



**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CORAM. D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 104 OF 2019**

**BETWEEN**

**JAMES GITATA GATUGUTA .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the original conviction and sentence dated 21<sup>st</sup> June 2018 in Criminal Case No. 8 of 2016 at the Magistrate's Court at Kikuyu before Hon D. N. Musyoka, PM)*

**JUDGMENT**

1. The appellant, **JAMES GITATA GATUGUTA**, was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and rape contrary to **section 3(1)( a) (b) and 4** of the **Sexual Offences Act**. The particulars of the 1<sup>st</sup> count of robbery with violence were that on 11<sup>th</sup> February 2016 at [particulars withheld] village within Kiambu County he robbed **RWK** of 2 mobile phones make Samsung valued at Kshs. 7,000/- and immediately before the time of such robbery wounded the said **RWK**. The particulars of the offence of rape were that on the same day at the same place the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **RWK** without her consent.
2. The appellant was convicted on both counts. He was sentenced to death on the first count and to serve 10 years' imprisonment on the second count. The court ordered that the sentence on the second count be held in abeyance.
3. The appellant now appeals against conviction and sentence based on the memorandum of appeal filed on 29<sup>th</sup> October 2019 and written submissions filed on 9<sup>th</sup> January 2020. The main issue raised by the appellant was that the prosecution did not prove the case beyond reasonable doubt. He contended that the evidence by the witnesses was inconsistent, contradictory and uncorroborated and could not support a conviction. He pointed out that he was convicted on the basis of inadequate evidence of identification. The respondent supported the conviction and sentence and contended that the prosecution proved that all the elements of each offence and that the appellant was positively identified as the assailant.
4. As this is a first appeal, this court is entitled to review all the evidence afresh and come to its own conclusion bearing in mind that it never heard nor saw the witnesses testify. It is for this reason that I now set out the evidence that emerged before the trial court.
5. The complainant, **RWK (PW 1)**, testified that on 11<sup>th</sup> February 2016 she left Kikuyu town to go home at about 8.00pm with her neighbour, **JMG (PW 2)**. **PW 1** recalled that as she was walking with **PW 2**, she saw a person behind them who passed them and in a short while she saw the person starting to fight with **PW 2**. She also started running and screaming for help. The person who was fighting with **PW 2** followed her and hit her on the forehead with a sharp object. As she was still bleeding, he took her to a nearby shamba and demanded her phone and while threatening to kill her, demanded that she removes her clothes. He thereafter raped her, took her phone and told her to leave. As she was leaving, her phone rang and from the light she could see him. The assailant asked her why she was looking at him and she told him she did not know him. The phone rang again and she could see him. The assailant then led her to the road and told her to run away. She was taken to hospital by good Samaritans and treated and as she was in hospital she was informed that the assailant had been arrested. She was told to go and identify him. When cross-examined by the appellant, **PW 1** stated that she had seen the appellant before as he came from the village and she could see him when the phone rang.
6. **PW 2** testified that on the material night as he was going home with **PW 1**, the appellant whom he knew well passed him and as they proceeded to towards the dam, someone came from behind them and he tried to pass, the person cut him with a slasher causing him to become unconscious. When he regained consciousness, he saw the appellant ahead struggling with **PW 1** and taking her to a nearby shamba. He followed them towards the dam and started screaming causing people to come. He told the people that the appellant had taken **PW 1**. He also called a friend who took him to the hospital where he remained admitted for one week before he reported the matter to the police.
7. A driver in the area, **PW 3**, recalled that on the material night he was in his house when he heard people screaming for help. He ran out

and met PW 2 who was bleeding profusely. PW 2 told him that some assailants had taken PW 1. He called other neighbours and they started looking for PW 1. They started following gum boot prints which led to the appellant's home. The appellant threatened that he would kill them but they called police officers who opened the door and found the appellant wearing wet clothes as it had rained.

8. A Clinical Officer, PW 4 produced the post-rape care form on behalf of his colleague who examined PW 1 on 12<sup>th</sup> February 2015. According to that report PW 1 appeared distressed and had taken a shower. She had a cut wound on her forehead and right hand. Vaginal examination revealed a tear on the external genitalia. She concluded PW 1 had been assaulted and raped. PW 5, a Clinical Officer, produced the P3 medical form on behalf of his colleague who examined PW 1. She noted a cut wound on the forehead that had been stitched. There was injury on the upper arm and she concluded that the nature of the injuries was harm caused by a sharp object. PW 5 also produced the P3 medical form in respect of PW 2. It disclosed that PW 2 had a cut wound on the head and a fracture on the temporal bone. He was admitted to hospital for 6 days.

9. The investigating officer, PW 6, testified that he was asked to investigate the case on 12th February 2016 after the appellant had already been arrested. He recorded statements and issued the two with P3 medical forms.

10. When put on his defence, the appellant gave sworn testimony in which he denied the charge. He told the court that on 11<sup>th</sup> February 2016 he worked as usual during the day and went home in the evening. At about 2am, some people knocked his door and one of them was PW 3. The people had pangas and runkus. He told them he wouldn't come out until they called police officers who later came and took clothes he had soaked in water. He claimed he was taken to a house which he later came to know it was the house of the victim, he told the police that he did not know any of the witnesses. He produced the statements by PW 1 and PW 2 in evidence.

