photographs of the scene of crime and recovered other exhibits which he later produced in court.

21. He stated that he was not able to take the under garments of PW3 for DNA analysis because they lacked sample collection experts. He added that a raid was, on 18th September 2013, carried out in town and several suspects were arrested out of which the witnesses were able to

identify the appellants herein.

22. PW6, Michael Chepkwony was the clinical officer who produced the medical reports in respect to PW2 and PW3 as Pexhibits 6 and 7 respectively. He stated that he treated both PW2 and PW3 and produced the treatment notes as Pexhibit 7 (a) and 7 (b) respectively. The medical reports revealed that PW2 and PW3 had been sexually assaulted.

23. PW7 Alfred Chege Muthua was the OCPD Transmara West. He conducted the identification parade in which PW1, PW2, and PW4 were able to identify the appellants as having been among the people who robbed and sexually assaulted them. He added that PW3 was not able to identify anyone at the identification parade as she was still in shock. He produced the duly signed identification parade forms as Pexhibits 8 (a) (b) (c) and (d).

24. In his unsworn statement before the trial court, the 1st appellant stated that he was threatened by the police who alleged that he was a thief and that PW1 had a grudge with him because he (1st appellant) used to be his employee and that he (PW1) refused to pay him.

25. On his part, the 2nd appellant testified that he was arrested on 18th September 2013 while on his way from work before being charged for offences that he knew nothing about.

Analysis and determination

26. I have carefully considered the record of appeal and the submissions made by the state and the appellants. I note that the main issues for determination are as follows:

> **a) Whether the appellants rights under Articles 21 (1), 49 (a) and 50 (2) (g) and (h) of the Constitution were violated at the hearing.**
>
> **b) Whether the appellants were positively identified as the robbers and by extension, whether the identification parade was properly conducted.**
>
> **c) The circumstantial evidence linking the Islamic cap to the 1st appellant.**
>
> **d) Whether the charges against the appellants were proved to the required standards.**

27. **Articles 21 (1), 49 (a) and 50 (2) (g) and (h) of the Constitution** stipulates as follows:

> **"21. (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights."**
>
> **"49. (1) An arrested person has the right—**
>
> **(*a*) to be informed promptly, in language that the person understands, of—**
>
> > **(i) the reason for the arrest;**
> >
> > **(ii) the right to remain silent; and**
> >
> > **(iii) the consequences of not remaining silent;"**
>
> **"50 (2) Every accused person has the right to a fair trial, which includes the right—**
>
> **(*g*) to choose, and be represented by, an advocate, and to be informed of this right promptly;**
>
> **(*h*) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly; "**

28. While **Articles 21 (1) and 49 (a) of the Constitution** provide for the duty of the state and every organ to respect, observe and protect the rights and fundamental freedoms in the **Bill of Rights, Article 49** provides for the rights of arrested persons. In this case, the appellants claimed that their rights under **Article 50 (2) (g) and (h) of the Constitution,** which stipulates that an accused person be informed of his right to be represented by an advocate of his choice and the right to be assigned an advocate at the expense of the state where substantial justice would occur, were violated.

29. The issue of an accused person's right to legal representation at the state's expense was discussed in the case of **David Macharia Njoroge vs Republic (2011) eKLR** where it was held:

> ***"Whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it took cognizance of the aforesaid decision by the Court of Appeal and only hoped that the right to assign legal representation to***

<u>all</u>(emphasis court) accused persons will be realized progressively but sooner than later. In light of the aforesaid limitations on assignment of legal counsel, this court was not persuaded to find that the Appellant's rights to fair trial had been infringed as he had contended in his Written Submissions."

30. In the instant case, I similarly find that no material was placed before the court to convince me that any of the appellant's rights to fair trial had been infringed during the trial.

31. Turning to the substantive issue of whether each of the charges against the appellants were proved beyond reasonable doubt, I note that it was not disputed that the first complainant, PW1, was violently robbed by a group of people on the material night and that his wife PW2 and his daughter PW3 were sexually assaulted at the time of the said robbery. I find that the prosecution tendered sufficient evidence to support their case in this regard. I note that besides the oral evidence, treatment notes and P3 forms in respect to PW2 and PW3 were also produced as exhibits to confirm that they were indeed sexually assaulted at the time of the robbery.

