REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 50 OF 2018

(From Original Conviction and Sentence in Criminal Case No. 622 of 2014 by the Principal Magistrate's Court at Hamisi)

AMRAN CHANZU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. M. Nabibya, Senior Resident Magistrate, of robbery with violence, contrary to Section 296(2) of the Penal Code, Cap 63, Laws of Kenya, and was sentenced to death. The particulars of the charge were that on the night of 30th June 2014 at an unknown time at [Particulars Withheld] village, Gisambai Location within Vihiga County, the appellant while armed with *pangas*, jointly with others, robbed LM of a mobile phone, chickens, radio and money, the property of MM, and in the process of the said robbery raped the complainant.

2. At the trial court seven witnesses testified against the appellant. The complainant was at her mother's home in the midnight of 30th June 2014 when she saw over twenty individuals in her bedroom. They took several items from the house, roughed her up and raped her. There was evidence from a health officer which indicated that the complainant had been sexually assaulted by several people. Several police witnesses also testified. The appellants, upon being put on their defence, denied the offence.

3. The appellant was aggrieved by his conviction and sentence and lodged an appeal. In his petition of appeal, he alleged that the trial court did not take into account the fact that the case was a frame up arising from a grudge between him and PW1, that the first report did not identify where the offence happened nor the identification marks of the assailants, and that the ingredients of the offence were not established to the required standard. In further grounds, he averred that he was not positively identified, there were contradictions and inconsistencies that ought to have been resolved in his favour, his defence was not considered and the offence of rape was not fully proved.

4. The appeal was argued on 20th June 2019. The case for the appellant was articulated in his written submissions. The state was represented by Mr. Ng'etich. In the written submissions, the appellant raised issues relating to poorly conducted identification parade, inadequate identification, insufficient evidence on ownership of the items allegedly stolen, inconsistences and contradictions in the evidence, rejection of his alibi defence, and tests not done to establish the offence of rape. In his response, Mr. Ng'etich submitted that the identification parade was properly conducted, the appellant was well-known to the victims, the stolen items were not recovered, the elements of robbery with violence were proved, and the appellate court may consider resentencing.

5. Being a first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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 magistrates' findings can 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."*

6. I will now advert to the grounds raised in the appeal.

7. On inconsistencies and contradictions in the testimonies of the prosecution witnesses, according to the appellant, the complainant, PW1,

stated that the attack happened on 30th June 2014, while a police witness talked of 29th June 2014. The other example is that she said she saw about twenty people, yet the investigating officer put the figure at ten. I have perused through the court record. I have noted that those inconsistencies were minor.

8. The decision of the Ugandan Court of Appeal in *Twehangane Alfred vs. Uganda* [2003] UGCA 6, on inconsistencies and contradictions in the state's case, states the law on the matter. The court said:

> *'With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of eth prosecution's case."*

9. My view is that the inconsistencies pointed out by the appellant were minor. I do not think much should turn on the alleged inconsistencies.

10. There other ground raised was that the conditions for identification of the assailants were not positive. It was submitted that the incident happened at night, and that there was no other light apart from the torch light from PW1's mobile phone.

11. The guidelines on identification under difficult circumstances were set out in such cases as *Roria vs. Republic* [1967] EA 583 and *Republic vs. Turnbull* [1976] All ER 549. PW1's evidence was that the assailants had torches, whose light they flashed around, ostensibly as they looked for items in the house. I am persuaded that that would have been sufficient even if flashed fleetingly on the assailants. The attack took some time. PW1 was with the assailants for a while, including the whole ordeal of rape by eight individuals. I am not persuaded that the circumstances were not conducive to identification.

12. The appellant raised issues with the identification parade conducted by the police. However, he did not coherently articulate, in my view, what was wrong with the manner in which the parade was conducted. He did not demonstrate that the parade did not meet the guidelines in the Police Force Standing Orders, made under the National Police Service Act, 2011, and set out in *R. vs. Mwango s/o Manaa* [1936] 3 EACA 29 and *Ssentale vs. Uganda* [1968] EA 365.

13. He argued that the ownership of the items stolen was not established. The record is clear, there were no recoveries and, therefore, the issue of ownership of what was stolen was not relevant. What was critical was the testimony of the victims that items were stolen from them, so long as that testimony was cogent and the witnesses credible, reliable and believable. The mere fact that no recoveries were made and ownership of the alleged stolen items was not established, of itself, should not diminish the claim by the victims that property was stolen from them.

14. On the issue of the defence not being considered, I note that the appellant gave an unsworn statement. The position in law is that an unsworn statement is worthless evidence. It was said in in *Odongo vs. Republic* [1983] KLR 301, that the unsworn statement of an accused person was not evidence.

15. On the question of proof of the allegation that PW1 was raped, I have seen the evidence of PW6, the clinical officer, it was cogent and consistent. I am satisfied from it that PW1 had been assaulted sexually by several men. I am not persuaded that that evidence was deficient for the purpose of establishing the fact of rape.

16. Was the appellant at the scene? PW1 was positive that she recognized him. According to her, he was a person that she had met previously, unlike the other person who had been jointly charged with him. She mentioned his name to the police, and it was on that basis that he was arrested and charged. His was a case of recognition. Her testimony placed him squarely at the scene.

17. The appellant faced a charge of robbery with violence. The said offence is created under section 296(2) of the Penal Code, which states as follows:

> *"296. (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*
>
> *(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."*

18. The offence is established where a robbery is committed accompanied by either of the three factors set out in the provision – that the robbers were more than one, or used actual violence on their victim, or were armed with offensive or dangerous weapons. See *Simon Materu Munialo vs. Republic* [2007] eKLR. In this case the PW1 was positive that the individuals who attacked her were more than one, and there was use of violence. She was raped and tied up with ropes.

19. In view of the above, I am persuaded that the conviction of the appellant was safe. I shall accordingly uphold his conviction. The sentence imposed is what the law creating the offence prescribes. However, in view of the recent decision of the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR the trial court can exercise some discretion in sentencing where the statute has prescribed mandatory sentences. Robbery with violence is a mandatory capital offence whose statutory penalty is death. The Supreme Court in *Francis Karioko Muruatetu & another vs. Republic* (supra) held that the death penalty was not legal. The appellant was considered as a first offender at the sentencing hearing on 28th July 2017. As such he should be handled with some measure of leniency. The spirit in *Francis Karioko Muruatetu & another vs. Republic* (supra) appears to be that where an appellate court finds that resentencing is necessary it should remit the matter to the trial court for that purpose. I shall, accordingly, direct that the trial file in Hamisi PMCCRC No. 662 of 2014

be remitted to the Hamisi Principal Magistrate's Court for the resentencing of the appellant. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF July 2019

W MUSYOKA

JUDGE