



**HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CORAM: D.S. MAJANJA J.**

**CRIMINAL APPEAL NO. 119 OF 2017**

**BETWEEN**

**PATRICK JOSIAH OLUMBOKA .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. C.S. Nambafu, SRM dated 27<sup>th</sup> February 2017 at the Magistrates Court at Mumias in Criminal Case No. 22 of 2016)*

**JUDGMENT**

1. The appellant, **PATRICK JOSIAH OLUMBOKA** was charged and convicted of one count of rape contrary to **section 3(1)(a) and (b) and 3 of the Sexual Offences Act** and a count of robbery with violence contrary to **section 296 (2) of the Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of rape were that on 7<sup>th</sup> June 2016 at about 1230 hours in Mumias East Sub-County of Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of MSK without her consent. The particulars of robbery with violence were that at the same time and place, the appellant robbed MSK of her mobile phone make Nokia 1680 valued at Kshs. 3,500/-, a grey Jacket and long trouser valued at Kshs. 1,500/-, 5 chicken and immediately at the time of such robbery used actual violence to the said MSK.

2. Upon conviction, the appellant was sentenced to 10 years' imprisonment for the offence of rape and to death for the offence of robbery with violence. He now appeals against conviction and sentence on the basis of the grounds set out in his petition of appeal and written submissions. In summary, the appellant contends that the prosecution failed to prove the case against him beyond reasonable doubt. He complains that the trial magistrate had by relying on a defective identification parade which was conducted in contravention of the law and applicable principles. He contends that there was no evidence linking him to the offence of rape and that he was not medically examined to confirm his complicity. He submits that the totality of evidence was such that it could not sustain the conviction against him.

3. In response, the counsel for the respondent opposed the appeal and supported the conviction and sentence on the basis that the prosecution proved all the elements of the offences. Counsel pointed out that the incident took place in the day in circumstances favourable for positive identification. Further that he was found in possession of various items that were stolen from the complainant's house.

4. Before I deal with this appeal, it is important to recall that the duty of the first appellate court. It is to evaluate all the evidence on record afresh and come to its own independent conclusion bearing in mind that it neither had or saw the witnesses testify so as to make a finding on their demeanor. In order to proceed with this task, I will set out the evidence that emerged before the trial court which was as follows.

5. MSK (PW 1) testified that she was at home on 7<sup>th</sup> June 2016. At about noon, while she was playing with a child, she saw the appellant standing near the borehole. He inquired from her whether the place was the home of her husband, SKN (PW 2). He informed her that SKN had sent him. She decided to call PW 2 to confirm but before she could, the appellant became angry, grabbed her, pulled her into the house and started beating her. He wrestled her to the floor and removed her skirt. He also removed his trouser and proceeded to put his penis into her vagina. Because of fear, she did not scream. He dragged her into the bedroom while demanding Kshs. 500,000/-, ransacked it and took PW 2's jacket. He then took her to the kitchen and took her Nokia phone. While in the kitchen, the appellant tied her to a pole, entered into the chicken coop with a sack and took 4 chicken. Thereafter he untied her, took her back to the bedroom, ransacked the bedroom and tied her to the window grill using her headscarf. He continued to threaten her and told her that he was going to bring her child. When he left, PW 1 freed herself and ran outside where she found a girl along the road and narrated to her the ordeal. The girl on the road assisted her to call PW 2. She thereafter went to the Health Centre and reported the matter to the police station. On 8<sup>th</sup> June 2016, she went back to the police station to attend an identification parade where she identified the appellant.

6. PW 2 testified that on 7<sup>th</sup> June 2016 while he was in Kitale, he received a call from his wife, PW 1, on a different number. She told him

she had been assaulted, raped and that the assailant had stolen her phone, chicken and his clothes. He returned home and found her admitted at the Hospital. Her face was swollen and she had a bruised neck. PW 2 testified that PW 1 gave him a description of the assailant and when he went to the market on 8<sup>th</sup> June 2016 he was able to identify someone selling his chicken and a young man wearing his trouser and jacket. He grabbed the man and demanded to know where he got his jacket. The man wanted to run away but was arrested with the assistance of the public. Thereafter he called PW 1 to come to the police station and identify the appellant.

7. PW 4, a police officer, recalled that on 8<sup>th</sup> June 2016, he was at Makunga patrol base at about 7.00am when he heard noises from the market. He proceeded there and found the appellant had been arrested by members of the public. After being identified by PW 2, he re-arrested the appellant and recovered a jacket and trouser that the appellant was wearing and which PW 2 identified as his.

8. The investigating Officer, PW 6, told the court that on 7<sup>th</sup> June 2016, PW 1 came to the police station with injuries on her face, neck and hands and reported that she had been raped and robbed of her phone, chicken and her husband's clothes. He issued a P3 medical report form and referred her to hospital for treatment. PW 3, the Clinical officer who examined PW 1, confirmed that PW 1 was treated at Health Centre on 7<sup>th</sup> June 2016. PW 1 complained that she had been raped and that the assailant had attempted to strangle her using a headscarf. PW 3 observed that PW 1 had swollen eyes and ulcerations on the neck and that her genitals were normal with a whitish substance but no bruises. She concluded there was rape as there were epithelial cells after conducting urinalysis.

