



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.78 OF 2018

JOSEPH NDUNGU MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the Judgment, conviction and sentence of Senior Principal Magistrate, Nakuru Hon. V. Wakumile in Criminal Case No.214 of 2018 Nakuru delivered on 31st August 2018.)

JUDGMENT

INTRODUCTION

1. The accused was charged with three counts of offences:
2. Count I is the offence of **robbery with violence contrary to Section 295 as read together with Section 296 of the penal code**. Particulars are that on 19th day of January 2014 at Tipis Trading Centre with others not before court and while armed with dangerous weapons namely pistols and knives robbed CN of Kshs.250, a Forme mobile phone valued at Kshs.2,500 and a Samsung mobile phone valued at Kshs.2,000 all valued at ksh 4,750 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said CN.
3. **Count two is the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006 in the alternative Indecent Act with an adult contrary to Section 11(A) of the Sexual Offences Act No.3 of 2006.**
4. Count 3 is **being in possession of Narcotic drugs contrary to section 3 (1)** as read with **Section 3 (2) (a) of the Narcotic and psychotropic substances Act No.4 of 1994**. Particulars are that on 21st January 2014 at [particulars withheld] Trading Centre in Njoro District of Nakuru County, appellant was found in possession of cannabis sativa (Bhang) to wit 9 rolls with street value of kshs 90 in contravention of the said Act.
5. After hearing the trial magistrate convicted the appellant for the 3 counts and sentence him to serve 40 years imprisonment for count 1 and 15 years imprisonment for count 2.
6. Being dissatisfied by the trial magistrates' determination, the appellant filed this appeal on the following grounds:-
 - i. That the learned trial magistrate erred in law and facts in convicting the appellant while relying on identification recognition by PW1 CNW, PW2 WWM and PW3 AWM whereas the circumstances of identification were not favourable for a positive identification.
 - ii. That the learned trial magistrate erred in law and facts in failing to appreciate that the prosecution had failed to prove its case beyond reasonable doubts.
 - iii. That the learned trial magistrate erred in law and facts in failing to appreciate that the prosecution case was insufficient, incredible doctored conjectured, fabricated and lacked probative value.
 - iv. That the learned trial magistrate misdirected himself in law, that is, he shifted the onus of proof from the prosecution to the appellant and the said misdirection occasioned a miscarriage of justice.
 - v. That the learned trial magistrate erred in law and facts in convicting the appellant whereas the records were incomplete and this

occasioned a miscarriage of justice.

vi. That the learned trial magistrate erred in law and facts in failing to comply with the clear provision of Section 169 (1) of Criminal Procedure Code.

vii. That the learned trial magistrate erred in law and facts in failing to comply with Section 200 (4) of Criminal Procedure Code.

viii. That the learned trial magistrate erred in law and facts in failing to accord the appellant a right for disclosure and this occasioned a great miscarriage of justice.

ix. That the learned trial magistrate erred in law and facts in failing to take into account and or failed to consider and or failed to give reasons why he disregarded the appellant's defense.

7. This being the first appellate court, I am obligated to reevaluate evidence adduced in the trial court and arrive at an independent determination. This I do while minded of the fact that unlike the trial court, I never got opportunity to take evidence first hand and observe demeanor of witnesses. For this I give due allowance.

8. PW1 testified that she was in PW3's house when she requested PW2's sister to accompany her outside for a call of nature; when outside they were attacked by 3 people. She testified that PW2 was held by the trouser and both of them were forced to go back into the house. She said one was armed with a knife and the other with a panga. She said they entered into the house with the two while one remained outside. She said the one with a knife had worn marvin cap but had covered from the forehead and the one with a panga had not covered his head. She said the one who held PW2 asked for PW3 while telling PW2 that he knew she was the sister to PW3. She added that the person who was holding PW2 removed a pistol when he learned that PW3 was not in the house. He said the person asked them to give him money and keys to PW3's Mpesa shop. She said he took her (PW2) to the bedroom when she said she had no money; and one remained to guard them in the sitting room. The one guarding them asked for mobile phones which they gave and ordered them to look for keys to Mpesa shop.

9. She said the one who remained outside kept brandishing the panga he had on the curtain door. She said the same person entered the house and demanded for PW3's mobile number and called her. She said that they decided to go with PW1. They got to a church opposite PW3's house and locked PW1 inside a toilet. One remained to guard her and the others went for PW2. When they came back, they said they had been set and the one who had entered the bedroom with PW2 and now guarding her entered the toilet ordered PW1 to kiss her, when she responded that she did not know how to kiss, he removed a gun, pushed her to the wall and had carnal knowledge of her.

10. When propped by the person outside the toilet to come out so that they could flee, he came out and threw PW1 across the fence; the other suspect who was armed with a panga held her. She said it is the appellant who held her across the fence. She said he agreed with the person who raped her that appellant takes her back. She said on the way appellant ordered her to lie down, when she pleaded with him, he told her she did not know how many people he had killed. He fell her down removed his trouser and had carnal knowledge of her. After the ordeal she woke up and went to the house but did not find anyone; she decided to go to her mother's house.

11. PW1 said the person who was armed with a pistol was not arrested. She said she stayed with the appellant and ran for two hours with him; that she identified the appellant well because she stayed with him for considerable time. He said he knew appellant stayed in [particulars withheld] and she knew his name as Ndungu. She said she knew his home well. She said she was seeing the other two suspects for the first time. She said she gave appellant's description and name to police and had no grudge with him. 12. In cross examination PW1 said she had known the appellant for many years; from the time they settled at Tipis in the year 2004. She said the appellant had worn marvin cap in a way she could see his face and that there was light both in and outside the house. On further cross-examination, she said she knew one man who came from Tipis but she did not know his first name. She said she gave his name but police did not record further statement. She said she saw appellant clearly at the time he raped her and was able to identify him. She said when he was at the door the marvin cap covered his face; that he was able to see the parts of the face but not as clear as at the time he raped her. She said there was moonlight and he pushed his cap backwards as he raped her. She said as he described to police, they asked her if it's the person referred to as Wa Mokorino, which she confirmed. She said the police knew him as Ndungu wa Mokorino and she also described her as such. On reexamination, PW1 said appellant was one of the two people who raped her.

