



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO 110 OF 2018
CONSOLIDATED WITH
CRIMINAL APPEAL NO 112 OF 2018

JOSEPH MIRORO GWARO.....1ST APPELLANT

JOSEPH GWARO RAGOGL.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence at Kisii Law Courts before Hon. N.S. Makila (SRM) the judgment was delivered on 6th of November 2018)

JUDGMENT

1. The appellants, **Joseph Miroro Gwaro** and **Joseph Gwaro Ragogi**, were charged before the trial court with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars were as follows;

On the 2nd day of May 2017 in Kisii Central Sub County jointly with others not before the court while armed with dangerous weapons namely axes, pangas, iron bars and rungas robbed HKO of cash Kshs 1,030a88/=, one mobile phone make Tecno 340 and one axe all valued at Kshs 3,530 and immediately before such robbery used actual violence to the said HKO.

2. Then **Joseph Gwaro Ragogi** was also charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars were that on the 2nd May 2017 in Kisii Central Sub County jointly with others not before the court while armed with dangerous weapons namely axes, pangas, iron bars and rungas robbed **Josephine Kemunto** cash of Kshs 500/= and immediately before such robbery used actual violence to the said **Josephine Kemunto**. He was also charged of a third count, rape contrary to **section 3 (1) (a) (c) (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on 2nd May 2017 in Kisii Sub County within Kisii County, intentionally and unlawfully caused his penis to penetrate into the vagina of **HKO**, by use of threats.

3. This being the first appellate court I am mandated to reanalyze and reexamine the evidence on record and come to a conclusion while taking cognizance of the fact that I did not have the opportunity to see the demeanor of the witnesses (*see: Okeno v Republic [1972] EA 32*).

4. The prosecution called six (6) witnesses to prove its case. **HKO (Pw1)** recalled that on 1st May 2017 people entered her house with torches and through to her bedroom claiming to be police officers looking for illicit brew. She saw two men, one short man and a tall one. The two asked for her phone and PIN number and assaulted her as she could not recall the details. They threatened her and she gave them her phone and Kshs 3,130/-. She was taken to the next room where the tall man with a dotted jacket raped her while the short man threatened her and warned her to remain silent. She recalled that the incident took place for 30 minutes and because of the torches they had she could see their faces. She went for treatment at the Kisii Training and Referral Hospital and made a report at the police station. She was called to identify the suspects on different dates. She identified the 1st appellant whom she described as short, with a big head and very harsh. She later identified the 2nd appellant as the one who raped her and ate the mandazi from the cupboard during the night of the incident.

5. **Daniel Nyampino (Pw5)** testified that he works at Kisii Teaching and Referral Hospital and examined Pw1 who came with a history of rape. Upon examination of Pw1 on the 30th May 2017 he found that she had tenderness of the right shoulder and right ring finger. The injuries were about 3-4 weeks old. There was no discharge in her private parts and high vaginal swab showed red blood cells, pus cells, spermatozoa and epithelia cells. The urinalysis revealed white blood cells and pus cells. The findings were consistent with rape. The physical findings were consistent with assault.

6. **Josephine Kemunto** (Pw3) recalled that on the night of 2nd May 2017 at around 2 a.m. the robbers entered their premises told her to open her room whereupon they entered carrying an axe and panga. She saw two men one had the panga and the other an axe. They told her that they wanted the money she got from selling fish, they searched the house and took Kshs 500/-. They hit her hand and told her not to scream. The two suspects had a torch which lit her bedroom. She had not known the assailants prior to the incident. That though the two suspects were in her room she could hear one person in the sitting room where her children slept. The suspects were later arrested and she identified them at the police station in an identification parade.

7. **Carolyn Sarongi** (Pw2) told court that on the night of the incident she was sleeping at the house of Pw3. At around 2 a.m. she heard a bang at the door and 4 men entered her room, one man had her hands tied up. The three had an axe, sticks and demanded for money. She testified that they introduced themselves as robbers and demanded that Pw3 to open her door. The robbers had a torch and was able to identify them, one was tall and the other two were short. She reported the matter to the Kisii Central Police station and was later called for identification parade. She identified the 2nd accused who was tall and wearing an army jacket.