9. PW 6 further testified that on 8<sup>th</sup> June 2016, the appellant was brought to the police station after having been arrested. He arranged for an identification parade which was carried out by PW 5, a Chief Inspector of Police, who testified that PW 1 identified the appellant.

10. When put on his defence, the appellant denied the charges in his sworn testimony. He testified that when he was arrested, he was in his own clothes and the clothes that were produced in evidence were sneaked into the vehicle at the police station. He stated that this case had been brought to frame him.

11. The offence of robbery with violence under **section 295** as read with **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 person or that at immediately before or immediately after the time of robbery beats, strikes or uses other personal violence to any person. I am satisfied from the evidence of PW 1 that all elements of the offence of robbery with violence were proved. The testimony of PW1 was detailed and established that the assailant violently assaulted her and stole her phone, grey jacket, long trouser and chicken. Her injuries were corroborated by the medical examination conducted by PW 3.

12. I am also satisfied that PW 1's detailed testimony was credible. It was not shaken on cross-examination and it established the offence of rape. 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*

13. PW 1 narrated in detail how the assailant used force to cause an act of penetration. In other words, the act of penetration was without her consent and was obtained by force. If any corroboration was required, it was established by the testimony of PW 2 who saw her in a state of distress and to whom she narrated her ordeal immediately after the incident. The medical evidence of PW 3 further corroborated the act of penetration.

14. The issue in this appeal is whether the appellant was the assailant. The prosecution relied on the direct evidence of identification and circumstantial evidence or recovery of stolen items.

15. As regards identification, the court ought to warn itself of the dangers of a mistaken identity particularly where identification took place in difficult circumstances. In this case however, the incident took place at noon in broad daylight. PW 1 gave evidence of how the appellant came to her home and proceeded to assault her. The period of interaction and the close proximity of the parties during the day are all circumstances favorable for positive identification. Since the appellant was a stranger, his identity by PW 1 could only be tested by an identification parade.

16. The identification parade was conducted by PW 5 after the accused had been arrested. PW 5 explained that he followed the correct procedure that there were 8 people on the parade and the appellant was put between number 3 and 5. He told the court that PW 1 was in his office and could not see him. She was called and pointed out the appellant by touching him thereafter the appellant appended his thumb print on the form to confirm that he was satisfied with the manner that the parade was conducted. I have considered the manner in which the parade was conducted and I do not find any error. Taking into account the circumstances which were favourable identification for positive identification at the time the offence was committed, I am satisfied that the appellant was positively identified and I find and hold that he committed the offence.

17. I now turn to consider the second basis of the appellant's conviction based on the doctrine of recent possession. The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. In **Arum v Republic [2006] 1 KLR 233**, the Court of Appeal set out conditions that must exist before court can rely on the doctrine of recent possession as a basis of conviction in a criminal case as follows: -

- (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.

18. The proof as to time will depend on the ease with which the stolen property can move from one person to another. Once the elements of the doctrine are established, the evidential burden fall on the accused to show how he or she came into possession of the stolen goods (see **Malingi v Republic [1989] KLR 255**).

19. PW 1 narrated how PW 2's trousers and jacket were stolen from her house. When PW 2 was at the market on the day after the incident, he saw the appellant wearing his trouser and jacket. Both PW 1 and PW 2 identified the trouser and jacket produced in evidence. I am therefore satisfied that the items were properly identified as belonging to PW 2 and were indeed stolen from his house. In his defence, the appellant suggested that the clothes were sneaked into the vehicle in order to frame him. When the appellant raised the issue in cross-examination of PW 4, PW 4 was very clear that the clothes were taken from him and were removed at the station. The appellant did not lay claim to those clothes or give a reasonable explanation how the clothes were obtained on the day next after the robbery and rape incident. I therefore find and hold that the doctrine of recent possession was established and therefore an assailable inference was that he is the one who robbed PW 1. The totality of the evidence is that the prosecution proved the offence of rape and robbery with violence and I affirm the conviction on both counts.

20. I now turn to the sentence. In his written submissions, the appellant correctly pointed out that the mandatory death sentence 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**). Bearing that in mind, I set aside the sentence of death imposed on the second count. Based on the same principal mandatory minimum sentences for rape and like offences under the **Sexual Offences Act** were declared unconstitutional (see **BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019]eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR**). I would be hesitant to review the sentence in light of the facts which I have outlined above as the rape was deliberate and accompanied by violence. I therefore quash the death sentence imposed on the second count and substitute with a term of 20 years' imprisonment.

21. In conclusion, I dismiss the appeal on conviction but allow the same on the sentence to the extent that the sentence of death on count 2 for robbery with violence contrary to **section 296(2)** of the **Penal Code** is set aside and substituted with a sentence of 20 years' imprisonment. Since both offences were from one transaction, they shall run concurrently from the date of arraignment, that is, **9<sup>th</sup> June 2016**.

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT KAKAMEGA THIS 26<sup>th</sup> day of SEPTEMBER 2019.**

**W. MUSYOKA**

**JUDGE**

Appellant in person.

Ms Ombega, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.