



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 118 OF 2018

MICHAEL KIPROP 1ST APPELLANT

PABLO MURUNGA ALFRED.....2ND APPELLANT

FREDRICK SOITA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. This Judgment is in respect to three consolidated Appeals in which the Appellants appear in the following order; Michael Kiprop (1st Appellant), Pablo Murunga Alfred (2nd Appellant) and Fredrick Soita Alias Freddy (3rd Appellant). This order of appearance is by dint of the order of consolidation made by Hon. Justice Sewe on 23rd January 2020.

2. The three were jointly charged in Eldoret Criminal Case No. 2077 of 2017. To be noted this early is that at trial, the order of appearance was slightly different as follows; Michael Kiprop (Accused 1), Fredrick Soita Alias Freddy (Accused 2) and Pablo Murunga Alfred (Accused 3). So as to avoid a confusion when discussing the evidence, it is proposed that the Appellants be referred to as they appeared at Trial.

3. The Accused Persons faced two joint charges of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. They also faced two counts of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2007 and each faced two counts of the offence of indecent act with an adult contrary to section 11(a) of the Sexual Offences Act No. 3 of 2007. In addition, Accused 1 and 3 faced separate charges of handling stolen property contrary to section 322 (2) of the Penal Code.

4. The Trial Court ably summarized the particulars of the charges as follows:-

“On 14th May 2017 at [Particulars Withheld] the accused persons jointly with others not before Court, while armed with offensive weapons (crowbars, pangas, and rungus) robbed PS of one power saw, LG television set, Nokia Lumia mobile phone, kaduda mobile phone, 3 pairs of shoes, one blanket and one sword all valued at 170,800 shillings and at the same time used actual violence on her. At the same time, they also robbed EM of one mobile phone, one bag and assorted women clothes all valued at 12,300 shillings and at the same time used actual violence on her.

On 18/5/17 otherwise than in the course of stealing, Michael Kiprop was found with one sword at kapkuress village, property of PS knowing it to be stolen property and Fredrick Soita alias Freddy was found at Musembe village with a jacket, property of EM knowing it to be stolen property.

On 14th May 2017 at the same place the accused persons in association with other persons not before court alternately wilfully and unlawfully caused their penis to penetrate the vaginas of PS and EM.”

5. Eleven prosecution witnesses testified at Trial and put together the following case. On the fateful night of 14.5.2017, PS (PW1) was at her home at [Particulars Withheld]. With her, at home, were Aggrey Mamu, EM and 4 children. Later in the night, three people broke the rear door to the house and made entry while armed with pangas, rungus and hammers.

6. They assaulted PW1 as they demanded for money. When she said she had none, one of the assailants asked her to telephone her husband and feign illness as a pretext for requesting for money. She obliged but her husband told her that he did not have money. The assailants made a brief exit of the house but carrying with them items which included a t.v. and power saw.

