REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 111 OF 2019

GABRIEL NJOROGE NDUTA ...APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. The appellant, *Gabriel Njoroge Nduta,* was charged and convicted in two counts with the offences of robbery with violence contrary to *Section 296 (2)* of the *Penal Code* and rape contrary to *Section 3 (1) (a), (b)* and *(c)* of the Sexual Offences Act No. 3 of 2006.

2. In the charge of robbery with violence, it was alleged that on 5th December 2016 at Kariobangi North Estate in Nairobi within Nairobi County, while armed with a dangerous weapon namely a knife, the appellant robbed MKN (Name withheld) cash KShs.1,000 and a mobile phone make Itel valued at KShs.3,000 and at the time of such robbery used actual violence against the said MKN

3. In count 2, the particulars were that on the same date and place, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MKN without her consent.

4. Upon his conviction, he was sentenced to serve forty years imprisonment in each of the two counts. The sentences were ordered to run concurrently.

5. Being dissatisfied with his conviction and sentence, the appellant proffered an appeal to this court vide a petition of appeal filed on 24th May 2019. He filed the appeal in person thus the description of his petition of appeal as *"Memorandum grounds of appeal"*.

6. In his grounds of appeal, the appellant mainly complained that the learned trial magistrate erred by convicting him of charges which were defective; convicting him on the basis of contradictory evidence which was insufficient to prove the ingredients of the offences charged in each count beyond reasonable doubt; and by disregarding his plausible defence.

7. Both parties chose to prosecute the appeal by way of written submissions. The appellant filed his submissions on 24th January 2022 to which he attached amended grounds of appeal but on 21st February 2022 when the appeal came up for mention, he requested the court to ignore the amended grounds filed together with his submissions as he wished to rely on his initial petition of appeal.

8. In his submissions, the appellant focused on his alleged identification as the perpetrator of the offences subject of the trial. He faulted his identification by PW1 claiming that it was unreliable considering that PW1 described her assailant as a person whose left ear had been cut off which could not have referred to him since he had his left ear and only his right ear had been cut off. He also challenged validity of the identification parade arguing that it was flawed and unsafe considering PW1's testimony that she had seen him at the police station before picking him out in the identification parade. He urged me to disregard PW1's evidence and allow his appeal.

9. The respondent in its submissions supported the appellant's conviction and sentence. The respondent denied the appellant's complaint that the charge sheet was defective and that he was not positively identified as PW1's assailant. It was the respondent's contention that the evidence adduced by the prosecution before the trial court proved all ingredients of the two offence preferred against the appellant beyond any reasonable doubt and that he was properly convicted. The respondent in a nutshell implored me to dismiss the appeal for lack of merit.

10. The brief facts of the prosecution case are that on 5th December 2016 at around 4:30am, PW1 was going back to her house to collect some luggage when a man emerged from behind a *"kibanda"* and went straight towards her. She saw him as he approached through a big floodlight besides the road.

11. PW1 recalled that she knew the man previously by seeing him in Kariobangi North though she did not know his name. She identified

that man as the appellant in this case. She recalled that on getting to her, the appellant held her by the collar using his right hand and in his left hand he held a knife. He threatened to harm her with the knife asking in Swahili *"unataka nikuwekelee"*.

12. According to PW1, the appellant moved her towards a road which was not lighted and as they walked side by side and was trying to resist, the appellant continued threatening her with the knife.

He took her KShs.1,000 and mobile phone and then led her to a *kibanda* in which he raped her after hitting her on the jaw.

13. The complainant further testified that after the rape ordeal and as she was leaving the *kibanda*, she found the appellant at the gate and they walked together towards the floodlight and before they parted company, she noted that his left ear was cut off.

