IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 18 OF 2016

BETWEEN

FK.....1ST APPELLANT

GEOFFREY KINYANJUI.....2ND APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (**Kimaru & Ngenye, JJ**.) dated 22nd *October, 2015* ***in H.C. Cr. A. NO. 25 & 26 OF 2014)***

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JUDGMENT OF THE COURT

[**1**] The two appellants were convicted by the Principal Magistrate, Kiambu of two counts of Robbery with violence contrary to **section 296 (2)** of the Penal Code and sentenced to death in each count. The 1st appellant, ***FK*** was also convicted for the offence of **gang rape** in **count III contrary** to **section 10** of the **Sexual Offences Act** and sentenced to 15 years imprisonment. Similarly, the 2nd appellant, ***Geoffrey Kinyanjui,*** was convicted for the offence of **gang rape** in **count IV** contrary to **section 10** of the **Sexual Offences Act** and sentenced to 15 years imprisonment.

However, the respective sentences of 15 years imprisonment were ordered to be held in abeyance. The respective appeal to the High Court at Nairobi against conviction and sentences in all counts was dismissed. This second appeal is against the judgment of the High Court.

[**2.1**] The prosecution case against the appellant can be briefly stated:

The complainant in count 1, ***JC*** (***J***) and the complainant in count II, ***JW (JO)*** were employed in a bar in Kahawa West, Nairobi. ***JO*** was living with her boyfriend ***NA (N***) about 2 kilometers from the bar. ***J*** was living at the house of her employer near the bar.

On 6th October, 2012, ***J*** and ***JO*** left work at about 12 midnight and ***J*** agreed to sleep in the house of ***JO.*** As they were walking to ***JO's*** house, six people emerged from a dark place and demanded money and mobile phones from the two. JO did not have either of them. J gave them her LG mobile phone. The people who had a gun and whips inquired from JO about the whereabouts of N and told her that they knew that there was money and a laptop in the house. They asked JO to take them to the house and two of them left in the company of JO. J followed them accompanied by four men. They reached a shop which had security lights and JO identified the 1st appellant who used to be a customer in the bar. On arrival at the building where the house of JO was located, JO was forced to point her house and the house keys were taken from her. One of the two men opened the door and entered inside the house and switched on the lights.

[**2.2**] JO observed that one of them had a pistol while the other had a knife. The two searched the house for the laptop and when they failed to get it, they tied JO 's hands with a table cloth, knocked her down, placed a knife on the neck and the two men raped her in turns. When one was on top of her, he asked the other "*Nansu have you taken my phone*"? The other man replied "w*hy are you calling me like that*". Meanwhile, J was forced into the house by one of the four men in her company. She found the 2nd appellant raping JO while the 1st appellant was standing by. The person in the company of J asked the 1st and 2nd appellants why they had done what they had not agreed. The two groups started arguing and J was taken outside and released. She went to her employer's house and reported the incident.

[**2.3**] After the appellants left, JO went to a neighbour's home who telephoned N. Upon receiving a call, N who was working as a D.J. went

to his house in the company of two Administration Police officers. He found JO in the house who was traumatized. He looked around the house and realized that Ksh. 5,500/- in cash, an amplifier and Sony Ericson mobile phone were missing.

[**2.4**] Both JO and N reported at the police post. On the evening of 8th October, 2012, the two appellants went to the house of N . The 1st appellant asked him what was going on and told him to leave the prostitute alone because they had accomplished their mission. The 2nd appellant threatened N .

JO reported the rape to ***PC Florence Wambui Mwangi*** (***PC Florence***) on 7th October, 2012 who issued her with a P3 form. ***Dr. Joseph Manduku*** examined her on 9th October 2012. Before reporting to the police, JO had gone to **Medicins Sans Frontiers** clinic and was examined by

Sohelo Ahmed Aboud.

The two appellants were later arrested.

[**2.5**] The 1st appellant testified at the trial that he was a Form three student at **[Particulars Withheld] High School** and that on the material day, he was with his girlfriend ***Grace Wamweru*** at Makuti pub in Kahawa from 6 p.m. and stayed there until morning. He called ***Grace Wamuyu Ngugi*** who testified that she was with the 1st appellant at Makuti club from 7 p.m. to 6.00 a.m. on the material day. The 2nd appellant stated at the trial that he was at home with his mother on the material day and that on 14th October, 2012 he met N who told him that they were spoiling his wife's name by calling her a prostitute and demanded that the things stolen from his house be returned. The 2nd defendant called ***Rose Wanjiru***, his mother, who testified that the 2nd appellant was at home on the material day and that before the arrest of the 2nd appellant, N had gone to her plot and given her a list of some properties and demanded payment for the properties.