13. PW2 confirmed that they were in her sister's (PW3's) house when PW1 asked her company to go out for a call of nature. She said a person suddenly held her and when she looked back, she saw the person had worn marvin cap. She said he forced her and PW1 back into the house and remained at the door. She said the appellant had a panga, which he was brandishing on the curtain door. She said they demanded money and as she pulled out drawers but got only kshs 50 which angered the one holding a knife on her neck. She requested him to call her sister but she did not pick the call. She asked another number from PW1. She was able to talk to her sister in mother tongue. She was later led to the kitchen where she stayed until her sister's daughter opened for her. She learnt the assailants had gone with PW1.

14. PW2 said that they were at the stage with PW3 CM and PW1, she saw appellant and she quickly recalled it is he who had attacked them at night and the same person who had earlier gone to PW3's shop asking when they close the shop. She told PW3 who called the police.

15. PW4 a police officer confirmed that PW1 said she knew one of the attackers when she went to report at Mau Narok Police Station. He said they recorded her statement and they asked her to go home and go back to the station the next day to record further statement. He confirmed that PW2 saw appellant while on the way to the police station and with her identification, they arrested the appellant. He said upon arrest, the appellant was searched and five rolls of bhng were found in a pack of sportsman cigarettes.

16. The appellant in his sworn defense stated that he was being victimized by OCS Mau Narok after he refused to work in his farm.

ANALYSIS AND DETERMINATION

17. The appellant argued that he was not positively identified. I wish to consider whether ingredients for the offences charged were proved. This will answer the grounds of appeal filed. Ingredients for the offence of robbery with violence are as follows:-

- i. Assailants should be armed with dangerous weapons,**
- ii. be more than one,**
- iii. presence of use of violence or threat to use violence before and after the incident.**

18. There is no doubt that from evidence adduced, that the attackers were armed with dangerous weapons, the witnesses testified that they were armed with a panga, pistol and knife. They also testified that they were 3 in number and they threatened to harm them and forcefully took mobile phones from them; PW1 and PW2 testified that the appellant was armed with a panga, which he was brandishing as they threatened them, and the other armed with a pistol. Evidence on this issue was consistent.

19. What is in issue is whether the appellant was positively identified as one of the attackers. Record show that the complainant PW1, said he had worn Marvin cap but pushed to open the face and she was able to see him using electricity lights which were in the house and outside the house. She said the appellant was brandishing a panga while threatening them in the house, she further said that the appellant pushed the Marvin cap behind while having carnal knowledge of her; that she took considerable time with her and she was able to see and recognize him as she had seen him before. She described the appellant to the police and confirmed to them that it him the person known as Wa Mokorino who police knew as Ndungu Wa Mokorino. She said she had known the appellant since 2004 when they settled in Tipis.

20. PW2 corroborated PW1's evidence by stating that she saw appellant well during the incident and she was able to identify him when he saw him at the bus stage. She said he had been to PW3's shop before the incident and asked what time they close the shop. PW2 identified the Appellant for arrest by police. PW1 and PW2's evidence of identification was unshaken. I therefore find that appellant was positively identified as one of the people who robbed the complainant and rapped her together with his college.

21. In respect to gang rape what should be proved by prosecution:

- i. More than one person having carnal knowledge of the victim,**
- ii. Lack of consent from victim.**

22. For sexual offence it is unlikely for it to be witnessed other than the victim. However, even without eye evidence, the court can still convict the accused if it is satisfied that the victim is speaking the truth. Medical evidence was shown to court and marked for identification but the prosecution failed to produce it. In my view failure to produce medical report to confirm that the victim was gang raped was fatal to count 2. For that reason appeal on count 2 succeeds. In respect to the alternative charge of indecent act, there is no doubt that the complainant adduced unshaken evidence which was not sufficiently challenged by the appellant in his defense. I therefore convict the appellant of the offence of indecent Act under section 11 of the sexual offences Act No.3 of 2006.

23. In respect to count 3, I note that no evidence was led by prosecution to prove the offence of being in possession of cannabis sativa (Bhang). appeal on that count is therefore allowed.

24. Having found that count 1 was proved; I wish to consider the sentence imposed. The appellant was sentenced to 40 years' imprisonment. I have considered the circumstances surrounding the offence. I am however of the view that the sentence imposed is on the higher side and I am inclined to reduce to 20 years' imprisonment.

25. In so far as alternative charge to count 2 is concerned, the appellant is sentenced to 3 years' imprisonment.

26. FINAL ORDER

- 1. Appeal against conviction in respect to count 1 dismissed.**
- 2. Appeal on count 2 is set aside and appellant is convicted of the alternative charge of indecent act with an adult c/s 11 of SOA.**
- 3. Appeal on count 3 is allowed.**
- 4. Sentence reduced to 20 years' imprisonment and 3 years for alternative charge to count 2**
- 5. Sentences to run concurrently from the date the appellant was sentenced in the lower court.**

Judgment dated, signed and delivered at Nakuru via zoom This 30th day of April 2020

In the presence of:

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RACHEL NGETICH JUDGE

Schola - Court Assistant

Appellant in person

Rita Counsel for the State