14. On the same day, she reported to *Mary Wanjiru* [PW2] what had befallen her and together they went to Medicins Sans Frontiers (MSF) Clinic at Eastleigh. At the clinic, she was examined by PW4, a clinical officer who noted that her external genitalia was normal but her cervix had fresh bruises and her hymen had multiple old tears. PW4 recalled that spermatozoa was found in her urine and high vaginal swab. She completed the Post Rape Care Form (PCR form) which she produced as *pexhibit 1*.

15. On 7th December 2016, PW1 reported the incident to PW6 *PC Thomas Onduso* at Kariobangi Police Station. He recorded her statement in which she described her assailant as a man whose left ear had been cut. As she had already received treatment at the MSF Clinic, he issued her with a P3 form. He noted that PW1 was traumatized as she kept crying when recording her statement.

16. On 1st January 2017, PW1 called him telling him she had spotted the suspect and following the information provided by PW1 including the description of her assailant, assisted by PW5, he arrested the appellant.

17. In the course of his investigations, PW6 organized the conduct of an identification parade and also visited the scene of crime. He noted that near the scene, there was a *"mulika mwizi''* (flood light). After his investigations, he charged the appellant with the offences subject of his conviction.

18. When placed on his defence, the appellant elected to give a sworn statement and did not call witnesses. In his statement, he stated that he used to live in Kariobangi prior to his arrest. He narrated how he was arrested and denied having committed the offences as alleged.

19. This being a first appeal to the High Court, I am enjoined to carefully re-evaluate and reconsider the evidence presented to the trial court in order to arrive at my own independent conclusions regarding the soundness or otherwise of the appellant's conviction.

In doing so, I should remember that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance to that disadvantage. See: ***Okeno V Republic, [1972] EA 32; Mwangi V Republic, [2004] 2 KLR 28.***

20. I have given due consideration to the grounds of appeal, the evidence on record and the parties' rival submissions. I have also read the judgment of the trial court.

Having done so, I wish to deal first with the appellant's complaint that he was convicted on defective charges. The appellant in his submissions concentrated on the issue of identification and did not make any reference to this complaint. He did not therefore explain how in his view, the charges preferred against him were defective.

21. On my part, I have looked at the charge sheet and I am satisfied that the charges in count 1 and count 2 fully comply with the provisions of *Section 134* as read with *Section 137* of the *Criminal Procedure Code*. Each of the counts contains a statement of the offence charged and particulars thereof disclosing the nature of the offence and how it was allegedly committed. It is therefore my finding that the charges are not defective as alleged. They are valid and were properly laid before the trial court.

22. After my independent analysis of the evidence on record, I find that it was not disputed that the offences of robbery with violence and rape were committed against the complainant on 5th December 2016 and the evidence adduced before the trial court also proved this fact beyond any reasonable doubt. The only issue in my view which arises for my determination in this appeal is whether the appellant was positively identified as the culprit.

23. It is settled law that where the prosecution case is based solely on identification evidence, the trial court must analyse such evidence with utmost care and must be satisfied that the circumstances surrounding the alleged identification were favourable to a positive and reliable identification of the offender.

24. In ***Wamunga V Republic, (1989) KLR 424*** the Court of Appeal had this to say on identification evidence:

> **"It is trite law that where the only evidence against a defendant is 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 the possibility of error before it can safely make it the basis of a conviction."**

25. It is trite that evidence of recognition is more reliable than that of identification of a mere stranger although mistakes can sometimes be made even in cases of recognition. See- ***Republic V Turnbull & Others, [1976] 3 All ER 549; Kiarie V Republic, [1984] KLR 379.***

26. When convicting the appellant, the learned trial magistrate accepted PW1's claim that she knew the appellant physically prior to the material date by seeing him severally at Kariobangi since the appellant admitted in his defence that he used to live in Kariobangi prior to his arrest. This formed the basis of her finding that PW1's evidence on identification amounted to recognition of the appellant as her assailant and that this recognition was credible and reliable given that the place where PW1 was first attacked was well lit by a floodlight.

