



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 156 OF 2017

FORMERLY MACHAKOS HCRA NO. 21 OF 2016)

EDWARD NYAMAI KATINGA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 286 of 2015 by Hon. P. Wambugu (SRM) at the Principal Magistrate's Court in Kilungu)

JUDGMENT

INTRODUCTION

1. The appellant was charged with the offence of **Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that on the 12th day of June 2014 at around 02.00hrs at Wea Village, Ngaamba Location, Mukaa Sub-County within Makueni County together with two others not before the Court, while armed with pangas and rungas, robbed CNM one mattress, DVD player and assorted household goods all valued at Kshs. 18,000/= and immediately before and immediately after the time of the said robbery threatened to harm the said CNM.
2. In count 2, the appellant was charged with defilement contrary to Section 8(2) of the Sexual Offences Act, No. 3 of 2006. The particulars were that on the same day, at the same place and time, together with another not before the Court, willfully and unlawfully caused his penis to penetrate the vagina of CNM aged 14 years.
3. There was an alternative charge of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the same day, at the same place and time, the appellant intentionally and unlawfully touched the vagina and breasts of CNM aged 14 years.
4. The learned trial magistrate convicted him on the main charge and sentenced him to death.

THE APPEAL

5. Aggrieved by that decision, the appellant filed the instant appeal and raised 10 grounds of appeal. The appellant contended that the learned trial magistrate erred in law and fact by;

- a) Delivering a judgment which was not reflective of the facts presented by the parties.*
- b) Failing to appreciate the law as relates to burden of proof as required in criminal cases.*
- c) Convicting the appellant when the charges against him were not proved beyond reasonable doubt.*
- d) Failing to interpret the glaring contradictions in the prosecution's evidence in favour of the appellant.*
- e) Failing to take into account the fact that the appellant was already in police custody at the time the alleged offence was committed.*

f) Believing and taking into account the medical evidence of a person who was not a medical practitioner registered under the Medical Practitioner's and Dentists Board.

g) Basing the conviction of the appellant on the findings of an inconclusive and unlawful identification parade.

h) Failing to consider issues that arose from the appellant's cross examination of the prosecution witnesses.

i) Failing to record all the proceedings during the course of the trial.

j) Constantly, off record, threatening and indeed telling the appellant that he (trial magistrate) would sentence the appellant to death.

6. The appeal came up for hearing on 18/12/2017. The appellant was represented by learned Counsel Mr. Mwangela and the state was represented by Learned Prosecution Counsel Mr. Orinda. Mr. Mwangela highlighted his written submissions.

7. He submitted that the prosecution's star witnesses were all minors and their evidence should have been treated with a lot of caution. According to him, they may have been coached to testify as they did.

8. He said that according to the three minor witnesses, the appellant was wearing a yellow jacket at the time of the alleged crime yet the jacket was not produced as an exhibit. He also wondered why the panga, which PW2 and 3 talked about, was not produced as an exhibit. He noted that PW1 did not talk about the said panga.

9. He also took issue with the way the identification of the appellant was conducted. He wondered how the witnesses could identify the appellant in a big parade which had ten people yet they were unable to identify him in an initial parade which had only two people.

10. Further, it was his submission that according to the witnesses, they were able to identify the appellant at the police station because of his voice which they had allegedly heard at the time of the commission of the crimes. On the other hand, the witnesses testified that the appellant did not speak at the Identification parade (*herein after 'ID parade'*).

11. It was further submitted that, the fact that the appellant was found sleeping in a building under construction did not point to the commission of a crime as per the testimony of the investigating officer. He went on to say that there was no connection of the appellant and the offence and nothing was recovered from the appellant.

12. The appellant's Counsel contended that the conviction was unsafe and urged the Court to allow the appeal.

13. On his part, Mr. Orinda submitted that the intelligence of PW1 was not tested through *voir dire* and that in itself disclosed a mistrial. Further, he submitted that the judgment refers to the appellant as 'Robert' yet the charge sheet talks of 'Edward'. He prayed for a re-trial. I note that Mr. Orinda's oral submissions departed from the written submissions which had prayed for the conviction to be upheld and sentence to be confirmed.

DUTY OF COURT

14. The duty of a first appellate Court as aptly put in the case of **Okeno V. Republic (1972) E.A. 32** is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

15. Before going any further, I propose to deal with the issue raised by the Prosecution Counsel. In my view, it will inform the general direction that this appeal will take.

VOIR DIRE

16. PW1 testified that she was a class 8 pupil. PW6, the complainant's father produced her birth certificate (*exhibit 6*) which indicated that she was born on 7th December 2000. Consequently, at the time of the commission of the offence, the complainant was 13 years and 6 months. From the record, it is evident that *voir dire* was not conducted. So, what are the consequences of this omission, if any?

17. **Section 125 (1)** of the *Evidence Act*, Chapter 80, Laws of Kenya states:-

"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".

18. **Section 19 (1)** of the *Oaths and Statutory Declarations Act*, Chapter 15 of the Laws of Kenya addresses the issue of receiving the evidence of a child of tender years in the following terms:

"Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath,

his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth”.

19. The two sections above talk about children of tender years but the phrase ‘tender years’ is not defined in any of the two statutes. I therefore have to resort to **Section 2 of the Children Act**, No. 8 of 2001 which defines a child of tender years to mean **“a child under the age of 10 years”**. This definition notwithstanding, Court decisions show that a higher threshold of 14 years has been maintained.

20. In **Kibangeny Arap Korir v Republic**, [1959] EA 92; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years.

21. In **Patrick Kathurima v Republic**, [2015] eKLR; the Court of Appeal sitting in Nyeri held as follows;

“We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children’s Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes”.

22. This issue was extensively discussed by the Court of Appeal in Nyeri (*Nambye, Koome, Kiage JJA*) in the case of **Samuel Warui Karimi –vs- Republic (2016) eKLR** where a complainant aged 12 years had not been subjected to *voire dire* yet the issue had eluded both the trial Court and the High Court. The learned Judges of Appeal expressed themselves as follows;

“Which definition should guide the courts in determining who is a child of tender years, is it the Children Act, or the precedents set by the Court of Appeal? The requirement by the aforementioned provisions of the Evidence Act and the Oaths and Statutory Declarations Act of voire dire examination of a witness of tender years in a criminal trial is meant to guarantee an accused person a fair trial. A fair trial is guaranteed by the Constitution. We have done the aforementioned review of the law and decided cases in an attempt to ascertain I n this case whether failure by the trial magistrate to conduct voire dire examination on the complainant a child aged 12 years affected the credibility of her evidence.

We are persuaded the definition of a child of tender years under the Children Act cannot globally be imported for offences under the criminal law. This is because children develop and mature differently depending on their social economic and other factors such that, some children of 11, 12 or 13 years can be very sharp and intelligent witnesses whereas others in the same age bracket may not at all comprehend what is a court of law.

This explains why the Courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the Children’s Act has remained a guide in regard to criminal responsibility”

“..... On our part, we have no good reason to depart from this well-trodden path, as we are in agreement the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances we find the evidence by the complainant was not properly received thus, the conviction of the appellant becomes unsafe to sustain as she was the complainant and not any other witness.

23. Similarly, I have no good reason to depart from this jurisprudence in the current case. Clearly, it has been re-affirmed severally by our Court of Appeal. I am convinced that the appellant’s evidence was not well received.

24. In order to make a decision on whether a re-trial should be ordered, as per the prosecution’s prayer, it is important to analyze the evidence on record.

25. The brief facts of this case are that in the wee hours of the morning of 12/06/2014 while the complainant and her siblings were asleep in their house, robbers broke into their house and stole assorted household goods valued at Kshs. 18,000/=. In the process, they defiled and/or indecently handled the complainant. Later on, the complainant identified the appellant at the police station and charges were preferred against him.

PROCEEDINGS BEFORE THE TRIAL COURT

26. **PW1, CNM** was the complainant. She testified that on 12/06/2014 between 1.00 a.m. and 2.00 a.m., she was asleep in their house together with her siblings. Somebody called her name from outside. She enquired who it was.

27. The caller knocked the door violently and asked why she was enquiring. The caller broke the door and entered. He pulled her outside and asked for money. She told him she did not have any.

28. The caller took her to the farmhand-Antony Musembi- and asked for the house keys. They found him (Musembi) under the bed. Musembi said they did not have any money because all the money that had been sent by the complainant’s father had been spent. He (assailant) then took the complainant to her father’s house and asked for the keys again. He threatened her. He then opened the lock with a

mallet and threw the lock away.

29. He ransacked the house and took away several items i.e. blanket, mattress, mirror, CD's, DVD, shoes and socks. He was accompanied by another person who was collecting the items (*this other person had been guarding the farmhand*). The appellant then helped to collect the items while his accomplice took the complainant to the goat pen. He told her to lie down and to remove her clothes. She refused. He beat her and then raped her. The appellant showed up and they tied the items.

30. PW1 went on to say that she was taken back to the cow pen by the '2nd accused' (*I think she meant appellant*) who also raped her. She was then locked inside her father's main house and the assailants went away. A neighbor by the name Sila is the one who opened for her. Together, they went and released the farmhand. Other neighbors appeared. She told them that she had been raped and they made phone calls. She reported to Salama police station on the same day and was referred to Kilungu Sub District Hospital.

31. PW1 proceeded to testify that she was sure it was the appellant who attacked her because when he entered her father's house, he lit the electricity and when he was collecting the aforesaid items, she saw him. She did not know the appellant before that day and that it was the farmhand who told him (appellant) her name.

32. On cross examination, she maintained that the appellant attacked her when he went to their home at 12.00 hours. She said that she recorded her statement with the police on the same night and told the police that she could recognize the person who had stolen from her. Two people were brought to her from the cells but she did not recognize him instantly. She later recognized him when the parade was made bigger.

33. She described the appellant as medium sized, thin and black. The accomplice was short, sturdy and dark. She said that she recognized the appellant because of the yellow jacket which he was wearing at the police station.

34. **PW2** was **N W**, the complainant's brother. He said he was in class five. He recalled that on 12/06/2014 at about 2.00am, they were asleep at their house in Salama. He heard somebody calling her sister by name. The caller asked them to open the door but his sister refused. He broke the door using his feet and entered. He had a beard and a yellow jacket. He demanded for money and phone but was not given.

35. The caller took his sister outside and he remained inside together with E K. The appellant's accomplice took the farmhand to where PW2 was and put him under the bed. He said he would shoot him. They were then locked inside the room. The assailants also locked his sister (*complainant*) inside their father's house. Later, a neighbor by the name Sila opened for them. They reported the incident on the same night.

36. On cross examination, he said that at the time of the incident, the appellant had a sizeable beard. The accomplice remained outside. He maintained that the appellant pulled the complainant outside and that it was the accomplice who put the farmhand under the bed by force. He said that he recognized him at the parade but he was differently groomed. He said that when he reported to the police, he told them that one of the assailants was wearing a yellow jacket.

37. **PW3** was **E K M**. She was in standard six. She recalled that on 12/06/2014, she was asleep with PW1 and PW2. Somebody called PW1 but she refused. He forcefully opened the door, took PW1's hand and took her out. They told them to sleep on the bed. They then got out and locked them in. one of the assailants asked for money and for the whereabouts of their mother. He also asked for keys to a house. He then went out and returned with the farmhand and said he would shoot him.

38. PW3 did not see the one who entered but he carried a panga and a torch. Their neighbors opened for them. It was her testimony that she saw the accused and heard his voice. She pointed the appellant in Court and said that he was one of the thieves. She said that there was electricity and that the appellant was wearing a yellow jacket.

39. On cross examination, she said that she heard the appellant's voice and realized they were thieves because they kicked the door open. She said that the appellant talked to them for long. She however said that the appellant did not speak at the police station and that when he went to their house, he illuminated them in the eye.

40. **PW4, Eric Kasyamani** was a clinical officer at Kilungu Sub District Hospital. He produced the complainant's P3. He testified that upon examination, they found that the complainant had fresh tears on the labia and a white discharge. He treated her on PEP and anti STI.

41. Further, he testified that laboratory investigations showed that she had S.T.I and pulse cells. He gave her medicine. When the complainant went for check up on 11/07/2015, she had fully recovered. He concluded that she had been defiled because treating does not happen in consensual sex. He was not cross examined.

42. **PW5** was **PC Kenneth Kimathi Maingi** attached to Salama police station. He testified that on 12/6/2014, he was at the OCPD house at 8.00pm. He was called by the driver and told he had a person. The person had gone to an empty house which was under construction and slept inside. PW5 proceeded to the house and found that members of the public had locked him in. They opened and found the appellant who could not explain why he was there.

43. They took him to the station and booked him. The owner of the house was Daniel Mbuvi. They heard that there was theft in the same area. They booked the appellant on 12/06/2014 at 12.00noon. He was not cross examined.

44. **PW6, M W** was the complainant's father and a businessman in Nairobi. He testified that the complainant was born on 07/12/2000 and produced her birth certificate. He was not cross examined.

45. **PW7** was **Inspector Joseph Nyasili** of Salama police station. He is the one who conducted the ID parade. He produced the ID parade

report. He testified that at the time of the ID parade, the appellant was in the cells. They told him the purpose of the parade and he agreed to take part but refused to sign the report. He said that PW2 identified the appellant by touching him. There was no cross examination.

46. **PW8, Sergeant Martin Wanjala** was CID officer in Emali. On 12/06/2014, he was called by the OCPD and informed that there was robbery and defilement at Mukaa Sub County. He proceeded to Salama Police station and then to the scene of crime where he took the statements of the witnesses. They told him that they were attacked at the scene and that a stone was used to block the house. That the assailants took one girl and used a crowbar to open their father's main house. That they locked the others inside then took the complainant and raped her.

47. Further, he testified that the complainant identified one of them at an ID parade. A neighbor by the name David Masila is the one who opened for them. He produced the stone that was used to open the worker's door as exhibit 8. The iron bar used to break the main house was produced as exhibit 4. This witness was not cross examined.

48. At this juncture, the prosecution closed its case and the appellant was put on his defence. He elected to remain silent.

ANALYSIS AND DETERMINATION

49. The question of identification featured prominently in this appeal. In **Wamunga -vs- Republic (1989) KLR 426**, the Court of Appeal stated as follows:-

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

50. In **Nzaro -vs- Republic (1991) KAR 212** and **Kiarie -vs- Republic (1984) KLR 739** it was the holding of the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

51. From the evidence on record, I have a visual set-up of the complainant's homestead. There was the children's house (*where complainant and her siblings were sleeping*), the farmhand's house and the father's house (*where the alleged stolen items were kept*).

52. According to the evidence of PW1, when the appellant entered the children's house forcefully, he just pulled her outside and asked for money. This, in my view, paints the picture of a very brief interaction between PW1 and the appellant at that particular point. She however said that while at her father's house with the appellant, he could see him because there was light from the electricity. He was wearing a yellow jacket.

53. On the other hand, PW3 said that the appellant talked to them for long, thus materially contradicting the evidence of PW1. She also said that she did not know who entered but went on to say that she saw the appellant and that he was wearing a yellow jacket. PW3 is the only witness who talked about lighting at the children's house. She said that there was electricity. PW3 also talked about being illuminated in the eyes by the assailant which casts doubt as to her ability to see in that condition.