7. They returned into the house again, beat her and took her phone and forced her to give them the personal identification number (PIN) to her Mpesa account. She later learnt from her Mpesa statement that some money had been transferred from her Mpesa to an account in phone No. 0791[...] which belongs to Accused 1. The ownership of this number was traced to Accused 1 by Simon Bitok (PW 11) a data analyst with Safaricom, the company that operates the mobile money transfer service.
8. Back to the night, three assailants demanded that they have sex with her and PW3. Three of them allegedly ganged raped PW1, while PW3 was raped by one of them.
9. It was the testimony of PW1 that she was able to identify Accused 1 and 2 in an identification parade arranged by the police. As to Accused 3, she saw him on a later date and reported this to the police who arrested him.
10. The two victims were first treated at Lumakanda and a Police Form 3 filled in respect to each one of them at Turbo Health Centre. The forms were filled in by a Mr. Momanyi but produced in Court by Geoffrey Mojane (PW 6) as the maker was away in college. PW6 told Court that he was familiar with the handwriting and signature of his colleague.
11. Joseph Kipsongok (PW2) is a village elder at [Particulars Withheld] village. On 18.5.2017 he received a report of an alleged burglary of a shop belonging to one Felix Odego. On information that Accused 1 was a friend of Accused 2, he visited the home of Accused 1 and found a small sword (P. Exhibit 3) in that house which is one of the items said to have been stolen from the house of PW1.
12. The story of the stolen telephone is that on 30.5.2017 police officers visited Boniface Martin (PW5) and asked him about a certain phone. He told them that he had bought a phone from one Humphrey Lusivie (PW4) for Kshs.2,900/= and had pledged it to borrow money. He took the police to where the phone was. It was with Humphrey. PW4's testimony was that on 17.5.2017, Accused 1 brought him the phone and said he had a problem. He pledged the phone for Kshs.300/= lent to him by PW4. Accused 1 never returned. PW1 identified the phone, a Nokia Lumia Black (P. Exhibit 5) to be the phone stolen during the robbery.
13. Another stolen item which was recovered was a jacket (P. Exhibit 4) belonging to PW3. It was the testimony of P. C. Waweru (PW 8), a police officer attached to Turbo Police Post, that the jacket belonging to PW4 was found in house said to be occupied by both Accused 1 and 3. It is not clear, however, whether PW8 was present at the time of recovery. A matter to which I shall return.
14. Accused 1 and 2 gave sworn testimony. Accused 1 denied the charge. That sometime in 2018 at about 10.00 a.m he was at his shamba when boda boda riders asked him to accompany them to the office of the Assistant Chief where he was detained. He was not told why he was detained. Later at 11.00 a.m, the Complainant came and greeted him (See handwritten notes of the proceedings). He was later placed on a parade with other people.
15. In his evidence, Accused 2 says he is a barber and that he was asked to accompany police officers in respect to another complaint which they were investigating. He was told that his brother had been beaten in connection with that matter and he later found his brother dead. He remembers being placed on an identification parade where PW1 pointed him out.
16. Accused 3 gave a short sworn statement in which he denied knowing his co-accused. He says that he was told it is Michael (Accused 1) who mentioned him.
17. After considering this evidence, which is but a sketch of the entire testimony of the witnesses, the Trial Court returned a conviction against all the three in regard to the robbery charges. As regards gang rape, only Accused 1 and 2 were convicted.
18. As I turn to consider the appeals, I start with that of Accused 3 (the 2nd Appellant). As I do so, I reproduce this famous passage in *Okeno -vs- Republic* [1972] EA 32 which is a constant reminder of the role of a first instance appellate Court;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala v R* [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.”
19. The counsel for Accused 3 submits that the conviction of his client is unsafe as no identification parade was conducted in his regard and that unlike the other co-accused he was not found with any of the stolen items.
20. First, it is true that none of the stolen items were found with Accused 3 or connected with him. His conviction was founded on evidence of PW1. That she was able to see him as he committed the crimes. The Trial Magistrate stated:-

“The 3rd Accused was not identified at parade since he was not put in any. He was arrested after the 1st and 2nd had already been charged...”
21. As the Accused was arrested after been pointed out by PW1, it would have been needless for an identification parade to be arranged for purposes of identification by PW1.
22. PW1's evidence in regard to Accused 3 was that:-

“You were in the house. You were shining torches without caution and I was able to see your faces. I reported to the police who did investigations. I saw you, days later after the arrest of the others. I pointed you out to the police and you were arrested.”

23. PW3 who was also a victim of the robbery and rape did not mention Accused 3 in her evidence.

24. When PW1 was recalled to give further testimony she stated:-

“You had befriended my maid called Joy and was sleeping in my house eating my food

.....Murunga was a boyfriend to my maid.”

25. The sum total of the evidence by PW1 is that she recognized Accused 3 who she knew before as being a boyfriend to her maid. If that was so then it would be expected that she would, in her first report to the police, inform them that one of the assailants was known to her. There is no such evidence by PW1 herself or the police officers who received the report.

26. I therefore agree with the Appellant’s counsel that the evidence against Accused 3 was not sufficient to found a safe conviction.

27. The Appeals by the others are not dissimilar. Both contend that the conditions for identification at the scene of crime were not favourable. They argue that the identification parades in which they were identified were arranged and conducted in a manner that made them irregular and a nullity. Accused 1 states that there was a variance in the serial number of the phone recovered and that said to be of the Complainant. For Accused 2, he argues that it was insufficiently proved that that jacket recovered was the one stolen.

