



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 76 AND 77 OF 2018**

**ANTHONY GACHIGU WACHIRA.....1<sup>ST</sup> APPELLANT**

**DAVID KARIUKI WACHIRA.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Appeal from the original conviction and sentencing of Criminal Case No. 3154 of 2013 by Hon V. Wakumile S.P.M at Nakuru delivered on 21<sup>st</sup> September,2018).***

**JUDGEMENT**

1. The Appellants were jointly charged with the following five counts of offences.

**COUNT I & II (A1) AND (A2)**

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 295 AS READ WITH SECTION 296 (2) OF THE PENAL CODE.

**COUNT III (A2)**

RAPE CONTRARY TO SECTION 3 (1) (A) (3) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006.

**ALTERNATIVE COUNT**

INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11 (A) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006.

**COUNT IV (A1)**

DEFILEMENT CONTRARY TO SECTION 8 (1) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006.

**ALTERNATIVE COUNT**

INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11 (1) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006.

**COUNT V (A1) AND (A2)**

ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENAL CODE.

Particulars of the offences are as per the charge sheet.

2. The Appellants pleaded not guilty to all the 5 counts above. The case proceeded for hearing and they were both convicted of count I & II and 2<sup>nd</sup> Appellant was further convicted on counts III and V.

3. On the account of robbery with violence both were sentenced to 40 years' imprisonment, on the count of rape Accused 2 was sentenced to 20 years' imprisonment, on the account of assault causing bodily harm Accused 2 was sentenced to 6 months' imprisonment.

4. Being dissatisfied and aggrieved by the said convictions and sentences imposed, each of the appellants filed individual appeals, the first appellant filed the appeal on 7<sup>th</sup> November 2019, while the 2<sup>nd</sup> appellant filed the appeal on 28<sup>th</sup> September 2018. The appeals were consolidated on 7<sup>th</sup> November, 2019 for purpose of trial and determination and raised the following grounds: -

1. *That the trial court erroneously relied on purported recognition by voice without considering that the parade conducted over the same was done in a contravention manner.*

2. *That the trial court erroneously convicted the appellants without considering that they were not accorded a fair trial since they were not allowed to recall PW1 and PW2.*

5. The state opposed the appeal on both conviction and sentence. Parties agreed to proceed by way of written submission. Appellants filed submissions on 13<sup>th</sup> October, 2020.

#### **APPELLANTS' SUBMISSIONS**

6. The appellants submitted that the trial court relied on testimony of the witnesses to the effect that an identification parade was conducted and the same corroborated by a voice recognition. Further that the appellants were arrested because a black jacket belonging to the appellants was found outside the complainants' house and submitted that as held in the case of **Okeno Vs Republic [1972] E.A 32 at page 36**, the court stated the duty of first appellate court being to reevaluate evidence adduced before the trial court and make an independent determination.

7. The appellants submitted that PW1 stated that the intruders were about 10 in number and that she had seen the appellants near her home on several occasions meaning they were known to her and PW2 confirmed that it was 3.00 am when the incident occurred but never said the number of assailants and in the parade PW2 said she had seen accused 2 at the shopping center and that she knew the appellants brother **Ndungu** and had even though one of the appellants brother by the name **Muthui**; that this was vital information that should have been recorded by police *ab initio*.

8. The appellants listed requirements in conducting identification parade as provided in the police force **Standing Orders (Form P156) Under National Police Service Act 2011**.

9. Appellants submitted that visual identification in criminal cases can cause miscarriage of justice and should be carefully tested and cited the case of **Wamunga Vs Republic [1989] KLR 424** where the court held as follows:

**“Where the only evidence against a defendant is evidence of identification or recognition, the trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”**

10. Further that in the case of **Nzaro V Republic [1991] KAR 212** the Court of Appeal held that identification by recognition at night must be absolutely watertight to justify conviction. Appellants submitted that in the instant case, the parade was not conducted properly as the appellants were not informed of the right to consent to participate in the parade, their right to have a friend or solicitor present and as per evidence of PW1 and PW2, at no point in the parade were the suspects requested to cover their mouths partially or requested to wear Marvin. Further failure to give suspects descriptions render identification parade worthless and in respect to black jacket it was mere circumstantial and it was never proved the appellants owned such jacket.