8. **Corporal Joel Langat** (Pw6) told court that on the morning of 2nd May 2017 he was informed of a robbery. He testified that he went to the home of the complainant. He arrested the 1st accused and conducted an identification parade. On 11th May 2017 he received information that the 2nd accused was in the office of the chief and had the 2nd accused arrested and organized an identification parade. They did not recover anything from the accused persons upon investigations. He summoned the complainants. The suspects were at the cell and the complainants at the OCS's office and that at no point did the complainants go to the chief's office. The identification parades were done by Inspector Ochieng and Inspector Wambugu.

9. **Inspector Nicholas Mombugu** No. 236162 (Pw4) attached at the DCI Kisii Central was informed by Pw6 to do an identification parade of the 2nd appellant. He told court that Pw2 and Pw3 came and identified the 2nd accused. There were 8 suspects and the accused person was the 9th person. The suspect was standing between the 5th and 6th suspect. The 2nd appellant was dissatisfied and said that he was at a funeral at the time of the offence. Pw4 told court that he also conducted an identification parade of the same accused and was positively identified by Pw1. He told court that during the identification parade the accused was standing between the 4th and 5th suspect. All suspects in the parade were of the same sex and same approximate age. The witnesses were put in separate rooms and did not consult each other.

10. At the close of the prosecution case the trial court found that the prosecution had established a prima facie case against the appellants and put them on their defence. The 1st appellant testified that on 2nd May 2017 he was home alone at 12.20 p.m. farming when 3 men arrived and informed him that Chief Anyiega was calling him at his office. He told court he accompanied the men and went to the chief's office where he found 4 ladies and 5 men. He was asked whether he knew the whereabouts of the 2nd accused and also informed that the two of them were found to be the master minds of robberies in the area. He was taken to the DCIO's office in Kisii. He joined 8 people who were part of the identification parade and saw the ladies he had seen in the chief's office come in. He told the police officer that he had seen the ladies in the chief's office and the identification parade was stopped.

11. The 2nd appellant told court that he got a report on 10th May 2017 that the chief needed to see him and went to his office thinking that it was a dispute on land. He was taken to Kisii Police station and photographed. The next morning as he left the cell he saw 4 women at the counter and he proceeded to join some men in a line. The women came separately and touched him. The women were shown his photographs and he was charged with charges unknown to him.

12. At the close of the trial, the court found that the prosecution had proved its case against the appellants beyond reasonable doubt. The court found the appellants guilty of count 1 and the 2nd appellants guilty of count 1, 2 and 3. It is the said judgment that has occasioned the current appeal where the appellants have appealed against the conviction and sentence. In a nut shell their memorandum of appeal are on the grounds that the prosecution did not prove its case to the required standard, beyond reasonable doubt and that the sentence imposed by trial court was excessive.

13. Both the 1st and 2nd appellants filed their written submission and made oral submissions at the hearing of the appeal. The 1st appellant opposed the finding of the trial court claiming that he was arrested for a different matter **Criminal Case 991 of 2017**. He submitted that he was arrested on mistaken identity as he has a similar name with the 2nd Appellant. He submitted that the investigating officer confirmed that he held his identity card. He contends that the charges were invalid as the OB used to compile the charge sheet was never given to him and the charge does not state the time the offence was committed. He submitted that Pw1 told court the incident took place on 1st May 2017 while according to Pw2 it was 2nd May 2017, the charge sheet on the other hand reflects that the offences were committed on 2nd May 2017. He advanced though the investigating officer told him that he was positively identified through an identification parade he did not participate in the parade and the forms from the parade were forged. He explained that the officer who conducted the parade did not present the forms before court and that a closer look at the forms reveal that they were not signed leading to the conclusion that the parade was not conducted by the officer. He told court that he was not supplied with the investigating diary and all the statements thus his constitutional rights were thus infringed.

