REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL CASE NO. 67 OF 2019

BISHAR FARAH ……APPELLANT

VERSUS

REPUBLIC ……..…RESPONDENT

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Alenga for the State

JUDGMENT

The appellant was tried and couched of the offences of Robbery with Violence contrary to Section 296 (1) of the Penal Code and that of rape contrary to Section 3 (1) (a) (c) (3) of the Sexual Offences Act and was sentenced to ten (10) years imprisonment for each count.

Being aggrieved with both conviction and sentence, he preferred an appeal to the High Court on the following grounds:

> ***(1) That the Learned trial Court Magistrate erred in Law and fact in convicting him on the charge of robbery and rape without proper identification evidence.***
>
> ***(2) That the Learned trial Magistrate erred in Law and fact in convicting him with the charge of rape where there was no proof of penetration.***
>
> ***(3) That the Learned trial Magistrate erred in Law and fact by failing to consider the period spent in remand custody prior to conviction and sentence pursuant to Section 333 (2) of the Criminal Procedure Code.***

The submissions by the appellant relate to the crucial issues of identification as entailed in R v Turnbull {1976} 3 ALL ER 549. He further drew the attention of the Court that the circumstances of his arrest remain obsecure, incapable of proving the elements of the offence. The appellant also contended that the offence was never proved as required with regard to the key elements on penetration and subsequent recognition evidence was faculty.

The appellant further submitted that the medical evidence captured in the P3 Form indicated that the private parts of the victim showed no signs of rape. He further argued and maintained that the prosecution did not call the crucial witnesses who could have buttressed the issue on identification. The appellant further submitted that the Learned trial Magistrate in sentencing erred in Law pursuant to Section 333 (2) of the Criminal Procedure for not taking into account the period he spent on pre-trial remand.

In reply the Learned senior prosecution counsel **Mr. Alenga** opposed the appeal on conviction given the overwhelming evidence adduced at the trial of the appellant in making reference to the witnesses evidence on oath and the appellant defence.

Learned prosecution counsel submitted that on the issue of identification the surrounding circumstances were favourable to squarely placed the appellant at the scene of the crime. He cited and relied on the case of **Douglas Ntonbi v R {2014} eKLR**. He prayed that the appeal is dismissed accordingly.

Consideration of the appeal

This being a first appeal, the Court's mandate is single as illustrated in the cases of **Pandya v R {1957} EA 536 and Ruwalla v R {1957} EA 570.** In the first appellate Court parties are entitled to be heard on the questions of fact as well as on the Law. I should also bear in mind

that as I weigh the evidence, I have neither seen nor heard the witnesses, which due attendance must given in this respect.

The question paused in this appeal relate to the offence of robbery contrary to Section 296 (1) of the Penal Code. The elements of the offence of robbery stem from the provisions of Section 295 as read with Section 296 (1) of the Penal Code. The provisions connote theft of property, with actual use of or threat to use violence during the theft the accused participated in person in committing the offence.

The prosecutor adduced evidence from four witnesses in its bid to discharge the burden of proof beyond reasonable doubt. In accordance with the requirements of Section 107 (1) and 108 of the Evidence act. The prosecution relied on the testimony of **(PW1) SM**. He stated in Court that on 30.12.2015 while in company of **(PW2) ZMC** they were stopped by the appellant. In a short conversation, the appellant robbed him of the wallet with Kshs.2,000/=. Thereafter, the appellant ordered **(PW1)** to strip-naked and in that state he chased him away, remained behind with the wife **(PW2).** At about the same time **(PW1)** went back to the scene but failed to trace his wife or the appellant. The wife, however appealed in the morning and alleged that she had been raped by the same appellant.

The incident was reported to the police station and **(PW2)** was issued with a P3 Form. According to **(PW4) Cpl. Kapkama** he took over the investigations which resulted in the arrest of the appellant.

On 31.12.2015, **(PW3) Rashid Omar** of Samburu Health Center examined **(PW2)** who came in with an history of having been raped by unknown suspect. In the evidence of **(PW3)**, after analysis of the information and data given by **(PW2)** he established that there were no bruises, fear, although the hymen was broken. The essence of the evidence by **(PW1)** and **(PW2)** together with the investigations conducted by **(PW4),** there was prima facie case of robbery and rape committed against **(PW1)** and **(PW2)** respectively.

The appellant elected to give unsworn statement of defence in answer to the charge. He vehemently denied both counts of robbery and rape. He claimed that he was arrested for offences he did not know about.

The evidence adduced by the prosecution to prove the elements of the offence is purely founded on identification of **(PW1)** and **(PW2).** As correctly pointed out, the Learned trial Magistrate convicted the appellant based on recognition evidence of **(PW2).** Therefore, bringing the case within the sole identifying witness whose identification was made during the night on the material day.

Because of this, a Court must always satisfy itself that in all circumstances the threshold outlined in the cases of **Wamunga v R {1989} KLR 424, Anjoni v R {1976 – 80} 1 KLR, Roria v R {1967} EA 583**. The principles in these precedent setting cases are instructive that on many occasions an identification is almost worthless without an earlier identification parade.

Further that the evidence of a single identifying witness has to be tested with the greatest care and with certainty on the issue to leave no doubt that the accused was the one who committed the crime. In **Abdallah Bin Wendo v R {1953} 20 EACA 166**, the Court stated interalia:

> ***"That a careful scrutiny is not the same thing as an elaborate justification accepting dubious evidence. A careful scrutiny means, for example, comparing a first report with evidence in Court, really testing the effect of light, what type it was, where it was, and how illuminated the scene. Questioning the time and why the witness did not see the clothing of the accused and whether the witness remembers any special features of the suspect. The guidance also was expressly affirmed in R v Turnbull {1976} 3 ALL ER 549."***

> ***"Such interrogatories and enquiry as to how long did the witness have the accused under observation? At what distance? In what light, whether the observation was impended in any way. Had the witness 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 ……?"***

Having, these principles in mind, I would subject the evidence of **(PW1)** and **(PW2)** and the same is to be weighed against the defence. On the first point this was a robbery and a rape which took place in the night in a surrounding described by **(PW2)** consisting of a forest. In the case of **(PW1),** he told the Court that he was able to identify the appellant through the light from his own torch which illuminated upon their facts. With regard to **(PW2),** she identified the appellant from the source of moonlight but no evidence to suggest that the appellant was in possession of a torch. What is striking are the major discrepancies and inconsistences in respect of the witness states to have positively assisted in identification of the appellant.

In addition, it was a scene within a thicket or shrubs and therefore likely to impair clarity of vision on objects, it is assimilating to say the least that **(PW2)** a victim of rape was in a position to capture the sequence of events so that she could even positively identify the appellant.

At the center of the evidence of these two key witnesses are the variations and impressions made of the incident and identification of the appellant. Its not in dispute that **(PW1)** was robbed and ordered to undress and in time leave the scene to give way for the appellant to have sexual intercourse with his wife **(PW2).** Its nevertheless difficult to fathom that the appellant and **(PW2)** spent the whole night in that forest before she made it home in the morning. The evidence adduced by **(PW1)** does not provide support to the evidence given by **(PW2)** due to the discrepancies of the of the description of the appellant and variances on the source of light.

I also query whether someone can say with confidence that moonlight can clearly illuminate inside the forest to aid in **(PW2)** identification of the appellant. Its even more suspicious for **(PW1)** to have told the Court that to some extent it was the appellant's torch light which he used to positively identify the suspect.

> ***"To use another well known phrase the evidence of identification must be watertight."***

In the present case, I am convinced that these witnesses appear to have been coached taking all the discrepancies into account. The Learned trial Magistrate accepted identification evidence which definitely failed the test in **R v Turnbull (supra)** set guidelines.

As to the merits of the appeal with the collapse of identification evidence there is no sound evidence to support culpability of the offender who committed the robbery contrary Section 296 (1) of the Penal Code and the rape contrary to Section 3 (1) (a) (c) and (3) of the Sexual Offences Act.

In the result, I allow the appeal, quash the conviction, set aside the sentence and direct that the appellant shall be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant

2. Mr. Mwangi for the state