REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

CRIMINAL APPEAL NO 57 OF 2016

PETER GITHINJI NGANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*Being an appeal from the original conviction and sentence in the Chief Magistrate's**

Court Naivasha at Cr. Case No.3043 of 2012 delivered by Hon. S. Mwinzi Ag. SRM.

on *5th June, 2014).*

JUDGMENT

Background

1. Peter Githinji Nganga, the Appellant herein in Count I was charged in count 1 with the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code**. The particulars were that on the 22nd day of September, 2012 at [particulars withheld] village in Kongoni area of Naivasha Municipality within Nakuru County, robbed RWN one mobile phone Techno T381 IMEI 868362003411480 valued at Kshs. 3,000/- and a wallet with KShs.750/- all valued at KShs.4,000 and at or immediately before the time of such robbery wounded/struck the said RWN.

2. In Count II, he was charged with attempted rape contrary to **Section 4** of the **Sexual Offences Act**. The particulars were that on the 22nd day of September, 2012 at [particulars withheld] village in Kongoni area of Naivasha Municipality within Nakuru County unlawfully and intentionally attempted to rape RWN by wrestling her down and removing her blouse and squeezing her neck on the ground and attempting to penetrate her vagina by use of his penis.

3. The Appellant pleaded not guilty to both charges. Upon trial, he was convicted of Count I and acquitted in Count II. He was sentenced to death under **Section 296(2)** of the **Penal Code**. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

4. He filed what he deemed as Amended Grounds of Appeal on 4th November, 2021 raising three (3) grounds of appeal, namely that he was not positively identified, that the ingredients of the offence of robbery with violence were not proved and that the death sentence imposed was harsh and excessive in the circumstances.

Summary of Evidence

5. The prosecution called a total of four witnesses. **PW1, RWN** was the complainant in the case. She lived in an Internally Displaced Persons (IDP) Camp in [particulars withheld] in Mai Mahiu where she taught children within the camp. On the material date, 22nd September, 2012 at about 7.00 pm, she was walking to the camp where she had arrived from Laikipia. As she approached her house, somebody emerged from the bush, tried to pass her and attacked her from behind. By then, she had turned to face him and she held his hand in defence and started screaming. The attacker tried to strangle her by the neck. He hit her on her face with a fist and she started bleeding. She fell on the ground and the assailant started jumping on her chest and rolling her on the ground. He also hit her nose, mouth and teeth which also bled. Using her leso, he started dragging her into a valley. He then demanded that she removes all her clothes. He also demanded that she gives all the money she had which was in a wallet. He put his legs between hers while attempting to rape her. She then lost consciousness. When she came to, the assailant had disappeared. He had stolen her Nokia mobile phone and Kshs 700/- which was in a wallet inside a hand bag. She traced the bag in a farm nearby.

6. When she woke up to leave the scene, she was too weak and was vomiting blood. She thus crawled to a nearby road and a good samaritan

took her to hospital. She was admitted in a hospital in Kericho for a month where her children took her. She was also treated at Naivasha District Hospital. She reported the matter at Kongoni Police Station where the offence was booked. Later, an identification parade was conducted in which PW1 positively identified the Appellant who was charged with the offences.

7. According to PW1 she was able to identify the Appellant as she used to see him pass by the camp in the evening holding a panga. It was her evidence that during the attack she identified him with a receding hair but not completely bald after his hat fell off during the struggle in the attack. PW1 also described the Appellant as a short man who also had a nickname 'Sheys' who she came to learn was Githinji. She also stated that although it was at 7.00 pm, it had not yet fallen dark and she was therefore able to identify her attacker.

8. PW2, Joseph Kinya Kariuki was the Chief of Ndabibi Location. He testified that on the same date at 8.00 pm, he was called by one Njoroge who informed him of the incident namely that R had been attacked. He also had information that she had been taken to hospital by a good samaritan. He then called the police and informed them of the incident. He testified that the informer had seen a man running from the scene. He then used informers to look for the man who fled from the scene and he was arrested after two weeks. As it were, the person arrested was the Appellant herein. He further testified that the people who saw the Appellant described him which led to his arrest. He was escorted to Kongoni Police Station after which he was charged.

9. PW3, Fredrick Gachie a Clinical Officer at Naivasha District Hospital adduced in evidence a P3 Form issued to the complainant. The same was dated 27th November, 2012. The complainant had reported an assault case on 22nd September, 2012 at 7.00 pm as she was going home. He testified that she had injuries on her right eye and had lost conscious for two hours after the incident. At the time of examination, she complained of chest, shoulder, back and left hip joint pains. The injuries were nine (9) weeks old. The weapon used to inflict them was s a blunt object. He degree of injury was assessed as maim.

10. PW4, PC Muthoka of Kongoni Police Station was the investigating officer. His testimony was that the Appellant was escorted to the police station on 4th October, 2012 by Administration Police Officers from Aquila Patrol Base and the Assistant Chief on allegations of having committed a robbery with violence and attempted rape. He issued a P3 Form to the complaint. He testified that the Appellant fled after the incident. Further that the complaint knew the attacker who was a charcoal dealer. He recorded the statement of the witnesses and preferred the charges against the Appellant.

11. After the close of the prosecution of case, the court ruled that the prosecution had established a prima facie case against the Appellant. He was put on his defence. He gave an unsworn statement of defence and he did not call a witness. He stated that on 3rd October, 2012 he woke up and went about his daily routine as usual until 4.00 pm. At 6.00 pm he went to Gachugu Centre and went to rest at the polytechnic gate him while smoking bhang. The area chief approached him and asked why he was smoking bang and cigarettes. The chief told him that he would charge him. On 4th October, 2012 he was taken to the police station and booked. He was charged on 5th October, 2012 with robbery with violence.

12. In denying that he committed the offence, he stated that PW1 said that he was arrested in a wheat farm. That she saw him in the police station with other people who were charged. Further that PW4 said that he was selling charcoal at the camp and that PW1 was raped yet that was not the evidence of PW1.

Appellant's submission

13. The Appellant relied on the written submissions filed on 4th Nov, 2021.He submitted that the evidence on identification was not been free from error as the complainant did not recognize him. He relied on the Court of Appeal decision in ***Criminal Appeal 20 of 1989 Cleophas Otieno Wajunga vs Republic (1989) eKLR*** which held that evidence on identification and recognition must be free from error. He contended that the visual identification was not satisfied as PW1 did not tell the court how she recognized her attacker.

14. The Appellant further contended that PW2, the area chief did not avail a Mr. Njoroge as a witness who he said called him after he saw the Appellant fleeing from the scene. On the same issue, he submitted that the person who allegedly saw him free the scene of attacked ought to have been called as a witness.

15. The Appellant also submitted that PW4 stated that she knew him as a charcoal dealer. This, he said, contradicted PW1's as she did not tell the court who what exactly the attacker was doing for a living. Furthermore, that the OB extract did not reveal that she identified her attacker.

16. It was his submission that the failure to call the officer who conducted the identification parade was detrimental as PW4 in evidence stated that they did the parade but did not fill an identification parade form. This, according to the Appellant, flies in the face of the holding of the Court of Appeal in Nakuru ***Criminal Appeal 13 of 1986 Njihia vs Republic (1966) eKLR 422*** where it was held that identification parades 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 mismanaged then the complainant shall be hard pressed to give reliable evidence in identification.

17. On ground two of his appeal, the Appellant submitted that the charge of robbery with violence was not proved against him. He asserted that the ingredients for the offence as was held by the Mombasa Court of Appeal in ***Criminal Appeal 116 of 1995 Johana Ndungu vs Republic*** were not established. The Appellant considered the three ingredients of the offence as pre-requisites for the satisfaction of the offence and he discredited each one of them. He stated that the complainant testified that her attacker used fists and not a weapon; that the attacker was alone and not in the company of others; and lastly that nothing was stolen bearing in mind that the first two tests were not established.

18. The Appellant on ground three submitted that the death sentence was harsh and excessive as it was applied without considering his mitigation and case circumstances. He submitted that the nature of the offence and the circumstances ought to inform the court in sentencing. He cited, inter alia, ***Kitale HC Criminal Appeal 13 of 2018 Benjamin Kemboi Kipkore vs republic (2018) eKLR*** where three armed robbers

armed with an AK47 robbed the complainant KShs 250,000/- and the learned Judge substituted the death sentence with 20 years' imprisonment; Kisii ***Miscellaneous Application 23 of 2017 Paul Ouma Otieno vs Republic (2018) eKLR*** where the accused armed with an AK-47 rifle and a kitchen knife robbed the complainant of KShs 450,000/- and 3 mobile phones and the court substituted the death sentence with 20 years' imprisonment and ***Eldore***t **Criminal Appeal No. 22 of 2016** ***Wycliffe Wangugi Mafura vs Republic eKLR*** in which the Court of Appeal imposed a sentence of 20 years imprisonment where the Appellant was involved in robbing an MPESA shop agent with the use of a fire arm. He asked the court to further follow the decision of the Supreme Court in ***Petition No. 15 of 2015 Francis Karioko Muruatetu & another vs Republic.***

19. The Appellant further submitted that the court be guided by **Section 333(2)** of the **Criminal Procedure Code** which requires a sentencing court to consider the period spent in custody.

Respondent's submissions

20. Learned Counsel for the Respondent, Miss Maingi in her written submissions filed on 10th January, 2022 submitted that the identification of Appellant was water tight as he was identified by way of recognition having been previously well known to the complainant. This was in view that the complainant, PW1, had previously seen the Appellant in the Internally Displaced Persons (IDP)Camp where she taught. She submitted that PW1 testified that the Appellant went by the moniker 'Sheys'. It was her submission that although it was a case of a single identification witness, the trial court had warned itself respectively while relying on the case of ***Kiriungu vs republic 2009 KLR 638 at Pg. 644.***

21. On proof of the offence of robbery with violence, learned counsel in relying on the case of ***Oluoch vs Republic (1985) KLR 549*** submitted that all the elements of the offence were proved as defined under Section 296(2) of the Penal Code. In this regard, she submitted that the Appellant prior to robbing the complainant attacked her by striking her across the face, groin and dragged and strangled her. The injuries were confirmed by which PW4, a Clinical Officer who adduced a medical examination report (P3 form) which showed the degree of injuries as maim.

22. As to sentencing, learned counsel urged the court to uphold the death sentence in view that the Supreme Court decision in the now know Muruatetu Case would not apply in mitigating a lesser sentence.

Analysis and determination

23. This being the first appellate court, its duty is to reevaluate the evidence and make independent conclusions. In doing so, that court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See: **Kiilu & Another V. Republic [2005] 1 KLR 174** where the Court of Appeal held that:

> **"An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 1st Appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, only then can it decide whether the Magistrate's finding 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. …."**

24. I have considered the grounds of appeal, the evidence adduced in the trial court and the respective submissions. I have demarcated the issues for determination to be:

> **a. Whether the Appellant was properly identified.**
>
> **b. Whether the offence of robbery with violence was proved.**
>
> **c. Whether the sentence imposed was proper.**

Whether the Appellant was properly identified.

25. On the issue of -***Kariuki Njiru & 7 others vs Republic [2001] eKLR***, held that:

> **"Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."**

26. In ***Nzaro v. Republic (1991) KAR 212*****,** the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction. The persuasive authority of Nakuru ***Criminal Appeal 299 of 2011 Donald Atemia Sipendi v R (2019) eKLR*** observed that in evaluating the accuracy of identification testimony, the court should also consider such factors as:-

> a) **What were the lighting conditions under which the witness made his/her observation?**
>
> **b) What was the distance between the witness and the perpetrator?**

c) Did the witness have an unobstructed view of the perpetrator?

d) Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

e) For what period of time did the witness actually observe the perpetrator?

f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g) Did the witness have a particular reason to look at and remember the perpetrator?

h) Did the perpetrator have distinctive features that a witness would likely notice and remember?

i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

What was the distance between the witness and the perpetrator?

j) …

k) …

27. This court is therefore duty bound to interrogate whether or not the circumstances in the case at hand were favourable for a positive identification by the Complainant of the Appellant.

28. According to PW1, it was not yet dark at the time of the robbery although it was 7.00 pm. She stated that she used to see the Appellant pass by at the Internally Displaced Camp (IDP) Camp where she lived while carrying a panga. She said she had seen him a month before the incident. She stated that the Appellant was arrested while she was still in hospital. Further, that she later identified him in an identification parade. To confirm that indeed an identification parade was conducted, she stated in cross examination that there were eight members of the parade who were paraded.

29. PW1 went on in cross examination to give the description of her assailant by the clothes she wore. She said:

"You had a jumper (black), black marvin and a black trouser. I said you had a residing hair line. I did not say it was a full bald head. You had not shaved your hair"

30. PW1 also stated that he knew the Appellant as a short man who passed by the IDP Camp and was known by nick name Sheys which she learnt was referring to Githinji.

31. What comes out clearly from the evidence of PW1 is that she well knew the Appellant by the description of frequently passing by the IDP Camp in the evening and being a man who always carried a panga. She also described him as a man with residing hair which she saw after his hat fell off during the attack. This implies that the attacker was a person she could easily have been able to identify if she saw him again. And as the police rightly did, they conducted an identification parade in which the Appellant was allegedly identified by PW1 leading to his arraignment in court.

32. The twist of events is that the officer who conducted the parade did not testify. PW1 was also not led in evidence to identify the parade form casting doubt as to whether a parade was ever conducted.

33. It must be noted that an identification parade is conducted for a reason. It is intended to erase any doubt in the mind of the court that the person a complainant describes and says attacked him/her, say in a case of robbery, is the person who is charged so that any doubt of a mistaken identity is cleared.

34. This is a case where the robbery took place at night. Although PW1 said it was at 7.00 pm and not dark, it is clear that she did not know that Appellant by name but by description. The extent of the light at that time was not put to test by the prosecution while leading the evidence in chief. This leaves many questions as to what exactly PW1 was able to see from her attacker at a time she was being tossed up and about and rolled on the ground. She definitely was a frightened victim.

35. It is common knowledge that many men are short and have residing hair on their head. PW1 claimed to have seen this mark while she was struggling with her attacker. Again, a question arises; in such hour of fright, how was she able to identify the specific person with the residing hair? And how far had the hair resided? Wouldn't an identification parade have confirmed the described features?

36. Further, it was alluded that the Appellant used to sell charcoal. Again, it was not elucidated where he sold the charcoal to rule that PW2 and PW4 were not referring to someone else; after all, charcoal sellers are many and could have been anybody else selling charcoal.

37. To erase doubt that this description fitted the Appellant, an identification parade was the sure thing to do. The failure to conduct the parade means that it is doubtful that the person PW1 said attacked her was one and the same person who was charged, the Appellant herein.

Also, if the parade was conducted as alleged, why did the investigators and prosecution decline to adduce its evidence? All these unanswered questions beg more than meets the eye and gravely weakened the prosecution case.

38. With a doubt that the Appellant was identified, it follows that even if PW1 was robbed, it cannot be proved that the assailant was the Appellant.

39. Further, from the evidence of PW2, the area chief, is that he was assisted to arrest the Appellant by people who saw him flee the scene of the incident. PW2 also testified that the people who saw the Appellant flee the scene described him (Appellant) to him. These are the people who allegedly led to the arrest of the Appellant after they described him. What is intriguing is that these people were not called as prosecution witnesses. These are people who, in my view, were crucial in shedding light as to how they concluded that the Appellant was fleeing the scene after committing the offences. They would also have described to the court how they linked the Appellant to the scene of the crime and committing the offence. The failure to call them as witnesses created a very big gap as to how the prosecution concluded that the Appellant was the culprit yet according to PW1 she identified him in an identification parade.

40. The prosecution in the circumstances failed to piece up evidence that would have linked the Appellant to the offence. This casts doubt in the mind of the court that the Appellant herein was none other than the person who was seen by the persons mentioned by PW2 fleeing the scene.

41. As was held in the case ***of Bukenya & Others V Republic [1972] EA, 549,*** the failure to call crucial witnesses who are readily available and whose evidence is crucial would easily lead to an inference that, had such witnesses been called, they would give adverse evidence. No explanation was availed for the failure to call the witnesses yet they lived within the vicinity of the incident. This omission was a fatal blow to the prosecution case.

Whether the offence of robbery with violence was proved.

42. The offence of robbery with violence is defined under **Section 296(2)** of the **Penal Code** as:

> **"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

43. From the wording of the above definition, a proof of any of the three elements is sufficient to establish the offence of robbery. That is to say that, the ingredients are to be read disjunctively not conjunctively**.** See also ***Nairobi Court of Appeal,Criminal Appeal No. 300 of 2007 Dima Denge Dima & Others vs Republic [2013] eKLR.***

44. In the present case, although the Appellant was alone, he was armed with a big stick, commonly referred to as a rungu. He injured the complainant through the kicks, brows and dragging meted against her. Indeed, she was admitted to hospital for a month and medical evidence by a P3 Form described the injuries as maim. This amounted to use of personal violence. Additionally, he stole her personal belongings which included money and which were never recovered. In sum, the elements of the offence charges were established.

45. I find this a pathetic case that even with such grave circumstances of the robbery, the investigators took their job very casually. It begs why an identification parade was conducted but no officer testified in this regard. Was it by sheer oversight or a deliberate omission from carelessness? This has flattened the prosecution case at the cost of the complainant getting justice. But again, justice cannot be one sided. Even the Accused himself is entitled to a fair trial. The Appellant herein, from amalgamation of all the evidence could have fallen for a mistaken identity. And even if he committed the offence, the prosecution failed to discharge their burden by proving their case beyond all reason doubt. This burden can never shift to the accused, however strong the suspicion that he committed the offence, is.

46. In the result, I come to the conclusion that the Appellant was not properly identified. The appeal on conviction having succeeded, I need not delve into the issue of sentence. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held.

47. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 24TH DAY OF FEBRUARY, 2022

G. W. NGENYE-MACHARIA

JUDGE

1. Appellant in person.

2. Ms. Kirenge for the Respondent.