11. On the issue of request to start the case *denovo* as per **Section 200 of the Criminal Procedure Code**, the appellants urged the court to look at the lower court proceedings pages 44,47,49 and 50 and submitted that **Section 200 of the Criminal Procedure Code** entrenches the accused's right to fair trial as provided in **Article 50(1) of the Constitution** and submitted that the appellants herein were not accorded the right to fair trial; and submitted that the conviction and sentence were not sound as there were inconsistencies and grave miscarriage of justice.

#### **RESPONDENT'S SUBMISSIONS**

12. On behalf of the state, the state counsel submitted on the three ingredients for the offence of robbery as set out in the case of **Oluoch Vs Republic [1983] KLR** where the court held as follows:

**“Robbery with violence is committed in any of the following circumstances: -**

**a. “The offender is armed with any dangerous weapon or instrument or**

**b. The offender is in company with one or more person or persons; or**

**c. At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other violence to any person...”**

13. In respect to identification parade, the state counsel submitted that after recovery of the black jacket and axe at the scene, they were taken to town center where villagers identified them as belonging to the appellants who were brothers; that the members of public led the police to the accused persons home where the second accused attempted to escape while dressed in women clothes. She further submitted that the complainants gave the police description of the accused persons and stated that they could easily identify them.

14. The state counsel cited the case of **Njihia Vs Republic [1986] KLR 422** where the court stated as follows: -

**“It is difficult to arrange well conducted parade. If properly conducted, especially with an independent person present looking after the interest 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 on clear evidence of identification apart from parade...”**

15. She further submitted that PW3 described and was able to pick the 2<sup>nd</sup> appellant out of the parade as the one who sexually assaulted her and that she identified the 2<sup>nd</sup> appellant as she had close contact with him.

16. The state counsel further submitted that the parade was conducted a few hours after the incident and the complainants said they could remember their voices. She submitted that accused 2 talked to PW5 while committing the offence and accused had on previous occasions spoken to her at the center in Kikuyu and Kiswahili; and cited the case of **Choge Vs R [1985]1KLR** where the Court of Appeal held that depending on circumstances, identification by recognition carry as much weight as visual identifications since its identification by recognition rather than first sight.

17. That the appellants were properly identified at the identification parade and further submitted that there was no contradiction on the prosecution evidence and submitted that the appellants were convicted on the evidence of more than one witness and was further corroborated by the recovery of their jacket and axe used during the robbery at the homestead of the complainant; that the 1<sup>st</sup> accused failed to account for their whereabouts on the night of the incident and the 2<sup>nd</sup> Accused failed to give a reasonable explanation as to why he tried to flee from his home disguised in a women dress.

18. And further **Karani Vs Republic** where the court held as follows: -

**“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favoring safe identification.”**

19. On issue of being denied opportunity to have the case start *denovo*, the state counsel submitted that at the time of application under **Section 200 of the Criminal Procedure Code**, the complainants had relocated due to threats from accuseds’ family and were traumatized and the court delivered ruling on the application on 6<sup>th</sup> December 2016; that the court ordered the case to proceed from where it had reached noting that the matter had taken long in court at the instance of accused persons who feigned sickness and disrupted court proceedings.; and cited the case of **Abdi Adam Mohammed Vs Republic[2017]eKLR** where the court held that while complying with **Section 200 of the Criminal Procedure Code**, the court has to bear in mind how far the trial has reached, availability of witnesses, time that has lapsed since commencement of trial and prejudice to be suffered by either prosecution or accused and in the case of **Nyabutu & Another V R[2009]KLR 409** the court stated as follows:-

**“...By dint of section 200(1) (b) of criminal procedure code a succeeding judge may act on evidence already recorded wholly by his predecessor...”**

**...Musinga J.in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so.it cannot be lost in mind that public policy demands that justice be swiftly concluded.”**

20. The state counsel submitted that the right under **Section 200 of the Criminal Procedure Code** is not absolute and the trial court dismissed the application as it lacked merit.

