REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.61 OF 2018

JACKSON MAINA BEN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from both against both the conviction and the sentence of Hon. L. Gichecha (Senior Principal Magistrate) delivered on 17th of January 2018 in Nakuru Chief Magistrate's Court case No. 125 of 2017)

JUDGMENT

1. The Appellant, together with two others, was charged before the Chief Magistrate's Court in Nakuru with two Counts. The first count was Robbery with Violence Contrary to Section 296 (2) of the Penal Code. The particulars of the charge as contained in the charge sheet were as follows:

> *On the night of 28th August 2016 within Nakuru County, being armed with crude weapons namely panga and metal rod jointly robbed MWN her one television make sayona valued at ksh 16,000/=, one star time decoder, one 6kgs gas cylinder, two blow dry machines, assorted cosmetics substances and one mobile phone make Tecno pst, all valued at 80,000/= and immediately before or immediately after the time of such robbery used actual violence against the said MWN.*

2. This count had an alternative charge of handling stolen goods contrary to section 322 (1) as read with section 322 (2) of the Penal Code. The particulars of the charge as contained in the charge sheet were as follows:

> *On the 13th day of January 2017 within Nakuru County, otherwise than in the cause of stealing, dishonestly retained one mobile phone make Tecno pst and 1 blow dry machine all valued at Kshs 20,000 the property of MWN.*

3. The second count was gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006. The particulars of the charge as contained in the charge sheet were as follows:

> *On the 5th day of December 2016 within Nakuru County intentionally and unlawfully inserted your male genital organs namely penis into female genial organ namely vagina of MWN which cause penetration without her consent*

4. This count had an alternative charge of committing an indecent Act with an Adult contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge as contained in the charge sheet were as follows:

> *On the night of 28th August 2016 within Nakuru County, intentionally and unlawfully committed an indecent act with an adult by touching her private parts namely vagina, anus and breast of MWN with your penis*.

5. After a fully-fledged trial, the Trial Court convicted the Appellant on the first count and sentenced him to suffer death. The Court acquitted him on the 2nd count. The Court also acquitted the Appellant's two Co-Accused Persons.

6. The Appellant is aggrieved by the conviction and sentence and has filed the present Appeal. The grounds of appeal dated 26th January 2018 are that:-

> *a. The Learned Trial Magistrate erred in law and in facts by convicting the Appellant in the present case on the basis of the identification evidence yet failed to note that the underlying circumstances were not conducive for positive identification.*
>
> *b. The Learned Trial Magistrate erred in law and in facts by convicting the Appellant in the present case on the basis of identification by single witness failed to find that no identification parade was conducted*

c. The Learned Trial Magistrate erred in law and in facts by convicting the Appellant in the present case yet failed to note that the core ingredient of the offence charge termed robbery were not proved to any reasonable doubt.

d. The Learned Trial Magistrate erred in law and facts by convicting the Appellant in the present case on the doctrine of recent possession yet failed to find that there was no nexus created by the Prosecution between the Appellant and the alleged scene of recovery.

e. The Learned Trial Magistrate erred in law and facts by relying on the evidence of PW4 yet failed to note and appreciate that there was a grudge between me and the witness.

f. The Learned Trial Magistrate erred in law and fact by failing to find that the evidence adduced by the Prosecution evidence was deficient of key probative values.

g. The Learned Trial Magistrate erred in law and in facts by dismissing any plausible defence without offering any cogent reasons the same was credible enough to water down the Prosecution case.

h. The Learned Trial Magistrate erred in law and in facts by convicting the Appellant in the present case on alleged evidence of recovery yet failed to find that the Prosecution did not produce authentic inventory records.

i. The Learned Trial Magistrate erred in law and in facts by relying on the evidence of the doctor which was not corroborative to the charge.

j. The Learned Trial Magistrate erred in law and in facts by relying on contracting and inconsistent pieces of evidence and in further filing the glaring gaps in the Prosecution case.

k. The Learned Trial Magistrate erred in law and facts by relying on evidence of PW1 (Complainant) on identification which was not corroborated at all.