28. The evidence of the eye witnesses, PW1 and PW3, is that they were able to see the faces of the assailants as the assailants had torches. For instance PW1 said:-

“You were shining torches without caution.”

While PW3 stated:-

“You had torches and shone on your faces asking us if we knew you.”

29. So although the incident happened at night, the torches which the accused persons used provided sufficient light for the victims to see their faces. Further, the incident was not in a fleeting moment. The victims were not only robbed but also one gang raped by three people who consecutively had sex with her. Remember also that the assailants entered the house, robbed the victims, removed the stolen items to the outside and returned to rape the victims. While no doubt a terrifying episode, there was opportunity for the victims to see their attackers.

30. So how were the identification parades arranged and conducted?

31. The Force Standing Orders which governs identification parade was issued pursuant to section 5 of the Police Act, Cap 5 Laws of Kenya. The Police Act was repealed by the National Police Service Act (No. 11 A of 2011). However by dint of the saving and transition provisions found in section 131 of the latter Act, any standing orders issued under the repealed Act and in force immediately before the commencement of the Act are deemed as made and issued under the new statute. In this instance, the Force Standing Orders on identification parades survived the repeal.

32. Police Form 156 sets out the Force Standing Orders in regard to identification parades. One of the prerequisites of a fair parade is that the witnesses ought to give a description of the suspect to the police officer in charge of the crime so that the officer arranging the parade picks members to the parade who, as much as possible, fit the description of the suspect. When parades are not arranged or conducted with scrupulous fairness then their evidential value is lessened or annulled (See Order 6(iv) (h).

33. In regard to Accused 1, PW1 was unequivocal that she did not give a description of the suspect. This may affect the evidential value of any identification made by PW1 in regard to that accused. Whether or not PW2 gave this prior description to the police is not clear as the issue was neither taken up by the prosecution nor the defence.

34. On another front, Accused 1 takes issues with the membership of the parade. First, that PW1 stated that she saw 10 members on the parade. This may not be an accurate characterization of her evidence because her testimony was:-

“An identification parade was conducted and I saw about 10 people.”

(My emphasis)

She says she saw about 10 people. This is not the same thing as saying she saw 10 people. The identification parade form shows that suspect was placed amongst 8 people. 8 people could be about 10. Nothing much should be made of this.

35. Standing Order 6 (v) (d) provides:-

“The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent.”

In using of the words “as far as possible of similar,” the rule foresees that there may well be practical difficulties in the police assembling a parade of people of similar age, height, general appearance and class of life as a suspect. So, whilst PW 9 conceded that the parade had members of “mixed heights and weights”, how much weight should be placed on this supposed flaw depends on whether, on the overall, the parade was fair. If other rules that give credibility to parade are adhered to, then this flaw can be overlooked. If, however, the manner the parade is arranged and conducted is fraught with other irregularities then the non-adherence to the rule assumes greater prominence. This is the approach the Court takes.

36. Accused 1 was identified by both PW1 and PW3. In respect to PW1, it is clear that she did not give the description of the suspect to the police. As for PW3, there is no evidence as whether or not she gave the description. So in respect to the identification by PW1, it may well be problematic given, as well, the apparent non-compliance with Order 6(v) (d). Not so with PW3 who identified him.

37. Yet any weakness on the identification on Accused 1 is overawed by the evidence connecting him to the stolen phone and the sword. It is to this evidence that I turn.

38. The case of the prosecution was that phone that was stolen from PW1 was eventually found with PW4 and traced back through PW5 to the Accused 1. Accused 1 attacks this evidence on the basis of the Serial Number of the phone. He submits that it had Serial Number 3545166061430056 while that stolen was 354249061430059.

39. The difference in the serial numbers seems to be from the variance in evidence of PW1 and PW7. PW1 is the wife of PW7. On the phone recovered by the police, PW7 says:-

“This is the one (PMFI - 5) a Nokia Lumia No. 3545166061430056.”

Identifying the same phone when recalled to give evidence PW1 stated;

“This is the one a Nokia Lumia (PMFI – 5). I had written the Serial No. 354249061430059.”

While from the record it seems that PW7 was reading the serial number from the phone while PW1 stated what she had written as the serial number. Yet why the two should differ is unclear.

