REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 67 OF 2019

DENNIS SOITA ANDAJE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence (Hon B. Kasavuli, PM), delivered on 15th August 2019 in Criminal Case No. 430 of 2017 at the Principal Magistrate's Court, Ngong)

JUDGMENT

1. The Appellant was charged with several counts. Two counts of robbery with violence, two for handling stolen goods; one for rape, and an alternative of count of committing an indecent act, and one for preparation to commit a felony.

2. In Count I, he was charged with robbery with violence contrary to section 296(2) of the Penal Code. Particulars were that on the 21st day of August, 2017 at Ngong Forest in Karen, within Nairobi County, being armed with an offensive weapon, namely a Knife, he robbed **TAO** of her mobile phone make Motorola BR50 valued at Kshs. 5,000/= and that at the time of such robbery used personal violence to the said **TAO**.

3. In count II, the appellant was charged with handling stolen goods contrary to section 322(1) (2) of the Penal Code. Particulars were that on the 4th day of September, 2017 at Karen Police station in Karen, within Nairobi County, otherwise than in the course of stealing, dishonestly retained a phone make Motorola BR50 valued at Kshs. 5,000/= knowing or having reasons to believe it to be stolen.

4. In count III, he was again charged with robbery with violence contrary to section 296(2) of the Penal code. Particulars being that on the 3rd day of September, 2017 at Ngong forest in Karen within Nairobi County, being armed with an offensive weapon namely a Knife, he robbed DKT of her phone, make Techno N25, values at Kshs. 5,500/= and that at the time of such robbery threatened to use actual violence to the said **DKT**.

5. In count IV the appellant was again charged with handling stolen goods contrary to section 322 (1) (2) of the Penal Code. Particulars were that on the 4th day of September, 2017 at Karen Police station in Karen within Nairobi County, otherwise than in the course of stealing, dishonestly retained a mobile phone make techno N25 valued at Kshs. 5,500/= knowing or having believe it to be stolen.

6. The appellant was further charged in count V with rape contrary to section 3(1)(a)(c)(3) of the Sexual Offences Act (No. 3 of 2006). Particulars being that on the 21st day of August 2017 at Ngong forest in Karen within Nairobi County, he intentionally and unlawfully caused his male organ to penetrate the female organ of **TAO** without her consent.

7. He faced an alternative charge of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 21st day of August 2017 at Ngong forest in Karen within Nairobi County, he intentionally and unlawfully touched the female organ of **TAO.**

8. In the last count, the appellant was charged with the offence of preparation to commit a felony contrary to section 308(1) of the Penal Code. Particulars were that on the 4th day of September, 2017 along the Southern By-pass, in Karen within Nairobi county, he was found armed with an offensive weapon, namely a knife in circumstances that indicated that he was so armed with intent to commit a felony namely robbery.

9. The appellant pleaded not guilty to all the counts, and after trial in which the prosecution called 7 witnesses, and the his unsworn defence, he was convicted on the two counts of robbery with violence (counts I and II) and sentenced to 30 years imprisonment each. He was also convicted on count IV for rape and sentenced to 10 years. He was acquitted in the other counts.

10. He was aggrieved with both conviction and sentence, and filed this appeal, raising the following grounds, namely:

> ***1. THAT, the pundit magistrate erred both in law and fact when he convicted him in the present case yet failed to find that section 68(5) of the Evidence Act Cap 80 laws of Kenya was not observed.***
>
> ***2. THAT, the pundit magistrate erred both in law and fact when he convicted him in the present case yet failed to find that crucial witnesses did not testify during the trial.***
>
> ***3. THAT, the pundit magistrate erred both in law and fact when he relied on contradictory evidence to convict him resulting to unsafe conviction.***
>
> ***4. THAT, the pundit magistrate erred both in law and fact when he relied on evidence acquired in contravention of Article 50(4) of the Constitution.***

Appellant's submissions

11. During the hearing of this appeal, the appellant relied on his grounds of appeal filed together with the petition of appeal. He submitted that he underwent an unfair trial because he was not furnished with all evidence that the prosecution was intending to rely on; and that his application to recall and cross examine a witness under section 200(3) of the Criminal Procedure Code was declined. He relied on **Articles 27** and **50** of the **Constitution,** and the cases of ***R v Ward*** [1993]2 All ER and ***Abdi Adan Mohamed v Republic*** [2017] eKLR.

12. The Appellant argued he was not identified at the crime scene; that although both complainants reported to the police station, there was no indication when the report was made given that the offence was allegedly committed on 21st August, 2017.

13. Regarding the conduct of the identification parade, the appellant submitted that the parade members were the same for all the two parades; that members of the parade were all police officers and that it was impossible to change their physical appearances apart from their positions in the parade. He argued that the complainants were told the person to pick out in the parade since the officer informed them that he was putting on the clothes he had when committing the offence. He relied on ***Mwangi Ngige & another v Republic*** [2018] eKLR**.**

14. The appellant again submitted that his rights were not explained to him before participating in the identification parade, but was only asked to sign the document. He argued that there must be positive identification which should rhyme with the first report. It was his case that the complainants did not give the description of the attacker to the police when they first reported the incident. He relied on ***Kariuki Njiru and 7 others v Republic*** [2001] eKLR and ***Wamunga v Republic*** **[1989] KLR 424.**

15. Regarding incredibility of witness, he submitted that the prosecution did not produce the weapons alleged to have been used in the commission of the offences which PW1 alleged she took from the attacker, thus he should have been given the benefit of doubt. He also argued that failure to produce the weapon created doubts in the prosecution case and depreciated credibility of its evidence. He relied on ***Kiilu & Another v Republic*** [2005] KLR 174 at 175.

16. According to the appellant, ingredients of the offence were not proved beyond reasonable doubt. He urged that the appeal be allowed, conviction quashed, the sentence set aside.

Respondent's submissions

17. The Respondent submitted that the charges of robbery with violence were proved. According to the respondent, the appellant used a weapon to threaten both PW1 and PW2; that they both testified that their properties were forcefully taken by the appellant and that they positively identified the appellant during identification parades. It was contended that PW1 and PW2 had sufficient time with the appellant and they were able identify him.

18. Regarding the charge of rape, the respondent argued that PW1 stated that the appellant raped her without her consent, and PW5 the doctor confirmed that she had been sexual assaulted. It was also contended that the appellant was positively identified by PW1 as the person who robbed and raped her. The court was urged to dismiss the appeal.

19. I have considered the appeal, submissions and the decisions relied on. I have also perused the trial court's record and considered the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that.

20. In ***Okeno v Republic*** [1972] EA 32, it was held that:

> ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion... 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 finding and conclusion; 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.***

21. In ***Kiilu & Another vs. Republic*** [2005]1 KLR 174, the Court also held that:

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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.

22. Similarly, in ***Naziwa v Uganda*** [2014] UG CA 28 (10th April, 2014)**,** the Court of Appeal of Uganda observed, that it is the duty of the first appellate court to re-evaluate all the evidence on record and make its own findings of fact on the issues, while giving allowance for the fact that it had not seen the witnesses as they testified, before it can decide on whether the decision of the trial court can be supported.

23. That view was reiterated in ***Fr. Narsensio Begumisa & 3 others v Eric Tibebaga*** [2004] UGSC 18 (22 June 2004), where the Supreme Court of Uganda held:

It is a well settled principle that on a first appeal, the parties are entitled to obtain from the court of appeal its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

24. **PW1** testified that on 21st August, 2017, the appellant went to her house and informed her that he was looking for someone to wash newly put up houses along the Southern By-pass. she agreed to go with him and they used a short cut through Ngong forest. She went ahead of the appellant as he wanted to relieve himself. When she looked back, she noticed that he was holding a knife. The appellant held her throat and pushed her to the ground. She screamed but he ordered her to keep quiet. She pleaded with him to no avail. He took her mobile phone and all the money she had. He then ordered her to undress which she did. He also undressed and proceeded to rape her. He placed the knife on her head and then on the ground. She took the knife which the appellant had put on the ground besides her and attempted to stab him. They struggled and she overpowered him but the knife cut her. He started shouting calling for help and she did the same. She attempted to stab him forcing him to let her free. She ran away in a petticoat leaving behind her skirt and shoes. She met a woman who assisted her to call her children who brought her a skirt and shoes.

25. She went to Karen health center and later to Karen police station and reported the matter and gave the description of the attacker. She took police officers to the scene and recovered her black skirt and black sandals which were produced as exhibits. On 4th September 2017, she was called by the police and informed that they had arrested a suspect. She identified the appellant at an identification parade. He was wearing the same cloths he had when he raped her. She also identified her phone.

26. **PW2** testified that on 3rd September 2017, the appellant went to her house and introduced himself as an electrician. He told her that his boss wanted a day time house help who would be working during day time at a salary of Kshs. 12,000/=. They agreed that he comes for her the following day at 1.00 pm. On the following day the appellant case at as agreed and told her that the place was near Karen Hill Crest. They left, crossed the Southern Bypass and entered into Ngong forest which he told her was a short cut. The appellant lagged behind for some time and suddenly tripped her and she fell down. He removed a knife and demanded whatever she had. She gave him Kshs. 150/= and her mobile phone. They started fighting and she screamed. She escaped and ran back toward the direction they had come from. She went and reported the matter at Karen police station. She was later called and identified the appellant at an identification parade. She also identified her mobile phone.

27. **PW3** a Chief Inspector of Police attached to Karen Police Station, testified that on 4th September, 2017, he received a report from an informer on the whereabouts of the appellant who was wanted for rape and robbery offences and gave him the description of the man. He went with fellow officers and arrested him. They recovered a sharp kitchen knife from his left thigh long trousers. They took him to the station where they searched him and recovered two mobile phones. He organized an identification parade and the complainants identified him. They also identified their phones. He filled the identification form which he produced as an exhibit.

28. **PW4**, another police officer testified that on 4th September 2017 he was with PW3 and another police officer when they arrested the appellant along Langata Road/ Southern Bypass junction. He recovered the kitchen knife from him. They took him the station where he again recovered two phones a Tecno and Motorola. He prepared an inventory on the recovered items.

29. **PW5,** a Doctor from Nairobi Police Surgery, testified that on 12th September 2017, he examined PW1on allegations of rape. She had a healing scar on the fifth finger which was about 21 days old. It must have been caused by a sharp object. The hymen was broken with old scars. He concluded that she had been raped. He signed a P3 form which he produced as an exhibit.

30. **PW6** a Lady police officer from Karen police station testified that on 21st August, 2017, a lady reported that she had been robbed and raped. She recorded her statement. She visited the scene and recovered shoes left by the complainant. She took the complainant to Nairobi Women's Hospital where she was examined and treated and a PRC form filled for her. On 4th September, 2017, he received a report that the appellant had tried to rape another woman. They went to the scene and arrested him. PW1 was the first person to identify the appellant at an identification parade. The complainants also identified the recovered phones and a knife the appellant had.

31. **PW7** a clinical officer with Nairobi Women's Hospital produced medical reports one GVRC the other PRC both prepare and signed by Jackeline Mutua, who had since left the hospital but he was familiar with her handwriting. The PRC showed that the complainant was examined at the facility. Her outer genitalia were normal but the hymen had an old tear. the victim said she had nonconsensual sex.

32. When put on his defence, the appellant gave unsworn testimony. He told the court that he was a carpenter. on 4th September 2017, he was in a matatu on his way to work. He was arrested at a stage, taken to Karen police station and later taken to court. He told the court that he had

nothing to say about the allegations against him.

33. After considering the evidence, the trial court was satisfied that the prosecution had not proved its case on the two counts of robbery with violence and the one of rape. It convicted him prompting this appeal. The appellant complained that the prosecution did not prove its case against him beyond reasonable doubt; that he was not properly identified and that his right to recall a witness was denied which violated his right to a fair trial.

34. I have considered this appeal and submissions by parties. With regard to the counts on robbery with violence, the trial court was satisfied that they were proved beyond reasonable doubt. The trial court considered the definition of the offence under section 295 of the Penal Code and the ingredients of the offence under section 296(2), as well as the evidence of PW1 and PW2 and concluded that they proved the offence.

35. I have gone through the trial court's record and the evidence on the two. PW1 testified that the appellant went to her place and informed her that he could take her to a place to work. They set out to go to the place she was expected to work. On the way, the appellant turned and robbed her of a mobile phone and money while armed with a knife. She struggled with him and in the process, the knife injured her. She managed to escape and reported the matter to the police.

36. PW2's testimony was that the appellant went to her place and informed her that he was to take her to work somewhere. They agreed that he comes for her the following. on the following day he came as agreed on their way, he used the same trick tripped her and robbed her while armed with a knife. The evidence of the two witnesses was clear that they were robbed. The appellant agued was that he was not the one and that he was not identified as the attacker.

37. The appellant was also convicted for raping PW1. PW1 testified that the person who robbed him also raped her. She testified that the person even inserted his male organ into her female organ several times before he raped her. Medical evidence showed that she had been injured and that her hymen had old scars. When she went to hospital, she had changed cloths.

38. Even if the medical evidence could not show that she had been raped given the time it had taken to go for examination, and the fact that she was a mother, PW5 opined that someone who was used to sexual intercourse did not necessarily have to be examined to confirm rape. This witness' view was that rape could not be rule out. The court is also a live to the proviso to section 124 of the Evidence Act that evidence of a sexual assault victim can support a conviction if the court believes that the victim is telling the truth. I am satisfied that the trial court was right that PW1 had been raped.

39. The fundamental question in this appeal is whether the prosecution proved that it was the appellant who committed the offences. The trial court agreed with the prosecution that the appellant had been identified by both complainants as the person who committed the offences. The appellant argued that he was not the person and that he was not identified at the scene. He also argued that the identification parade was not properly conducted, and that his rights to participate in the parade were not explained to him.

40. The appellant was identified by the complainants at an identification parade after he had been arrested following a report of commission of the offences. In ***Tumusiime Isaac v Uganda*** [2009] UGCA 23(10th June2009)**,** the Court of Appeal of Uganda set out the factors a trial court should consider in deciding whether the conditions under which the identification was made were conducive for positive identification without the possibility of error or mistake. These include; whether the accused was known to the witness at the time of the offence, the conditions of lighting; the distance between the accused and the witness at the time of identification and the length of time the witness took to observe the accused.

41. Similarly, in ***Wamunga v Republic*** [1989] KLR 426, the Court stated that:

> ***[I]t is trite that where the only evidence against a defendant is evidence 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 possibility of error before it can be safely make it the basis of conviction.***

42. The principle was laid down in ***R v Turnbull & Others*** (1976) 3 ALL ER 549, thus:

> ***The Judge should… examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

43. And in ***Francis Kariuki Njiru & 7 others v Republic*** [2001] eKLR, the Court of Appeal stated:

> ***The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, 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. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.***

44. I have considered the appellant's arguments and the evidence on record. The complainants testified that the person who went to their homes was the one who committed the offences. The person went to their homes during the day and committed the crimes in broad day light.

The man went to PW2' home on two occasions. He walked with both complainants as they talked. The complainants had time to talk, interact and observe. When he robbed them they were seeing him. PW1 even wrestled and extricated herself from him and ran away.

45. PW1 testified that she gave description of the attacker to the police when she reported the matter. The police were able to use the description and information to trace and arrest the appellant. He was subsequently identified by both complainants at an identification parade. I must point out that PW1 and PW2 were not together when they were robbed and PW1 raped. The crimes took place on different dates and time. That notwithstanding, each of complainants was able to picked him out in the parades.

46. Secondly, the appellant was found in possession of the phones that were robbed from the complainants. They also identified the phones. The appellant did not explain how he came into possession of the phones. He did not deny that the phones were found in his possession. When put on his defence, he simply stated that he had nothing to say about the allegations. I am satisfied that the complainants had an opportunity to identify their attacker and that the trial court did not err in this regard.

47. The appellant again argued that he was not informed of his rights to participate at the identification parades. The trial court addressed its mind to the issue of identification parade and was satisfied that it had been properly conducted and stated:

> ***The witnesses herein reported to the police and gave a description. When the accused person was arrested following the description he was wearing the same cloths. At the time of identification parade he was picked. I have seen the identification parade forms produced by CIP Patrick Wainaina. In both occasions the accused person stated that he was willing to participate in the parade.***

48. The trial court referred to the Standing Orders for governing identification parades and was satisfied that the parade was properly conducted.

49. I have considered the appellant's argument on this issue, and perused the trial court's record. I have also seen the identification parade forms produced as exhibit 10. There were 9 men in the parades including the appellant. The victims identified the appellant by touching him. He raised no objections and each time he stated that he was satisfied with the conduct of the parade and signed the forms. According to the forms, the witnesses were far away in the canteen and were only called when the parades were ready. I am satisfied that the parades were properly conducted when the appellant was identified.

50. The appellant further argued that his right to fair trial was violated. This, he contended, was because he was denied the right to recall a witness under section 200 of the Criminal Procedure Code. I have read the trial court's record in this regard. The case was heard by two magistrates. The first magistrate heard 6 witnesses and only one witness was remaining. He was transferred and another magistrate took over the case. He explained the requirements of section 200 to the appellant. The appellant applied to have the case start de novo which was opposed by the prosecution. The trial court disallowed his request because all except one witness had testified. The court also stated that the only reason the appellant wanted to have the case start afresh was that he was not satisfied with the questions he had asked.

51. Section 200(3) states:

> ***(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.***

52. In ***Abdi Adan Mohamed v Republic*** [2017] eKLR (Criminal Appeal No. 1 of 2017 Msa), that:

> ***Section 200 envisages two situations in a trial that is incomplete at the time the trial magistrate ceases to exercise jurisdiction. The trial magistrate will have either recorded the whole or part of the evidence. Where judgment has been written and signed by the former magistrate, the succeeding magistrate is only required to deliver it. Where all the witnesses have been heard and the trial magistrate is transferred, no issue arises. The succeeding magistrate may act on the recorded evidence. But the succeeding magistrate may also recommence the trial and resummon witnesses. The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of concern… Section 200 therefore entrenches the accused person's rights to a fair trial as provided for today under Article 50(1) of the Constitution.***

53. I have considered the appellant's complaint on this issue. The trial court is required to consider the request and make a decision on it. The idea is to do justice of the case. The trial court declined because it was of the view, that starting the case afresh would not enhance the justice of the case. I do not agree with the appellant that by declining to allow the case to start afresh violated his right to fair trial. The trial court exercised its discretion in favour of justice for both sides. In any case it is not a must that the request must be granted. I am unable to fault the trial court on this.

54. On sentence, the appellant was sentenced to 30 years imprisonment on each count of robbery with violence, and 10 years for rape. the sentences were ordered to run concurrently. According to the record, the appellant seemed to have been applying the same modus operandi to lure his victims. The sentences meted out were lawful and deserved. The appellant was arrested on 4th September 2017 and was sentenced on 15th August 2019. Although he was in remand throughout the trial, the trial court did not consider this period when sentencing him as required by section 333(2) of the Criminal Procedure Code.

55. In the end, having considered the appeal and submissions and reevaluated the evidence myself, I do not find merit in the appeal on both conviction and sentence. It is dismissed. The sentence shall, however, run from 4th September 2017 when the appellant was arrested.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 16TH DAY OF APRIL 2021.

E C MWITA

JUDGE