REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 88 OF 2019

VINCENT OTIENO OKERO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment, conviction and sentence by Hon E.N.Wasike, SRM in Bondo PM SO Case No. 269 of 2019 delivered on 17/12/2019)

JUDGMENT

Introduction

1. The Appellant **VINCENT OTIENO OKERO** was charged before the Principal Magistrate's Court at Bondo with the following offences. In Count 1, he was charged with robbery contrary to section 296(1) of the Penal Code the particulars of the offence being that on the 22.4.2019 at about 0230hours at [Particulars Withheld] village in Rarieda sub-county within Siaya County he robbed **RAA** of her mobile phone make Tecno 310 valued at Kshs. 1,200/= and at the time of such robbery, threatened to use violence to the said RAA.

2. The appellant faced a second count of robbery contrary to section 296(1) of the Penal Code the particulars of the offence being that on the 22.4.2019 at around 0230 hours at [Particulars Withheld] village in Rarieda sub-county within Siaya county he robbed SAO of her mobile phone make Phantom Z valued at Kshs. 28,000/= and at the time of such robbery threatened to use actual violence to the said **SAO.**

3. The appellant also faced a third count of rape contrary to section 3(1) as read with section 3(3) of the Sexual Offences Act No.3 of 2006, the particulars of the offence being that on the 22.4.2019 at around 00200 hours at [Particulars Withheld] village in Rarieda sub-county within Siaya county he intentionally and unlawfully caused his penis to penetrate the vagina of **RAA** without her consent.

4. The appellant further faced a 4th count of rape contrary to section 3(1) as read with section 3(3) of the Sexual Offences Act No. 3 of 2006 the particulars of the offence being that on the 22.4.2019 at around 0210hours at [Particulars Withheld] village in Rarieda sub-county within Siaya county intentionally and unlawfully caused his penis to penetrate the vagina of **SAO** without her consent.

5. The appellant pleaded not guilty to all the charges and the matter proceeded for hearing whereby the trial magistrate, Hon. E.N. Wasike after hearing the seven prosecution witnesses and unsworn testimony of the appellant found that the prosecution had proved their case beyond reasonable doubt against the appellant on all four counts and proceeded to find the accused guilty of the four offences brought against him. The trial magistrate sentenced the appellant to serve 25 years imprisonment on each of the counts brought against him further ordering that the sentence were to run concurrently.

6. Dissatisfied by the said conviction and sentences the appellant filed his petition of appeal based on the following grounds:

a. That he pleaded not guilty to the charge.

b. That he was not found in the possession of stolen items (phone).

c. That the identification process was not adequate to warrant conviction.

d. That the medical examination was not availed in court to confirm that he had engaged himself in sexual intercourse.

e. That none of these ladies raised the alarm during the alleged ordeal.

f. That he prayed to adduce more grounds when the court proceedings will be availed.

The Appellant's Submissions

7. The appellant filed written submissions to canvass the appeal. He submitted that the conviction was based on an inadmissible evidence and on evidence of identification which was not positive. It was his submission that the failure of PW2 and PW3 to give the name of the attackers immediately to the neighbours gave an inference that the attackers were unknown to the victims. He relied on the case of **Simiyu & Another v R 920050 KLR 192**.

8. He further submitted that the prosecution failed to call essential witnesses specifically the arresting officer. It was further submitted that the case was not proved beyond reasonable doubt as the trial magistrate failed to understand that PW1, the medical officer was not a qualified government analyst and was thus in breach of Section 77 of the Evidence Act. He submitted that PW1 failed to produce any document to shed light in his examination.

9. The appellant further submitted that the ingredients of the charges facing him had not been established to the required legal standards and as such the trial court erred by convicting him on insufficient evidence whereas his defence was rejected.

10. It was further submitted that the evidence brought against the appellant amounted to hearsay and was made to a person not of the rank of Inspector as required by law. He relied on the case of **Collins Omuse Obure v R**.-no citation.

11. The appellant further submitted that section 296(1) of the Penal Code provided for 14 years' imprisonment which should have benefited the appellant in Counts 1, 2, 3 & 4. The appellant further submitted that his rights under Article 49(1)(f) was contravened during his arrest and that he was unrepresented during trial.

12. The Respondent was accorded the opportunity to file written submissions but indicated that they did not intend to file the same hence this judgment.

Analysis & Determination

13. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction 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 1978) E.A. 424."***

14. Revisiting the evidence adduced before the trial court, the prosecution evidence as laid out in the trial Court was as follows: **PW1 Jared Obiero Opondo** a clinician testified in relation to a P3 form (P. Exh.1) in respect of RA whom is alleged to have been robbed and raped by a known person. In his examination, the clinician observed that the patient had bruises on the anterior aspect of the neck, inflamed vaginal orifice and mucus like discharge was noted. The clinician concluded by stating that the patient was raped and infected with a sexually transmitted infection. He also produced a Treatment book (P. Exh.2) and a Post-Rape Care Form (P. Exh.3) as part of his evidence.

15. The clinician also testified in relation to a P3 or (P. Exh.4), treatment book (P. Exh.5) and a Post-Rape Care Form (P.Exh.6) in respect of SAO whom its alleged was robbed and raped by a known person. He then said that upon-examining the patient, he realized that she had injuries on the right side of the chest laterally, inflammation of the vaginal mucosa and there was increased vaginal discharge. He concluded by stating that the patient was assaulted, raped and infected with sexually transmitted infection.

16. PW2 **RAA** stated that on the 21.4.2019 at about 12.30am at midnight, she and her niece and nephew were sleeping when she heard some sounds outside and after about 15 minutes the door was flung open and someone entered with a bright spotlight who was armed with a sword and she was able to identify the person who turned out to be the appellant.

17. She testified that he put off the light and a commotion ensued and it was at that point that her niece and nephew woke up and that is when the appellant scared them with dire consequences should they raise their voices. The complainant then said that the appellant slapped her and demanded for sex and so she complied and that is when the appellant raped her and after finishing with her, he also forced her niece by the name S to have sex with him.

18. She further testified that after the ordeal, he took S 's phone and also took her phone and he left. It was her further testimony that later on, their brother by the name JO went to where they were and they explained to him what had transpired and they were taken to a different house where they slept until morning. They went and made a report at Ndori Police Patrol Base after which they proceeded to Bondo sub-county hospital where they received treatment and also went to Akala Health Centre for further treatment.

19. She stated that she knew the appellant very well as they were neighbours.

20. **PW3 SAO** testified and reiterated PW2's evidence and stated that indeed on the fateful date while they were sleeping, they were attacked by the appellant who had a spotlight and was armed then he raped both her and PW2 after which he robbed them of their mobile phones and that is when their uncle went to their rescue. She testified that on the following day, they went and reported the matter to the police station after which they went to seek for medication at the hospital.

21. **PW4 TBJ** a minor who was with PW2 and PW3 on the fateful night reiterated the evidence adduced by PW2 and PW3.

22. **PW5 Walter Okoth Auma** stated that on the fateful night at about 2.30am, he was in his house sleeping when he heard dogs barking and so he stepped outside to see what was happening and as he was patrolling around with his torch, he met the appellant and two other people coming from the home of **GO** a neighbour and so he proceeded to the said home where he found PW2 and PW3 who told him that someone had raped them and robbed them of their phones. It was his testimony that he also found their uncle at the scene. He then said that as a village elder, he went and made a report to the area Assistant Chief. In cross examination he stated that PW2 and PW3 stated that it was the appellant who had attacked them.

23. **PW6 JOO** stated that on the 22.4.2019 at about 0200hours, he was sleeping when he was awakened by sounds of dogs barking and so he took a torch and started patrolling outside and he proceeded to the house where PW2 and PW3 were sleeping and that is when the complainants told him that they had been raped and robbed off of their mobile phones by the appellant.

24. He testified that he took the victims into his house and called S's father and informed him accordingly. It was his testimony that on the following day, they went and made a report at Ndori Police Patrol Base and later the victims were taken to Bondo sub-county hospital where they received treatment. He stated that PW4 told him that he was able to identify the culprit as Odinga.

25. **PW7 Corporal Francis Odongo** of Ndori Police Patrol Base and the Investigating Officer in this case, stated that on the 22.4.2019 at about 0330 hours, he was at the station when the complainants (PW2 and PW3) went and reported that they had been raped and robbed off their mobile phones by a person well known to them as Vincent Otieno Okero (the appellant).

