REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CRIMINAL APPEAL NUMBER 66 OF 2016

ROBINSON MOGAKA OBARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from a Judgment dated 4/4/2016 by Hon. W. Kagendo (CM)

in Molo Chief Magistrate's Court Criminal Case Number 2521 of 2014)

J U D G M E N T

1. As the day of 9th September 2014 turned over, NWW was sleeping with her daughter in their house within Elburgon Hospital. N ran an MPESA shop within Elburgon Township.

2. About 1.45 a.m. she heard knocks on her door, the third knock forced the door open. She had picked her phone to call the hospital guards but none of the calls was getting through. At the time the persons banging the door entered, someone was calling her back but the phone was snatched from her. They found her in the bedroom. She tried to fight against their entry but they over powered her, one man entered the bedroom armed with a torch and a panga, grabbed her by the neck and gave her only two (2) choices, her money or her life. Though the bedroom lights were on, she never got to look at this man's face, she was in shock and confused. She could not recall where the money was but luckily, while she frantically rummaged through the children's clothes, some Kshs. 20,000/= she had kept there fell out. The person holding her by the neck took it. Two other men came into the room. She did not look at them. They spoke to him but he did not respond. They went back to the sitting room. The strangler remained. He ordered her to turn around and bend, which she did, and he raped her. He finished then ordered her to get under the bed. She did. He left. As she lay there she heard them disconnecting her electronics. About ten (10) minutes later she heard her child scream. She went to console her child.

3. The robbers had left with her Panasonic radio, hoofer, four (4) speakers and DVD player, her three (3) phones, and the money. She went out of her house, only to see some people coming. Thinking they were the robbers, she screamed but learnt it was the security guards. Her neighbours Eunice and Hellen took her to Elburgon Nyayo Hospital. She was treated, placed on Anti-Retroviral's (ARVs), and samples taken for laboratory reports. The strangler had pulled her braids causing her injury, she had injuries in her private parts due to forceful penetration. Two weeks later, she learnt that some suspects had been arrested and the Panasonic radio, DVD player and speakers recovered. She later identified the exhibits in court.

4. That same night about 2.00 a.m. the report was made at Elburgon Police Station, and PW3 No. 66325 Cpl Charles Ndelwa, the OCS CIP Raburu went to the scene, through some side paths on foot. About 300 meters from the staff quarters they met four (4) people carrying electronic goods, ordered them to stop. They did not, and ran into a nearby maize plantation. They shot in the air but the four did not stop. They dropped two (2) small LG speakers, two (2) Panasonic hoofers, one (1) Golden radio, one (1) LG DVD and a small Somali sword.

5. When they got to Elburgon Hospital staff quarters, they found the complainant, staff, and security guards. She narrated her ordeal. They told her to go to hospital. While there, PW4 Newton Kuria who was a watchman told them that he heard the complainant screaming, rushed to the scene, saw four men leaving the house, threw a stone at them and some dropped their stolen loot.

6. On 18th September 2014 at 9.30 p.m. Cpl Ndelwa was at the police station when he received a report that two (2) people were being attacked by a mob near Elburgon Nyayo Hospital. He went there with other officers and rescued them took them to hospital. The two (2) were Robinson Mogaka Obara alias "Chali" and Richard Karanja Maina alias "Stingo". The two (2) were admitted at the hospital. While undergoing treatment, Newton Kuria told the police that he had recognized one of them, Robinson, to be one of the robbers who had robbed N on 9th September 2014. That Nicholas told the police that he had identified the said Robinson as the Kisii man who lived not far from the hospital and recognized him because on the night of the robbery he had remained behind.

7. On the strength of this statement PW3 charged the two (2) with the following offences:-

COUNT I

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE

(1) ROBINSON MUGAKA OBARA (2) RICHARD KARANJA MAINA

On the 9th day of September 2014 at Nyayo Hospital Staff Quarters – Elburgon in Molo District within Nakuru County, jointly with others not before court being armed with dangerous weapons (swords) robbed NWW of her cash Kshs. 20,000/= (twenty thousand shillings only), two mobile phones, four radio speakers, a DVD player and a radio all valued at Kshs. 45,800/= (forty five thousand eight hundred shillings only) and at or immediately before/immediately after the time of such robbery assault and raped the said NWW.

COUNT II

GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT NO 3 OF 2007/2006

(1) ROBINSON MUGAKA OBARA (2) RICHARD KARANJA MAINA

On the 9th day of September 2014 at Nyayo Ward Hospital Staff Quarters - Elburgon in Molo District within Nakuru County, in association with others not before court intentionally and unlawfully caused his penis to penetrate the vagina of NWW.

8. During the trial, the court heard two (2) other witnesses. PW2 was Dr. George Biketi from Elburgon Nyayo Wards Hospital. He filled Naomi's P3 on 16th June 2015 though the history was that she was attacked and raped on 9th September 2014. He relied on the treatment documents issued on 9th September 2014 which showed she had sustained soft tissue injuries, on her head due to the pulling of her braids, blood stains, not from periods. The patient told him that the incident had affected her psychologically hence her decision not to pursue the P3 at that time.

9. Newton Kuria testified as PW4. This witness was only availed after a warrant of arrest was issued against him. The record shows that when he testified on 9th November 2015, he was in custody. He testified that he had moved from Elburgon, and was now working in Gilgil. That on 9th September, 2014 he was on duty at 2.55 a.m. when robbers attacked the staff quarters. He received a call from one member of staff by the name Joyce who told him that the robbers were at W's house. At this time he and his colleague Solomon were at the wards. The staff quarters were about 50m from the hospital and in under 2 minutes they were at W's house. As they reached there, the thugs were leaving the door. To his mind, they heard him and his colleague coming but from Naomi's testimony we know that that was not so. They were too late. He testified that he was armed and threw a stone at the thug who was carrying the DVD player. He dropped it. He recognized this thug. In his own words he said;

> *"It was Robinson. He is a neighbour to the hospital. I had met him in Kaloleni. I had not known him for long but I knew him as a neighbour. I was able to recognize him as we were close to each other. I did not know his full names then. He is accused 1 in the dock. There was moonlight that night. We also had torches. That is myself and Solomon. Each of us had a torch. My torch was on. I pointed it towards the people and that is how I saw accused 1. I recognized his features. Accused 1 dropped his DVD (MFI 1 identified). Accused and I ran off. I then went into W's house. We took W to hospital, Elburgon hospital. As we took W to hospital we heard the sound of gun shots. This was from the direction of Michinda Secondary School. This was ten minutes after the encounter with the thugs. After the while some police officers came with other items that they had recovered. They said the fleeing thugs had dropped the items. I went to continue with the patrols. I cannot identify the sub hoofer I saw that night. I did not bother much with the policemen. I did not even check how many policemen came to the hospital. On 18/9/2014, some 2 people were brought to hospital (Elburgon). They had been attacked by a mob. It is policemen who brought the two suspects. I identified him as one of those I had seen on the night of the robbery at W's house. "*

10. The prosecution closed its case and the trial court found that the two (2) had a case to answer. They were each put on his defence. In his sworn statement of defence, accused 1 told the court that on 18th September 2014 he was involved in a fight after a pool table game went awry. He was taken to hospital, only for him to be picked from the hospital by police officers and to be charged with this offences. Accused 2 made an unsworn statement of defence. He has testified that he was involved in a pool table fight and was taken to hospital by four (4) police officers. He was later arrested from that hospital and brought to court and charged with these offences.

11. In the judgment delivered on 4th April, 2016, the trial court acquitted the 2nd accused of all charges and found the 1st accused guilty of the offence of Robbery with Violence Contrary to Section 296(2) of the Penal code. The court found that the charge of gang rape had not been proved. The 1st accused was sentenced to death.

12. Aggrieved by both the conviction and sentence he filed this appeal on the following grounds together with his written submissions:-

1. *THAT, the learned magistrate erred in law and facts by awarding death sentence but failed to consider the Supreme Court's recent developments, IN FRANCIS KARIOKO MURUATETU AND ANOTHER, which gave courts discretion in sentencing. Thus the appellant prays for sentencing and re-hearing.*

2. THAT, the learned magistrate erred in law and facts by relying on the evidence of IDENTIFICATION by PW4 without considering that the prevailing circumstance at the scene of crime was not favourable for a positive identification.

3. THAT, the learned trial magistrate erred in law and in fact by holding that, the defence of robbery with violence contrary to section 296[2] of the penal code was proved, but failed to note that no evidence either circumstantial or direct connected the appellant to this offence.

4. THAT, the learned trial magistrate erred in law by dismissing the appellant's defence of alibi without giving an objective analysis to test whether it was truthful.

13. At the hearing of the appeal, the appellant was unrepresented. He relied wholly on his Amended Grounds of Appeal and his written submissions. He raised four (4) grounds:-

On the first one he faulted the trial court for sentencing him to death. Citing the trial court's judgment;

"The accused person is hereby sentenced to death as by law provided. The court noted that, accused has not sought forgiveness. The offence was enhanced by the brutal manner which (sic) the complainant was even raped."

14. He submitted that this revealed the trial court's bias against him because in the first place the charge of gang rape had not been proved and he had been acquitted of the same.

15. He also faulted the trial court for its failure to follow the Court of Appeal holding in **Godfrey Ngotho Mutiso v Republic** that the death sentence was only the available sentence in this case, quoting the passage.

"… That while the Constitution itself recognizes the death penalty, as lawful it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be recorded…"

He noted that this decision was upheld by the Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR.**

16. He also challenged the evidence on identification. That the trial court relied on the evidence of a single witness PW4, yet that evidence was unreliable, and the trial court despite warning itself, did not test the evidence as required. He relied on the passage from **Abdallah bin Wendo v Republic [1953] 20 EACA 166** cited in **Peter Kifue Killu v Republic [2005] eKLR**.

"Subject to well-known exceptions, it is trite law that a fact may be proved by the 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 favoring 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 a single witness can safely be accepted as free from the probability of error."

17. He also cited the passage from **Roria v Republic [1967] EA 573**

"A conviction resting entirely on identity invariably causes a degree of an easiness that, danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that, in all the circumstances it is safe to act on such identification."

And the England Case of **Republic v Turnbull & Others [1976] 3 All ER 549.**

18. The third ground was that none of ingredients of Robbery with Violence had not been proved. He relied on **Johana Ndung'u v Republic [1996] eKLR** where he Court of Appeal set out the said ingredients;

"1. If the offender is armed with any dangerous of offensive weapons or instruments or

2. If he is company with one or more other persons

3. If, at or immediately after the time or robbery, he wounds, beats, strikes or uses any other violence to any person."

19. Finally, that his defence was not considered that he had a right to be presumed innocent until proven guilty, and the onus was on the prosecution to prove his guilt, not him to prove his innocence.

20. He submitted that the investigating officer never investigated the case. That the investigating officer's testimony that he had an "alias" name of "Chali" and that he had been lynched by a mob due to his criminal activities were allegations, as no one had recorded a single statement or complaint against him prior to his arrest on 18th September, 2014. That the prosecutor's reliance on mere suspicion could not stand in the light of the holding in **Sawe v Republic [2003] eKLR.** He urged the court to quash the conviction and set the sentence aside, allow his appeal.

21. In opposing the appeal, the state was represented by Ms. Mwangi. She submitted that the prosecution had proved its case beyond a reasonable doubt, she conceded that the complainant did not identify any of her attackers. She relied on the evidence of PW4 submitting that he recognized the appellant as one of the robbers, that there was moonlight and he had a torch, that he knew the appellant prior to the robbery

and he was not a stranger to him.

22. That the appellant in his defence did not tell the court where he was on 9th September 2014, and did not deny committing the offence.

23. Regarding his sentence and the application of the **Muruatetu Case** to his case, counsel argued that the appellant had mitigated before the trial court, the mitigation was considered together with the fact that he had not asked for forgiveness. That the trial court had considered the totality of what had happened to the complainant during the robbery, and the appellant deserved the sentence meted to him.

24. The issue for determination is whether this appeal has any merit. To arrive there, we must answer the questions; whether ***the offence of robbery with violence was proved,*** whether ***there was proper identification of the appellant***, and on the sentence, whether ***the trial magistrate had any discretion to give any other sentence upon conviction of the appellant on 4th April, 2016***.

25. The duty of the first appellate court is expressed in the case of **Okeno vs Republic (1972) EA 372** thus;

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."***

26. It is not in doubt that on the night of 9th September 2014 the complainant herein was attacked by people who robbed her and one of whom raped her. It is also not in doubt that she never identified any of the attackers. It is also evident that the she was taken to hospital the same night for treatment but though samples were taken for DNA, that was never followed up. It is also on record that the offence had such dire psychological effect on her that she left the area and never pursued the P3 form for purposes of prosecuting the perpetrators. She was reluctant to prosecute.

27. It would not serve the justice of this victim if I do not call out the conduct of the prosecution with regard to the manner in which they treated her reluctance to come to testify. It brought to sharp focus the attitude of the criminal justice system that a complainant is first a witness to the crime, for the state to get its conviction, yet, it is so clear that a victim of a crime is first and foremost a victim who requires all the support she needs to enable her cope with the trauma of the evil visited upon her, and then to come and testify. In this case, the court prosecutor asked for the victim to be arrested. She submitted;

> ***"The complainant has been uncooperative. I pray that warrant of arrest do issue to the complainant."***

28. The magistrate proceeded to issue a Warrant of Arrest for the complainant on 28th May 2015. On 12th June 2015, the complainant was in court. The prosecutor told the court;

> ***"The complainant is here. She has refused to cooperate."***

This compelled the complainant to tell the court that, she had moved to Lodwar and that she was still interested in pursuing the case. The court then ordered her to have the P3 completed on that day, and fixed the case for hearing.

29. Here was a complainant, a woman who had been robbed and raped, forcing her to flee from town, here was a prosecutor who did not want to know why this poor lady was reluctant to proceed which the case. A complainant who knew she had not identified any of the robbers, or the thug who had raped her. She had suffered trauma. The prosecution had not kept nay tabs on her to know her state of mind or whether she had received the requisite psycho-social support she needed to enable her appear in court to testify. There is nothing on record to show that the prosecutor ever engaged her on this issue, or whether she was made aware of the fact that she could withdraw her complaint if she did not wish to press charges. Neither the court nor the prosecutor sought to know from her why she had never pursued the P3 report. As the victim, she deserved better.

30. So, were the ingredients of robbery with violence proved? The answer must be yes. The evidence is there that the complainant was attacked, robbed and raped on 9th September 2014.

31. Was the appellant one of the robbers?

32. It is evident that the trial court did not interrogate the PW4's testimony.

33. The first eye witness to the crime was the complainant. As already noted she did not identify the robbers.

34. The second witness is PW4 whose evidence was that on the material night of **9th September 2014** he recognized the appellants one of the robbers but did not know his name; until the **18th of September 2014** when the appellant was admitted in the hospital on allegations that he and his co accused were beaten by a mob on account of their criminal activities. His evidence begs many questions. First, he never told the police about this when they met at the scene of crime, immediately after confronting the robbers. His testimony becomes doubtful because he described the appellant as the Kisii man who lived near the hospital. If he knew this on the 9th why did he not tell the police? His excuse that at that time he had lost his mother, and was engaged in the funeral and, did not remember to tell the police is not believable. He was on duty that night as a guard. He went after the robbers. He escorted the complainant to hospital. Why would he not reveal the identity of the robber he saw to the police, the neighbours who had come out or even the complainant that night? On the 9th September, 2014, this is

what he told the police,

> "*One of the hospital night guards called Newton Kuria told us that he had heard the complainant screaming. That he had rushed to the area near the complainant's house. That he had seen the 4 leaving and he had thrown a stone at them and they had dropped some of the stolen loot."*

