



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 51 OF 2020

MOSES NJOGU NJOROGE.....1ST APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

As Consolidated with

CRIMINAL APPEAL NO. 66 OF 2020

DENIS NJUGUNA WAITHERA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in the Senior Principal Magistrate Court

at Kikuyu, D. Musyoka dated 7th December, 2017 in Criminal Case CAP. 20 of 2015)

JUDGMENT

1. The events of the night of 13th November, 2014 in the life of TWK and her family was indeed traumatizing. It is those events that led **MOSES NJOGU NJOROGE** and **DENIS NJUGUNA WAITHERA** to be charged before the Senior Principal Magistrates Court, Kikuyu with two counts. They were charged with the offence of robbery with violence contrary to **Section 296(2)** as read with **Section 295** of the Penal Code, on the first count and on the second count they were charged with the offence of gang rape contrary to **Section 10 of the Sexual Offences Act**. They were convicted on both those counts and were sentenced on 14th December, 2017 to suffer death, as provided under law, on the first count and to 15 years imprisonment on second count but the sentence on that second count was held in abeyance. They both have appealed against their conviction and sentence.

2. This is the first appellate court. The Court of Appeal in the case of **ODHIAMBO VS. REPUBLIC** considered the duty of the first appellant court and stated:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor”.

3. TWK at about 7.30 pm on 13th November, 2014 was in Kikuyu town driving her vehicle on her way home at Gikambura. When she was near home, at 8.30 pm, she telephoned the house help and requested her to switch on the security lights and to open the gate. TWK, on arriving at the home, found the house help had opened the gate of the home. TWK drove into the compound. As she parked the car, she saw six men behind her vehicle who ordered her to get out of her vehicle. They asked her for the car keys and her telephone. TWK noted one of those men had a gun. She also noted that others had metal and a knife. TWK screamed and was hit on the head with the gun. The house help was also beaten. TWK was ordered, while in the house, to lie down on the floor. The men began to take items of property such as DVD, Meko gas, camera, microwave, radio and iron box. These were put in her car. TWK was ordered at gun-point to enter her vehicle, on the passenger seat and she was asked to lie down on the seat. TWK did not know where she was driven to, but she was later to learn it was Thogoto forest. One of the men asked her for her pin to her mobile money account (Mpesa) and when she gave it Kshs.10,700 was transferred from her account to another phone.

4. The men beat her with sticks and ordered her to remove all her clothes. She was at first reluctant to do so but when one of them pointed the gun at her, she complied. All the six men proceeded to rape her while the car engine and the lights were on. Afterwards, the men left with all the stolen items, leaving her behind with her car whose engine and lights were still on. TWK, after the men left, screamed aloud and a man and his wife went and found her naked. TWK used this couple's telephone to call her husband who went to the scene with police officers. TWK was taken to Nairobi Women Hospital where the Post Rape Care Form (PRC Form) was filled at that hospital.
5. TWK was called to the police station on 4th February, 2015 and informed some men had been arrested. An identification parade was mounted up and she was able to pick out both appellants.
6. The house help NNK confirmed that on the material date at 8.00 pm she was at TWK's home with two children. She was telephoned by TWK and she proceeded to switch on the security light when TWK drove into the home and as she assisted in removing shopping from the car and while inside the house, she heard TWK scream. On looking, she noted TWK had been hit and had fallen on eggs she was carrying. One of the men who entered the house hit NNK. She saw the men loading items of property in the car. The 1st appellant who she said was elderly and had a wooden club (rungu) pushed NNK into the kitchen and locked her there but the 2nd appellant asked NNK to be returned where they were. NNK informed 2nd appellant she did not have a phone. NNK saw the men commandeer TWK into the car. NNK called TWK's husband and informed him of the robbery.
7. NNK gave clear evidence of her identification of the two appellants. That identification was dock identification and not identification through a parade.
8. The PRC Form was produced by the Clinical Officer at Wangige District Hospital. He informed the court the PRC Form which was filled by a doctor at Nairobi Women Hospital, showed that TWK had pain in her genitalia which was consistent with rape and she was found to have bruises on the head and hip.
9. 1st appellant offered an unsworn defence. He did not give evidence of his whereabouts on the night of the commission of the offence. He however stated that on 1st February, 2015 at around 3.30pm he was arrested by police officers, in plain clothes, while he was at Wangige shopping centre.
10. He further stated that on 3rd February, 2015, while under arrest, he was taken to the crime office of the police station where he saw a woman and a man. That, that woman was the one who participated in the identification parade on 4th February, 2015. 1st appellant denied the charges against him.
11. The 2nd appellant also gave unsworn statement in his defence. He testified that on 1st February, 2015 there was a general arrest (*Musako*) of people in the plot he resided. He was arrested with his girlfriend and although he tried to bribe the police by offering them Kshs.500/= the police demanded Kshs.2,000/= which he did not have. Later, he was taken to a room where the investigating officer pointed him out to a lady. That same lady picked him out of the identification parade on 4th February, 2015.
12. Both appellants have raised similar grounds to their appeals, as follows:-
- 1. That the learned trial magistrate erred in law and fact by convicting the appellant while relying on the evidence of identification which through the identification parade that was conducted improperly rendered it un-procedural.**
 - 2. That the learned trial magistrate erred in law and fact by convicting the appellant while the prosecution case was poorly investigated.**
 - 3. That the learned trial court erred in law and in fact by convicting the appellant on the basis of suspicion which cannot form a basis of conviction.**
 - 4. That the learned trial magistrate erred in law and fact by convicting the appellant while shifting the burden of proof on the appellant while dismissing the appellants' defence.**
13. I have considered the written submissions of both the appellants and the respondent.
14. The appellants faulted their conviction on the identification evidence of TWK and NNK on several fronts. Firstly, they submitted that TWK had not given description of those who robbed and raped her to the police prior to the arrest of the appellants. Accordingly, the appellants argued that TWK's identification and also of NNK amounted to dock identification which was "worthless."
15. The identification parade was conducted by Officer in Charge of Station (OCS) Kikuyu Police Station. He was requested by the Investigating Officer to conduct that parade. Both accused agreed to participate in the parade. However, after the identification parade and after TWK picked out the appellants, they both alleged that TWK had seen them when the Investigating Officer pointed them out to TWK at the Kikuyu Police Station.
16. TWK denied having been shown the appellants before participating in the Identification Parade. She was categorical that she identified the appellant during that parade.
17. She further fortified that evidence by specifically setting out how she identified the appellants on the night of robbery. She confirmed and so did, NNK, that there were security lights on and there were lights in the house and that the robbers had not disguised themselves in

any way.

18. In respect to the 1st appellant TWK said that he was the oldest in the group of robbers. It was him who beat her and took special notice of him while he raped her. She also noted he had gaps in his teeth and he was bald.

19. In respect to the 2nd appellant TWK described him as “the short one.” She said he poked her eyes telling her, “*you are looking at me to identify me!*”

20. NNK’s identification of the appellants was dock identification. She however was able to state what each appellant did during the robbery and also their appearance. She confirmed the men were six in number.

21. NNK confirmed the 1st appellant was elderly and that he was holding a club. She also noted 1st appellant’s teeth were missing. She stated:-

“I could see you well. You had no teeth and had a bald head. I wrote in my statement that I can identify the ones in court.”

22. The trial magistrate did indeed confirm that the 1st appellant had some teeth missing. The trial court also indicated that NNK was a credible witness who was firm and unshaken in cross-examination.

23. NNK confirmed that during the robbery she noted the 2nd appellant had a knife. This witness also stated:-

“I saw you with my own eyes...

I cannot doubt seeing you. Even if I found you on the road...

I stated in my statement that I can identify those who robbed us. I did not go for the parade.”

24. The Court of Appeal in the case of **PATRICK KIMANTHI VS. REPUBLIC (2018 eKLR)** discussed the value of identification parade where the identifying witness did not give description of those to be identified and stated:-

“In NATHAN KAMAU MUGWE VS. REPUBLIC- CRIMINAL APPEAL NO. 63 OF 2008 this Court faced with a similar situation expressed itself thus:-

‘As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL’s Case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness SHOULD be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.”

We agree with the findings in NATHAN KAMAU MUGWE’S Case. Our view is that the failure by Hesbon to give a description of the appellant before the identification parade did not vitiate the identification parade.”

25. From that jurisprudence, it follows that the evidence of TWK cannot be discounted simply because she did not give description of the appellants before the parade. I am satisfied that in addition to the identification parade that TWK was very clear on the role each appellant played which assisted their identification.

26. Similarly, the discussion in the case **MUIRURI & 2 OTHES VS. REPUBLIC (2002) iKLR 274** is useful to consider. The court therein stated at page 277 between paragraphs 25 and 40 that:

“But the holding in GABRIEL NJOROGE case (supra) appears to us to be too broadly couched. We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like ABDULLA BIN WENDO V. REP (1953) 20 EACA 166, RORIA V. REPUBLIC [1967] EA 583, and CHARLES MAITANYI V. REPUBLIC (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found

a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

27. I have re-evaluated the evidence adduced at the trial court and I find that the identification of the appellant by TWK and NNK cannot be faulted. Both witnesses gave lucid evidence and were adamant that they had clear vision of the appellants and the robbery and for TWK as the rape took place. I do not believe the appellant’s evidence that TWK saw them before the identification parade. That evidence in my view seemed to have been contrived.

28. Although appellants argued that TWK made her statement on 2nd February, 2015, that is not supported by the evidence on record. TWK stated she reported the matter at the police station after leaving hospital. She was discharged, according to her husband, the day after the robbery. What TWK seems to have presented to the police on 2nd February, 2015 was her P3 Form. See the evidence of Investigating Officer in that respect.

29. Appellants also argued that the rape or rather penetration was not proved by medical evidence.

30. As stated before a clinical officer who attended trial and produced the PRC Form that was filled by Nairobi Women Hospital. That form indeed showed that TWK was sexually assaulted and was also physical hurt on her head as well as her genitalia and her hip. Her injuries were classified as harm.

31. In the case of ***LAWRENCE CHAMWANDA & ANOTHER VS. REPUBLIC (2016) eKLR*** the court held that rape and defilement can be proved by oral evidence. This is what was held in that case:-

“Furthermore, the law is now settled that rape or defilement is not proved by a DNA test or medical examination but by evidence of the victim, and that evidence could include circumstantial evidence. This position was stated in the case of FAPPYTON MUTUKU NGUI V REPUBLIC [2014] eKLR. In that case, it had been argued for the appellant that there was no medical examination to link the appellant with the offence of defilement. The court stated:-

“In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2’s testimony which was trustworthy as to the person who had defiled her.”

In the case of KASSIM ALI V REPUBLIC [2006] EKLR the court stated:-

“The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim or by circumstantial evidence.”

32. The appellant also erred to submit that the case was poorly investigated, that they were convicted on evidence of suspicion or that the burden of proof was shifted.

33. To the contrary, having re-evaluated the trial court’s evidence, I find that the prosecution presented evidence that proved beyond reasonable doubt that the appellants were part of a gang that robbed TWK and also raped her on 13th November, 2014. Their conviction was not on suspicion. The prosecution’s evidence well met the ingredients of robbery with violence set out in **Section 296(2)** of the Penal Code as follows:-

“a. the offender must be armed with any dangerous or offensive weapon or instrument; or

b. the offender must be in the company of one or more other person or persons or;

c. 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.

34. Proof of any of the above ingredients is sufficient to establish an offence under Section 296(2) of the Penal Code: See case of ***MOHAMED ALI VS. REPUBLIC (2013) eKLR.***

35. In this case, prosecution proved the robbers were armed, they were in the company of more than one person and before and immediately after the robbery wounded and struck and used personal violence on the complainant.

36. Further, prosecution proved the charge of rape as discussed in the case ***JEREMIAH MWANGI NGATIA VS. REPUBLIC (2015) eKLR*** where it was stated that:-

“The actus reus of rape is having unlawful sexual intercourse with a woman or a man who at the time of the intercourse does not consent to it. While the mens rea is an intention to have sexual intercourse with another person knowing that he or she does not consent to the act. Consent is important to sexual matters because it can transform coitus from being among the most heinous of criminal offences into sex that is of no concern at all to criminal law. Consent is a voluntary, sober, imaginative, enthusiastic, creative, wanted, informed, mutual, honest and verbal agreement. Consent cannot be coerced; never implied and cannot be assumed, even in the context of a relationship.”

37. The appellants gave unsworn statements in their defence. They denied committing the offence but failed to state where they were on the day the offence was committed. In consideration of that defence the appellants offered, I find and hold it failed to impeach the prosecution's evidence.

38. I find the trial magistrate correctly convicted the appellant for both counts, the evidence against the appellant was overwhelming in my view. It follows that the appeals against conviction are dismissed.

39. On sentencing, bearing in mind the Supreme Court decision of *FRANCIS KARIOKO MURUATETU VS. REPUBLIC (2017) eKLR*, I shall interfere with the appellant's sentence on count 1.

40. In the end the judgment of this Court is as follows:

- a) The appeals against conviction of MOSES NJOGU NJOROGE and DENIS NJUGUNA WAITHERA are hereby dismissed.
- b) MOSES NJOGU NJOROGE and DENIS NJUGUNA WAITHERA sentence on Count 1 are hereby set aside.
- c) MOSES NJOGU NJOROGE and DENIS NJUGUNA WAITHERA are hereby sentenced on Count 1 to imprisonment of 25 years which sentence for each appellant will commence from 6th May, 2015.
- d) The sentence for each appellant on 1st Count shall run concurrently with the sentence on Count 2

JUDGMENT DATED and DELIVERED at KIAMBU this 20th day of MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant.....Kevin

1st Appellant:present

2nd Appellant:present

For the Respondent:Miss Kathambi

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE