IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)

CRIMINAL APPEAL NO. 285 OF 2011

BETWEEN

EKIRU EKAI …….....……. APPELLANT

AND

REPUBLIC …….…....…… RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kitale, (Muketi, J.)

dated 14th November, 2011

in

H.C.CR.A. NO. 80 OF 2010)

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JUDGMENT OF THE COURT

1. The appellant was convicted of the offence of gang rape contrary to **section 10** of the **Sexual Offences Act, 2006** and sentenced to 30 years' imprisonment. His first appeal to the High Court was unsuccessful, hence this second and final appeal.

2. The brief facts of the case were that complainant, **N. L.,** a woman aged 28 years, testified that on 17th January, 2009 at about 6.00p.m. in Turkana North, she was on her way home after fetching water when the appellant and one other person by the name **Loroma Epenet** (now deceased) pounced on her and raped her in turns. The complainant knew her assailants because they were her neighbours.

3. After the ordeal, the complainant reported the incident to her father, **PW4,** and together they went to the home of Loroma and arrested him. The appellant was arrested on the following day. On18th January, 2009 the complainant was examined by a clinical officer who certified that she had bruises on her neck. There were also bruises and lacerations around the labia majora and minora.

4. In his defence, the appellant stated that on 16th January, 2009 he was arrested at Kakuma where he had gone to visit his brother. He was locked up at Kakuma Police station and while there he

was shown another man whom the police alleged was his accomplice in the commission of the offence of gang rape. They were together arraigned in court four days thereafter.

5. In his memorandum of appeal, the appellant contended that there were no favourable circumstances for positive identification or recognition; that the complainant did not state to her father or the police his full name if indeed she knew him before the material day; and that there was no medical evidence to connect him to the offence that he was alleged to have committed. During the hearing of the appeal, the appellant relied on his written submissions wherein he amplified the aforesaid grounds of appeal.

6. Contesting the appeal, **Mr. Mulati**, Principal Prosecution Counsel, submitted that the offence was committed at about 6.00 p.m. when there was sufficient sunlight to enable the complainant recognize her assailants, who were not strangers to her. He added that the complainant spent a considerably long period of time with her assailants and was therefore able to see and recognize them.

7. In determining this appeal, the critical issue for our consideration is whether or not the complainant's evidence of identification or recognition of the appellant was credible. The offence was committed at about 6.00 p.m. when there was sufficient sunlight to enable the complainant see her assailants.The complainant said that her assailants were not strangers, they were her neighbours. They had not camouflaged themselves in any way. When she got home she told her father that she had been raped by the appellants and together they went to the appellants' homes. The complainant's evidence was that of recognition. As this Court stated in **ANJONONI & OTHERS V REPUBLIC (1976-80) 1 KLR 1566,** recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger.

8. We are alive to the fact that the appellant's conviction was based on the evidence of a single identifying witness. It is a well settled principle that such evidence can lead to miscarriage of justice and therefore must be examined very closely. In

ABDULLA BIN WENDO & ANOTHER V REPUBLIC (1953) 20 EACA 166, it was held that:

> **"subject to the well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult."**

9. Both the trial court as well as the first appellate court were cautious and alive to the aforesaid principle and having carefully analyzed the evidence on record came to the conclusion that the evidence adduced by the complainant was free from any possibility of error. We see no reason to depart from the concurrent findings of the two courts below. Besides this, under **section 124** of the **Evidence Act,** in sexual offences, the Court can convict only on the evidence of a victim if it believes it. In this case, the trial court had no doubt in the credibility of the complainant's evidence.

10. We find no merit in this appeal and consequently dismiss it in its entirety.

Dated and delivered at Eldoret this 10th day of December, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

…….…….

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……...…..……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR