



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KIAMBU

CRIMINAL APPEAL NO. 149 OF 2017

BETWEEN

PAUL NGANGA MWAURA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence

dated 3rd August 2017 in Criminal Case No. 4769 of 2014

at Thika Chief Magistrates Court before Hon. Ileri, PM)

JUDGMENT

1. The appellant, **PAUL NGANGA MWAURA** was charged with one count of robbery with violence contrary to **section 296 (2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** and rape contrary to **section 3(1) (b)** and 3 of the **Sexual Offences Act** and an alternative charge of committing an indecent act with an adult contrary to **section 11(1)** of the **Sexual Offences Act**. He was convicted on the two principal charges and now appeals against conviction and sentence.
2. The particulars of the charge of robbery with violence was that on 20th December 2014 at [particulars withheld] village in Muranga County being armed with a dangerous weapon, namely a panga, he robbed D K M of his mobile phone valued at Ksh. 2500/- and Ksh.8000/- cash. The particulars of the charge of rape are that on the same date at the same place, he intentionally and unlawfully caused his penis to penetrate the vagina of B N K without her consent.
3. The thrust of the appellant's case was that the prosecution did not prove its case beyond reasonable doubt. On one other hand, the respondent was of the view that it proved all the elements of the respective offences.
4. As this is a first appeal, I am enjoined to consider all the evidence and independently reach a decision whether or not uphold the conviction all the time bearing in mind that I neither heard nor saw the witnesses so as to make a finding on their demenour.
5. The prosecution case was as follows. B N K (PW 1) and D K M (PW 2) were husband and wife. On 24th December 2014 at about 3.00pm, they had been called by John Kamau (PW 3) to go to his farm and collect grass for their cattle. PW 1 and PW 2 proceeded to the appointed place and as their vehicle was being loaded with maize stacks, PW 1 and PW 2 decided to relax.
6. PW 1 recalled that as she was taking soda, someone carrying a panga and sugarcane came and demanded money from them. He assaulted them. PW 1 testified that he was given Kshs.1000/- and demanded more money so he was given Kshs.7000/- by PW 2. PW 1 and PW 2 also gave him their mobile phones. PW 1 had a 1680 Nokia while PW 2 had a 1280 Nokia.
7. The assailant frog marched PW 1 and PW 2 to their vehicle but as they were going, he pulled PW 1 into the nearby plantation, ordered her to undress and with a panga placed on her neck and threatened to kill her, he proceeded to insert his penis into her vagina. PW 1 recalled that he did remove his clothes and that he wore a brown and orange t-shirt and black trouser which were produced in evidence. He returned the phone and went away while warning her not to report.
8. In the meantime, PW 2 went to look for help when the assailant ordered them towards the vehicle after he had demanded that PW 2 go and retrieve more cash from the vehicle. When he returned, he found PW 2 in a bush in state of distress. PW 2 who had by now called PW 3

went with them to report the incident to the police. PW 3 testified that after the assailant had been described to him, he recognized that it was the appellant who had been to his farm earlier to cut sugarcane.

9. The incident was reported at Kangema police station on 20th December 2014 at about 8.00pm. Corporal Mwasamoni Nzau (PW4) testified that PW 1, PW 2 and PW 3 and others came to report the incident. They identified the appellant and on the same night he went with PW 3 to the appellant's home where they found the appellant in the house. They recovered the T-shirt, which PW 1 confirmed he was wearing when he raped her. Likewise, the panga, sugarcane, cash and PW 2's Nokia 1280 was recovered in his house. He was arrested and charged.

10. PW 5, Joseph Kiteme, the clinical officer who prepared the P3 form confirmed that she was examined and treated PW 1 at Thika Level 5 hospital on 20th December 2014. Although PW 1's genitalia were normal, she was able to detect spermatozoa and concluded penetration.

11. In his unsworn statement, the appellant stated that on 20th December 2014 at about 6.30 he was carrying sugar cane and a panga and as he was on his land he saw a man and woman lying on a lesa on his bean crop. He got angry and demanded Kshs.1000/- from them. They gave him the money and he left. He was therefore surprised when he was arrested. One of the officers who came, went to his bedroom and recovered a mobile phone and money which he stated he had been paid when he sold charcoal.

12. The testimony of PW 1, PW 2 and PW 3 is straightforward. PW 1 and PW 2 testified that they were assaulted by a man carrying a panga. The appellant argued that he ought to have been charged and convicted of simple robbery. The Court of Appeal in the case of **Ganzi & 2 Others v Republic [2005] 1 KLR 52** elaborated the elements of the offence of robbery with violence as follows:-

The offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely:-

(a) The offender is armed with any dangerous or offensive weapon or instrument; or

(b) The offender is in company with one or more other person or persons; or

(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.

13. The prosecution may prove any of those elements. In this case, the appellant was armed with an offensive weapon namely a panga when he took PW 2's mobile phone and his money. The stolen mobile phone was recovered on the same night in his house. The prosecution therefore satisfied the elements of the offence of robbery with violence.

14. The fact of rape was also clearly proved. The act of penetration was done without the consent of PW 1 who was under the threat of force. The testimony of PW 1 did not require any corroboration in light of the proviso to **section 124** of the **Evidence Act**. However, it was corroborated by PW 2 and PW 3 who saw her clearly in a state of distress after the act. The fact that she had been raped was confirmed by the presence of spermatozoa in her vagina so soon after the incident was reported.

15. Although appellant was a stranger to PW 1 and PW 2, the evidence is that the incident took place between 5.00pm and 6.00pm, when there was still some daylight and considering the level of interaction between them and close proximity, the appellant must have left with a clear impression. PW 1 described his clothes he was wearing, which clothes were recovered in his house. The fact that PW 2's mobile phone was recovered in the house leaves no doubt as to his complicity in the felonious act. In addition, the description of the appellant by PW 1 and PW 2 to PW 3 left no doubt as to his identity as he was known to him and he had been seen in the vicinity. Finally, the appellant's own defence put him at the *locus in quo* thus negating any notion of mistaken identity.

16. The totality of evidence put is that the appellant is the one who committed both the offence of rape and robbery with violence. The conviction is affirmed. The sentence imposed on the offence of rape was the statutory minimum under the **section 8(3)** of the **Sexual Offences Act** hence it is upheld.

17. In light of the Supreme Court decision in **Francis Karioko Muruateru & Another v Republic SCK Pet. No. 15 OF 2015 [2017]eKLR** declaring the mandatory death sentence unconstitutional, I quash the sentence of death imposed on the appellant. I now invite the appellant to make his mitigation before imposing the final sentence.

DATED and DELIVERED at KIAMBU this 20th day of February 2018.

D.S. MAJANJA

JUDGE

RULING ON SENTENCE

Following the unsuccessful appeal after the appellant had been convicted of the offence of robbery with violence, I asked him to make his mitigation. The appellant denies the committed the offence. He is not remorseful. The offence is serious as it is coupled with rape. Considering all the circumstances, I sentence the appellant, **PAUL NG'ANG'A MWAURA** to **twenty (20) years** imprisonment. Since both offences were committed in one transaction, the sentences shall run concurrently from the date of sentence of before the trial court.

The final orders are therefore as follows;

(a) The conviction on both counts is affirmed.

(b) The sentence on the charge of rape is affirmed.

(c) The sentence on the charge of robbery with violence is set aside and substituted with a sentence of **twenty (20) years** imprisonment

(d) Both sentences shall run **concurrently** from the date of sentence in the subordinate court.

(e) The appellant is informed of his right of appeal to the Court of Appeal.

DATED and DELIVERED at KIAMBU this 20th day of February 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

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