14. The 2nd appellant submitted that he was summoned by the chief and arrested to answer charges in **Criminal Case 991 and 977 of 2017** on allegations that his identity card had been used for criminal activity. He contends that one of the cases is before court number 2. He submitted that he asked for the OB of 10th and 2nd May 2017 but was not supplied with the OB for the charge in **Criminal Case 977 of 2017**. He submitted that though Pw1 testified that she was robbed on the 1st May 2017, he was not supplied with the OB of 2nd May 2017. Pw1 described the colour of the clothes the suspect had worn as a dotted jacket but on cross examination testifies that she could not recall the colour of clothing worn by the suspects. He contends that Pw3 when cross examined testified that she reported the matter to the chief's office and police office. He submitted that the said chief was not called as a witness. He advanced that they used his photos to conduct an identification parade which as no reason was given by the investigating officer took the 2nd appellant's photos from his home. He advanced that the investigating officer did get information concerning the appellant from an informer and not from the complainant. He also submitted that Pw1 did not have any evidence to show that she went to hospital.

15. Mr. Otieno for the State opposed the appeal. He submitted that the identification of the appellants was centered on the identification parade done and the victims were able to identify the two appellants in two separate parades. That Pw7 produced the identification parade form in respect of the 1st appellant. In his cross examination in his defense the appellant claimed he was placed in an identification parade and produced as exhibit number 1. The complainants described the appellants to the police as a stout man with a big head and the other described as a tall man. Pw1 identified the 2nd appellant in the identification parade as the one who raped her, Pw2 identified the 2nd appellant in the identification parade. That though 1st appellant submitted that their names were similar hence the confusion however the witnesses did not identify them by their names but visual identification. He submitted that in accordance to the proceedings before the trial court on 19th December 2017 the prosecutor confirmed that all documents they relied on were given to the accused persons and no objection was raised by the appellants and subsequently when the matter was set for hearing the appellants confirmed they were ready to proceed. The investigating officer was not cross examined by the 2nd appellant to confirm whether the photos were taken as the officer testified that no photo was taken. He submitted that the appellants were identified assailants responsible for the offences. Pw6 produced medical evidence that Pw1 was raped. He contends that the 20 years imprisonment was sufficient in consideration of the offences the appellants were convicted of.

DETERMINATION

16. The appellants raised issues concerning **criminal case number 991 of 2017** claiming that they were arrested for charges contained in that case. I note that from the record, on 17th August 2017 the investigating officer released the phone and photos of the 1st and 2nd appellant respectively. He explained that he would continue holding the 2nd Appellant's Identity Card to be used in the **court file No. 991 of 2017** before the Kisii Magistrates Court. It therefore follows that all issues pertaining to the investigation of that case will be determined in **court file No. 991 of 2017**. The current appeal before me only relates to **Criminal Case No. 977 of 2017**.

17. The 1st appellant submitted that Pw1 told court the incident took place on 1st May 2017 while Pw3 testified the incident occurred on 2nd May 2017; the charge sheet on the other hand reflects that the offences were committed on 2nd May 2017. I note that there were contradictions as to when the offence took place but also note that the incident took place in the wee hours of the morning of 2nd May 2017 between 1:00 a.m. and 2:00 a.m. I therefore do not find that the contradictions were substantial and fundamental to the main issue. I am guided by the Court of Appeal finding in **Richard Munene v Republic [2018] eKLR** where the court held that;

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

18. I now turn to whether the prosecution proved the offence of robbery with violence beyond reasonable doubt. **Section 296 (2) of the Penal Code** provides that:-

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in the 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.”