If it is true he had recognized one of the robbers, he would have mentioned it here. He did not and that is why his story is unbelievable. Look at his evidence on how he knew it was the appellant he said, *"I recognized his features"*, which he did not describe. He knew his home ***"He was living in Kaloleni Estate next to the hospital."*** He never told the police this on the night of robbery; He said he was close to him when he saw him yet he said as they approached the house he saw the robbers leaving and threw a stone, one dropped the DVD he was carrying. How far was he? How long did he have his eyes on him?

On cross examination he said;

> "*I did not tell the policemen that it is a Kisii man who had robbed Wanjiku. I decided to confirm your residence and full names first. I knew you and where you used to live. That night I did not tell the policemen about you as we got involved in many things. I had seen you a couple of times before that time. I also knew you. I did not know the work you do. On 9/9/2014, I was able to see what is going on. Then I identified you on 18/9/2014."*

35. He continued to say that he followed the robbers for 50m, that he saw appellant well when he jumped over the fence, that he was 6m away when he saw him jump over the fence. He did not record a statement until the appellant was arrested on 18th. His second recognition is suspect and in any event he was a reluctant witness until he was arrested

36. Applying the test in **Peter Kifue Kiilu**, what other evidence, either circumstantial/direct did the trial court have to support the identification? The appellant was not found with any of the stolen goods, none of the other witnesses placed him at the scene. It was at night. If the PW4 had to throw a stone at him, he could not have been that close and if he was following him it means he had his back to him.

37. On cross examination PW3 the investigating officer testified that he had received reports about the appellant which he had interrogated. However, he did not provide any evidence of that, not a single OB number. This was contradicted by his own testimony that in the two (2) years, one (1) month he had been in Elburgon, he had not seen the appellant at the police station. The only other independent evidence was that the residents *"generally were saying that [he] [was] involved"* in the robbery. None of those residents recorded a single statement, not even the mobsters alleged to have beaten up the appellant on allegations of being a criminal.

38. The trial court rightfully pointed out the lack of investigations, though specimens were taken from the complainant, none were taken for DNA, which would have been matched with the suspect's DNA to confirm whether he had committed the offence.

39. The police did not even check the complainant's house or the recovered items for finger prints, yet that too could have assisted them in determining who was at the scene that night. This way of conducting investigations has been passed by time, or as we say, "*imepitwa na wakati"*. If police are to nail criminals, then they need to up their game and bring evidence that is capable of proving the case beyond a reasonable doubt.

40. The words of the Court of Appeal in **Maitanyi v Republic [1986] eKLR** ring true to the case at hand:

> ***"In this case there is no other evidence, circumstantial or direct. The decision must turn on the need for testing with the greatest care the evidence of this single witness. Is that what the courts below really did. 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 its 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… 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 the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters."***

41. There was no testing of the evidence of PW4 as the sole identifying witness and his testimony failed all the tests. There was sufficient doubt as to the identification of robbers.

42. I have considered the submissions regarding the sentence. The trial magistrate could not have applied the case of **Godfrey Ngotho Mutiso** because the Court of Appeal had clearly stated that what they had pronounced was specific to the offence of Murder. Nevertheless, the appellant was justified to complain about the trial court's use of the charge of gang rape as an aggravating circumstance yet the same was not proved.

43. While there is evidence that the complainant was robbed and raped, the prosecution failed to prove that the appellant was one of the robbers.

44. Going by the holding in **Roria v Republic [1967] EA 573** the trial court was in error to rely on the uncorroborated evidence of a single witness. The conviction was unsafe, the same is quashed, the sentence set aside and the appellant set at liberty unless otherwise legally held.

Delivered, Dated and signed at Nakuru this 12th day of June, 2020.

Mumbua T. Matheka

Judge

In the presence of; VIA ZOOM

Edna Court Assistant

For state Ms Wamboi

Appellant present