27. The learned trial magistrate also noted that the description PW1 gave to PW2 on the date of the incident regarding the identity of her assailant and to PW6 two days thereafter fitted the physical features of the appellant except that it was his right ear which was cut off not the left as alleged by PW1.

28. After my own appraisal of the evidence on record, I agree with the learned trial magistrate that the circumstances in which the appellant was identified and or recognized as PW1's assailant were conducive and favourable to a positive and reliable identification of the culprit. It is clear from PW1's and PW6's evidence that the place where PW1 was first attacked was fully illuminated by a nearby floodlight. The manner in which the complainant was handled by her assailant and the fact that she walked side by side with him for some distance till they got to the place she was raped described as a *kibanda* and the fact that after the rape ordeal, they still walked back together while engaging in some conversation and parted company near the floodlight demonstrates that PW1 had ample time and opportunity to see and identify the appellant as her assailant. She noted that he did not have his left ear.

29. The fact that it later turned out that it was his right not his left ear that was missing was inconsequential since the important point to note is that one of his ears was missing. Given the traumatic experience PW1 had gone through, it would be unreasonable to expect her to remember the exact detail of which of the assailant's ears was missing.

30. In any event, the learned trial magistrate who had an opportunity of seeing the appellant in court confirmed in the proceedings that the other description given by PW1 regarding her assailant's physical features fitted the appellant.

31. Given the foregoing, I have come to the same conclusion as the learned trial magistrate that the appellant was positively identified and recognized as the person who robbed PW1 while armed with an offensive weapon namely a knife and thereafter raped her. I am thus satisfied that the appellant was properly convicted in each count. His appeal against conviction therefore fails.

32. In respect of the appeal against sentence, the penalty prescribed by the law for the offence of robbery with violence contrary to *Section 296 (2)* of the *Penal Code* is death.

In imposing a sentence of 40 years imprisonment, the learned trial magistrate must have been guided by the decision of the Supreme Court in ***Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR*** in which the mandatory death sentence for the offence of murder was declared to be unconstitutional as it fettered the court's discretion in sentencing.

33. The reasoning of the Supreme Court was subsequently applied by the courts to cover other mandatory sentences provided by the law for other offences including the offence of robbery with violence and sexual offences.

The courts interpreted the Supreme Court's decision to mean that their discretion to impose appropriate sentences in cases where the law prescribed mandatory sentences had been restored.

34. Although the Supreme Court has recently clarified in the ***Francis Karioko Muruatetu & Another V Republic, Katiba Institute & 5 Others (Amicus Curiae), [2021] eKLR*** that its earlier decision on the unconstitutionality of the mandatory death sentence applied only to the mandatory sentence prescribed for the offence of murder and not any other offence, I am unable to fault the learned trial magistrate for sentencing the appellant to 40 years imprisonment in count 1 while relying on the first ***Muruatetu*** decision since directions issued in the second ***Muruatetu*** decision cannot be applied retrospectively.

The sentence imposed by the trial in count 1 is therefore confirmed.

35. Regarding count 2, the punishment provided by the law for the offence of rape is a minimum of 10 years imprisonment which can be enhanced to life imprisonment.

36. Though the sentence of 40 years imprisonment imposed by the trial court in this count was lawful, the learned trial magistrate did not assign reasons why she found that sentence more appropriate than the minimum mandatory sentence of 10 years imprisonment prescribed by the law.

Granted, there were aggravating circumstances in this case in the manner the offence was committed but in my view, the minimum sentence of ten years imprisonment would have been sufficient punishment for the appellant in count two.

37. Consequently, I set aside the sentence of 40 years imprisonment passed by the trial court in count two and substitute it with a sentence of 10 years imprisonment.

38. The appellant's appeal on sentence therefore partially succeeds. The sentences in each count will run concurrently and shall take effect from the date of the appellant's arrest which is 1st January 2017.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2022

C. W. GITHUA

JUDGE

In the presence of:

Appellant – Present virtually

Mr. Kirago for the Respondent

Court Assistant – Karwitha