19. The ingredients of robbery with violence pursuant to **Section 296 (2) of the Penal code** are that the offender is armed with any dangerous or offensive weapon or instrument, or he is in the company with one or more other person or persons, or at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

20. Pw1 testified that they threatened by the appellants and she gave them her phone and Kshs 3,130/-. Pw5 examined Pw1 on 30th May 2017 and found she had tenderness of the right shoulder and right ring finger and concluded that she had been assaulted. Pw2 and Pw3 confirmed to the court that they saw the 2nd appellant enter the house carrying an axe and panga. Pw3 told court that they were two men, the 2nd appellant being one of them, searched the house and took Kshs 500/-.

21. I find that the appellant's constitutional rights were not infringed as alleged. **Article 50 (2) (j)** of the Constitution provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence while **sub-article (c)** provides for the right of the accused to have adequate time and facilities to prepare his defence. The 1st appellant told court that he was not supplied with the investigating diary and all the statements thus his constitutional rights were thus infringed. On 7th December 2017 the prosecution issued a copy of the investigative diary to the 1st appellant and made a copy for the 2nd Appellant. The record shows that the appellants after several adjournments were supplied with witness statements before hearing of the prosecution case.

22. The prosecution having proved the ingredients of robbery with violence, it is vital that the appellants be positively identified as the assailants of the crime. I have reminded myself of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, inter alia, that:

“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light”.

23. It has been proved that the incident occurred between 1:00 a.m. and 2:00 a.m. and that at the time it was dark. However Pw1, Pw2 and Pw3 all testified that the appellants had a torch which was lit during the incident. Pw1 further testified that spent a considerable time with the appellants, 30 minutes, and could identify them. She described both the appellant as follows ‘one was tall and one was short, the tall had a

jacket which was dotted'. In *Wamunga v Republic*, [1989] KLR 424-Criminal Appeal No 20 of 1989, this court 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. Whenever the case against a defendant depends wholly or to a great extent on the correctness of more or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

24. In this case the investigating officer, Pw6 not only relied on the visual descriptions given by the complaints but also directed that an identification parade be conducted. Identification parades are meant to test the correctness of a witness’s identification of a suspect. (*See John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68 & 69 of 2008*).

25. Pw1 identified both the appellants during the identification parade. Pw2 and Pw3 identified the 2nd appellant as one of the assailants who came to their home on the material day. However, the appellants were both disgruntled with the manner in which the identification parade was conducted. The 1st appellant testified that he met the ladies who identified him at the office of the chief, the 2nd appellant also told court that as he left the cell to the identification parade there were 4 women seated at the counter, and who came and identified him as a suspect. In *Rex v Mwangi s/o Manaa*[1936] 3 EACA 29 the court found that an identification parade ought to be conducted in accordance with the Force Standing Orders. The Force Standing Orders relevant to an identification parade are as follows;

1. *The Accused person is always informed that he may have an Advocates or friend present when the parade takes place.*
2. *The officer in charge of the case, although he may be present, does not carry out the identification parade.*
3. *The witness does not see the accused before the parade.*
4. *The accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.*
5. *The accused is allowed to take any position he chooses, and he is allowed to change his position after each identifying witness has left, if he do desires.*
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10. *The witness is to touch the person he identifies.*
11. *At the termination of the parade or during the parade the accused is to be asked if he is satisfied that the parade is being conducted in a fair manner and a note is to be made of his reply.*

26. Pw1, Pw2 and Pw3 all gave evidence that they made a report to the police station and were summoned to the police station to identify the accused persons and did not go to the chief’s office as alleged by the 1st appellant. Pw6 told court that they got information of the 1st appellant’s whereabouts from an informer, and he proceeded to make an arrest. Pw6 testified that the 1st appellant was arrested while he was coming from a hotel in the company of a lady and not in the chief’s office. Pw6 thereafter summoned the complainants to identify the suspects. He told court that the complainants’ were at the OCS’s office and that at no point did the complainants go to the chief’s office. He also confirmed that the identification parades were conducted by Inspector Otieng and Inspector Wambugu in compliance with the Standing Force Orders as the two inspectors were not the investigating officers. The evidence by the prosecution is clear that the 1st appellant never met the complainants at the chief’s office, as he was arrested by Pw6 from the hotel.

27. However I do note that the identification parade form for the identification parade by Inspector Otieng’ was not signed at paragraph ‘F’. Paragraph ‘F’ reads as follows;

“F CERTIFICATE BY THE OFFICER CONDUCTING THE PARADE:-

I conducted the whole of the proceedings in connexion with the parade and certify that the instructions on Identification Parades were strictly complied with and that, as far as possible, the persons taking part in the parade were of similar age, height and general appearance, as the suspect.

Signature.....

Date..... Rank.....”

28. It is not clear why the inspector failed to certify that the instructions on Identification Parades were strictly complied with in accordance to part F. However having established that the 1st appellant was arrested by Pw6 and that they did not go the chief’s office as alleged by the 1st appellant in his defense. I find that he was positively identified. His comments after identification parade form were an afterthought.

29. Pw4 conducted the identification parade of the 2nd appellant and confirmed to the court that the 2nd appellant was positively identified by Pw1, Pw2 and Pw3. He testified that all suspects in the parade were of the same sex and same approximate age and were more than 8 during the parade. He told court that the witnesses were put in separate rooms and did not consult each other. After analysis of the entire evidence

before the trial, it is my finding that the Court was perfectly justified to reach the conclusion that the prosecution had proved the offence of robbery with violence in regard to the 1st and 2nd appellant. I am constrained to agree with the finding of the trial court that the defence raised by the appellants was unfounded and mere denials as they failed to account for their whereabouts at the time of the incident.

30. I now turn to whether the offence of rape was proved to the required standard. The ingredients of rape which the prosecution must prove are set out in **Section 3(1) of the Sexual Offences Act, 2006**. Under section 3(1) of the Act, 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.*

31. Pw1 testified that she was raped by the 2nd appellant. She told court that she was told to keep silent during the incident. She elaborately described the assailant as a tall man with a dotted jacket and the one who ate the mandazi from the cupboard. She was able to identify him at the identification parade. The clinical officer Pw5 told court that upon examination of Pw1 there was no discharge in her private parts and high vaginal swab showed red blood cells, pus cells, spermatozoa and epithelia cells. He concluded that the findings were consistent with rape. However I do note that the incident took place on 2nd May 2017 while Pw1 was examined on 30th May 2017. Pw5 testified that the genitalia appeared normal and high vaginal swab revealed presence of spermatozoa, however four weeks had since passed and the presence of the spermatozoa could not have been as a result of the rape as the examination was done four weeks after the incident. That said, there was the evidence of Pw1 which remain unshaken that she was raped by the 2nd appellant. There was clear evidence that Pw1 positively identified the 2nd appellant as the assailant, and I find that the prosecution proved the offence of rape beyond reasonable doubt. The conviction by the trial court for the offence of rape is hereby affirmed.

32. I recognize that 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*). In this case the trial court sentenced the 1st appellant to 20 years ‘imprisonment on count 1, while the 2nd appellant was sentenced for 20 years’ for count 2, and 10 year’ for the count 3. I note that the 2nd appellant was convicted on count 1 but not sentenced and hereby sentence him to 15 years ‘imprisonment on count 1. In *Samson Boyii Nkulet V Republic [2019] eKLR* the court reduced the sentence of 20 years’ imprisonment for the offence of robbery with violence to 10 years. I therefore reduce the 1st appellant’s sentence on count 1 to 15 years’ imprisonment and 2nd appellant’s sentence on count 2 to 15 years imprisonment, while I affirm the 2nd appellant’s sentence for the 3rd count. The sentences to shall run concurrently from the date of sentence.

Dated, signed and delivered at Kisii this 8th day of August 2019.

R. E. OUGO

JUDGE

In the presence of;

1st Appellant Present

2nd Appellant Present

Mr. Otieno Senior State Counsel Office of the DPP

Rael Court clerk