



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 29 OF 2016

ALLAN JUMA.....1ST APPELLANT

VICTOR ONZERE2ND APPELLANT

BIKO ANDAYI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by E.W. Muleka, SRM in Hamisi PMC Criminal Case No. 909 of 2014 dated 23/12/2015)

JUDGMENT

1. Allan Jumba, Victor Onzere and Biko Andayi (herein referred to as the 1st, 2nd and 3rd appellant were convicted in count 1 of the offence of robbery with violence contrary to section 296(2) of the penal code and each of them sentenced to death.
2. The 1st appellant was in addition convicted in count 2 of the offence of gang rape contrary to section 10 of the sexual offences Act No. 3 of 2006. The 3rd appellant was also convicted in Count 4 of the offence of gang rape contrary to above stated section. Sentence on counts 2 and 4 were ordered to remain suspended after the sentence of death.
3. The appellants were aggrieved by the conviction and the sentence and filed the instant appeal.
4. The grounds of appeal are in summary that:-
 - (1) The prosecution evidence was contradictory, unreliable, inconsistent and insufficient.
 - (2) The medical evidence was inconclusive.
 - (3) The trial Magistrate erred in law and in fact in making findings that were contrary to the evidence adduced at the trial.
 - (4) The trial Magistrate erred in law and in fact in failing to find that the charge was not proved beyond reasonable doubt.
5. The particulars of the offence in count 1 were that on the 13th September, 2014 being armed with offensive weapons namely knives robbed PA (herein referred to as the complainant) of kshs.500/=, sumsang mobile phone, 3 litres of golden fry cooking fat and a photograph all to the total value of kshs.6,050/= and immediately before the time of such robbery used violence to the said complainant.
6. The particulars of the offence in count 2 were that on the 13th day of September, 2014 in Maragoli Location within Vihiga County, the 1st appellant in association with Victor Onzere, Biko Andayi and others not before court intentionally and unlawfully caused his penis to penetrate the vagina of PA without her consent.
7. The particulars of the offence in count 3 were that on the same date, time and place as in count 2, the 2nd appellant in association with Allan Jumba, Biko Andayi and others not before court intentionally and unlawfully caused his penis to penetrate the vagina of PA without her consent.
8. The particulars of the offence in count 4 were that on the same date, time and place as in count 2, the 3rd appellant in association with Victor Onzere, Allan Jumba and others not before court intentionally and unlawfully caused his penis to penetrate the vagina of PA without

her consent.

9. The grounds of appeal were expounded by the written submissions of the advocates for the appellant, **Malalah & company Advocates**. The state did not make any submissions in the case but relied on the record of the lower court.

Case for prosecution-

10. The prosecution case was that the complainant is a resident in Vihiga County. That on the material day at 10pm she was sleeping at her house when she heard movements in the house. She switched on the lights. She saw Biko the 3rd appellant, Victor the 2nd appellant and 2 other people she did not know inside her house. Jumba the 1st appellant then came out of the kitchen. He was armed with a knife. She wanted to scream but Jumba held her and squeezed her throat. He pushed her to the corner of her bed and removed her skirt and underpant. Biko held her legs apart while Victor held her hands. Another person was holding a knife on her throat. Jumba then raped her for 30 minutes. After he finished Biko raped her and then Victor. As Victor was rapping her Jumba was searching the house for money. He took her phone and kshs.500/=. They ransacked all her drawers. Jumba took one of her photographs. They took her to the kitchen where they took 2 litres of golden fry fat. A vehicle then hooted on the road outside her home. The robbers escaped.

11. The complainant reported to her neighbour **Millicent Mwereri** PW5 who assisted her with a phone and she called her husband. Her husband went there and took her to Mudete Police Station where she made a report. She gave out the names of the three people to the police. She went for treatment at Mbale hospital. On 15/9/2019 the 1st appellant was accosted by members of the public who set upon him and started to beat him up. **PC. Omar** PW4 and **Corporal Mutai** PW6 of Chavakali police patrol base received the report of the beating. They rushed to the scene and rescued the 1st appellant from the mob. PC Omar searched the 1st appellant and found him with a photograph in his pocket which was identified to be that of the complainant.

12. The 2nd and the 3rd appellants were arrested by members of the public and taken to Mudete Police Station. **Corporal Mutai** PW7 investigated the case. He issued a P3 form to the complainant. It was completed at Vihiga County Referral Hospital by a clinical Officer PW2. The Clinical Officer found the complainant with swellings, tenderness and pain on the neck and bruises in the vagina. A vaginal swab revealed presence of many active spermatozoa. Corporal Mutai charged the appellants with the offence. During the hearing the Clinical Officer produced the P3 form, the Post Rape Care form and laboratory tests as exhibits. The investigating officer PW7 produced the T-shirts that the appellants were wearing on the date of the robbery as exhibits.

Defence case.

13. When placed to his defence, the 1st appellant gave sworn evidence in which he stated that he is a farmer at Sabatia. That on the morning of 15/9/2015 he was heading to work when he was attacked by a mob. He went home. He lost consciousness. When he came to he found himself at the police station. He was charged.

14. The 2nd appellant stated in an unsworn statement that he lives at Chavakali. That on 14/9/2014 at 8pm he was at a pub when he quarreled with a certain person over spilt drink. He was then arrested and taken to Mudete Police Station. On the following day the investigating officer took his T-Shirt. He was taken to court and charged with robbery.

15. The 3rd appellant stated in an unsworn statement that he lives at Yandegge Mudete. That on 15/9/2015 at 8am he was on the way to work from his home while smoking bhang. He met with a village elder with 3 other people. They arrested him. He was taken to the police station. On the following day he was charged.

Submissions

16. The advocate for the appellants **Mr. Malalah** submitted that the essential elements of the crime of robbery with violence under Section 296(2) of the Penal Code were not proved as set out in the case of **Johana Ndugu – Vs – Republic Criminal Appeal No. 116 of 1995**. That it was not proved that the appellants were armed with a dangerous weapon. That the complainant and PW3 stated that the appellants were armed with a panga. That the charge sheet states that they were armed with knives. That the clinical officer said that the injuries were caused by a blunt object which therefore cannot have been caused by a panga. Therefore that it was not proved that the appellants were armed with a dangerous or offensive weapon. That there was thereby no crime of robbery with violence and if any robbery took place it was simple robbery.

17. The advocate submitted that the stolen items were not recovered except the photograph that was found with the 1st appellant. That the evidence of the complainant that the items were stolen from her was uncorroborated and worthless.

18. Counsel submitted that the evidence adduced against the appellants was contradictory. That the complainant stated in her evidence that she was asleep when she heard movements in the house. That in cross- examination by the 1st appellant she stated that the accused persons entered into the house through the window. She did not tell the court how she knew that the people entered through the window.

19. Further that the complainant stated that she saw 3 people in the house which contradicts the evidence of PW3 who said that he saw one person getting in through the window. That PW5 stated that she heard PW1 scream while PW1 stated that there was no point that she screamed as she was threatened by the 1st appellant.

20. That the complainant, PW3 and PW4 all stated that the 1st appellant was wearing a white T-shirt with red stripes which evidence was contradicted by that of PW6 who stated that on arrest the 1st appellant wore a red T-shirt with red stripes.

21. The advocate submitted that the appellants were not examined so as to link them with sperms found in the vagina of the complainant. That the complainant was a married woman and therefore that the sperms could have been from her husband. That the charge of gang rape was not proved.

22. It was further submitted that the appellants were not informed of their rights to be provided with a counsel at state expense under Articles 50(2)(h) of the constitution. That failure to inquire from the appellants whether they needed a state provided counsel in a serious death penalty matter amounted to a breach of the constitution, was illegal and dealt manifest injustice to the appellants.

23. The advocate submitted that an accused person should only be convicted on the strength of the prosecution case and not on the weakness of an accused's defence. That the onus on the prosecution to prove the charge against the accused person beyond all reasonable doubt were shifted to the accused. That in this case the prosecution never met its burden of proof. Counsel urged the court to acquit the appellants.

Analysis and Determination

24. This being a first appeal the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while at the same time bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify-see **Okeno – Vs – Republic (1972) EA32** and **Kiilu & Another – vs – Republic (2005)1 KLR 174**.

25. The offence in this case is said to have been committed at night. The complainant's evidence was that she knew the appellants before as she used to see them at Mudete Market. That the robbers took two hours in her house. That she had known the 2nd appellant for one year.

26. It is trite law that evidence relying on identification especially where the offence is committed at night ought to be treated with a lot of caution so as to erase any possibility of error in identification. The manner of how to go about such evidence was stated by the Court of Appeal in the case of **Cleophas Otieno Wamunga – Vs – Republic (1989)eKLR** where it was held that:-

“Evidence of visual identification in a criminal case can bring about miscarriage of justice and it is of vital importance that such evidence be examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one 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. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well-known case of Republic – vs – Turnbull (1976)3 All ER 549 at page 552 where he said.

“Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

27. The complainant's son PW2 did not say that he identified any of the robbers. The complainant was therefore the only identifying witness in the case. It is trite law a court can convict on the evidence of a single identifying witness thorough the court is required to thoroughly examine the evidence and ensure that it is free from the possibility of error. **In Kiilu & Another – Vs – Republic 2005 1KLR 174 the Court of Appeal** held that:-

‘ subject to certain well known exceptions , it is trite law that a fact may be proved by 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, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.’ See also **Abdalla Wendo & Another Vs Republic (1953) 20 EACA(166) KLR 198**.

In **Maitanyi Vs Republic (1986) KLR 198** the same court held that:-

‘1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made.

The court continued and held that:

‘That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these

matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves’.

28. The trial court considered the issue of identification and held as follows:-

On this issue its more straight forward since the accused persons committed the offence while the lights were on, and also had personal contact with the complainant during the rape, she managed to see them very well and this is corroborated by the evidence of PW4 who found the photograph of the complainant with accused No. 1 at the time of arrest. She was also able to identify the clothes which the three were wearing and they are also people personally known to her in that connection. I am convinced that the 3 were positively identified by their victim.

29. The complainant testified that she used a bedside switch to switch on the lights. Though it was not stated the kind of light that it was, it is apparent that the light was electric light that necessitated to be switched on by a switch. The complainant stated that she identified the appellants in the said light. She further said that the lights were on as the appellants raped her and as they ransacked the house. That the 1st appellant was the first one to rape her followed by the 3rd appellant and then the 2nd appellant. That the 1st appellant took her phone, money and a photograph. That on reporting to the police she gave out their names.

30. PC Omar PW4 stated that he re-arrested the 1st appellant from the members of the public and that upon searching him he found him with the complainant’s photograph. Corporal Gitonga PW7 testified he was with PC Omar when PC Omar searched the 1st appellant and recovered a photograph of the complainant from his pockets.

31. The complainant testified that she saw the 1st appellant in a stripped T-shirt. That the 2nd appellant was in a black T-shirt while the 3rd appellant was in a green T-shirt. PC. Omar PW4 testified that the T-shirt that was before court that he 1st appellant was said to have been wearing had red stripes. That it was identified by the son of the complainant. The said son PW2 however did not state that it is the 1st appellant whom he saw wearing the said T-shirt. The complainant on her part stated that the T-shirt that was being worn by the 2nd appellant was black in colour but that the one produced in court as the one that was being worn by the 2nd appellant had 3 different colours. It is clear that the T-shirts were not identified beyond all reasonable doubt as the ones the appellants were wearing during the robbery.

32. I have carefully evaluated the evidence adduced at the lower court. There is no doubt that the room where the complainant was sleeping was well lit. The complainant knew all the appellants by seeing them at Mudete market. She knew each of them by a single name. She gave their names to the police when she reported the incident. In her evidence she gave a sequence of what each one of them did during the robbery. The 1st appellant was found with the complainant’s photograph that the complainant said that he had taken from her house. Though the complainant was as single identifying witness in the case it was clear that she recognized the appellants as the assailants. The fact that the 1st appellant was found with the photograph of the complainant stolen from her house during the robbery lends credence to the evidence of the complainant that she had identified her assailants. It is therefore my finding the identification of the appellants by the complainant was free from the possibility of error.

33. The appellants did not testify as to where they were on the night of the robbery. Their defence did not dislodge the prosecution case.

34. In **Johana Ndungu – Vs – Republic Mombasa Criminal Appeal No. 116 of 1995** and in **Oluoch – vs – republic (1985) KLR 549** the Court of Appeal held that a charge of robbery with violence under section 296(2) is proved:-

- (1) if the offender is armed with any dangerous weapon or instrument or
- (2) if he is in the company with one or more other person or persons; or
- (3) if that or immediately before or after the time of the robbery he wounds, beats, strikes or uses personal violence to any person.

The court held that proof of any of these 3 ingredients is sufficient to prove the offence.

35. The complaint gave a graphic evidence of how the appellants raped her. There is no requirement in law that there has to be corroborative medical evidence for the offence of rape to be proved. Rape can be proved by way of oral and circumstantial evidence-See **Geoffrey Kioji – vs – Republic, Nyeri Cr. App. No. 270 of 2010 (COA)**, **AML – vs – Republic 2012 eKLR** and **Kassim Ali – vs – Republic, Mombasa (COA) Cr. App No. 84 of 2005**.

36. The complainant is a married woman. There was nothing for her to gain in lying that she was raped by the appellants. The fact that sperms were found in her vagina to some extent corroborated her evidence on rape. There was sufficient evidence that the appellants gang raped the complainant.

37. The appellants raped the complainant and robbed her. The act of rape was use of personal violence on the complainant. There was evidence that the robbers were about 5 in number. There was evidence that the 1st appellant was armed with a knife. The offence of robbery with violence was sufficiently proved.

38. The submission by counsel for appellants that the appellants were not accorded a fair trial at the lower court was not contained in any of the memorandum of appeals filed by the appellants. The court need not consider that ground of appeal.

39. The upshot is that the appellants were convicted on solid and water tight evidence. The contradictions pointed out by the advocate for the

appellants did not affect the substance of the prosecution case. The appeal on conviction is thereby dismissed.

Sentence-

40. The appellants were sentenced to suffer death in court 1. The Supreme Court in **Francis Kirioko Muruateti & Another – Vs – Republic (2017) eKLR** held as unconstitutional the mandatory death sentence for the offence of murder provided in section 204 of the penal code. The court held that the mandatory death sentence deprives courts of their inherent discretion not to impose the death sentence in an appropriate case. In **William Okungu Kittiny – vs – Republic (2018)eKLR** the Court of Appeal applied *Mutatis Mutandis* the Supreme Court decision in *Muruatetu case* to the provisions of robbery with violence as provided in Section 296(2) of the penal Code and held that the mandatory death sentence in Section 296(2) of the Penal Code was unconstitutional for the same reasons given by the Supreme court in the *Muruatetu case*. Therefore the mandatory death sentence for robbery with violence under Section 296(2) of the penal code is a discretionary death sentence.

41. The 1st appellant mitigated at the lower court that he was requesting for forgiveness. The 2nd appellant mitigated that he had a wife and children who were dependent on him and that he was at the time aged 25 years. The 3rd appellant mitigated that he was at the time aged 24 years, that he was a first offender and sought to be given another chance.

42. Section 333(2) of the Criminal Procedure code requires a sentencing court to take into account the period spent in custody awaiting trial. The appellants were in custody for slightly over one year awaiting trial.

43. I have considered other cases where High Court judges have re-sentenced convicts after the Supreme Court decision in the *Muruatetu case*. In **Ben Benjamin Kemboi Kipkone – vs – Republic (2018) eKLR** the sentence of death was substituted with imprisonment of 20 years. In **Paul Ouma Otieno – vs- Republic (2018)eKLR** the sentence was substituted with 20 years imprisonment. In **Wycliffe Wangugi Mafura – Vs – Republic (2018) eKLR** the Court of Appeal substituted the death sentence with 20 years imprisonment.

44. The appellants not only robbed the complainant but also raped her. I hereby set aside the death sentence imposed on them and re-sentence them as follows;

Count 1- Each appellant to serve 20 years imprisonment.

Count 2- 1st appellant to serve 20 years imprisonment.

Count 3- 2nd Appellant to serve 20 years imprisonment.

Count 4 -3rd appellant to serve 20 years imprisonment. Sentence to run concurrently commencing from the date of sentence by the lower court.

Dated, signed and delivered at Kakamega this 17th day of December 2019

J. N. NJAGI

JUDGE

In the presence of:-

N/A.....for Appellant

Miss Omondi.....for state/Respondent

Appellant.....Present

Court Assistant.....polycap

14 days right of appeal.