REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HCCRA NO.73 OF 2018

JOHN MACHARIA MUCHIRI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with two counts of offences. Count 1 is the offence of **Robbery with violence contrary to Section 295 as read together with Section 296(2) of the Penal Code.** Particulars are that on the 9th of February 2014 at Nakuru County accused jointly with others not before Court being armed with dangerous weapons namely pangas, they robbed **PWN** of items listed in the charge sheet.

2. In the second count the appellant was charged with the offence of **gang rape contrary to Section 10 of the Sexual Offences Act**. Particulars are as stated in the charge sheet.

3. The appellant denied the two counts. The case proceeded for hearing with the prosecution calling 5 witnesses. The appellant elected to adduce unsworn evidence and availed one witness. He was found guilty of the 2 counts and sentenced to 30 years' imprisonment.

4. The appellant was found guilty and convicted for the two counts. Being dissatisfied and aggrieved by the decision of the trial Court, the appellant filed this appeal against both conviction and sentence on the following grounds: -

i. That the trial magistrate erred in fact and law by failing to appreciate the appellant was not afforded the right to mitigate.

ii. That the trial magistrate erred in fact and law by relying on identification evidence whereas circumstances of identification was not favorable for positive identification.

iii. That the trial magistrate erred in fact and law by failing to appreciate that there was no description given in the initial report to police whereas it was alleged that PW1 and PW2 identified the appellant.

iv. That the trial magistrate erred in fact and law by failing to appreciate that no documentary evidence was tendered in court supporting PW1 and PW2 identification.

v. That the trial magistrate erred in fact and law by failing to take into account the appellant's plausible defence.

vi. That the trial magistrate erred in fact and law by failing to resolve material contradictions inconsistencies in favour of the appellant.

vii. That the trial magistrate misdirected himself and shifted the onus of proof to the appellant contrary to the law.

viii. That the trial magistrate erred in fact and law by failing to appreciate that critical witnesses were never called by prosecution thus remains own proved.

ix. That the trial magistrate erred in fact and law in admitting evidence which was inadmissible in law.

5. In his oral submissions, the appellant submitted that no exhibit was recovered from him and that he does not know anything about the offence.

6. In her response **Ms. Rita Rotich** for the state submitted that the appellant was identified by PW1 who stated that she put on solar panel at the time of the robbery and she was able to see the appellant. She further stated that the suspects had torches on during the robbery and PW1 identified the appellant as the person who raped her repeatedly during the attack. She stated that the bruises found by the doctor around the genitalia and anus confirmed that PW1 was raped. She submitted that PW1 stated the light from PW1's torch was very bright and it enabled her to identify him; further that the appellant was arrested upon identification by the complainant and her son.

7. In a rejoinder the appellant stated that when PW1 went to police station, she never said she knew the appellant but when she came to Court, she said he knew him. On arrest, the appellant said he took himself to police station and said police asked him for kshs.2000 and said he talked badly.

ANALYSIS AND DETERMINATION

8. This being the first appellate Court, I am expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate Court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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 conclusions; 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, (See Peters v. Sunday Post, [1958] EA 424.)"**

9. In view of the above, I have perused and considered evidence adduced before the trial Court. I have also considered submissions by the appellant and the state counsel. From evidence adduced, there is no dispute that the complainant was robbed and gang raped. PW4 the doctor confirmed that PW1 had bruises in her genitalia and her anal opening. What I consider to be in issue is whether the appellant was positively identified as one of the people who robbed the victims herein. PW1 and PW2 testified that the people who attacked them had torches. PW2 testified that he was familiar with the shorter suspect and that he was able to see the taller one who is the appellant herein when the shorter one flushed the torch on him as he stood on a chair to remove solar panel.

10. The trial magistrate in his judgment noted that the arresting officers never adduced evidence and the Court therefore never got the benefit of hearing from him how the appellant was identified for arrest.

11. The appellant raised defence of *alibi* by stating that between 28th February 2014 and 18th February he had gone to Keringet to do paint work for one **Faith Chepngetich**. He called one witness to support his defence of *alibi.* The trial magistrate did not believe the defence of *alibi* because the witness stated that much as he was working in Keringet during the day, he would come to spent the night in his house and the witness never spent the night with him in his house.

12. As indicated by the trial magistrate, PW1 and PW2's identification was dock identification. No identification parade was conducted; the appellant was not known to PW2 and PW2 before. PW2 said the shorter suspect was familiar to him but appellant herein was the taller one. He said he later learnt that the taller man was **Muchiri**, the appellant herein. He confirmed that no identification parade was conducted.

13. In my view there was need to conduct identification parade to confirm if PW2 truly identified the appellant. The prosecution also failed to avail the arresting officers to shed light on how the appellant was identified for arrest. From the foregoing I find that there was no prove beyond reasonable doubt that the appellant was positively identified as being one of the two people who robbed and gang raped PW1. I find that it was unsafe to rely on PW2's dock identification to find conviction. I see merit in this appeal and proceed to allow it. The conviction is hereby quashed and sentence set aside.

14. FINAL ORDER

1. The Appeal is hereby allowed.

2. Conviction is quashed and sentence set aside.

3. Appellant is hereby set free unless lawfully held.

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

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Appellant in person

Rita for State