7. In his amended grounds of appeal, the Appellant raised the following grounds:

a. *The Learned Trial Magistrate erred in law and fact by failing to find that the prosecution had not proved its case to the required standard of beyond reasonable doubt.*

b. The Learned Trial Magistrate erred in law and fact by failing to appreciate that there was no inventory made by the arresting officer of the goods allegedly recovered with the Appellant.

c. The Learned Trial Magistrate erred in law and fact by wrongly applying the doctrine of recent possession in the present case.

d. *The Learned Trial Magistrate erred in law and fact by dismissing the Appellant's defence*.

e. The death sentence imposed on the Appellant was unconstitutional as spelt out by the Supreme Court in the case of Francis Maniafetu and the honourable court should review the same

8. The Appellant in his supplementary grounds of Appeal stated as follows:

a. *The Trial Magistrate Court erred by sustaining the conviction of the Appellant on insufficient and contradictory evidence*.

b. The Trial Magistrate Court imposed an illegal and manifestly harsh and excessive sentence.

9. As a first appellate Court, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

10. The evidence that emerged from the Court below was as follows. The Complainant was MWN. She testified as PW1. She told the Court that on 28/08/2016 at around 12:00am while in her house she heard some noise in her living room. On going to check, she found three men. They were armed with pangas, metal bars and torches. They pushed her into the bedroom and demanded money. She gave them Kshs. 31,000/-. They demanded more. They hit her with the back of the panga. One of the assailants raped her in the midst of it all. The Complainant testified that the lights were on and that she had a good view of the assailants.

11. The Complainant testified that after one of the assailants had raped her, the Appellant attempted to rape her as well – but he was interrupted by the others who insisted that it was time to leave. She said that she saw the Assailants well; and very well saw the Appellant during the ordeal which took more than an hour. The assailants left carrying with them the money and stock from her salon; her blower drier; cosmetics; clothes and her phone of the make, Techno. They also took away a Star Times decoder.

12. After the assailants left, the Complainant rushed outside and raised alarm. Her brother, who lives in the same compound as her came out to assist. She also called her father who came to her house. They took her to Nakuru PGH for treatment; and then to Central Police Station to report. No arrests were immediately made.

13. About three weeks after her ordeal, the Complainant received a call from Star Times Customer Care Desk. The Company was doing promotions. Upon informing them that her decoder had been stolen, the Company agent informed her to report to the office with her ID number and phone number. On doing so, the Company advised her that her decoder was being paid for by a lady by the name Roselyne. She immediately reported to the Police.

14. About two weeks later, the Complainant got a call from the Police. The Police told her they had traced Roselyne. Roselyne told the Police that she had been given the decoder by a certain Francis Kinyanjui Waithera who is her in-law. Francis was arrested. He was eventually charged as the 3rd Accused Person in the Lower Court but was acquitted.

15. The Police tracked Roselyne's phone and it led them to the Appellant. The Appellant was arrested together with one, Esther Wangui Muchemi. The Police recovered a blower dryer machine which the Complainant identified as hers in the Appellant's house. Also recovered was a Black Techno phone which had also been stolen from the Complainant. The Complainant was quite categorical that she was able to identify the Appellant because the electric lights were on and because of the length of time the Appellant and his colleagues spent in her house. However, no identification parade was done. She said that she identified him in Court.

16. Roselyne Waithera, who was found with the stolen decoder after the intervention of Star Times Company, testified as PW3. She testified that she was given the decoder by the Appellant and three other persons in September, 2016. She said that the four had a decoder and a blow dryer. Since she was in financial problems and the Appellant is her in-law (the Appellant is married to PW3's sister), the Appellant offered her the decoder to use. Roselyne testified that she used the decoder for two weeks then ran into even more financial problems. She then decided to off-load by selling it as a second hand item to one Francis Kinyanjui. It was recovered from the said Francis. Roselyne was quite categorical that it was the Appellant who gave her the decoder; and that he also had a blow dryer with him on that day.

17. Edwin Kaka, an employee with Star Times Ltd as a Customer Care agent testified as PW6. He explained to the Court that the Complainant reported to their office about her stolen decoder. From their system, the agent was able to track who was paying for the decoder. It was Roselyne Waithera (PW3). Edwin confirmed giving the information to the Complainant. He also produced a copy of the Statement from Star Times Ltd showing the Account number of the Complainant which used to pay; and the account number which Roselyne used to pay. Edwin confirmed that according to their records, the Complainant was the owner of the decoder but that Roselyne had established a new account with which she paid for service on the decoder at least once.