32. The main bone of contention in this appeal is whether the heinous crimes were committed by the appellants. This brings me to the 2nd issue for determination which is whether the appellants were positively identified as the perpetrators of the crimes in question considering that the incident took place at night when positive identification may be a challenge. It is settled law that before a court can base a conviction on the evidence of identification at night, such evidence should be absolutely watertight, and visual identification must be treated with the greatest care. That is what the court of appeal held in the cases of **Peter KimaruMaimo Versus Republic Cr. App. 111 of 2003; Mohamed MafhabiAnd Others Republic Cr. App. 15 Of 1983; Republic V. EriaSebwato 1960 EA 174.**

33. In the case of **Wamunga vs. Republic (1989) KLR 424** the Court held at page 426:

"..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 a conviction."

34. In the instant case, PW1, PW2, PW3 and PW4 were categorical that they woke up because of a loud bang on the door on the night in question. According to PW1, PW2, PW3 and PW4 the robbers did not cover their faces at the time of the robbery and that they were therefore able to see and identify them properly from the light that was emanating from the torches.

35. PW1 stated as follows on the circumstances under which he was able to identify the appellants on the night in question:

"During the robbery I was able to identify them. One was brown and was polite and we sat with them for a long time. He had a gun and brown sweater. His face was not covered. He was average height. We were using Kiswahili Language. The other with a panga was taller dark and had a panga. His face was not covered. I had a torch and also they had torches. They were not hiding anything. They were using torches in the room which was a small one. I could see their faces using my torch before they took it. I had lit it. There was also reflection from their torches. The whole incident took 20 minutes in my room. The one with panga I had seen him before in Lolgorian Town. He used to live with a doctor who is late and was called sabasaba. I do not know if they were related. Sabasaba was my friend, the one with a gun was not known to me. It was my first time to see him. I was called to the station to identify the suspects."

36. PW2 testified in part, as follows on the events of the fateful night:

"There was a lot of light in the house and I could see them. One was short and brown and was wearing an Islamic cap. The other was tall and slim. I saw 3 of the attackers. There were others outside. The other was short with light complexion."

37. On cross examination by the 1st appellant PW2 stated:

"I have never seen you before that day. Each one of you had a torch and you placed them on the cupboard. We stayed with you while raping me for more than 45 minutes… You were the first to defile my child."

38. On cross examination by the 2nd appellant PW2 stated:

"I identified you by your face. You are tall, slim and dark. You were saying you will stay until morning. You had a torch and you placed it on a cupboard and raped me. You also defiled my daughter."

39. On her part, PW3 testified as follows:

"They placed torches on the cupboard and there was a lot of light. I could see him, he was short and brown with pimples… The second one to rape me was tall and dark. I saw him well. He was slim."

40. PW4 on the other hand, stated as follows on identification of the appellants:

"the first one was short, had pimples and was wearing an Islamic cap. It was black with stripes. The cap is in court (witness identifies the cap mfi4). The 2nd one was taller than the other. They had torches which they were shining on us. Both of them had torches. I was able to see one of them properly…. It took almost 1 hour while they were in our house. They were not in a

hurry when they left me.”

41. From the above extracts of the testimonies of PW1, PW2, PW3 and PW4, I am satisfied that the conditions at the house of PW1 on the night of the robbery and sexual assault were favorable for proper identification. I say so because, firstly, the assailants did not conceal their faces and therefore their victims were able to see them properly without any obstruction. In fact PW4 and PW3 were able to see the finer details of the appellants' appearance, complexion and skin tone. Secondly, all the witnesses testified that there was sufficient light from at least 3 torches which the robbers placed on a cupboard as they went about robbing and raping their victims in turns. Needless to say, rape and defilement are crimes committed by an assailant whose body is literally locked in a very intimate contact with the victim for a long time, in which case, the victims had ample time to see their attackers' appearance considering that they were assaulted in turns. Lastly, the entire incident took between 45 minutes to 1 hour and therefore, I find that the witnesses had sufficient time to see the appearances of attackers well and were later able to pick them out at an identification parade.

