REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 20 OF 2018

ARNOLD NYONGESA WANYONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in original Kimilili SPM'S

Court ***case number 1589/2013 delivered on 2.5.2018 by Hon D.O.*** Onyango***. SRM)***

J U D G M E N T

The appellant Arnold Nyongesa Wanyonyi was charged in the Magistrates Court with 2 counts. **COUNT ONE**, **Robbery with Violence Contrary to Section 295 as Read with 296(1) of the Penal Code.** *Particulars of offence being; that on the night of 24th day of November 2013 within Bungoma County being armed with offensive weapons namely pangas and robbed **LNN** one sack of 90kgs dry maize, three iron sheet, one mobile phone make Techno, six kgs of dry beans, one black hen and one kilogram of sugar all valued at Kshs.4,400/=*

COUNT TWO appellant **Arnold Nyongesa Wanyonyi** was charged with offence of Gang Rape Contrary to Section 10 of the Sexual Offence Act No.3 of 2007(2006).Particulars of the offence being; *that on the 24th day of November 2013 within Bungoma County in association with others not before court intentionally and unlawfully caused his penis to penetrate the vagina of **IWB** without her consent.*

The evidence before the trial court briefly was that PW1, LNN on the 24/11/2013 was asleep in her house when she heard a sound outside. The door was hit and she heard her daughter IW who was in the sitting room screaming ***''Mama majambazi***". She tried to rise up but they had already reached her and told her to lie while facing down. They took her phone, wimbi sacks and started offloading maize. She testified that she was able to see two of the faces during the robbery as they had a torch that they used to see the maize sacks. She testified that they took three iron sheets, beans, maize and Techno phone. They took her daughter outside and raped her and when they left she ran to the clan elder who called police officer from Mbakalo. She took her daughter to Naitiri Hospital for treatments at 9am. She testified that she had seen two of the suspects during the robbery and that the accused is one of the attackers is a neighbour and she managed to see his face when they attacked.

Pw2 IWB a daughter to PW1 testified that on 24/11/2013 at around 3 a.m. Arnold came to their house. She tried to scream but was ordered to keep quiet. She testified that Arnold was with others and they were armed with Pangas and rungus. She recalled that they got into

the house and ordered her to give them her cell phone. She testified that she identified two of the thugs that is Aron and Chinga. She was removed from the house and Aron and Otinga removed her clothes and raped her. She testified that they were using torches to see her nakedness, she stated appellant was the first person to rape her and they did not use protection. Her mother escorted her to Naitiri Hospital. She testified they reported to Mbakalo Police Station. She testified that they notified the chief and while in the company of chief they saw accused hiding in video show room at Mitua and he was arrested.

On cross examination she testified that the incident occurred at around 3am to 5am and the thugs had torches and they were flashing the torch on and off. She testified that the accused is a distant relative and during the attack he had a red marvin.

PW3 John Kisindoe testified that he is a clinical officer and used to be based at Naitiri Sub County hospital. He testified that he filled a P3 form on 26th November 2013 for the complainant who had history of having been sexually assaulted. He testified that she had tenderness on the thigh and she had vaginal discharge. He approximated the age of injury to be 72 hours. He testified that she had infection. He signed P3 form and produced the same as exhibit 1. **Pw4 No.81451 Pc Muniu Mburu** attached to Kimilili Police station, testified that on 24/11/2013 while at Mbakalo Police Station one Barasa Kwarado reported that he had been attacked at his shop.

He testified that when visited the scene he received report from a lady that she had equally been attacked and she narrated to him that several items had been stolen and her daughter Irene raped. He testified that on 26/11/2013 I identified one of the men who had attacked and reported to the Administration Police who had the man known as Arnold arrested.

After close of prosecution case the appellant was found to have a case to answer and was placed on his defence. The appellant gave sworn evidence calling no witness. He testified that on 23/11/2013 on a Saturday he had come from music practice. On 25th November 2013 he went to school and came back. He recalled that on 26th November 2013 he went to the market having been sent by his grandmother and while on his way back he met PC Korir. P C Korir asked him to accompany him to Mitua AP camp where he met the complainant. He testified that he was transferred to Mbakalo Police Station and on 27th November 2013 he was arraigned in court.

It is upon the above evidence that appellant was found guilty, convicted and sentenced 35 years imprisonment in count one and 20 years imprisonment in count two the sentence to run concurrently. The appellant being aggrieved by conviction and sentence filed this appeal on the following grounds;

i. That the trial magistrate erred in law and fact by convicting and sentencing Appellant to imprisonment without considering the evidence of appellant.

ii. That the trial magistrate erred in law and fact by convicting and sentencing the appellant without considering evidence of prosecution was inconsistent.

iii. That the trial magistrate erred in law and fact by failing to consider appellant defence and sentencing the appellant to 35 years of imprisonment.

iv. That the trial magistrate erred in law and fact by relying on speculative evidence.

v. That the trial magistrate was generally biased and the IO did not conduct the parade for identification.

Mr. Nyakibia for the state opposed the appeal and submitted that identification of the accused by the complainant was positive as he was well known to the accused. He submitted on penetration that evidence of PW1 was clear on penetration and consent was not obtained and the appellant used force and threat. He submitted on sentence that the trial court considered all aspects and therefore the sentence was proper.

From the evidence on record this court should determine whether;

1. The ingredients of robbery with violence were proved against appellant.

2. ***Whether the appellant committed the offence of rape***

This being a first appeal, the court is required to examine all the evidence tendered before the trial court, analyze it and arrive at its own conclusions *see* ***Kiilu v Republic (2005) KLR 174***. This court will of course bear in mind that it did not see the witnesses in order to weigh their demeanor.

I have now considered the grounds of appeal, the rival submissions on record and the evidence adduced in the trial court. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of **Oluoch v Republic (1985) KLR** where the court held:

"***Robbery with violence is committed in any of the following circumstances***:

(a) The offender is armed with any dangerous and offensive weapon or instrument; or

(b) The offender is in company with one or more person or persons; or

(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person……"

The appellant filed written submissions in support of the grounds of appeal. He submitted that PW 1 had difficulty in identifying the attackers as the light from the torch would not have been sufficient and that her identification of the accused was dock identification. Further the trial magistrate failed to warn himself of the danger of identification when conditions are difficult and that the prosecution evidence did not place him at the scene of the offence.

The appellant submits that on the second count of rape, the PW 2 did not produce treatment notes, no evidence of post-rape care treatment to show that she was raped and that the evidence of PW 2 did not indicate the names of the persons who raped her as she did not give names to the police when she first reported. He submitted that there were many material contradictions in the prosecution evidence particularly on the time the offence occurred, whether it was at midnight or 3 a.m. He submitted that the prosecution did not prove its case and finally that the sentence meted out was excessive in the circumstances.

M/s Nyakibia for the state opposed the appeal. She submitted that the complainants identified the appellant by recognition. That on the charge of rape there was evidence of penetration and lack of consent by evidence of use of force. Counsel for the state finally submitted that

the trial court considered all the aspects of the case and the sentence imposed was proper.

The Appellant was charged in court with the offence of Robbery with Violence Contrary to Section 296(2) which states: -

> ***"Section 296(2) (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

The elements of the offence of Robbery with Violence which the prosecution must prove were set out in **Oluoch Vs Republic (1985) KLR 549** where the court stated: -

> ***i) It is sufficient to prove the charge if the prosecution proves any one of the following modes: -***
>
> ***a) If the offender is armed with any dangerous or offensive weapon or instrument.***
>
> ***b) If the offender is with one or more persons OR***
>
> ***c) If at or immediately before or immediately after the time of such robbery, the offender wounds, strikes or causes any other personal violence to any person.***

The prosecution has, therefore to lead evidence to prove any of the three ingredients of the offence and more importantly prove that the accused is the one who committed the offence. **PW 1 LNN** testified that the people who entered into her house were three in number, they were armed with a panga, a dangerous or offensive weapon and one placed a panga on her neck, threatening to inflict injury on her. This evidence shows that not one but all the elements of robbery were established. Further, PW 1 testified that they took away 3 iron sheets, beans, maize and techno mobile phone which was the object of the robbery.

The main issue raised by the appellant in this appeal is that he was not positively identified because the conditions for positive identification did not exist and secondly, that the complainants did not give his name as the robber to the authorities at give a description of the robber. The evidence of PW 1 on this issue was as follows: -

> ***"I heard my daughter in the sitting room crying, screaming "Mama Majambazi". My daughter is called IW. When I tried to rise, they had already reached me and they ordered me to lie on the maize sacks and I was to lie while facing down. They took my phone. The attackers were three, I obeyed then one stood on the bad and placed a panga on my neck. They picked wimbi sacks and poured it down, they started offloading maize. As they did so I peeped and saw two of the faces, one I did not know. They had a torch which they used to spot the maize sack. I knew Haron Odinga. They took three iron sheets, they took beans, maize and phone Techno. They took my daughter outside and raped her. She had an infant aged 4 months when they came out I ran to the clan elder who telephoned the police officer Mbakalo. When I went back home and after a short while my daughter said they had raped her. The police advised that she be taken to hospital. I took my daughter to Naitiri Hospital where she was treated. I took her at 9 a.m. afterwards the chief asked me if I knew the suspects and I said I had seen two. We went to Mitua police station where I said who I had seen. Those people had pangas and rungus. They were threatening to use a gun though I did not see it. The accused in the cock is one of three who robbed me and raped my daughter. He is a neighbor and I managed to see his face when they attacked."***

On being cross-examined by Kituyi Advocate for the appellant the witness said: -

> ***"They ordered me to lie facing down. I was lying facing the floor but I would see forward. When facing down you cannot see upwards.***
>
> ***The assailants had a torch. My house is 2 room. I sleeps in the sitting room while I slept in the bedroom. The attackers were three when they entered they had covered their face with caps. One of them was wearing a black jacket and red T-shirt with sports. The other wore a coat and scarf and red cap. I would not see the third one who was ahead of me I only saw those who were collecting the maize. I did not tell the police how they were dressed. The accused is a neighbor. I how him as Haron Odinga.***
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> ***I told the police I knew the attackers although I did not tell them the names. We have no grudge with the accused. He gave Haron's name to the police. I was not called for identity parade."***