18. PC Wilfred Kinyua of Nakuru (Central) Police Station was the Investigating Officer in the case. He testified as PW5. He testified that he received a report from the Complainant about the robbery and rape on 28/08/2016. He recorded the matter in the OB and started investigations. He confirmed that he received further information from the Complainant a few weeks later that she had new information from Star Times Ltd regarding her decoder. With Officers from DCI, PC Kinyua tracked the telephone number supplied by Star Times Ltd as the person paying for the stolen decoder. It led them to Roselyn Waithera (PW3). Roselyne led the Investigative Team to Francis Kinyanjui who was eventually charged as the 3rd Accused Person after the Complainant identified him as the assailant who had raped her during the robbery.

19. PC Kinyua testified that through some informers and members of the public, he was able to know of the house of the Appellant. Together with DCI Officers, they staged an ambush at the Appellant's house. They found him and his wife at home and arrested both. They recovered a blow dryer and a mobile phone of the model Techno. The Complainant identified both as some of the items stolen from her. PC Kinyua, then, recommended that the Appellant, his wife and Francis Kinyanjui be charged with robbery with violence; and for the Appellant and Francis Kinyanjui to be charged with gang rape.

20. SNK is the father to the Complainant and testified as PW2. The Complainant called her in the morning after the robbery to take her to the hospital. He then accompanied her to the Police Station. PN is a brother to the Complainant. He lives in the same compound as the Complainant. He is the one who came out after he heard the Complainant screaming after the robbery. He also accompanied her to the hospital. He testified as PW4. Both PW2 and PW4 testified that the Complainant told them that she had been robbed and raped in the immediate aftermath of the incident before taking her to the hospital.

21. Finally, Dr. Wangechi testified as PW7. She produdced the P3 Form for the Complainant on behalf of Dr. Kanyotu. She stated that the doctor was examined on 28/11/2016 and that the examining doctor found normal genitalia. The physical examination could not establish if there was rape.

22. The Prosecution withdrew its case against Esther Wangui Muchemi. The Trial Court found that a prima facie case had been established against the Appellant and Francis Kinyanjui. However, the Trial Court acquitted Francis Kinyanjui in its judgment while convicting the Appellant of the first count of robbery with violence. The Trial Court also acquitted the Appellant of the second count of gang rape. The main reason for acquitting on this charge was that the date indicated on the charge sheet was 05/12/2016 while evidence showed that the offence had been committed on 28/08/2016. The Trial Magistrate thought that the variance between the charge sheet and the evidence entitled the Appellant to an acquittal.

23. In his defence, the Appellant gave an unsworn statement saying that he was arrested on allegations of selling stolen clothes. He claimed that the Police asked for a bribe and that they charged him when he refused to pay the bribe.

24. However, the Learned Trial Magistrate was persuaded that the charge of robbery with violence was proved by both identification evidence as well as under the presumption permitted by the doctrine of recent possession.

25. In the submissions filed on his behalf by his lawyers, and in Ms. Alwala's oral submissions during hearing, the Appellant raised four main points. The first First, the Appellant says that there was insufficient evidence to convict for robbery with violence. The Appellant relied on ***Benard Gitonga Karanu v Republic [2019] eKLR***. The Appellant's argument seems to be that the evidence presented at most disclosed the lesser cognate offence of robbery with violence contrary to section 296(1) of the Penal Code. The argument seems to be that the Complainant was not injured; and that no offensive or dangerous weapons were produced.

26. The Appellant places his reliance on the following paragraph in the decision in ***Benard Gitonga Karanu v Republic [2019] eKLR***:

> *24. In order to interrogate if this evidence was sufficient to convict for the charge of robbery with violence, the rationale for the requirement of more than one person during the robbery must be appreciated. This requirement is to illustrate that there was some overwhelming force used or meted on the victim of the robbery, so that even in the absence of an offensive weapon or injury, and such force will qualify as violence.*
>
> *25. The lack of evidence of any injuries caused to the PW1 and of any weapon that was recovered from the scene of the crime should in my view be construed in favour of the Appellant, particularly on the issue as to whether there was force used by more than one person on PW1. I therefore find that there was insufficient evidence to sustain a charge of robbery with violence as against the Appellant. However, the evidence adduced before the trial Court disclosed a lesser cognate offence of simple robbery contrary to section 296(1) of the Penal Code, which offence carries a maximum sentence of 14 years imprisonment.*