40. However, what ultimately connects Accused 1 to the stolen phone is data from Safaricom which shows he transferred some money from PW1’s phone Number 0710701276 to his phone Number 0791[...]. Although there is a discrepancy in the amount sent (Kshs.24,000.00 and 240, perhaps a typographical error), what is curious is that data (Exhibit 1) from PW1’s phone shows that money was transferred at 03.30a.m on 14th May 2017 and received on Accused 1’s phone thirty five seconds later. The date and time is about the same time of the robbery. That is overwhelming evidence against Accused 1. In addition, the stolen sword of found was found in the house of the accused. This put together with the identification evidence, albeit problematic, was sufficient evidence to found the convictions entered against this Accused person.

41. Regarding Accused 2, he was identified on the parade by only PW1. PW3 did not identify him. This would be one of the reasons the Trial Court acquitted him of the charges of gang rape.

42. The argument by Accused 2 is that the evidence of PW1 was one of recognition and that that he should not have been subjected to an identification parade in her regard. This Court has tooth combed the evidence of PW2. Not once does she state that she had known Accused 2 prior to the incident. Hear her evidence on this;

“In the parade, I saw 2 people I could identify. They are the 1st and the 2nd accused.....The 2nd accused was the one threatening; he would kill my children.....”

Elsewhere, she says;

“I identified you from your hairstyle. You were the one standing at the door returning keys from the others. The one who was killed resembles you. The one who was killed is the one who entered the house. I told the parade officer you were tall and had the hairstyle you have now.”

43. The Trial Court rehashes this evidence as follows;

“She said she remembered the 2nd accused since he was the one threatening to kill her children....

...she remembered the 2nd accused because of his hairstyle and he was the one standing at the door as the others carried things from inside.”

44. The Trial Court then holds, in respect to Accused 2;

“When he was put on the parade he was identified by the witnesses. P said she knew the 2nd accused from the area and he also had a brother who also participated in the robbery but was arrested at the same time over a different issue....

The 2nd accused confirmed that his brother had been killed and when he went to report incidents (sic) to the police he was detained and charged. P was categorical that she knew both of them and they were not alike as the one who was killed was shorter and stout. She could not therefore be said to have confused them. She said the 2nd accused was the one standing at the door receiving things from the ones inside the house. She said she identified him from the hairstyle he had then and still had it in court when she testified which she pointed out.”

45. I have to say that if this holding by the Learned Magistrate gives the impression that Pw1 knew Accused 1 prior to the incident then it has to be a misapprehension of the evidence as, not once did the witness say so. I do not agree with the accused when he argues that an identification parade was unnecessary. I shall return to the parade.

46. A jacket (P. Exhibit 4) is said to have been recovered from Accused 2. Although PW3 identified it as her jacket, PW2 who was present during the recovery of the jacket did not think the jacket in Court to be the one. This is what he said;

“You said your brother and Kevin stay in that house. In your brother’s house was found a mattress and a jacket for Kevin not the one in court”

47. Accused 2 picked this inconsistency to discredit the theory of recent possession proposed by the prosecution in regard to the jacket. Although there were other people present when the jacket was recovered, none was called. This weakens this aspect of the prosecution case.

48. At the parade where PW1 was the identifying witness, she picked out the 2nd Accused as a suspect. The circumstances favouring positive identification have been discussed earlier in the decision. Reading the submissions of this appellant, he dwells on the argument that the parade should not have been conducted at all because the witness alleges to have known him before the incident, an argument already discounted by this Court. The Appellant is unable to fault the manner in which the parade was arranged and conducted and this Court agrees with the Trial Court that the 2nd Accused was positively identified.

49. The upshot is that only the appeal by the 2nd Appellant (Paulo Murunga Alfred) succeeds. His conviction is quashed and the sentence imposed set aside. The Appeals by the 1st and 2nd Appellants on conviction fail. However, I set aside the death sentence imposed on them and instead impose a prison term of 30 years from the date of initial sentence.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 23RD DAY OF FEBRUARY 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Michael Kiprop (the 1st Appellant) present in person.

Paul Murunga Alfred (the 2nd Appellant) present in person.

Fredrick Soita (the 3rd Appellant) present in person.

Miss Limo (DPP) for state