



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 15 OF 2018

JACKY KAMUMBUAPPELLANT

-VERSUS-

REPUBLICRESPONDENT

JUDGMENT

Introduction:

1. The Appellant was charged for with offence of ***robbery with violence contrary to section 296(2) of the Penal Code, Chapter 63 Laws of Kenya.***
2. On the 18th day of March 2017, within Makueni County, Jacky Kamumbu robbed CMK of Kshs.400/= while armed with a machete (panga) and immediately before and at the time of the robbery he wounded her by cutting her on the left hand using the said machete (panga)
3. **COUNT II: Attempted rape contrary to section 4 of the sexual offences act No. 3 of 2006**
4. Particulars being that on the 18th day of March 2017, within Makueni County, Jacky Kamumbu intentionally and unlawfully attempted to cause his penis to penetrate the vagina of CMK without her consent.
5. The appellant was found guilty in respect of the two counts and was convicted and sentenced;

COUNT 1: Death sentence.

COUNT 2: Ten years' imprisonment.

6. Being aggrieved by the aforesaid decision, the Appellant lodged an appeal and set out eight grounds of appeal.
7. The parties agreed to canvass appeal via written submissions. The state relied on record but Appellant filed submissions.

Appellant's Submissions:

8. **On ground 1 & 2** the Appellant submits that the learned magistrate erred both in law and fact when she convicted him (Appellant) on a single identifying witness and uncorroborated testimony.
9. The complainant testimony was that, it was at night inside her house when she heard a thud and shone a torch which was hit and fell down and then it was dark this was like a second.
10. She said that she saw the appellant but did not describe how he was dressed or what made her to recognise him. She mentioned that she had children in the house 3 of them said one child 1 year, 3 years and another 4years.
11. PW2 and PW3 narrated just what they claim was told by PW1 and none of them witnessed the incident. It is therefore not proper to enter conviction on a single witness testimony and uncorroborated testimony.
12. Further on ground 3 of the Petition of Appeal the Appellant submits that the learned magistrate erred both in law and fact when she

convicted and held that the he had been properly recognised and identified when the circumstances of identification was unfavourable.

13. PW1 testified that when she shone a torch to the Appellant, hit it and broke, it was not explained for how long the torch shone on the offender before it was broken how much light it had whether it had new batteries or old, the intensity of light was not explained. The learned magistrate did not warn herself when she convicted the Appellant on such evidence of an artificial light of a torch.

14. In **HCCCR No. 99 of 2001 Mutuku Mwema Munguti –vs- R Justice R. Nambuye and R. M. Mutitu** held that when identification is made through artificial lighting such as a torch light or moon light there is need for the trial court to warn itself of the dangers of relying on such light to reach a conviction.

15. He cited also **Criminal Appeal No. 33 and 34 of 2004 (Consolidated) KLR (2005) IKLR 192.**

16. Further in the **Criminal Appeal No.193 and 195 of 2002 (2004) 2KLR 140** court of appeal held that, “**evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Holding No.2 the judges held that whenever the case against an appellant person depends wholly or to great or more identifications of the appellant the court must warn itself of the special need for caution before convicting the in reliance on the correctness of the identification. The judges also held mistakes can be made if even of close relatives the appeal was allowed.**”

17. The Appellant submits that in the present case the learned magistrate tried to use a foot print to strength her finding. It was not said the Appellant was the only person with a foot in the area in any case on foot prints were expert and therefore that evidence is unreliable.

18. On ground 6, the Appellant submits that the learned magistrate in his judgment did not consider the Appellant’s defence and therefore led to a miscarriage of justice.

Duty of the first Appellate Court:

19. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **Selle & Anor –vs- Associate Motor Boat Co. Ltd 1968 EA 123.**

Evidence Adduced:

20. PW1 CM informed the court that she knew the appellant person before court as Jacky who was a close neighbour and that his home was about 5 minutes away from hers. She testified that on 18/03/2017 at about 12 midnight, it had rained heavily and there were thunderstorms.

21. She was asleep in her house with her children. She then heard a thud outside. She took a torch and put it on while in the bedroom and on shining she saw Jacky while still in the bedroom as she was headed out to the sitting room.

22. She stated that he was holding a panga and entered her bedroom and hit her torch and it fell and broke and it became dark. He pushed her and held her at the throat and she began to scream and he put the panga on her head and told her to shut up.

23. He indicated that she kept quiet. He then asked her for money and she hurriedly went to get it in on the drawer. As she went to the drawer he was still holding her.

24. She gave him Kshs.400/= and he put it in his jacket. PW1 stated that she thought he would now let her go but he did not.

25. They began to struggle as she told him to let her go. He continued to hold her and then he cut her on the left wrist with the panga he was holding. He then asked her if she sleeps with clothes.

26. She continued to struggle with him and he threw her on the bed and he followed. He was threatening to stab her. He then tore her blouse and had dropped his pants but had his coat still on. He then came on top of her trying to remove her clothes.

27. She indicated that she was sleeping with her three children and because his clothes were wet and the panga cold, her first born got scared and woke up. She indicated that her children were G 4 years, F 3 years and precious 1 year.

28. Thus G asked her who it was and she kept quiet because the appellant person was holding her. It was her testimony that the panga then fell on P and she began to cry and shortly after all the children began to cry, she indicated that Jacky escaped.

29. She indicated that he had told her before to give it to him nicely. The appellant opened the door and left as she followed him. She stated that she saw him open the door and wondered how he entered. She then realized that he had broken the window because it was made of wood.

30. PW1 stated that all this happened while she screamed and then called her mother in law and sister in law and they came immediately with other relatives. They found appellant person had already escaped into the night.

31. On the next day, she informed her husband and he told her he would be coming. Her mother in law and nyumba kumi officials called for Jacky but he did not come. She therefore decided to report the matter at Kilome Police Station.

32. She was referred to Mutungu Hospital for treatment. She was issued with a P3 form and it was filled.
33. She indicated that the P3 form was in the name of RM and that the said name was also hers as R was her baptismal name while C was her confirmation name. However, she indicated that her ID bears the name R.
34. PW1 asserted that she was certain that it was Jacky who entered into her house and she saw him because she had a torch that she shone on him. She indicated that he is also a neighbour and she knows him well.
35. In cross examination, PW1 stated that she stood up from the bed and upon making a few steps before getting to the door, she saw the appellant. She indicated that she had heard a thud and was going to check. She stated that she had a torch because it was dark.
36. It was PW1 testimony that she did not expect to meet anybody and was shocked to see the appellant. She contended that he had not covered his face. PW1 indicated that he was holding the panga up.
37. He then pushed her to the wall with the panga and then pushed her to the bed and removed her blouse. She indicated that the appellant person was threatening to stab her. She tried to take the panga away from him and he cut her hand and had threatened her so she had surrendered by the time he tore her blouse.
38. She stated that the appellant person came to her house at midnight hence it was the night of Friday/Saturday and she reported on Sunday. She indicated that the appellant person did not come when he was called however she stated that he was called before they took action but he did not come.
39. She denied indicating in her statement that she had followed footsteps. She indicated that she did not state in her statement that the appellant person sought for forgiveness.
40. PW2 SK testified that on the night of 17th and 18th March 2017, she received a phone call and had heard it was his son's wife screaming namely CM.
41. She thus left her house and dashed to her house. She told her that somebody had entered into her house through the window and had a panga. The said person had cut her.
42. PW2 stated that when she got to her house she also screamed and neighbours came to C's house. She indicated that her house to C's is not too far and not too near. She saw that Catherine had been cut on the left wrist hand and right hand at the shoulder had been injured.
43. She informed her that the said person wanted to rape her and they had struggled and the said person ended up cutting her. The said person also took Kshs.400/= which she gave him when he demanded.
44. PW2 learnt that the complainant was sleeping with her children and they woke up on hearing the struggles going on, on the bed.
45. PW2 stated that she reported to the village manager and on the next day he came to her home and they told her what had happened. It was her testimony that that night it had rained and they saw footprints.
46. On that day PW2 stated that Jacky's uncle came and Jacky also came holding a panga and as they spoke Jacky asked who had a foot like his. He then put his foot on the footprint and it matched and he asked to be forgiven.
47. He then left after the manager told him only C could forgive him. PW2 stated that afterwards her son came and they called Jacky and he failed to come.
48. Her son thus went and reported at Kilome Police Station and he took his wife to hospital.
49. She identified Jacky as the appellant person before court. She indicated that they come from the same clan with the appellant.
50. In cross examination, PW2 stated that C did not tell her who was in her house. Her children however told her that it was Jacky who walks with dogs who had come to their house.
51. She indicated that Jacky stated himself who has a foot like his and measured and it fitted.
52. It was PW2 testimony that nobody else measured his foot apart from the appellant. She stated that she believed that he came pretending to be an innocent bystander.
53. She averred that she did not know whether the panga he had was the panga he had at night. She indicated that he asked for forgiveness in the presence of his uncle and the village manager.
54. PW3 Antony Mwau informed the court that he was the headman of [Particulars Withheld] village, it was his testimony that on 17/03/2017, in the morning at about 8:15 am he got a text message from CM who is from his village and she had asked him to go to her place.

55. He went and she told him that she had had an incident at night. She told him that someone had intruded in her house at night and she was able to identify him because she shone a torch light on him.
56. The torch later fell but she had seen him. She told him that the said person entered in the house through the window and the said person had a panga and removed her clothes and she remained with her inner clothes.
57. PW3 stated that as C explained to him, the appellant person came to where he was seated with C and immediately Catherine kept quiet. He asked the appellant person if he had heard what had happened last night.
58. PW3 informed the court that the appellant person was holding a panga and was barefoot. The appellant person replied that he had heard that people were following footprints.
59. He asked him to accompany him to C's house and they went and saw the window where the person had intruded in from. PW3 stated that he was also in the company of the appellant person's uncle and the brother to Catherine's father in law.
60. PW3 indicated that the appellant person walked in front of him and tried to spoil footprints on the ground. He pulled him back and saw the footprints still ahead. He then told him to fit his foot in the footmark and it fitted perfectly.
61. The appellant then asked who had feet like his in the village. PW3 stated that he kept quiet and did not respond. Then the appellant person's uncle Musyoka Kitua told the appellant that he would tell them if there was someone who had feet like his. PW3 asserted that C had earlier told him that she had identified appellant person on that night as Jacky Kamumbu.
62. When appellant realized his foot marched the footprint, he got shaken and he asked them to forgive him. PW3 testified that that night it had rained heavily and it was muddy. PW3 testified that there had been previous incidents in that area which he highlighted to the appellant and he replied if he thought he was the culprit, they forgive him.
63. The appellant person then asked to be excused and they allowed him to go. They later had a meeting between the appellant person's family and C's family.
64. The appellant person's family said that if C wanted to go to the police station they had no problem. The incident was consequently reported. It was PW3 testimony that the appellant person thereafter went into hiding for about four days. He got help from nyumba kumi youth and they found him and arrested him.
65. In cross examination, PW3 stated that the appellant person was not a good person as he does awful things in the village and goes to hide at his aunt's place in Kakamega.
66. He indicated that the complainant feared the appellant person hence they found it fit to find further evidence. PW3 asserted that the appellant person was the main suspect and that is why he told her to measure his foot.
67. PW4 Erick Kasiamani clinical officer at Kilungu District Hospital produced the P3 form in the name of RM. He indicated that it was established that the complainant had been injured on the left hand at the elbow joint. Degree of injury was classified as harm. He stated that no other injury was visible or noted.
68. PW5 Hannington Wambua clinical officer at Kilungu District Hospital informed the court that he filled in the P3 form produced in court on 06/12/2017. He confirmed that he filled it in respect of RM. He confirmed that the P3 form duly produced by his colleague PW4 had not been altered and the same contained his handwriting and signature. He confirmed that it related to this case.
69. In cross examination PW5 stated that he formed the opinion that the injury caused on the complainant was caused by a sharp object as it was not rugged.
70. PW6 Cpl Earnest Malelu of Kilome Police Station testified that the complainant herein CM reported on 20/03/2017 that the appellant person went to her home at night at around 12:30 am.
71. PW6 indicated that on receipt of the report he went to the scene at about 4:30 pm and established that the suspect had entered the house through the window. He observed that the window was made of wood and was closed by a nail and it did not have a lock.
72. The suspect pushed the window and the nail gave in and the window opened without a sound. The complainant heard a sound after the suspect had landed inside the house at the sitting room.
73. The suspect then went into the bedroom that did not have a door and there was only a curtain (pazia). After visiting the scene, PW6 stated that they looked for the appellant but did not find him. Two days later he was arrested by nyumba kumi officials.
74. PW6 further indicated that he established that the complainant is also known as R and that the said name appears in the ID card. He produced the crime and incident report and investigations diary as Exhb No. 2 & 3. He informed the court that he did not recover any weapon.
75. In cross examination, PW6 stated that the complainant tried to have the matter resolved at home that is why the report was made later. He indicated that he was informed a nyumba kumi meeting was held and the appellant attended, complainant and her mother in law.

76. He further was informed that the appellant person had stated that if he was suspected he be forgiven. The I.O indicated that the complainant was injured on her left hand after the incident. He contended that the complainant knew the appellant person and identified him with the help of a torch.

Defence Case:

77. The appellant person gave an unsworn testimony and stated that on 18/03/2017 at around 8:00 am he woke up as usual and went to get food for the cattle. While at the shamba, a neighbour approached namely Noah Kaluu who at the time was the acting manager of their village.

78. The said manager greeted him and requested him to be assisted with fodder to take to his cows.

79. While there, he told the appellant that he had heard something wrong or bad had happened at their home. Appellant person told him he had not heard but would go and find out.

80. It was the appellant person's testimony that after getting the fodder he went to their other homestead to find out what had happened as he was also in nyumba kumi. He got there and found members of that home seated with one village elder called Antony Kakwanzi who at one time was the village manager.

81. He greeted them and they welcomed him to join. He enquired what had happened and one of the men asked him angrily why he had come there with a panga. He told them that he was from the shamba and had no ill intention.

82. The appellant person informed the court that he heard the complainant narrate that there was someone who entered her house at midnight and wanted to rape her and stole money from her. The appellant person stated that since he knew her husband was not around, she thought to herself that the said person would enter the house through a window was not someone from far.

83. While there they were told where that person had passed and they went there and saw footmarks going through the shamba.

84. The appellant person testified that he opined that the people at the meeting had discussed him because Antony told him to put his leg on the footmark and he did and everybody stated that he was the suspect.

85. Antony then forced him to admit in the guise that everything would be resolved there. He declined because he was not involved. They later dispersed. On the next day while at the shamba, he saw a group of young men surrounding him and they had weapons pangas and rungunus.

86. The appellant person stated that he escaped to Antony's because he was in fear of his life. When he got to Antony's he told him that he had been summoned by the OCS and had declined to honour the summons.

87. He enquired if the OCS summons people by word of mouth. The young men found him at Antony's and attacked him. He thus told Antony to contact the OCS and shortly police from Kilome arrived and he was taken to the station and later brought to court.

88. Charges before court which were unknown to him were read which he stated that he did not know to date. The appellant person contended that the complainant stated that she got to identify the person who intruded in her house hence he wondered why it took so long for her to report if it was not to falsely accuse him.

89. The appellant person indicated that in the village, he did not have trust in the village manager and stated that from 2016 they had issues because his son is involved in crime and him (appellant) being a member of nyumba kumi they arrested him for housebreaking and he testified in court against him.

90. He also caused the arrest of three other men who were charged and convicted. The village elder at one point asked him why he was so close with the police. He thus asserted that the case before court had been brought against him due to malice by his village manager due to his work of aiding peace and justice in the society as a nyumba kumi official.

91. The appellant person further stated that he did not understand the P3 form before court as it related to RM yet the complainant said that she was CM.

92. He indicated that the I.O tried to explain that a person could have two Christian names. The appellant person opined that the two days it took for the matter to be reported evidence was being cooked against him.

Issues:

93. After going through evidence and submissions on record, I find the issues are; ***whether the identification of accused was proved beyond reasonable doubt? Whether the court failed to consider the appellant defence?***

Analysis and Determination:

94. PW1 testified that on the night of 18/03/2017, while asleep in her house with her children she heard a loud thud inside her house and woke up to go and check. She indicated that she had a torch and put it on.

95. It was her testimony that upon making a few steps while headed to check, she met with the appellant person herein inside her house and he was holding a panga. She indicated that with the help of the torch light she was able to see him and duly recognised him as he was a close by neighbour.

96. She stated that the appellant person hit her torch and it broke and it got dark. PW1 stated that the appellant person proceeded to hold her by the throat while threatening to cut her with the panga. He asked for money and she gave him Kshs.400/= that she had. She stated that she thought the appellant person would leave upon giving him the money but he did not. He continued to hold her and she struggled with him and he ended up cutting her with the panga on the left wrists.

97. He then pushed her on the bed and tore her blouse and told him that he should give it to him nicely. The appellant person also asked the complainant if she sleeps with clothes. She indicated that the appellant person had also dropped his trousers.

98. The complainant averred that she was sleeping with her children and they began to cry on hearing the commotion on the bed and also felt cold as the appellant person's clothes were wet as it had rained heavily that night and the panga was also cold.

99. Due to the children cry, the appellant person left. PW2 indicated that on the material night the complainant did call her screaming and she went to her house and she told her that someone had intruded in to her home.

100. PW2 stated that she did not find the said person. On the next day she reported the matter to the village elder and they learnt that there were footprints as it had rained heavily that night.

101. She stated that the appellant person showed up pretending to be an innocent bystander and made a remark that who had a foot like his.

102. He was asked to fit in his foot on the footprint and it fit. PW2 thus contended that the appellant person had committed the offence. PW3 also stated that he was informed of the incident that occurred on the night of 18/3/2017 and went to the complainant's.

103. While the complainant was narrating what happened, PW3 stated that the appellant person came to where they were seated. Shortly after as they went to the complainant's house to analyse the scene, they noted footprints whereupon the appellant person remarked who had feet like his.

104. PW3 asked him to fit his foot on the mark and they established that it fitted well. Hence PW3 formed the opinion that the appellant person had intruded in the complainant's house. Both PW2 and PW3 stated that the complainant did not tell them who had entered her house and/or whether she had identified him.

105. However, PW3 asserted that when the appellant person emerged at where they were seated, he observed that the complainant kept quiet as though she feared the appellant person.

106. The appellant person denied the charges and contended that he had been framed by PW3 as they had differences because he (the appellant person) was a nyumba kumi official and that in carrying out his duties had caused the arrest of PW3 son and testified in court against him.

107. The appellant person thus contended that as a good neighbour he went to find out what had happened on the material night after having learnt that something had happened from another neighbour, however he ended up being appellant of committing the offence.

108. PW1 testimony did not explain for how long the torch shone on the offender before it was broken, how much light it had whether it had new batteries or old, the intensity of light was neither explained.

109. PW2 who answered the screams by going to PW1 house, confirms that pw1 told her that someone had intruded in to her home. PW1 and PW3 were not told by PW1 who the intruder was a fact that trial court noted in its analysis.

110. That alone lessened the value of the allegation that PW1 recognised appellant at the material time of the attack. The subsequent coercion of the appellant to fit his foot on footprint at the scene confirms that the intruder had not been identified.

111. If the PW1 had recognised appellant as she alleged, the first thing she should have done, was to tell PW1 and PW2 the same fact .She could even have reported the same day to the police and other people in authority.

112. Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in Wamunga -vs- Republic (1989) KLR 424 at 426 had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

113. In Nzaro -vs- Republic (1991) KAR 212, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.

The trial court was therefore duty bound to interrogate whether or not the circumstances in the case at hand were favourable for positive identification.

114. Similarly, in the same case the *High Court at Mombasa Criminal Appeal No. 2 of 2010 Mohamed Ali –vs- R* upheld the reasoning in the case of *Maitianyi –vs- Republic (1986) KLR* the court of Appeal held that, “Subject to well-known exceptions it is trite law that a fact maybe 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 ...”

115. The identification evidence on record demonstrates that the same was not water tight to warrant conviction. It is the evidence on which this case turns. That ground alone justifies quashing of conviction without going into other raised grounds herein.

116. The court thus holds that the appeal has merit and same is allowed. The court makes the following orders;

- i. The conviction is quashed, sentence is set aside and the appellant is set at liberty unless otherwise lawfully held.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

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C. KARIUKI

JUDGE