[**3**] The trial magistrate considered the evidence and made a finding that the ingredients of robbery with violence had been established; that the offence of gang rape was committed; that the appellants were recognized by JO and J and therefore there was no need for an identification parade; that the identification of the appellants was free from error; that the defences of alibi should have been raised at the earliest time possible, probably during cross-examination and in this case the alibi were raised for the first time during defence hearing and the prosecution had no opportunity to rebut the defences; and that the prosecution proved the charges beyond reasonable doubt.

[**4**] The High Court considered the appeal. On the ground that the offence of robbery with violence was not proved beyond reasonable doubt; that the High Court made a finding that the attackers had a gun, whip and knife; that JO and J were beaten along the way and ordered to surrender their valuables; that Shs. 5,500/-, amplifier, were found missing from the home of N ; that JO was assaulted and raped and that more than one of the ingredients of robbery with violence were met. On the question of whether JO was robbed of the properties belonging to N , the court relied on **section 137(c)** of the Criminal Procedure Code and made a finding that whether the items belonged to N is immaterial to the substance of the charges.

Regarding the proof of charge of gang rape the High Court stated:

> **"We thus find that the evidence of the medical doctor, taken together with the accounts of PW1 and PW3 conclusively established that the complainant was indeed raped."**

The High Court considered the ground that the identification of the appellants was not watertight and made a finding that JO and Jidentified the two appellants by recognition when they were inside the house, and concluded that from the entire evidence the identification of the appellants was safe to justify a conviction and that the evidence of the prosecution on identification when cumulatively considered displaced the defences of alibi.

[**5**] The appellants were represented by ***Celyne Odembo*** and ***Charles Madowo*** who relied on the grounds of appeal in the memorandum of appeal dated 6th December, 2017. The main ground of appeal is that both the trial magistrate and the High Court failed to evaluate the entire evidence including the evidence of the appellants particularly in respect to the identification of the appellants. They also faulted the High Court for failing to consider that the charge was defective and did not tally with the evidence on record.

[**6**] We consider first, whether the evidence proved the charges of robbery with violence. The particulars of the first count of robbery with violence stated that the two appellants jointly with others not before the court while armed with dangerous weapons namely a toy pistol and whips robbed ***JC*** of her mobile phone, make LG valued at Kshs. 2,500/- and used actual violence immediately before or immediately after the time of the robbery. In the second count of robbery with violence, the particulars of the offence stated, *inter alia*, that the two appellants while armed with dangerous weapons, namely, a toy pistol and whips robbed ***JO*** of her mobile phone make Sonny Ericson, amplifier and cash Kshs. 5,500/-, all valued at Kshs. 19,500/-. The only evidence to support the first count was that of J who stated:

> **"I gave them a phone make LG."**

The evidence to support theft of money, amplifier and mobile phone in court was from JO who stated:

> **"They took amplifier, phone and money"**

And that from N who stated:

> **"I looked around and realized that Kshs. 5,500/- amplifier and phone make Sonny Ericson were missing."**

Referring to the theft of items in the two counts, the trial magistrate said:

> **"Even though they had no receipts for those items I had no reason to doubt they were stolen noting that it is not humanly possible to keep receipts for everything one owns**(sic)**"**

On its part, the High Court believed that the items were stolen from the respective complainant. ***N*** stated in his evidence in cross-examination:

> **"The amplifier was man made. It was not original. I had a receipt for the phone. I was not asked for it."**

The Investigating Officer ***PC Florence*** gave very brief evidence and stated in part:

> **"On 7/10/2012 I was on duty. A rape case was reported. I recorded a statement from complainant and two witness. I visited the scene."**

[**7**] Robbery with violence under **section 296(2**) of the **Penal Code** is a serious offence which carries a death sentence. Theft is a major ingredient of the offence which should be proved by satisfactory evidence. J merely said that she handed over her mobile phone to the robbers. The value of the phone is stated in the charge sheet. She did not give evidence of the value or any other evidence showing that the phone existed. Similarly, JO and N did not give satisfactory evidence regarding the existence of the money, amplifier and phone in the house. They did not even mention the value of Kshs. 19,500 mentioned in particulars of the charge. Both JO and N did not even say where the money and the phone were kept.

The appellants were not initially charged with the offences of robbery with violence as is clear from the original charge sheet. The record of appeal does not contain the original main charge to which the appellant pleaded on 22nd October, 2012. It only contains the respective alternative charges. We have traced the original charge sheet from the magistrate's record which record was transmitted to the High Court and which is part of the records submitted to this Court together with the record of appeal. We have ascertained from the original charge sheet that each appellant was charged with a separate count of gang rape and an alternative count of committing an indecent act. The sole complainant was ***JO . J*** and ***N*** were listed as witnesses. It is after ***JO*** had given evidence that the prosecutor applied for adjournment to amend the charge. The amended charge introducing the two charges of robbery with violence was filed on 23rd May, 2013, seven months after the appellants were first charged with the offences of gang rape.

