



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 91 OF 2016

BETWEEN

EDWIN ABUGA KEROSI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Were, SRM dated 20th January 2012 at the Magistrate's Court at Keroka in Criminal Case No. 1338 of 2011)

JUDGMENT

1. The appellant, **EDWIN ABUGA KEROSI**, and two other co-accused were charged with and convicted of two counts of offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* and three counts of gang rape contrary to **section 10** of the *Sexual Offences Act*. The particulars of the offences were that on the night of 17th and 18 November 2011 in Borabu District with Nyamira County, the appellant and his co-accused jointly while armed with pangas and metal bars robbed **MKN** of assorted property all valued at Kshs. 30,000/-. They also robbed **JKI** of a Nokia Mobile Phone valued at Kshs. 3,500/- and immediately after the time of such robbery used actual violence on the said **JKI**.
2. The particulars of gang rape against the appellant were that on the same night and at the same place, in association with his co-accused, he intentionally and unlawfully caused his penis to penetrate the vagina of **JKI** without her consent.
3. The appellant was sentenced to 30 years' imprisonment on both counts of robbery with violence and 20 years' imprisonment for the offence of gang rape. The sentences were ordered to run concurrently. The appellant now appeals to this court against the conviction and sentence on the grounds set out in the petition of appeal. The grounds of appeal are that the prosecution evidence was insufficient, speculative, discredited and lacked probative value. He contended that he was not identified by **JKI** and the identification parade in which **MNK** identified him was not fair and was unreliable as the complainant had seen him prior to the parade. Counsel for the appellant filed written submissions in which he amplified these points and urged the court to allow the appeal in his oral submissions.
4. Counsel for the respondent also relied on written submissions in which he contended that the identification the appellant by one of the witnesses was positive and free from error and that the prosecution proved all the elements of the offence.
5. Before I deal with the issues raised by the appellant, I must recall that I am guided by the principle that the duty of the first appellate court is to re-appraise the evidence and reach an independent conclusion as to whether to sustain the conviction bearing in mind that the court neither heard or saw the witnesses testify (*Okeno v Republic [1972] EA 32*). In order to proceed with this task, it is necessary to set out the evidence as it emerged before the trial court.
6. The key witnesses in the matter were **JKI** (PW 1) and **MKN** (PW 2). PW 1 was an employee of PW 2. They were staying in the same house when on the night of 17th November 2011, assailants broke into the house. PW 1 recalled that she was suddenly awoken by a panga on her body. She recalled had a big bright torch. She could recognise two assailants but not the appellant. They woke up the children, tied them up and started ransacking the house. They took her Nokia phone. One of the assailants took beans, the TV and battery and assorted household items to a waiting car while the other two waited. They also took PW 2's clothes. After they had ransacked the room, they each proceeded to rape her as they left they locked her in the room. PW 1 testified that PW 2 is the one who opened for her the door after the assailants had left. In the morning, police officer came and she was taken for medical examination and treatment. When the suspects were arrested, she attended an identification parade and was not able to identify the appellant.
7. PW 2 testified that she was asleep in the house when people with torches, pangas and iron bars entered into the house. The assailants grabbed her torch and demanded her phone and cash. They put one the electric light and began to ransack the house, they opened her

wardrobe and removed her purse which had Kshs. 3,200/-, they took 11 kgs of sugar, soap, matchbox, nails, cooking oil, assorted clothing items, TV and batter, radio cassette player and other items with they carried with a sack and bag. She recalled that since the electric lights were on, she could see the assailants clearly as they were also talking to her in Ekegusii. Before leaving, the assailants tied and warned her not to scream. After the assailants had left, she untied herself and went to PW 1's room where she found her crying. PW 1 told her she had been raped. The chief and police arrived thereafter. When she was called to the police station to identify some suspects who had been arrested, she was able to identify the appellant.

8. PW 1 and PW 2 were treated at Kijauri Level 4 Hospital. PW 7, a clinical officer at the Hospital, produced the P3 medical forms he had prepared after examining them. He noted that PW 1 had a bruised hymen. He cervix was closed and had a white discharge. The High Vaginal Swab disclosed pus cell and spermatozoa. He concluded that PW 1 had been subjected to an act of penetration.

9. The grandson to PW 2, PW 9, testified that he was at home on the material night when he was hit while asleep. When he woke up, he saw people with many torches demanding cash and phones. The assailants tied him and his cousin and covered them with blankets. He told the court he could not recognise the assailants. When PW 2 came and untied them later, he noticed the house had been ransacked and the TV, battery and other items were missing.

10. PW 4 testified that he used to see the appellant at Kijauri but he did not know his name. A CID officer from Keroka, PW 5, was called to conduct the identification parade for the suspects who had been arrested in relation to the robbery on 20th November 2011. He testified that the appellant was identified by PW 2. The Investigating Officer, PW 6, testified that he was informed of the robbery incident on the morning of 18th November 2011. He went to the scene where he found PW 1 and PW 2 who were still in state of shock and who informed them that the assailants, who were three in number, had robbed them of assorted household items. When he was informed that one of the appellant's co-accused had been arrested and had implicated the appellant and stated he was in Keroka. He went to Keroka with the said accused to a battery charging shop where the owner, PW 8, told them that the owner had brought the battery for charging and would come to collect it. PW 8, testified that when the appellant came to collect the battery on 19th November 2011, he called the police who came to arrest the appellant.

11. When put on his defence, the appellant gave an unsworn statement in which he denied the offence. He recalled that he was arrested by police officers on 19th November 2011 while in Keroka buying clothes. He told the court that he did not know the appellants and had nothing to do with the offence.

12. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, Oluoch v Republic [1985] KLR 549 and Ganzi & 2 Others v Republic [2005] 1 KLR 52***).

13. The offence of **gang rape** is provided for under **section 10** of the **Sexual Offences Act** which states;

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

14. The essential element of gang rape is rape committed in association with two or more persons. The ingredients of rape which the prosecution must prove are set out in **Section 3(1)** of the **Sexual Offences Act, 2006**;

A person commits the offence termed rape if –

(a) He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.

(b) The other person does not consent to the penetration; or

(c) The consent is obtained by force or by means of threats or intimidation of any kind.

15. I have no doubt that the prosecution proved all the elements of robbery with violence. The totality of the testimony of PW 1, PW 2 and PW 9 was that more than two assailants, while armed with pangas and metal bars, broke into the home of PW 2. They assaulted PW 1 and took her Nokia Mobile phone and also helped themselves to assorted household items belonging to PW 2. Likewise, PW 1 gave clear and consistent testimony how the assailants forced her to have sexual intercourse. PW 2 found her in a state of distress when she went to assist her when the assailants had left. The fact of penetration was corroborated by evidence of PW 7 who confirmed that PW 1's vagina had bruises and the HVS showed spermatozoa. This was evidence of penetration. The evidence is also clear that the fact of penetration was not consensual in the circumstances and it was committed by the assailants who raped PW 1 in turns.

16. The main issue for consideration is whether the appellant was one of the assailants. The incident took place at night in less than ideal circumstances for positive identification. In these circumstances, our courts have called for careful consideration of the evidence in order to avoid miscarriage of justice. In ***Paul Etole & Another v Republic NRB CA Criminal Appeal No. 24 of 2000 [2001]eKLR***, the Court of Appeal summarized the law as follows:

Such evidence (of visual identification) can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more

identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when a witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good, and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality the greater the danger.

17. In order to establish the circumstances of identification the court ought to inquire into the nature of lighting, its brightness or intensity, whether the witnesses view was impeded, the size of the room, the distance of from the light and the time spent with the assailant. This is not an exhaustive list and the court must examine all circumstances and weigh the evidence in order to determine whether the identification is free from error (See **Anjononi v Republic [1980] KLR 54**, **Regina v Turnbull [1976] 3 ALL ER 549**, **Maitanyi v Republic [1986] 2 KLR 75**, **Karanja & Another v Republic [2004] 2 KLR 140** and **Wanjohi & Others v Republic [1989] KLR 415**).

18. PW 2 was the key identification witness for the appellant as she identified him at the parade. Although she did not know him, she explained in her testimony that she saw them clearly on that night. She explained that it is the appellant who took items and clothes from the box while she was seated. She also stated that one of the accused had put the lights on and that they were speaking in Ekegusii, had not covered their faces and were demanding for cash. In these circumstances, it is clear that in the confined space of the room, the fact that the incident took some time while the lights were on and they were conversing were all circumstances that were favourable for positive identification hence when the appellant's identity was tested at the identification parade two days later, PW 2 picked him out.

19. The appellant condemned the identification parade on the ground that the identification parade was irregular since PW 2 had seen him at the police cell prior to the parade being conducted and he was not assisted. I have looked at the testimony of PW 2 and in particular the cross-examination and no suggestion was put to her that she had seen the appellant at the police station prior to the identification parade. She was clear in her testimony that she saw the appellant in the house and also at the police station after identifying him.

20. PW 5 explained how he conducted the identification parade. He confirmed that PW 3 identified by touching the appellant. He recorded in forms that the witnesses, PW 1 and PW 2 were accommodated in the CID office located outside the perimeter wall of the station. Further, he recorded that when he informed the appellant if he had a friend or lawyer present, the appellant stated that he did not have any. He also did not raise any objection to the parade. PW 5 also recorded that the appellant was satisfied with the manner in which the parade was conducted. In his unsworn statement the appellant did not raise any issue about the manner in which the parade was conducted or that he saw the appellant. The totality of my re-evaluation of the evidence, is that the circumstances of identification were positive and free from error and that PW 2 was able to identify him at the identification parade.

21. The appellant's conviction also rested on the doctrine of recent possession which posits that upon proof of the unexplained possession of recently stolen property, the trier of fact may draw an inference of guilt of theft or of offences incidental thereto. In **Arum v Republic [2006] 1 KLR 233**, the Court of Appeal set out conditions that must exist before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case. These include proof that:

- (a) The property was found with the suspect;
- (b) The property was positively the property of the complainant;
- (c) The property was stolen from the complainant;
- (d) The property was recently stolen from the complainant.

The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

22. The appellant was implicated when he was found in possession of the battery that had been stolen from PW 2's house. PW 1, PW 2 and PW 9 all confirmed that a battery was among the items that was stolen on the material night. PW 2 identified the battery (Exhibit No. 2) as the one which stolen. It had been recovered from PW 8's shop at Keroka where the appellant had gone to charge it. PW 8 told the court that the appellant is the one who brought the battery and when he came to collect it, he alerted the police to come and arrest the appellant who had been implicated by his co-accused. The battery had been brought to PW 8's shop a day after the robbery incident. In his defence, the appellant said nothing of the battery or lay claim to it. He only confirmed that he was arrested at Keroka. I am therefore satisfied that the evidence of recent possession of the battery puts the appellant squarely at the *locus in quo*.

23. I am satisfied that on the basis of positive recognition by PW 2, the appellant was one of the three assailants who broke into her house, raped PW 1 and made away with her phone and stole assorted items from her house. The evidence is corroborated by the fact the appellant was found after one day with the battery belonging to PW 2 and for which he could not account leading to the inevitable conclusion that he was involved in the robbery and gang rape. As regards the gang rape, PW 1 was clear that the assailants, who were three in number, raped her in turns. Although she was able to recognise only two of them, she did recall the other assailant but in this case, the evidence is that there were three assailants one of whom was the appellant. His appellant's defence was a bare denial and was overwhelmed by the prosecution evidence. I therefore affirm the conviction.

24. The appellant also raised procedural issues that he contended impinged on his right to a fair trial. He complained that the prosecution failed to supply him with witness statements. I have read the record and it shows that when the appellant and his co-accused were first arraigned in court on 21st May 2011, the court directed that they be furnished with witness statements. When the matter came up for hearing on 24th May 2011, the accused stated that they were ready to proceed and throughout the proceedings, they did not raise any issue that the prosecution had failed to provide them with witness statements. I therefore do not find any merit in this objection.

25. The other issue raised by counsel for the appellant is that record does not show that the charges were read to the accused. Counsel for the appellant submitted that this was fatal to the prosecution. **Section 207** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* deals with procedure for the accused to plead to a charge. It provides:

207 (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.

(5) [Emphasis mine]

28. The trial magistrate did not read the charge to accused and call upon them to plead. The matter was set down for hearing instead and it proceeded as if a plea not guilty had been entered. In the case of *David Mutune Nzongo v Republic* [2014] eKLR the Court of Appeal considered also considered the purpose of the process of plea taking as provided under **Section 207** of the *Criminal Procedure Code* by stating that:

The purpose of the process of taking plea was elaborated in J.A.O. v Republic [2011] eKLR by this court as follows:-

“The requirement under Section 207 of the Criminal Procedure Code for calling upon the accused person to plead serves the purpose of determining whether he admits the offence charged, in which case there would be a summary determination of the case, or denies the truth of it in which case a formal trial would be held. If there was no express denial but a refusal to plead, the trial would still proceed as if a plea of not guilty was entered.”

27 A similar issue arose in *David Irungu Murage and Another v Republic* NKU CA Crim. Appeal No. 184 of 2004 [2006] eKLR where the Court of Appeal observed as follows:

The record of the trial court shows that the two appellants were not asked to plead to the charge. When they first appeared before the Principal Magistrate a hearing date was taken straight away. It is worthy of note that though the appellants were represented by counsel throughout the trial which lasted more than a year, the question of the appellants not having pleaded to the charge was never raised. We also note that the appellants in their respective defences categorically denied the charge. It is manifestly clear, therefore, that the appellants were tried with the false notion that they had pleaded not guilty. It is also clear that the omission to plead was never raised before the first appellate court, though the appellants had representation by counsel.

The issue then that arises in these circumstances is whether the appellants had a satisfactory trial. We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not occasion a failure of justice and that whatever irregularities were committed were curable under section 382 of the Criminal Procedure Code.

28. I hold that failure to read the charges to the accused and failure to record a not guilty plea was not fatal if the accused was not prejudiced or such failure did not occasion a failure of justice. Since the accused did not admit the charge, the trial continued until the accused were placed on their defence. As I stated earlier, the court directed that the accused be furnished with witness statements. Throughout the proceedings, the accused did not raise any issue that they did not understand the nature of the charges against them. They were given the opportunity to cross-examine the witnesses and when called upon to make their defence, the trial magistrate informed them of the charges. I also note that this issue was not taken as a ground of appeal in the memorandum of appeal or the written submissions by the advocate but raised from the bar. On the whole I find that the appellant was not prejudiced by the failure by the trial court to comply with **section 207** aforesaid.

29. I now turn to consider the sentence imposed on the appellant. The appellant was sentenced to 30 years’ imprisonment. Since the mandatory death penalty was declared unconstitutional (see *Francis Karioko Muruatetu & Another v Republic* SCK Pet. No. 15 OF 2015 [2017] eKLR and *William Okungu Kittiny v Republic* KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR), it is now the maximum sentence. I have considered the level of sentences imposed in similar cases both by the High Court and the Court of Appeal to ensure consistency in sentencing. For example, in *Wycliffe Wangusi Mafura v Republic* ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR, the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her while in *Paul Ouma Otieno alias Collera and Another v Republic* KSM CA Criminal Appeal No. 616 of 2010 [2018] eKLR, the Court of Appeal sentenced the appellants to 20 years imprisonment where the robbery was aggravated by the use of a firearm. I find 30 years’ imprisonment harsh and excessive and reduce the sentence to 15 years’ imprisonment on Count 1 and 11.

30. Under **section 10** of the *Sexual Offences Act*, the mandatory minimum sentence for gang rape is 15 years’ imprisonment which may be enhanced to life. In this case, the appellant was sentence to 20 years’ imprisonment. I however reduce it to 15 years’ imprisonment.

31. I affirm the conviction but allow the appeal to the extent that I quash the sentences imposed on the appellant and substitute them with the following;

(a) Count 1 and II – 15 years’ imprisonment.

(b) Count IV – 15 years’ imprisonment.

Both sentences shall commence on **22nd November 2011** and shall run concurrently.

DATED and DELIVERED at KISII this 17th day of APRIL 2019

D.S MAJANJA

JUDGE

Mr Ochoki, Advocate for the appellant.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.