42. PW1 stated that he knew the 2nd appellant before the incident while the rest of the witnesses were strangers to the accused persons. In their evidence however, PW2 and PW4 indicated that they were able to identify the appellants through the light from the torches which were bright. The witnesses also stated that they interacted with the appellants for close to 45 minutes on the material night. PW1 testified that he knew the 2nd appellant before the robbery incident and I therefore find that his evidence regarding the 2nd appellant was one of identification by recognition. In the case of **Waithaka Chege v. Republic [1979] KLR 271** it was held that, while the issue of visual identification at night should always be approached with great care and caution, conviction could be entered where there had been visual identification at night by torch-light, in a situation where in such identification coincided with evidence of recognition.

43. In the instant case, not all the prosecution witnesses were familiar with the accused persons and it was therefore necessary for the police to conduct an identification parade. This leads me to the second issue of determination on whether the police carried out a proper identification parade in line with the Police Force Standing Orders.

44. In ***Calvins Peter Omondi Owayo –vs- R [2010] eKLR*** *the court observed: -*

“This Court has had occasion to emphasize the utility of a properly organized identification parade, stating as follows:

„The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

….It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect, the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

……

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

……

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;”

45. According to the evidence of PW7, the police officer who conducted the identification parade, he stated:

“A K was the first one to attempt the identification. I had gathered members of the parade. I took 1st accused and requested him to choose where he wanted to be. He chose to be fifth and sixth member. I asked him to change clothes if he wanted

when he told me he was ready. I went and brought A K. I told him there was a group of ten and the suspect could be among them or not. I told him to touch the person he suspected on the shoulder. When he reached at the 1st accused he held him and told us he was among the ones who attacked him. He told me he could only identify the 1st accused. I took him to the office of the deputy OCS. I asked accused if he had no objection. He replied he was being framed. I had explained to him about his right to call an advocate or a friend to be present. He affixed his left thumb print on the form. I then called IL from records office. Before I had asked 1st accused if he could change the position. He changed and stood between number 2 and 3, member 2 was Christopher Alisa Nyaboga and number 3 was Peter Nyakundi Nyatheyo. When Irene came, I told her I will show her a group of people and a suspect or none could be in that group. I told her to see if she could identify any of them. She proceeded to the parade and touched the 1st accused. She asked if they could talk. I told all members to talk in a time and she said she identified accused by appearance and his voice. He signed the forms. I returned the witness to the office of the Deputy OCS. I asked accused if he was satisfied and he said parade was okay but he was being framed. He signed the forms. I returned the witness to the office of the Deputy OCS. I asked accused if he could change position or clothes. He said he will not change position or clothes. I went to the records office and came with PN (*name withheld*). I explained to her that I will show her a group of people and she could see the suspects who raped them. She said she was shocked and could not identify any of them. I took her to Deputy OCS office. Accused said that one was telling the truth. I went back to the records office and brought the last witness J L. I explained to her that she will see a group of people and she could identify the ones who robbed them. L looked out and touched 1st accused and said he was one of the robbers. Accused ad not changed his position and was between the 2nd and 3rd members. I took her to Deputy OCS office.

I arranged a 2nd group to identify 2nd accused. The 2nd group had 8 members. They were different from 1st group but two or three were used again. I brought 2nd accused to him to choose where he wanted to stay and some people will come and try to identify him. I had closed my witnesses at records office when I returned them after 1st parade. I asked him where he wanted to stay. He chose to stay between number 7 and 9. The 7th member was Simon Odoyo Arunga and 8th member was David Shaikan He brought 1st witness A K. I explained to him there was a group of men and he should try to see if there was a suspect who had robbed him or not. He went to the line and touched 2nd accused and said he was the one. I asked 2nd accused if he was satisfied he said yes but he was being framed. He signed. I took the witness to the Deputy OCS office. I returned to the parade and asked him if he wished to change the clothes or position. He said he will stay where he was. I went and brought 2nd witness I T L. I explained to her what she was to do and she went to the line and identified 2nd accused without any problem by touching him. I took my witness to the Deputy OCS office. I returned and asked accused if he could change position. He chose to stay between number 4-5 where number 4 is Lemayan Stephen Kiguti and number five was Christopher Arisa. I went brought 3rd witness PN (*name withheld*). She said she was shocked and could not identify the accused. I took her to the Deputy OCS office. Accused chose to remain where he was between number 4 and 5. I went and brought my 4th witness J L. I explained to her if she could identify anybody to touch him. She went through parade and looked at the accused and said she could be making mistake and did not identify him. I finished my parade. My witness identified 1st accused and 2nd accused in the dock. I did not know them before. I would want to produce the identification parade form in court as exhibit 8 (a) (b) and 8(c) and 8(d). That is all."

