



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO 216 OF 2013

JASSAN NJUGUNA NJOROGE.....APPELLANT

VERSUS

REPUBLIC (DPP)..... RESPONDENT

(Appeal from the original conviction and sentence of Hon. E.N. J Osoro PM dated 31st May 2012 at the Senior Principal Magistrates Court at Muranga in criminal case no 1658 of 2009)

JUDGEMENT

INTRODUCTION

1. The appellant was charged with the offence of robbery with violence and on 31st day of May 2012, was convicted and sentenced to death on all the three counts for the offence of robbery with violence and ten (10) years for the offence of under section 3(1)(a) of the sexual offences Act.
2. This appeal was initially filed at the High Court at Nyeri and the same was subsequently transferred to this High Court registry for determination.
3. Being dissatisfied with the conviction and sentence, he filed this appeal and raised the following summarised grounds of Appeal:
 - A) That the trial Magistrate erred in law and fact in relying on the identification evidence which was full of contradiction and not free from error
 - B) That the prosecution case was not proved to the required degree
 - C) Crucial prosecution witnesses were not called to testify contrary to section 150 of the Criminal Procedure Code
 - D) That his defence was dismissed without reason contrary to the provisions of section 169(1) of CPC

DIRECTION

4. Directions were given, that the appeal herein be heard by way of written submissions which were duly filed and on 7th Day of September 2020 the parties appeared by Hon. Justice A K Ndungu and highlighted the said submissions and judgement reserved for 11th November 2020 when the good Judge issued what he called Direction of the Court to the effect that he had handled the trial of the appellant at the lower court and had convicted the same.
5. It was further stated that the said conviction was appealed against and the High Court ordered a retrial which was handled by Hon Osoro from which the appellant lodged the present appeal.

HEARING

6. This filed was thereafter placed before me for hearing at which both the appellant and the respondent indicated that they will be relying on the submissions earlier made on record which for the purposes of this judgement I summarize as follows.

7. The appellant submitted that the trial magistrate relied on the evidence of identification which was not free from error. It was submitted that the condition was not ideal for identification and that the identification paret was not fairly conducted. It was contended that according to the evidence on record there was no adequate lighting and that the attackers had concealed their faces thereby making it difficult for the witnesses to identify the attacker. It was further contended that the identification paret did not meet the threshold under the forces standing order.

8. It was submitted that the identifying witnesses were at the police station and that the witnesses were identifying total strangers under difficult conditions, in support of which the case of **JUMA NGONDI Vs REPUBLIC** was tendered for the proposition that the witnesses did not describe the attackers at the first instance and therefore could not pick them at the identification paret.

9. It was contended that the evidence of PW1 did not support any of the Counts as there was contradiction on the Amount of money she lost. It was contended further that the charge sheet was defective as the complaint **SWN** but the person who testified in Court was indicated **SWK**. The case of **JASON OKUMU YONGO v REPUBLIC** was tendered to support the preposition that the charge sheet id defective if it does not accord with the evidence in the committal proceedings and if it gives a miss description of the alleged particulars.

10. On the charge of rape, the appellant submitted that whereas medical report was tendered, there was no evidence that he is the one who raped the complaint and that his medical record was not produced in court t as rebuttal. It was finally submitted that his sworn statement of defence was not taken into account and neither was his alibi defence dislodged. It was contended that the police informer who led to his arrest was not called to testify and be cross-examined and therefore the said evidence was to be treated as hearsay as stated in the case of **GIKECHA Vs REPUBLIC (1963) EACA**.

11. On behalf of the State it was submitted by Mr. Waweru that the evidence of PW1 and PW2 was consistent on how the appellant was identified which identification was confirmed through an identification paret, where the same was positively identified at the first instance. It was contended that the evidence against the appellant was watertight.

PROCEEDINGS BEFORE THE LOWER COURT

12. This being a first appeal, the court is required to re-evaluate the evidence tendered before the lower court and to come to its own conclusion though giving allowance that unlike the trial court, it did not have the privilege of seeing and hearing witnessed as was stated in the case of **OKENO Vs REPUBLIC**.

13. This trial commenced by Hon A.K KANIARU then PM who took the evidence of two witnesses before the same started a fresh before Hon OSORO then SPM, wherein PW1 SWK testified that on the material day she had left Nairobi for Kagema in the evening and got there at night. While she was lying in bed she heard her sister TW screaming and when she got up, she saw three men armed with sticks, pangas and torches streaming inside the room where she was sleeping at.

14. With the aid of the lamp, that was on she was able to identify them and in the process the 1st –accused moved closer to her and demanded for money, she gave him Ksh 1000, which he declined to take, he then ordered her to undress and sodomized her as one of them stood next to him. They took thirty minutes with her, the neighbours thereafter responded and she was taken to hospital where P3 Form was filed for her. She later on attended an identification paret where she positively identified the appellant and the 2nd Accused.

15. It was her evidence in cross examination that she gave the description of the 1st Accused to the police and that there was a bright light from the lamp and the torch which made it possible for her to identify him. In cross examination by the appellant, she stated that he was wearing a jacket and a trouser and was brown, tall with a sharp nose.

16. PW2 AWN stated that she met the Appellant on her way to the main house and dashed back to the kitchen where he followed her, hit the lamp and took them to the room where PW1 was at, forcefully undressed her and raped her twice as she struggled being her first time to have sex as his co accused waited, she the reported to her mother who raised alarm. she was then taken to the hospital where P3 form was completed and later on identified the Appellant but did not see his co accused.

17. PW3. ANK while in the kitchen with her children saw two men emerge holding torches directly on her face causing her not to see them.

One of them came back and went with Pw2 before locking the door from outside, she raised an alarm and neighbours responded. It was her evidence that when called to the identification paret, she was unable to identify any of accused persons, while PW1 and PW 2 were able to pick the appellant and the1st Accused.

18. PW4 NWN met the one of the robbers, who ordered her to go back to bed and locked her inside the bed room, later on one of them went back to her and demanded money from her and took her 500 note which fell down from her dress. PW2 then reported to her, after the robbers had left that she had been raped.

19. PW5 PAUL MWANGI GATUNGU produced P3 forms in respect to S and A and confirmed that they had both been sexually assaulted. PW6 CIP CHARLES KIBETI conducted the identification paret and stated that he had kept the witnesses at separate room and that Susan identified the 1st accused while Agnes identified the 2nd appellant. He confirmed that the paret was fairly conducted and the appellant voluntarily signed the paret forms.

20. PW7 TOM ACHUYA took over the file from the initial Investigating Officer and noted that the investigations were conducted fairly. PW8 NATHAN MZURI NYANGE testified that he received the report of the robbery and on 3rd September 2006 received information that that some of the robbers were seen at Gitweku village were appellant was arrested and took the appellant to the hospital for medical examination, he then summoned the victims who were able to identify them at the identification paret.

21. It was his evidence that he was given the name of the appellant and his co-accused not by the complainants but through an informer and that no DNA was conducted.

DEFENCE CASE

22. When put on his defence, the appellant testified that he was a farmer and that the 1st accused was his family member. He stated that in the year 2007 he had gone to Siakago Embu and that he returned when he received a report that the police were looking for him.

23. He was then arrested and charged with the offence. He was locked in the police cell where he was assaulted and the following day he saw the complainant outside the OCs office and was later on forced to attend an identification paret.

24. In cross examination he stated that he had left home for Embu on 15th July 2006 but could not recall the name of his employer. He denied having committed the offence and that he was only arrest because he was always with the 1st accused.

25. In convicting the appellant, the trial court held that though there was material contradiction on how the appellant was identified at the identification paret, she found that the appellant was positively identified at the scene and that he sexually attacked PW2 as supported by the medical evidence.

26. And that there was sufficient opportunity to identify the appellant before the lamp was kicked out and that his presence at the scene was corroborated by PW1.

DETERMINATION

27. From the proceedings and submissions herein, the following issues are identified for determination;

- A) Whether the Appellant was positively identified at the scene
- B) Whether the appellants defence was considered
- C) Whether the prosecution case was proved beyond reasonable doubt.

28. The law on identification was stated in **DONALD ATEMI SIPENDI VS REPUBLIC [2019] e KLR** thus; “. *Identification evidence is defined as evidence that a defendant was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence. It is an established principle that there is a special need for caution before accepting identification evidence. In Charles O. Maitanyi vs Republic,^[10] it was held inter alia that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care.*

31. Evidence from eyewitnesses is often the starting point for police investigations and it is estimated that it plays an important role in all contested cases. However, the memory is a fragile and malleable instrument which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in miscarriages of justice.

32. In Kariuki Njiru & 7 others vs Republic,^[11] the court held inter alia that the “law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, 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.”

29. In this case the fact that the offence took place at night was not in dispute. What the Court is called upon to determine is whether the condition prevailing was ideal for the identification of the appellant. The evidence of the identifying witness as regards the appellant was that of PW2 as analysed herein above, she first met the appellant on her way to the main house and the appellant went back with her to the kitchen before taking her to the main house where he raped her twice .

30. PW2 later on picked the appellant at an identification paret thereby corroborating her evidence. From the proceedings it is clear that only PW2 who had spent time with the appellant was able to pick her at the paret thereby confirming that the identification was free from error noting that according to her evidence there was adequate lighting which enabled her to identify him. I therefore find no fault with the trial courts finding on identification and would dismiss this ground of appeal.

31. On the appellant defence, whereas the same raised an alibi defence, this was displaced by the circumstances leading to his arrest. The appellant though not required in law to offer any explanation, was silent when offered any opportunity to explain his whereabouts on the material night and could not provide the name of his alleged employer in Embu leading to conclusion that his alibi defence was an afterthought.

32. The only issue in dispute is whether the twin issues of rape and robbery with violence were proved to the required degree. The only offence as per the evidence before the trial Court which was proved is that of rape. The only witness who put the Appellant at the scene was PW2 and her evidence is that as she was going into the main house, she met the Appellant and she went back to the kitchen where he followed her, the appellant then took her to the main house where he raped her.

33. There was no evidence tendered before the court to confirm that the appellant stole anything from her unless the court took the fact that her virginity was stolen into account, which is not supported by the evidence on record as to whether it was something capable of being

stolen.

From the evidence of PW2, who was the only witness who put the appellant at the scene, there is no evidence that the same stole anything from her and that the same used actual violence on her save for the fact that the same forced himself onto her and having acquitted the Appellants Co-Accused, the conviction of the appellant on the count of robbery with violence was not safe and would therefore allow the appeal on that count, quash the conviction and set aside the sentence.

34. On the charge of rape, PW2 positively placed the Appellant at the scene, she was with him twice, at the kitchen before he kicked the lamp and at the main house where he had sex with her twice, she did not consent to the said act and the fact of penetration was confirmed through the evidence PAUL MWANGI GATUNGU, the Clinical Officer, who testified that her hymen was perforated and there was a whitish vaginal discharge and the fact that the Appellant was not medically examined, did not raise any doubt in the prosecution case, I am therefore satisfied that the charge was proved beyond any reasonable doubt and the conviction was safe .

35. On sentence, the appellant did not make any submissions thereon and sentence being at the discretion of the trial court and the same being lawful, I will not interfere with it, save that the same shall run with effect from 29th may 2009 when the Appellant first appeared in court in compliance with the provisions of section 333(2) of the Criminal Procedure Code.

36. In the final analysis I dismiss the appeal on the count of rape which was properly proved and make the following disposition;

A) Appeal on the Count of robbery with violence is allowed and the death sentence set aside

B) the appeal against the count of rape is dismissed and the conviction and sentence thereon affirmed from the date when he first appeared in court.

37. The State has a right of appeal

38 . And it is ordered

DATED SIGNED AND DELIVERED THIS 29th DAY OF NOVEMBER 2021

J. WAKIAGA

JUDGE