11. On the basis of the evidence I have outlined, the trial magistrate found that the appellant was the person who committed the act of robbery with violence and raped PW 1.

12. The offence of robbery with violence under **section 296(2)** of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, *Oluoch v Republic* [1985] KLR 549 and *Ganzi & 2 Others v Republic* [2005] 1 KLR 52).

13. I am satisfied that the prosecution established all the elements of the offence of robbery as I have set out above. PW 1 gave clear testimony on how she was assaulted and with a sharp object on the head causing her to bleed profusely. He was armed and was accompanied by other people when he waylaid her and PW 2. Further, the assailant stole her phone.

14. The ingredients of rape which the prosecution must prove are set out in **section 3(1)** of the *Act*;

*A person commits the offence termed rape if –*

(a) *He or she intentionally or unlawfully commits an act which causes penetration with his or 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.*

15. PW 1 gave graphic evidence on how she was taken by the assailant to a nearby shamba, undressed and subjected to an act of penetration. She had already been subjected to the violence and the act of penetration was not with her consent but obtained by fear and violence. I am satisfied that on the basis of the evidence produced, the prosecution proved both robbery with violence and rape. The issue in this case is whether the appellant was identified as the person who perpetrated the offences.

16. Since the incident took place in circumstances that are ordinarily difficult for identification, our courts have recognised that identification in these circumstances may lead to miscarriage of justice and have hence urged caution in accepting evidence of a single witness in such cases. In *Kiilu and Another v Republic* [2005] 1 KLR 174, the Court of Appeal stated as follows:

*Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.*

17. Before acting on such evidence, the trial court ought to make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused amongst other facts so as to be able to identify him (see *Maitanyi v Republic* [1986] KLR 198 and *R v Turnbull* [1967] 3 ALL ER 549). The Court of Appeal was categorical in *Kiarie v Republic* [1984] KLR 739, that reliance on such evidence of identification must be “*absolutely watertight*” to justify conviction. It is accepted that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see *Anjononi & Others v Republic* [1980] KLR 59) but even in such cases the court must still exercise caution to ensure that even recognition is positive and free from error.

18. In assessing the evidence of identification, the court ought to take into account the fact that a witness who identified an appellant would be able to give the police his description of that assailant. In *Simiyu and Another v Republic* [2005] 1 KLR 192, the Court of Appeal held

that where the identity of the accused is in question, the description of the accused and the terms of that description given by the witness are matters of highest importance. That court added that the evidence ought to be given first of all, by person or persons who gave the description and purported to identify the accused and then by the person or persons to whom the description was given. It is on the basis of this description that an identification parade will be conducted to test the veracity and correctness of witness description of a suspect. If this is not done then the identification amounts to a dock identification which the Court of Appeal observed in **Gabriel Kamau Njoroge v Republic [1982-1988] 1 KAR 1134** was, “generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade”.

19. The prosecution case was based on the testimony of PW 1 and PW 2. Both of them testified that they knew the appellant. PW 1 did not know him by name but recalled seeing him in the village while PW 2 knew him by name. As regards the nature and condition of lighting, the trial magistrate concluded that:

*As to the identity (sic) of the assailant, PW 1 and PW 2 testified that it was not too dark as time of attack was the time when normally many people go home and there was also security lights. The phone lights also corroborated this evidence and the fact that gum boot prints led to the house of the accused from the attack point and accused was in his house.*

20. Contrary to the conclusion by the trial magistrate, there was no evidence of the nature of lighting led by the prosecution. PW 1 stated that she was able to recognise the appellant when the phone light came on and she was able to see him. PW 2 told the court that he met the appellant and passed him. He also saw the appellant struggling with PW 1 before he called people to come and assist.

21. I have considered the evidence of identification and I am satisfied that the appellant was recognised by PW 1. Although it was dark, I find that from the close interaction and proximity between the appellant and PW 1, she was able to recognise him. She also recognised him from the light from the phone when it rang. When cross-examined by the appellant, she insisted that she had known him before and that she had even come to her stall. In her recorded statement, she explained clearly that she knew the appellant by appearance and would identify him if she saw him. This was confirmed by PW 7 in his testimony. Since she knew him prior to the incident, an identification parade was not necessary and thus she had no difficulty in identifying him on that night after he had been arrested.

22. The prosecution evidence was supported by that of PW 2. His evidence was that he knew the appellant by his name. He however did not name him to PW 3 when he was in a state of distress and neither did he name him in the statement recorded. In as much as I doubt the testimony of PW 2, I am satisfied that the appellant was positively recognised and that recognition was free from error. In light of the positive identification, the appellant’s defence is dismissed. He was arrested in the locality in circumstances that suggest that he was the person involved in the robbery and rape. I therefore affirm the conviction.

23. The appellant was sentenced to death as required by **section 296(2)** of the **Penal Code**. As the death sentence is no longer mandatory following the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR** (see also **William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR**), I set aside the sentence of death. The sentence is reduced to 15 years’ imprisonment.

24. I affirm the conviction on both counts. The appeal is allowed only to the extent that the sentence of death imposed on Count 1 is set aside and substituted with a sentence of **fifteen (15) years imprisonment**. Both sentences shall run **concurrently** from **16<sup>th</sup> February 2016**.

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KIAMBU this 29<sup>th</sup> day of JANUARY 2020.**

**J. N. ONYIEGO**

**JUDGE**

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.