[**8**] It is evident from the foregoing that ***JO*** and ***J*** did not lodge a complaint of robbery with violence. It is clear from the evidence of ***N*** that had the offence been investigated, he could have produced receipts for the phone. The finding of the trial magistrate that it is not humanly possible to keep receipts for items one buys was not supported by the evidence as neither Jnor JO said that they did not have receipts for the items. The truth is that the police did not investigate or do thorough investigation on the offence of the robbery with violence for the reason that no complaint of robbery with violence was made.

The High Court failed to properly evaluate the evidence regarding the charges of robbery with violence and we find that the finding in the two courts that the appellants stole the items, was not supported by cogent evidence and that the quality of the evidence in support of the theft of the items was very poor, unsatisfactory and unreliable.

[**9**] As regards the appeal against conviction for gang rape, the two courts below made a concurrent finding that JO was raped and that both JO and J identified the appellants as the two persons who raped her. It is clear that the appellants' defences of alibi were not considered by the trial magistrate for the reasons that the defences were raised too late in the day, thereby giving the prosecution no chance to rebut the evidence.

That was a misdirection in law which the High Court corrected and cited **Kiarie v Republic [1984] KLR 739** as correctly stating the law on the onus of proof of alibi. The High Court considered the defence of alibi raised by each appellant and made a finding that the prosecution evidence on identification cumulatively displaced the defence of alibi.

There was ample evidence to support the concurrent finding that JO was raped by two persons in turns. ***JO 's*** evidence was supported by the evidence of Jennifer. The report of rape was made immediately and both ***Sohelo Ahmed Aboud*** and ***Dr. Joseph Manduku*** upon examining ***JO*** found evidence of sexual intercourse.

According to the evidence of JO , she recognised the 1st appellant on two occasions, the first outside a shop through security lights and the second inside the house where the lights were on.

The High Court quite properly found that the evidence of identification through security lights was to be treated with caution. The High Court then considered the evidence of JO and Jon identification of the appellants inside the house and made a finding that they were positively identified by recognition.

[**10]** The appellants' counsel submitted that the identification of the appellants was not free from error. With respect, the submission by ***Celyne Odembo,*** learned counsel for the appellants, that ***JO*** stated in the medical report prepared by **Medicins Sans Frontiers** that she was raped by six men is not correct. Rather, the report shows that JO stated that they were ambushed by six men and that she got into the house with two men who sexually assaulted her. The evidence of JO and J was consistent throughout that two men took JO to the house and raped

her in turns.

However, it is true as submitted by the appellants' counsel that ***JO*** is shown to have stated that the perpetrators were "*unknown*". JO testified that she did not know the appellants by their names and that when reporting the offence, she told the police that she could identify the suspects. The police medical examination report (P3 form) dated 7th October 2012 states:

> **"SHE ALLEGES TO HAVE BEEN GANG RAPED BY PERSONS SHE CAN PHYSICALLY IDENTIFY."**

It is clear from the evidence that the word '*unknown*' which is in the prescribed form meant that ***JO*** did not know the names of the perpetrators and not that she could not be able to identify them.

[**11**] The trial magistrate considered the evidence of visual identification of the appellants inside the house and made a finding that there was light in the house and the appellants were recognised as persons who used to visit the bar where JO and J were working, and that their identification by recognition was free from error. The High Court re-evaluated the evidence in great detail and was satisfied that there was sufficient time for JO and J to observe what was going on inside the house and that they recognised the two appellants.

There was also evidence of N that the two appellants went to his house on the following evening after the report was made to the police and threatened him. Further, the 2nd appellant admitted in his evidence that he knew both JO and J.

In the final analysis, we are satisfied that the High Court exhaustively evaluated the evidence on visual identification, considered the appellants' defence and reached the correct decision that the appellants were positively identified.

The sentence of 15 years imprisonment is the minimum sentence provided by law for the offence of gang rape. For the foregoing reasons,

> **i. The appeal against conviction and sentence for robbery with violence in count I and II is allowed.**
>
> **ii. The conviction of each appellant in count 1 and II respectively, is quashed and the respective sentences set aside.**
>
> **iii. The appeal of the 1st appellant against conviction and sentence for the offence in count III of gang rape is dismissed in its entirety.**
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> **iv. The appeal of the 2nd appellant against conviction and sentence for offence of gang rape in count I is also dismissed in its entirety.**
>
> **v. The order holding the sentence of 15 years imprisonment in abeyance is hereby lifted.**
>
> **vi. The appellants shall each serve the sentence of 15 years imprisonment with effect from the date of this judgment.**

Orders accordingly.

Dated and delivered at Nairobi this 6th day of August, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR