REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 67 OF 2019

BRIAN CHOGO SIRINGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon. ML Nabibya, Senior Resident Magistrate (SRM) deliveredon the 10th day of June 2019 in Hamisi SRMCCRC No. 637 of 2017)

JUDGMENT

1. The appellant herein has proffered this appeal challenging his conviction and sentencing in Hamisi SRMCCRC No. 637 of 2017, of the offense of robbery with violence, contrary to section 295, as read with section 296(2) of the Penal Code, Cap 63, Laws of Kenya, and gang rape, contrary to section 10 of the Sexual Offences Act, No. 3 of 2016.

2. The duty of a first appellate court was stated by the Court of Appeal, in *Gabriel Kamau Njoroge vs. Republic* (1987) eKLR, (*Platt, Apaloo JA & Masime Ag JA)* in the following words:

> *" ... it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."*

3. The facts of the case, as presented in the trial court, are that on the night of the 15th October 2017, at or about 12.00 midnight, PW1 was sleeping in her house, at [particulars withheld] village, Hamisi Sub-County, within Vihiga County, together with her husband and grandchildren, when people broke into their house, and ordered them not to scream, but to cover themselves and sleep. They ordered PW1, while pointing a knife at her neck, to give them money. The intruders then started to make away with PW1's household goods and other items in the house, including, two mobile phones, of Wiko and Huawei brands. They then pulled PW1 to the side where they took turns to rape her. They had a torch, which they flashed around, making it possible for her to identify some of them. Through an identification parade, PW1 was able to positively identify the 1st and 2nd accused persons, that is to say Nicholas Vukono and Rodgers Alulu, as two of the three persons who raped her. The intruders then left with the items they had stolen. After that PW2, who was PW1's husband, went to his brother's house, borrowed his phone, and called for help from the police. PW1 then went to Kaimosi Hospital, where she was treated. She thereafter reported the incident at Serem Police Station, where she recorded a statement, and was issued with a P3 form. One of the items stolen from PW1's house, a Wiko phone, was traced and found to be in the possession of PW3, who testified that she bought the phone from the appellant herein.

4. The appellant was later released on bond pending trial, but he, however, did not participate in the trial, for he absconded, and the trial was conducted in his absence.

5. At the end of the trial, the court evaluated the evidence, and was satisfied that the offence of robbery with violence and gang rape had been proved to the required standard, convicted the appellant, and sentenced him to 15 years and 20 years, respectively, for the two offences, to be served concurrently.

6. The appellant was aggrieved by the conviction and sentence, and proffered the instant appeal, raising several grounds of appeal. He avers that the evidence of identification was not sufficient; his explanation of how he came to be in possession of the stolen phone was not taken into account in the judgment; his defence statement at the trial was not considered; he was denied an opportunity to participate in the trial; the prosecution had failed to call the arresting officer, the investigating officer and officials from Safaricom, who were all essential witnesses; the case was not proved beyond reasonable doubt; and the recovery of the exhibit did not have sufficient evidence.

7. The appellant put in written submissions in support of his case. The respondent had indicated, at various appearances, when the appeal came up, that it would put in written submissions, it eventually never did.

8. In his written submissions, the appellant raised several grounds. The first ground is that he was denied opportunity to participate in the matter. It is not clear in what respect, but he submits that his advocate was in court and cross-examined the witnesses, but he was himself unable to attend court and could not communicate with his advocate nor family to tell them where he was and what was happening, which resulted in the defence hearing happening in his absence. He complains that the defence happened in his absence and he was convicted in his absence. His second ground is that certain witnesses were not called by the prosecution, particularly the investigators, the arresting officers and officials from Safaricom. Ground three centres around the testimony of PW3, that she implicated him, and her evidence was not corroborated by other witnesses, and in particular those from Safaricom. Ground four is to the effect that the recovery of the stolen mobile telephone set was not supported by any documentary evidence. Ground five is linked to the earlier grounds, that certain crucial witnesses were not produced.

9. I will start with the general issues raised by the appellant, about his absence from the trial and the failure to call crucial witnesses.

10. The surety for the appellant, one Emmanuel Muegodi Kisiala, was approved on 8th November 2017. The appellant attended court thereafter on 15th November 2017, 21st November 2017, 5th December 2017, 30th January 2018. The hearing commenced on 30th January 2018, and the appellant was in attendance. Three witnesses testified. There was a further hearing on 2nd March 2018, when two more witnesses testified, in the presence of the appellant. When the matter came up on 22nd March 2018, 2nd May 2018, 17th May 2018 and 28th May 2018 the appellant was absent. A warrant was issued on 28th May 2018 for his arrest. On 29th May 2018, the Officer Commanding the Serem Police Station committed to have him arrested. It would appear that he attended court on 12th June 2018, when the matter came up for hearing, but the matter could not proceed on account of absence of the advocate for the defence. In the subsequent appearances on 19th June 2018 and 20th June 2018, the appellant did not attend court. Eventually the trial court took evidence from the remaining prosecution witnesses his absence notwithstanding. He never attended court at the rest of the appearances up to the time judgment was delivered.

11. When an accused person is admitted to bond, he signs an undertaking that he would attend court as and when required to by the court. If an emergence arises that makes it difficult for him to be in court, he is expected to send the person who stands surety, or even a member of the family to court, to explain his absence. In this case, the appellant stayed away from court, without sending his surety, or any other person, to attend court and explain his absence. It can only be surmised that he chose to stay away, and thereby breached the terms of his bond. It can be concluded that he absconded, either to inconvenience the court, in the misguided belief that the trial would collapse on account of his absence, or simply because he was afraid of facing justice. The court cannot be faulted for proceedings with the matter his absence notwithstanding. The appellant brought it upon himself.

12. The court in *Republic vs. Gatma Abagaro Shano* [2017] eKLR (*Mutuku J*) said the following in a case of an accused person absenting himself from trial:

> *"… it is my considered view that the trial against the accused person must proceed in the interests of justice. It has been pending since 14th October, 2015. The family of the deceased deserves justice and their rights must be considered. By absenting himself, the accused abrogated his constitutional right to be present during his trial. I therefore allow this application and direct parties to make final submissions notwithstanding the absence of the accused person to pave way for judgment on the evidence on record."*

13. I agree with the sentiments made above, and also in *Republic vs. BM & 3 others* [2018] eKLR (*Limo J)*, that a criminal trial cannot be put into limbo by an accused person who choose to waive his right to be present at trial by absconding. The hands of the trial court are not tied, and the court should not be helpless in the circumstances. In such a scenario, the court ought to continue the matter to its logical conclusion. What the trial court did in the instant matter, in the face of the continuous absence of the appellant, to continue with the trial with the accused persons who were available till the conclusion of the matter, was proper.

14. On the failure to the call crucial witnesses, the courts have said it is a principle of law that there is no required number of witnesses to testify in criminal matters. That position is stated in section 143 of the Evidence Act, Cap 80, Laws of Kenya, and it has been restated and repeated in such cases as *Keter vs. Republic* [2007] EA 135 (*Musinga & Kimaru JJ*) and *Republic vs. George Onyango Anyang & another* [2016] eKLR *JA Makau* J), where it was emphasized that the prosecution must call such number of witnesses as are sufficient to establish the charge beyond reasonable doubt. Then there is the caution in *Bukenya & Others vs. Uganda* [1972] EA 549(*spry AP P,Lutta Ag Vp & Mustafa JA*) where the court stated that where the evidence called was barely adequate the court may infer that the evidence of the uncalled witnesses would have been adverse to the prosecution.

15. The prosecution is not obliged to call each and every one who knows something about the matter in dispute. It should just call enough witnesses to establish the case it has brought against the accused. There is no required number of witnesses. The prosecution called police witnesses, who adduced evidence on how they conducted an identification parade, and how investigations were conducted. It is true that the officer who testified on the investigations, PW6, was not the investigator in the matter, but testified on behalf of his colleague. He was not the arresting officer. The fact that the arresting and the investigation officers did not testify was not fatal. What matters is whether the totality of the evidence placed on record established a case against the accused persons to the required standard of proof. There was also the issue of a witness from Safaricom, with respect to the moneys that were forwarded to the 4th accused, to testify on the authenticity of that transaction. The prosecution presented PW3, who alleged to be a friend of the appellant, and whom had requested him to get her a phone to buy. He took one to her, and she bought it. That evidence was not impeached. She testified when the appellant was present in court, and she was cross-examined by his advocate. Her evidence was fairly straightforward, and the appellant has not demonstrated that she lied, or was coached to testify against him. Her testimony was sufficient to bring the appellant into the matter, and even without evidence from officials from Safaricom, the trial court could still make a positive finding that the appellant was involved in the robbery in dispute. In any event, the advocate, appearing for the appellant and the other accused persons, did not object to the production of the MPesa statement, which should have been produced by officials from Safaricom, and the same was put in evidence by PW6. Consequently, there would have been no need to call an official from Safaricom. In any event, the statement was on the MPesa account of PW3, and she could quite properly produce it.

16. The offence of robbery is defined to section 295, and the elements of violence are elaborated in section 296(2), of the Penal Code is defined in the Penal Code as below;

> *"295 Definition of robbery:*
>
> *Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.*
>
> *296 Punishment of robbery*
>
> *(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*
>
> *(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, 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, he shall be sentenced to death."*

17. On the ingredients of the offence of robbery with violence, the Court of Appeal, in *Oluoch vs. Republic* [1985] KLR 549(*Chesoni, Nyarangi & Platt Ag JJA)* said:

> *"Robbery with violence is committed in any of the following circumstances:*
>
> *The offender is armed with any dangerous and offensive weapon or instrument; or*
>
> *The offender is in company with one or more person or persons; or*
>
> *At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ...*

The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code."

18. PW1 positively identified Nicholas Vunono, Rodgers Alulu and Edwin Anusu Shihalo as the persons she identified at the time of the robbery, although she did state they were accompanied by other persons that she did not identify. For example, she stated at one point in her testimony, that:

"*Another man came drinking something in a green bottle … 2 men then took me back to the bedroom and pushed me to the bed."*

19. To satisfy the ingredients of robbery with violence in this case, and specifically that the appellant was in the company of the other accused persons, the prosecution was obliged to prove beyond reasonable doubt that the appellant was at the scene of crime. The prosecution called six witnesses, out of which only two made reference to the appellant, that was PW3 and PW6.

20. In her testimony, PW3 stated:

> *"… I came home and found Brian, my family friend, he brought me a wiko and tecno phone, I had requested him to find me a phone and he promised to get from his electronic dealer friend. I picked the wiko phone. We agreed that I buy at 3000/-. I paid a down payment of 500/-, he asked for 100/- transport so I gave him a total of 600/- cash. On 24th he came evening, he said the owner of the phone wanted more money, I had 500/- I send 500/- to the number the he gave, it brought the name of Patrick Indiasi. On 25th morning, Brian came home, he was with Patrick as I has requested to meet the said Patrick, I told them I didn't have money. They requested for transport back, I therefore send 100/- and 100/- in 2 transactions because I had 200/- on my phone."*

21. The evidence of PW3 depicted the appellant as a middleman in this particular transaction. All the payments made towards the purchase of the Wiko phone were made by PW3 to Patrick Indiasi Mugenya, the 4th accused person in the original suit.

22. PW6 who said in his testimony:

> *"She produced (PW3) her MPesa statement to show she paid for the phone Kshs. 5200 total by cash and mpesa to Patrick Indiasi …"*

23. What emerges from the record is that the appellant was not identified by any of the witnesses who were at the scene as the robbery unfolded. He was roped into the matter when one of the items allegedly stolen in that robbery was traced to him through PW3. PW3 narrated how she was looking for a phone to buy, and the appellant, who was not a phone dealer, brought him two phones, so that she could pick one. She alleged that they had been given to him by a dealer, the 4th accused person at the trial. She negotiated with the appellant, and did not deal at all with the 4th accused person. She paid the money, negotiated by the appellant, to a number that was given to her by him, and which reflected the 4th accused person as the recipient of the money. It would mean that the appellant was connected to the offence by way of

circumstantial evidence.

24. The Court of Appeal, in *PON vs. Republic* (2019) eKLR (*Ouko, Gatembu and Murgor JJA*)**,** discussed how a court ought to handle circumstantial evidence. It stated:

> *"To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty."*

25. The doctrine of recent possession is relevant in this matter, and it was on it that the trial court appeared to base the conviction of the appellant, even though it did not say so in so many words. The Court of Appeal, in *Isaac Ng'ang'a Kahiga & Another vs. Republic* [2006]eKLR (*Tunoi, Bosire & Githinji JJA*) said as follows on the application of the doctrine:

> *"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant, thirdly; that the property was stolen from the complainant; and lastly; that the property was recently stolen from the complainant … in order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property; and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."*

26. The material on record indicates that the appellant was in recent possession of a phone that was recently stolen from PW1, and there was evidence that he presented it to PW3 for sale, who in fact bought it, as she did send the money equivalent to the price agreed between her and the appellant by phone money transfers to the 4th accused. Records from the money transfer service were produced, which corroborated the testimony of PW3. The appellant had possession of the stolen phone, and sold it to PW3. The doctrine of recent possession neatly applies to this case.

27. Once possession is established, the burden of proof shifts to the person found in possession to explain how he or she came to be in possession, and to exculpate himself or herself from the case that he or she was either the person who stole the item or that they merely handled it.

28. With respect to the instant case, the prosecution established the fact of possession of the stolen phone by the appellant when PW3 testified, and the burden shifted to him, to explain the circumstances of possession. He, however, did not avail himself of the opportunity at the trial, for when he was admitted to bond he chose to abscond, and the trial was conducted in his absence on that account. He did not, therefore, discharge the burden on him, and the facts positively established by the prosecution remained intact. He was found in possession of goods recently stolen from PW1 during a violent robbery, he did not explain how he came to be in possession, and he absconded from the trial when released on bond, all pointing to his guilt, that he was party to the robbery and that that was how he came by the stolen phone that he disposed of to PW3. His conviction cannot be faulted in the circumstances.

29. Let me now turn to the conviction for gang rape, contrary to section 10 of the Sexual Offences Act. The offence is defined as follows:

> *"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."*

30. Simple rape is defined in section 3 of the Sexual Offences Act as follows:

> *"(1) A person commits the offence termed rape if—*
>
> *(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;*
>
> *(b) the other person does not consent to the penetration; or*
>
> *(c) the consent is obtained by force or by means of threats or intimidation of any kind."*

31. PW1 testified that she was raped by three men. There is also no doubt that PW1 positively, and to the satisfaction of the trial court, identified two of the three men who raped her. No evidence was adduced at the trial implicating the appellant herein to the offence of gang rape against PW1. However, the trial court found all five accused persons guilty of rape and gang rape. The conviction implied that PW1 was raped by five men and not the three men that PW1 talked about. I, therefore, find the conviction of gang rape against the appellant was not supported by evidence, and it would, therefore, amount to a miscarriage of justice to convict him, when the offence had not been proved beyond reasonable doubt against him.

32. The standard of proof in criminal cases should at all times be one beyond reasonable doubt. It was stated in <u>*Miller*</u> *vs. Minister of Pensions* [1947] 2 All ER 372(Denning J)

> *"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful*

possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

33. In the end, I find that the appellant was properly convicted of the offence of robbery with violence, and the sentence imposed was within the law. I shall accordingly uphold the conviction and affirm the sentence. Regarding the gang rape offence, I find that the evidence on record does not positively connect the appellant to the same, and his conviction for the said offence is hereby quashed, and the sentence imposed is hereby set aside. The appeal is disposed of in those terms.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF AUGUST 2021

W MUSYOKA

JUDGE