21. The state counsel further submitted that the appellants’ defence was full of contradiction and didn’t challenge the prosecution case.

#### **ANALYSIS AND DETERMINATION**

22. This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first appellate court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

**“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings 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, (See Peters v. Sunday Post, [1958] EA 424.)”**

23. In view of the above, I have perused the lower court proceedings and considered together with submissions filed herein. Identification parade was conducted but the appellants’ arguments was that, the parade was not properly conducted. The following are issues for determination: -

i. whether the appellants were positively identified.

ii. Whether the appellants were accorded a fair hearing

iii. Whether sentence imposed is manifestly harsh and excessive.

**(i) Whether the appellants were positively identified**

24. There is no doubt that the incident occurred at 3.00 a.m; the complainant however testified that the intruders had touches; that they were about 10 in number; she said she informed police that she would be able to identify the assailants. She said she identified two and she identified the two in identification parade conducted. She further stated that she asked the intruders to say what they had said in the house during the parade “*lete mikono tukufunge kama mama yako.*” She further stated that she used to see them at Mwisho wa Rami. She further said she used to see accused 1 at [Particulars Withheld] stage but she didn’t know accused 2 and that she had never talked to them.

25. PW1’s evidence was therefore evidence of recognition and visual identification by appearance and voice identified in the course of the attack. She said the accused persons were not shown to her before the parade.

26. PW2 a foster mother to PW1 was in the house but in another room, which was forced open by intruders. She confirmed the incident occurred at 3.00 a.m. but there was light inside the house from security light that was lit outside. She said one person had an axe with metallic handle. She testified that she was placed on the table and raped by one intruder for about 5 minutes then he removed items from the kitchen; she said she watched the intruder as he did all that. She said the intruders left after raising alarm that people had come. She said she later learnt that her daughter was also defiled.

27. PW2 said she identified the 2 appellants herein and that it is the 2<sup>nd</sup> Appellant who raped her. She said at the parade she told the 2<sup>nd</sup> Appellant to repeat what he said in the house during the attack and he recognized his voice; she further stated that she used to see him at Kwa [Particulars Withheld] near the school she teaches; and that the 1<sup>st</sup> Appellant while in the house would refer to her as teacher; telling her that as a teacher she had a lot of money. She said the villagers said the jacket recovered used to be worn by both appellants. She said she used to see the appellants and especially the 2<sup>nd</sup> appellant and that, she knew their brother Ndungu and she taught their brother Muthui. She further said she had seen the 2<sup>nd</sup> appellant wear the jacket recovered on several occasions and at the market and it was identified by people in the shopping centre as one worn by Ndungu’s brothers. She said intruders had not covered their heads but wore Marvin cap. She confirmed that there was no light on in the house but security light was on and that she doesn’t normally put-on light in the house when security light is on.

28. PW3 and PW4 both administration police officers confirmed that they arrested the appellants and five other suspects on information from members of public

29. PW3 testified that she was sleeping with her mother PW2 in the same room. She testified that the people who entered the room had not covered their faces. She said after one suspect leaving the room with her mother, the other started poking his fingers in her vagina and tried to penetrate her vagina with his penis but he did not succeed; that he then forced her to suck his penis which she did out of fear for 45 minutes. She said he applied oil on his penis and tried to penetrate her again but it failed. He then forced her to turn around and tried to have anal intercourse but he was not able to penetrate; she said he became agitated and hit her with an axe on the head while she faced down making her lose consciousness; she said when she regained she saw him searching suitcases and cabinet; then she heard alarm from one of them telling them “*sasa inafaa twende*” meaning “we need to leave”. Then their neighbours arrived and untied them.