27. With respect, the authority relied on is inapplicable in the present case. The Learned Judge in the case was advancing the rationale that a charge of robbery with violence is only appropriate where there is evidence that violence was part of the commission of the offence: either use of overwhelming force or credible intimidation or threat of imminent violence. In the present case, the Complainant gave graphic details of both actual, brutal violence visited upon her (including rape); as well as threatened violence and intimidation. The Complainant testified credibly; and the Learned Trial Magistrate believed, that there were three assailants; that they were armed with pangas and other crude weapons; and that they roughed up the Complainant. They pushed her to her bedroom. One of them hit her with the panga. Another raped her. The Appellant threatened to rape her. It would be absurd in the extreme to come to the conclusion based on this record that the absence of actual physical injuries on the person of the Complainant coupled by the success of the Appellant and his colleagues to hide the weapons used should somehow sanitize the offence committed to one of "simple" robbery.

28. Second, the Appellant complains that there is a contradiction of the dates given by the Complainant, the Investigating Officer; and the doctor. The Appellant says that the Complainant testified that she was robbed on 28/08/2016 and went to the hospital and reported the matter to the Police on the same day. Yet, the Appellant says, the Investigating Officer testified that the report was made to the Police on 28/11/2016. Further, the Appellant says, the doctor also said that the doctor said that the Complainant was examined on 28/11/2016 and the P3 Form filled out in April, 2017.

29. I have looked at the Trial Court record keenly. The Complainant was quite categorical that the robbery and rape happened in the night of 28/08/2016. She went to the hospital and Police in the morning of 29/08/2016. In his examination-in-chief, the Investigating Officer (PW5) was as clear. I have noted that there is a statement that reads in the typed proceedings in cross-examination: "The report was made on 28/11/2016 as the offence took place on 28/08/2016." This is at page 17 of the typed proceedings. However, I have looked at the hand-written original proceedings by the Learned Trial Magistrate. She seemed to have written "11" as the month before cancelling it off and writing "8" over it. This appears to be a scrivener's error in typing. Indeed, the second phrase seems to make it clear that what was meant was 28/11/2016.

30. What about the doctor's evidence? The doctor appeared to have said in examination-in-chief that the patient went to the hospital on 29/11/2016. She, however, corrected that in cross-examination when she said that the Complainant was examined by Dr. Kanyotu on 29/08/2016. In any event, the P3 and PRC Forms are quite clear that the date of alleged rape was 29/08/2016. It is instructive that Dr. Wangechi was not the examining doctor but merely came to produce the P3 Form on behalf of Dr. Kanyotu.

31. The Appellant further complains that the circumstances surrounding the arrest of the Appellant provide proof of further contradictions. He says that PW3 claimed that when she was arrested she found Esther Wangui Muchemi (her sister-in-law) in custody and she (Esther) informed her that they (Esther and the Appellant) had been arrested with other items belonging to the Complainant. The Appellant says this contradicts with the evidence of the Investigating Officer who says that the Appellant was arrested on 13/01/2017 yet PW3 was arrested on 05/12/2016. The truth of the matter is that the supposed contradiction is merely contrived. This is what PW3 testified:

> *On 05/12/2016, Officers came and asked me for the decoder. I took them to Francis Kinyanjui and we went whether I had sold it. I found it there. <u>Later</u>, I was put in custody and I met my sister-in-law who said they had been arrested with other items belonging to the complainant.*

32. It is quite obvious that the witness is referring to a later arrest when she references meeting Esther in custody – and not 05/12/2016.

33. Finally, the Appellant complains that there was insufficient evidence to link him to the robbery. He says that no one saw him at the scene. He further says that the fact that the Complainant said that she had been raped by Francis Kinyanjui but that no evidence of rape was found by the doctor casts doubt on her evidence.

