



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 8 OF 2019

JOSHUA WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence imposed by A. Lorot, Senior Principal Magistrate while sitting at Machakos Law Court in Criminal Case 15 of 2017 on 23.11. 2018)

JUDGEMENT

1. This is an appeal that was lodged herein on **10.12.2018** by the Appellant, **JOSHUA WAMBUA**, against the conviction and sentence imposed by the Senior Resident Magistrate, **Hon. A. Lorot**, in Machakos Chief Magistrate's **Criminal Case 15 of 2017**. The Appellant had been charged before the lower court with the offence of Rape contrary to **Section 3(1) (a) (b) (3)** of the **Sexual Offences Act, No. 3 of 2006**. In the alternative, he was charged with Indecent Act with an adult, contrary to **Section 11(a)** of the **Sexual Offences Act**. The appellant faced a 2nd count of Robbery with violence contrary to Section 296(2) of the Penal Code Act. The offences were alleged to have occurred on **8th May, 2017** at [particulars withheld] Village, Kaseve Location in Machakos Sub-county within Machakos County.

2. The Appellant, having denied the allegations against him before the lower court, was taken through the trial process and a Judgment was subsequently rendered by the learned trial magistrate on **23rd November, 2018**. The Appellant was found guilty of the offence of Rape and robbery with violence and was convicted thereof and sentenced to serve 30 years' imprisonment in respect of each count that were to run concurrently. Being aggrieved by his conviction and sentence, the Appellant, preferred this appeal that challenged the decision of the trial court on the following grounds:

- a) The prosecution case against the appellant was not proved beyond any reasonable doubt;***
- b) The defence was dismissed;***
- c) No exhibit was tendered in court;***
- d) That the appellant was not supplied witness statements;***

3. Accordingly, the Appellant prayed that the conviction be quashed and sentence set aside.

4. In his written submissions, the appellant challenged his identification as a perpetrator and submitted that the prosecution did not meet its standard in proof of its case.

5. The appeal was opposed by the State. On the issue of witness statements counsel submitted that the appellant did not raise it early enough. Counsel cited the case of **Francis Muniu v R (2017) eKLR**. On the issue of identification of the assailant, counsel cited the case of **Donald Atemia Sipendi v R (2019) eKLR** where Justice Mativo observed that in evaluating the accuracy of identification testimony, the court should also consider such factors as:-

- a) *What were the lighting conditions under which the witness made his/her observation?*
- b) *What was the distance between the witness and the perpetrator?*
- c) *Did the witness have an unobstructed view of the perpetrator?*
- d) *Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?*
- e) *For what period of time did the witness actually observe the perpetrator?*
- f) *During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?*
- g) *Did the witness have a particular reason to look at and remember the perpetrator?*
- h) *Did the perpetrator have distinctive features that a witness would be likely to notice and remember?*
- i) *Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?*
- j) *What was the mental, physical, and emotional state of the witness before, during, and after the observation?*
- k) *To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?*

6. Counsel in placing reliance on the above case that the complainant had ample time to see the appellant. Counsel submitted that the case was not fabricated as the evidence on record was corroborated by the doctor and that the defence evidence constituted mere denials that did not challenge the prosecution evidence. Counsel cited the case of **CMK v R (2019) eKLR**. Counsel submitted that the prosecution proved its case to the required standard.

7. I have given careful consideration to the appeal and taken into account the written submissions made herein. I am mindful that, in a first appeal such as this, the court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal for East Africa expressed this principle thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

8. The Prosecution called a total of four witnesses in proof the particulars of the charges, the first of

whom was the Complainant (PW1). Her evidence was that, on the **8.5.2017** at 1.00 p.m., she was in the process of marketing some goods when someone pullet her to a thicket and she noticed that the person was the appellant whom she had earlier seen. She testified that the appellant penetrated her and took her Kshs 800/- that she had made as sales for the day. She sought medical attention at Machakos Level 5 Hospital and reported to Machakos Police Station and she presented in court the P3 form, PRC form. She testified that she went in search of the appellant within the neighborhood and identified him and this led to his arrest whereupon she was able to identify him at the police station. She added that she noted that the appellant was a stammerer and hence she could properly identify him

9. **PW2, James Muasya Musyimi**, testified and told the lower court that he received a warrant of arrest in respect of the appellant on 21.5.2017. He testified that he knew the appellant as a troublesome citizen.