26. He testified that he booked the report and issued the victims with P3 forms which they took to Bondo District Hospital where they were examined and the P3 forms filled. The officer later recorded their statements together with those of other relevant witnesses. The appellant was then arrested and escorted to the police station. It was his testimony that the following day, he visited the scene where he established how the incident happened and that at the conclusion of his investigations, he charged the appellant accordingly. PW7 then produced a receipt (P. Exh.7) of PW3's mobile phone and a jungle jacket (P. Exh.8) that the appellant wore on the fateful day as part of his evidence.

27. At the close of the prosecution's case, the appellant gave an unsworn statement of defence and stated that he did not know anything about the case. He said that as he was going to work, he met some people who told him that they were looking for him and after some time, he was taken to a certain home where the area chief came and he was bundled in some motor vehicle and taken to Bondo District Hospital where he was examined after which he was taken to Aram Police Station where he was held for two days and he was eventually arraigned in court where the present charges were read over to him.

Determination

28. Having carefully considered the appellant's grounds of appeal, the submissions and evidence adduced by the prosecution witnesses and the defence in the trial court, the main issues for determination in this appeal are:

a. Whether the prosecution proved its case against the accused beyond reasonable doubt

b. Whether the accused rights were infringed

c. Whether the sentence meted out on the appellant was harsh

On Whether the prosecution proved its case against the accused beyond reasonable doubt

29. On the question of identification of the appellant, it is worth noting that the appellant was identified and placed at the crime scene by PW2, PW3 and PW4. Further to this, PW2 and PW3 were emphatic on the appellant's identity as he was their neighbour. PW5 testified that he was woken up by dogs barking and when he stepped outside to see what was happening, he met the appellant and two other people coming from the home of Gideon Ojwang where he went and found PW2,PW 3 & PW4 having endured the crime. The appellant was thus positively identified by the witnesses. Recognition is more reliable than identification as was held in the case of **George Kamau Muhia v Republic [2014] eKLR**.

30. Accordingly, I am satisfied that it is the appellant who was at the scene of crime on that material night as he was well known to the victims and he even spoke to them and threatened to harm them if they made noise as he raped PW2 and PW3. PW2 was clear that the appellant took a lot of time raping PW3 and that she also recognized the appellant by voice as she had known him for a long time as her neighbour.

31. PW2 stated that on the fateful date and time the appellant attacked them while they were sleeping in their house whereupon he raped her and then raped PW3 after which he robbed them of their mobile phones. She said that the appellant threatened them with dire consequences should they raise an alarm and he even slapped her before raping her. The P3 form (P. Exh.1), treatment book (P. Exh.2) and the Post Rape Care Form (P.Exh.3) all in favour of PW2 confirmed the injuries that the patient sustained during the ordeal which were consistent with PW2's testimony. PW2's evidence was corroborated by that of PW3 & 4.

32. PW3 testified that that after the ordeal, the appellant robbed them of their mobile phones. PW4 who was with PW3 and PW2 during the ordeal clearly reiterated their testimonies and he said that he indeed saw the accused raping both PW2 and PW3 after which he took their mobile phones. PW3's treatment documents being a P3 form (P. Exh.4), treatment book (P. Exh.5) and a Post Rape Care Form (P. Exh.6) confirmed the injuries that the patient sustained as a result of the accused person's actions which were consistent with her testimony. Conversely, the appellant denied ever committing the offence.

33. The trial court after analyzing the totality of the facts and evidence on record together with the demeanors of the witnesses established that the prosecution witnesses appeared firm, consistent and believable and their evidence was never shaken by the defence whereas the defence was found to be a sham and lacking in credibility. From my analysis of the trial court record having not had the advantage of viewing the demeanour of the witnesses, I am inclined to uphold the factual findings of the trial court. I find no reason to interfere with those factual findings leading to the conviction of the appellant. I find no mistaken identity of the appellant by the complainants.

On whether the sentence imposed upon the appellant was harsh

34. The appellant has impugned the judgment of the trial court in imposing multiple sentences of 25 years each. It is his submission that the maximum sentence for robbery as prescribed in Section 296 (1) is fourteen years. The appellant was charged with two counts of robbery under section 296(1) and two counts of rape.

35. The role of this court in an appeal is not to interfere with the discretion of the trial court in sentencing on the sole ground that the sentence meted out is severe, unless it was manifestly excessive. The Court of Appeal of East Africa stated in **Wanjema v Republic [1971]EA 494** that:

> ***"An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case."***

36. Section 296 (1) of the Penal Code provides;

> ***"(1) any person who commits the felony of robbery is liable to imprisonment for fourteen years."***

37. Accordingly, it is my opinion that the plea to have the appellant's sentence on the two counts of robbery set aside succeeds as the appellant was given an unlawful sentence whose maximum, though not mandatory maximum could only have been fourteen and not twenty five years upon a conviction for robbery.

38. Regarding the charges of two counts of rape against the appellant, Section 3 (3) of the Sexual Offences Act provides as follows:

> ***"(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."***

39. On these two counts, the appellant was handed 25 years imprisonment which I find lawful.

On whether the accused rights were infringed

40. The appellant submitted that his constitutional rights uunder Article 49(1)(f) was contravened during his arrest and further that he was prejudiced in his case as he was not provided with counsel.

41. Article 49 (1) (f) provides that:

> ***"An arrested person has the right to;***
>
> ***to be brought before a court as soon as reasonably possible, but not later than—***
>
> ***i. twenty-four hours after being arrested; or***
>
> ***ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;"***

42. From the court record specifically the testimony of PW7, it is not clear when the accused was arrested. It is evident that the alleged offence took place on the night waking up to the 22/4/2019 and was reported on the afternoon of the 22/4/2019 at 3.30pm. PW7 in his statement stated that the appellant was arrested "later." The charge sheet shows that the appellant was arrested on 22nd April 2019 and arraigned on 25th April 2019. The appellant did not raise this fact to the trial court to seek for an explanation from the prosecution. The ground is an afterthought. The appellant can also file a petition seeking for declaration that his rights to fair trial were violated and seek compensation with proof.

43. The appellant further submitted that his trial was prejudiced as he was not provided with counsel. Article 50 (2) (h) of the Constitution provides for provision of legal representation by the state where substantial injustice would occur. Further, in its decision in **Republic v Karisa Chengo & 2 Others [2017] eKLR**, the Supreme Court considered the issue of legal representation at state expense and stated:

> ***"[87] Article 50(2) (h) of the Constitution provides that "[every accused person has the right to a fair trial, which includes the right…to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly." It does not define what "substantial injustice" means. However, in David Macharia Njoroge vs Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused***

of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result…." While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa vs Republic; C.A. No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.

(88] In addition to the above, we do not agree with the Court of Appeal's holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of the Constitution is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the Legal Aid Act. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result."

44. In **Bernard Kiprono Koech v Republic [2017] eKLR** in considering an argument similar to what is now before me Justice Mumbi Ngugi stated as follows:

"39. Secondly, there is now a framework in place, which was not in place at the time of the appellant's trial, under which an accused person can apply under section 40 of the Legal Aid Act No. 6 of 2016 for legal representation at state expense. Section 43 of the Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. It provides as follows:

43. (1) A court before which an unrepresented accused person is presented shall —

(a) promptly inform the accused of his or her right to legal representation;

(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

(c) inform the Service to provide legal aid to the accused person.

40. I am satisfied that in the present case, there was, first, no substantial injustice as suggested in the Karisa Chengo case resulting to the appellant. Secondly, it is evident that the accused fully understood the charges facing him, and was able to address himself to the issues that arose."

45. A similar situation obtains in the present appeal. The appellant was able to address the issues before the court, and to cross-examine witnesses. While the state must strive, through the Legal Aid Service, to provide legal representation in cases where substantial injustice may result, I am not satisfied that such substantial injustice resulted in the present case. This ground of appeal also fails.

46. In the end, I find and hold that the instant appeal against conviction fails. The appeal against sentence succeeds to the extent that the 25 years imprisonment meted out for the two counts of robbery is set aside and substituted with the prison term of ten years. I further set aside the 25 years imprisonment meted out for the two counts of rape and substitute the same with ten years imprisonment on each count. The sentences to run concurrently from date of sentence in the lower court.

47. Orders accordingly.

Dated, signed and Delivered at Siaya this 30th Day of November, 2020

R.E.ABURILI

JUDGE