34. It is true that the identification evidence in this case was problematic because all the Court was treated to was dock identification. While the Complainant was sure that the Appellant was one of the assailants; and that, indeed, he is the one who was minded to rape her before time ran out, the Complainant was also equally truthful that she only saw the Appellant in Court for the first time after his arrest. No identification parade was carried out at all. Without any further evidence on what led to the arrest of the Appellant, the only other evidence that directly identifies him is the dock identification by the Complainant. That is not enough as our case law has repeatedly counselled. As the Court of Appeal held in ***Ajode v Republic [2004] eKLR***:

> *It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.*

35. The identification in this case amounted to dock identification and was of little value.

36. However, the Learned Trial Magistrate in this case also relied on the doctrine of recent possession to convict the Appellant. She found as a fact that two items were found in the possession of the Appellant: the blow dryer and the mobile phone. A third item, to wit, the decoder was also traceable to the Appellant as well. All these three items were stolen from the Complainant during the robbery and were positively identified by the Complainant as hers. It was therefore incumbent upon the Appellant to explain how he had come into possession of these items – and he failed to do so. It was, consequently, justifiable for the Court to presume that the Appellant was, indeed, one of the robbers and convict accordingly.

37. In ***Isaac Ng'ang'a Kahiga & another v Republic [2006] eKLR*** the Court of Appeal sitting in Nyeri stated as follows regarding the doctrine of recent possession:

> *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. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. 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.*

38. In ***Gideon Meitekin Koyiet v Republic [2013] eKLR (Criminal Appeal No. 297 Of 2012)*** the Court of Appeal stated that the doctrine of recent possession is applicable where the Court is satisfied that the Prosecution have proved the following three elements:

> *a) That the property was found with the suspect;*
>
> *b) That the property was positively identified by the complainant;*
>
> *c) That the property was recently stolen from the complainant.*

39. In the present case, there is little controversy that the blow dryer and the mobile phone were found in the possession of the Appellant. The Complainant positively identified them as some of the stolen items and even produced the receipts for them. Additional evidence is provided in the form of the decoder which can be said to have been found in within the constructive possession of the Appellant. This is because there was credible evidence by PW3 that it was the Appellant who gave her the decoder which turned out to be yet another items stolen from the Complainant.

40. This evidence of recent possession was tight and categorical enough to warrant a conviction for the offence charged.

41. Turning to the appeal against the sentence, the Appellant complains that the death sentence imposed is manifestly harsh and excessive. The Appellant protests that it was improper for the Learned Magistrate to consider as a factor that the Complainant was raped since the charge of rape was never proved. He insists that the prosecution evidence, even if believed, would only warrant a conviction of the lesser cognate offence of "simple" robbery. He therefore urges that should the conviction be upheld, the Court should set aside the death sentence and substitute it with a sentence of five (5) years imprisonment as ***Benard Gitonga Karanu v Republic [2019] eKLR*** did.

42. In the aftermath of the Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR*** the death penalty is no longer mandatory as the Learned Trial Magistrate supposed. In the ***Muruatetu Case***, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

43. The reasoning in ***Muruatetu Case*** respecting section 204 of the Penal Code (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences. That was in ***William Okungu Kittiny v R [2018] eKLR***.

44. Turning to the case at hand, I note that the Appellant, through his advocate, offered mitigation and "prayed for leniency". He was a first offender. The advocate informed the Court that the Accused was the sole bread winner in a family with five children and an unemployed spouse. In meting out sentence, the Learned Magistrate pointed out that the offence was serious; deserved a deterrent sentence; and noted that the Complainant had been robbed and raped. She was persuaded that this called for the death penalty.

45. I agree that this was a heinous and barbaric crime; one which was committed in the most inhuman way possible. In addition to robbing the victims by force and menaces, one of the members of the Appellant's gang of robbers proceeded to forcibly rape the victim and the Appellant attempted to rape her. While the count of gang rape failed for technical reasons, there was sufficient evidence to warrant consideration as a factor in sentencing that the Complainant was a victim of rape.

46. While I am not moved to prescribe the ultimate penalty of death, I must conclude that the circumstances call for the longest possible imprisonment period. In my view, thirty years is an appropriate sentence. I will therefore set aside the death sentence imposed. In its place, I will sentence the Appellant to thirty (30) years imprisonment.

47. The disposition of the case, then, is as follows:

> **a. The appeal against conviction is hereby dismissed as unmeritorious. The conviction is hereby affirmed.**

b. The appeal against sentence succeeds. The death sentence imposed with respect to each counts is hereby set aside. In its place, the Appellant is sentenced to thirty (30) years imprisonment. The imprisonment period will be computed commencing on 16/01/2017 when the Appellant was first arraigned in Court since he has been in custody since then.

48. Orders accordingly.

Dated and delivered at Nakuru this 5th day of March, 2020

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JOEL NGUGI

JUDGE