10. The Senior Medical Officer, **Dr John Mutunga (PW3)**, told the lower court that he examined Pw1 and noted that she had laceration on her labia majora and minora and her hymen was absent. He filled the P3 form on 26.5.2017. He produced the PRC form that was filled on 8.5.2017 and testified that it contained the same details as those captured in the P3 form.

11. **PW4** was **Pc Gaudencia Mghoi**, who testified that she was the investigating officer in the case and that she was informed of a rape case on 8.5.2017 and that the complainant reported that she could identify her attacker. She testified that the appellant was later arrested. The court found that a prima facie case had been established against the appellant and put him on his defence.

12. In his defence, the Appellant told the court that on **8.5.2017** he was contracted to fix a road and he did so from 8 am to 5 pm. He testified that on the next day he went to Limuru to greet his mother and stayed there for two days and came back on 21.5.2017. He testified that he was arrested on a later date. He denied commission of the offence.

13. From the foregoing summary of the evidence adduced before the lower court, the pertinent questions to pose in this appeal, granted the Appellant's Grounds of Appeal are:

[a] Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of Rape and robbery with violence to the requisite standard;

[b] Whether there were any procedural infractions by the prosecution or the trial court that would vitiate the conviction recorded against the Appellant.

14. On the first issue, **Section 3** of the **Sexual Offences Act** provides for the offence of rape in the following terms:

"(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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

15. Hence the prosecution was under obligation to prove its allegations that there was penetration of the

complainant's genital organ and that consent for such penetration was not given or it was procured by force. In this respect, the prosecution adduced evidence of Pw1 that she was raped by the appellant.

16. The senior Clinical Officer who examined the complainant and filled the P3 Form corroborated the complainant's evidence that she was subjected to penetration. The Appellant's defence before the lower court was an alibi. The trial court seemed not convinced of the same and I agree with the rejection of the evidence and find that there was no doubt created in the evidence of the prosecution.

17. The evidence on record is direct, cogent evidence that is properly corroborated and I am satisfied that the sexual act did occur.

18. There is evidence produced of menaces or force that was meted on the complainant that is to the effect that she was pulled from behind and that her clothes were torn. With regard to the identity of the appellant, the evidence on record is that the complainant saw the appellant whilst in the process of her door to door sales; that she saw the appellant and later while he was having sex with her she saw him and was able to identify that he talked with a stammer. She testified that at the police station she identified him as her attacker. She had quite a length of time to see him and take note of him and the attack happened during the day in broad daylight and in totality all these were factors favourable to aid identification. I am satisfied that the appellant was properly identified as the perpetrator. The appellant's alibi did not shake the evidence of the prosecution which was overwhelming against him. It did not transpire from the evidence that there existed any grudge between the appellant and the complainant so as to suggest a frame up. The complainant gave cogent evidence and narrated the ordeal and that the aspect of penetration was proved by the evidence of the doctor.

19. In the result therefore, I am satisfied that the conviction of the Appellant for the offence of Rape contrary to **Section 3(1)** was based on sound evidence.

20. The appellant faced a 2nd count of robbery with violence. In a case of robbery with violence, the prosecution must prove beyond reasonable doubt that:

(i) There was theft of property;

(ii) There was violence involved;

(iii) There was a threat to use a deadly weapon or actual use of it; and

(iv) The accused took part in the robbery.

21. I shall address myself to the elements of the offence in performing the duty of the 1st appellate court. As to whether there was theft of property, there is evidence of Pw1 that on the material day, she was carrying out door to door day sales and she had already made Kshs 800/- that she had in her possession. Whether the offence was investigated by police is not clear from the evidence of Pw4. Be that as it may, I have seen no cause to doubt the evidence of Pw1. In these circumstances, I find as a fact that the prosecution has proved beyond reasonable doubt that theft was committed on 8.5.2017 to the prejudice of Pw1. The said theft took place under circumstances of fear of violence upon the complainant by the appellant. There was threat of violence if she did not cooperate.