46. I have carefully considered at the identification parade forms which confirm that the Appellants herein signed them as proof that they consented to the parades, they did not wish to have any of their friends or solicitors present during the parades and that they had no complaints on how the parades were conducted. I have equally looked at the Appellants cross-examinations on PW1, PW2 and PW4 and did not see any meaningful objections on how the parades were conducted. I note that PW1, PW2 and PW4 were able to pick out the 1st and 2nd appellants at different times at an identification parade that was conducted by PW7, the OCPD of Transmara west. PW7 explained, in great detail, the manner in which he conducted the identification parade. He produced the identification parade forms in court as exhibit 8 (a) (b) (c) and (d) and I am satisfied that the identification parade was properly carried out in accordance with the law governing identification parades. No evidence or material was presented before the court to show that the witnesses who identified the appellants held any grudge against them or had reasons to implicate them in the case without any just cause. The 1st appellant alluded to the fact that he was a former employee of PW1 who had refused to pay him his dues and instead decided to frame him up in this case. I find this claim by the 1st appellant to be not only farfetched, but amounted to a mere denial that was incapable of dislodging the testimony of PW1 which was corroborated by the testimonies of other witnesses. I therefore uphold the outcomes of the identification parades and find that they were conducted in strict conformity with the Police Force Standing Orders.

47. The issue of circumstantial evidence also arose in respect to an Islamic cap that was found in the custody of the 1st appellant. In **R Vs. Kipkering Arap Koskei & Another16 EACA 135,** the Court held:

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

48. In order to test whether the circumstantial evidence adduced by the prosecution meets the legal threshold it must meet the principles set out in the case of **Abanga Alias Onyango V. Rep Cr. A No.32 Of 1990 (UR)** where the learned Judges of the Court of Appeal stated thus:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."

49. In the instant case it was the evidence of PW2 and PW4 that on the material night, the 1stappellant wore a black striped Islamic cap. PW5, the arresting officer told the court that after 1st appellant was identified in the identification parade, he led them to his home, where

they conducted a search and recovered an Islamic cap that fit the prescription given by PW2 and PW4. The circumstances surrounding the identification of the 1st Appellant, in my humble view, were clarified by the fact that the fact that PW2 and PW4 saw him wearing the Islamic cap on the material night, he was identified in the identification parade by both witnesses and it was the same Islamic cap that was found in his house on conducting a search by PW5. I find that it could not be by sheer coincident that the 1st appellant was found to have been in possession of the same Islamic cap described by the witnesses. I find that there is sufficient evidence pointing to the fact that 1st appellant was positively identified as one of the people who participated in the robbery at PW1's house, that he was among the people who raped PW2. No evidence was presented by 1st appellant to put any doubt in the mind of this court that he was not one of the attackers in PW1's home.

50. The appellants also raised the issue of the lapse of time between the date of the alleged offence and the date of their arrest and argued that the almost one month period that it took before their arrest meant that they could have been victims of mistaken identity. I find that this argument by the appellant was not supported by any tangible evidence to show that the witnesses' memories could have faded due to the lapse of time. My take is that the crimes committed against the complainants were so gross, horrific and traumatizing that it was most unlikely that the victims of the crimes could forget the faces of their attackers so soon considering the fact that they testified that they were able to see them clearly on the night of the attack.

51. The upshot of the above findings and observations is that I find that the appellants' appeal lacks merit and are hereby dismissed it in its entirety.

52. Orders Accordingly.

Dated, signed and delivered in open court this 5th day of March, 2018

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Appellants in person
- Omwoyo court clerk