30. PW5 said the house is made of timber with spaces which allow light to penetrate. She said she identified the 2<sup>nd</sup> appellant as the person who attempted to rape her. She said prior to the attack, the two appellants had been supplying mandazi in their locality for about 2 years. She said she identified appellant 2 from his physical features and that she described the features of appellant 2 to police.

31. PW6 testified that **Chief Inspector Ogolla** who had been interdicted at the time of hearing conducted identification parade where the 1<sup>st</sup> and 2<sup>nd</sup> appellant were identified by PW1 and PW5.

32. PW7 produced medical reports on behalf of **Doctor Barasa** who had gone back to medical school at the time of the hearing. He testified that doctor Barasa established that PW5 had been defiled and PW2 had been raped

33. PW8 the investigation officer testified that PW2 said the assailants never made attempts to conceal their faces. He testified that the 1<sup>st</sup> and 2<sup>nd</sup> appellants were identified in identification parade. He said the complainants informed him that they were able to identify their assailants; and they also told asked them to speak and the witnesses identified their voices in the parade.

34. On their defence, the appellants chose to adduce sworn evidence; they denied having committed the offences herein and said they were not properly identified by PW1, PW2 and PW3.

35. I have considered evidence adduced. PW8 confirmed that the complainants indicated that they were able to identify the suspects. A parade was conducted the next day when their incident was still fresh in the minds of the witnesses and accused persons confirmed that the complainants asked them to speak; Further to being identified physically, their no doubt that their voices were identified by the complainants. From evidence adduced, the complainants gave descriptions of the suspects and their voice recognition corroborated the visual identification. PW5 said the 2<sup>nd</sup> appellant took 45 minutes attempting to rape her and committing indecent acts on her. PW2 also took considerable time with the 2<sup>nd</sup> appellant; they confirmed that light from security light outside, penetrated to their timber house due to spacing of the timber in the house.

36. From the foregoing, I do not see any doubt in identification of appellants herein. I find that they were positively identified as being

among the who committed the offences herein.

**(ii) Whether the appellants were accorded fair trial**

37. On issue of fair trial, I have perused proceedings of 6<sup>th</sup> December 2016 and note that sufficient reason was given as to why the prosecution proposed to have the case proceed from where it had reached before the previous trial magistrate. On the other hand, the appellant never gave sufficient reason to warrant starting the case afresh; in fact, record show that the case had been adjourned severally at the instance of the appellants. I agree with state counsel that the right to recall witnesses under **Section 200 of Civil Procedure Code** is not absolute; record show that it was in the interest of ensuring expeditious disposal of the matter and interest of victim which the court considered in declining the appellants request. No prejudice that appellants stood to suffer was demonstrated.

**(iii) Whether sentence imposed was manifestly harsh**

38. For the first two counts of robbery with violence, section 296(2) provides for mandatory death sentence. The trial magistrate however exercised discretion and imposed sentence of 40 years' imprisonment. I do agree with him that the degree of violence subjected to victim was high and must have left a lasting mark in them as they were subjected to severe traumatic experience. I am however of the view that 40 years' imprisonment is on the higher side and I am inclined to reduce to 25 years.

39. The sentence imposed for the other 3 counts are reasonable and I will not interfere with the same.

**40. FINAL ORDERS**

- 1. Appeal on conviction is dismissed in all the counts.**
- 2. Sentence on count 1 and 2 are reduced to 25 years.**
- 3. Sentence on count 3 to 5 not interfered with.**
- 4. Sentences in all the 5 counts to run concurrently.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 25TH DAY OF FEBRUARY 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

**Schola/Jenifer - Court Assistant**

**Rita Rotich for the State**

**Mr. Imbwaga counsel for the Accused**