22. As to whether or not there was violence, Pw1 testified that she was grabbed and her clothes torn. Pw3 testified to the fact that there were lacerations on Pw1's private parts indicative that she sustained injuries. It is my considered opinion that these acts meted upon Pw1 amounted to violence within the meaning of section 295 of the Penal Code. The second ingredient of the offence has also been proved beyond reasonable doubt.

23. This leads me to the issue of whether or not there was use of an offensive weapon or a threat to use it. A deadly weapon is defined in section 89 (4) of the Penal Code as any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for

such use. From the evidence of Pw1 and Pw3, the P3 form that was tendered in evidence, it is clear that use of an offensive weapon was proved by the prosecution. The appellant has assailed the fact that there was no weapon presented in evidence. Indeed no weapon was produced in evidence but the evidence of the complainant is that the appellant was armed with a panga that was strapped up to his waist and which he pulled it out. The complainant testified that the appellant menacingly informed her that he was a killer and she thus feared for her life. As the appellant threatened to use the said panga (weapon) and proceeded to steal from her after raping her, I find the ingredients of the offence of robbery with violence has been established by the prosecution.

24. In view of the evidence mentioned, I find that this ingredient of the offence has been proved beyond reasonable doubt. As to whether the appellant took part in the robbery, the whole issue hinges on the question of identification made by Pw1.

25. I will start with direct identification evidence as contained in the testimony of Pw1. Pw1 saw the appellant on the material day and saw him assaulting her. Her evidence brings into focus the issue of visual identification. In determining the correctness of visual identification, I have taken into account the following factors:

(i) The length of time the appellant was under observation;

(ii) The distance between Pw1 and the appellant;

(iii) The lighting conditions at the time; and

(iv) The familiarity of the Pw1 with the appellant.

26. As regards the length of time the appellant was under observation I find it was more than a fleeting glance. And for the distance between them, they were close enough when he was assaulting her. As for the source of light at the time, the act occurred during the day. As to the familiarity of Pw1 with the appellant, she stated that she did not know him but had seen him earlier during the day as she moved around selling kitchenware. She later on conducted her own investigations and managed to spot the appellant a few days later. She was able to note that the appellant was a stammerer. The appellant told the court nothing that was of assistance to controvert the evidence of the prosecution witnesses. He imputed an alibi that he was at work repairing a road. However in my view, this was identification made under favourable conditions. Pw1 was not in doubt about the identity of the appellant as the person who robbed and raped her.

27. The appellant raised the defence of alibi and assailed the trial magistrate for dismissing it. The law on alibi is now well settled. It is that a prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving it. The burden remains on the prosecution to disprove it. If evidence adduced in support of an alibi raises a reasonable doubt as to the guilt of an accused person it is sufficient to secure an acquittal. (see ***Leonard Aniseth v. Republic*** (1963) EA 206).

28. To counter this defence, the prosecution was required to adduce direct or circumstantial evidence proving that the appellant was the perpetrator of the unlawful actions. This was proved by the prosecution evidence as analyzed above. In this case, the prosecution's case largely rests on the accounts of P.W.1 that placed him at the scene of the crime. I have examined closely the identification evidence of the complainant and found it to be free from the possibility of mistake or error. In light of that evidence, I reject the appellant's alibi. I am satisfied that there was ample evidence which put him at the scene of crime.

29. In view of the foregoing analysis I find that the appeal against conviction lacks merit and is dismissed. With regard to sentence, Section 296(2) provides for a death sentence therefore the sentence of 30 years meted on the appellant is lenient. The sentence for rape is not less than 10 years imprisonment but which can be enhanced to life imprisonment. On considering all the evidence and the relevant factors relating to the sentence I find that there is no reason to interfere with the sentence passed by the court as the same is reasonable and commensurate with the offences.

30. In the result I find no merit in the appeal. The same is dismissed. The conviction and sentence is upheld.

Orders accordingly.

Dated and delivered at **Machakos** this **28th** day of **January, 2020**.

D. K. Kemei

Judge