PW 2 IWB the complainant in count 2 in her evidence stated: -

> ***"They had ordered me to give them my cell phone. They saw the cell phone on the table and picked it. I identified 2 of the thugs. The two were Haron and otinga. The cell phone was make Techno red in colour. When I had tried to scream they had threatened to shoot me. My mother was isolated from where I was in the sitting room. I did not know what went on in her room. The techno cell phone as my mother's. I had a skirt and top. I also had an inner wear. Haron and Otinga removed my clothes.***
>
> ***Otinga was the first, Haron then followed and the other who was not known to me. Otinga's real names are Arnold Nyongesa. Otinga is name we use to refer to the accused person in the dock.***
>
> ***Court: Accused person identified.***

Before they raped me the accused ordered me "Lala Chini tukutombe". They threatened to cut me using a panga. After raping me they escorted me to the sitting room. They had ordered me to lie face down and then raise my waist."

Upon being cross-examined by counsel for the appellant, she stated: -

"There is a kitchen detached from the main house. I identified Otinga and Haron. The accused is also known as Otinga. His real name is Arnold Nyngesa.it is the accused who took my child as we headed to kitchen. Aron is not in court. I was lying down facing the wall. I was being raped while partly lying down. I identified the accused during the rape incident. I could see every time. I turned my neck. The accused picked my child because he was crying. It is the accused who raped me before Haron took over. While raping me Haron was holding my child. It is the accused who had red marvin. I never attended any identity parade."

The question of positive identification or recognition of an offender is an important one in criminal proceedings for two reasons. First, guilt is assigned to a person and two punishment is meted out to an offender to achieve the objectives of punishment.

In **Anjononi & Others Versus Republic (1989) KLR 59** the court held: -

"***The proper identification of robbers is always an important issue in case of capital robbery emphatically so in a case like the present where no stolen property is found in possession of the accused. Being night time the condition for identification of the robbers in this case was not favourable. This was, however, a case of recognition not identification of assailant's recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

The evidence of PW 2 Irene is that she knew the appellant before. In fact she testified that her uncle married the mother of the appellant which therefore, makes him her cousin. She had known him and seen him at M shopping Centre. The evidence is, therefore, of recognition of a person known to her both by appearance and name. Even when the prosecution case is based on recognition, there is need to ascertain that conditions favouring positive recognition were existent. In **Maitanyi Vs Republic (1986) KLR** the Court of Appeal said: -

"It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into."

The evidence of PW 1 is that assailants were having a touch and that the assailants who entered her room wee three and that they had covered their face with caps. It is, therefore, evident that she did not identify or recognize any of the assailants.

PW 2 I testified that she was able to recognize the appellant as one of the persons who raped her. She was able to do so from the torch light they had. She informed the mother PW 1 that she had identified 2 of attackers. She testified that she gave the same information to Sylvester, their neighbour and also to police. She testified that she caused him to be arrested by police from a video place.

The only police officer who gave evidence is **PW 4 PC Muniu Mburu** who testified that the complainants made a report of having been attacked by people they knew by appearance. They did not give the name of the assailants.

In **Maitanyi Vs Republic** (supra) the Court of Appeal stated: -

"there is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to police."

In this case, PW 4 testified that the complainants did not give the names of the attackers. Indeed they said they only knew them by appearance. It appears that a similar report was made to the Administration Police Officers who arrested the accused. They testified that the matter was also reported to a clan elder who telephoned police at Bamalo. Neither the clan elder or arresting officer nor the neighbour Silvester was called to testify and indicate if the complainants gave the names of the suspect. These were crucial witnesses for the prosecution to testify that the complainants informed them that it is appellant was among the robbers. The rationale for requirement to give description of the assailant to the authorities is to ensure that there is consistency in the impression of the assailant in the mind of the complainant. Where the complainant alleges that he knew the accused before and recognized him as the assailant, failure to give the description or name to the authorities unless explained raises a doubt as to their identification or recognition accuracy. In the circumstances of this appeal, I agree with the Court of Appeal observation in **Toroke Vs Republic (1987) KLR 204** where it observed: -

"It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So the error or mistake is still there whether it be a case of recognition or identification."

Analyzing the whole evidence before the trial court, I am satisfied that there were gaps in the prosecution case which severely affected its evidence, against the appellant.

I find that the conviction on the 1st Count of Robbery with Violence under Section 296 (2) of the Penal Code and on Count 2 of Gang Rape contrary to Section 10 of the Sexual offences Act was not proved beyond reasonable doubt.

I allow the appeal on both counts. I direct the appellant **Arnold Nyongesa Wanyonyi** be set at liberty unless lawfully detained.

Dated, signed and delivered at Bungoma this 18th day of June, 2020.

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S N RIECHI

JUDGE