54. The evidence of PW2 also shows that the interaction with the assailant at the children's house was brief thus contradicting what PW3 said (*that the appellant talked to them for long*). PW2 and PW3 were then locked inside the children's house and did not interact with the assailants again.

55. The only witness who appears to have spent a considerable amount of time with the assailants was PW1. In my view however, her ability to identify the appellant was again cast into doubt when she did not identify the appellant at the police station (*when they were only two*) yet she claimed to have been able to identify him when the parade was made bigger. Logically and if she had indeed seen the appellant at the crime scene, she should have been able to point him out immediately the two suspects were brought out of the cells.

56. There are questions marks as to whether; the circumstances and conditions prevailing at the time of the attack were conducive enough to ensure an error-free identification. I don't think they were.

57. The 'yellow jacket' was mentioned by PW1, 2 and 3 and this makes it necessary to look at whether the ID parade was conducted properly. PW7, the officer who conducted the ID parade said that PW2 identified the appellant by touching him. On the other hand, PW2 said that she was able to identify the appellant (*in the big parade*) because he was wearing a yellow jacket.

58. In **John Mwangi Kamau -vs- Republic (2014) eKLR**, it was the holding of the Court of Appeal that identification parades are meant to test the correctness of a witness's identification of a suspect.

59. In **David Mwita Wanja & 2 others -vs- Republic- Criminal Appeal No. 117 of 2005**, the Court of Appeal sitting in Nairobi made the following observations;

“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders”

60. Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under **section 5** of the Police Act **Chapter 5** Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. The relevant sections in this case are **Standing Order 6(iv) (h)** and **(n)** which state as follows:

“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail;

(h) if the witness desires to see the accused/suspected person walk, hear him speak, see him with his hat off, this should be done, but in this event the whole parade should be asked to do likewise.

(n) the parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified.

61. My interpretation of **Order 6(iv) (h)** is that everything in the parade should be done as uniformly as possible. From the evidence of PW2, it is clear that only the appellant was wearing a yellow jacket in the parade. This in my view, made him conspicuous and easy to pick out thus negating the principle of fairness enshrined in the force standing orders. The poor conduct of the ID parade greatly diminished the probative value of the resultant evidence.

62. There was also the issue of the appellant's whereabouts at the time of the commission of the crime. Exhibit No. 5 was an OB extract of 12/06/2014. It indicated that on that day at 1210 hours, a prisoner by the name Edward Katinga was booked into the police station. The complaint against him was theft of 10 iron sheets belonging to one Daniel Mbevi. The next entry in the OB was at 1220 hours and it read as follows;

“Prisoners fed: to the station is the canteen managers contractor and feeds eight (8) prisoners with lunch”

63. From the OB extracts, it is clear the appellant was booked into the police station at 12.10 p.m. Indeed, the evidence of PW5 buttresses this fact. He said that they booked him in on 12/06/2014 at 12 noon. On the other hand, the offences in this case are said to have been committed in the wee (am) hours of 12/06/2014. Therefore, contrary to the submissions of the appellant's Counsel, the appellant was not in the police cells at the time of the commission of the offences.

64. However, it is also clear from the OB extract that the appellant was in the police station for a totally different offence. There might have been a series of offences in the same area at around the same time as testified by PW5 but it was incumbent upon the prosecution to prove beyond reasonable doubt that indeed the appellant was involved in the crimes that occurred at the appellant's house.

65. Having opined that the identification of the appellant was not error free and having further opined that the identification parade was not conducted properly, the evidence on record leads me to the inevitable conclusion that the appellant was a victim of circumstances.

66. He happened to be behind bars at the time the complainant was called upon to identify the assailant and due to a poorly conducted parade, he was picked out.

67. Apart from identification, there was absolutely nothing else that could connect the appellant with the offences. None of the stolen items were recovered from him and no medical evidence was tabled before Court to connect him with the defilement of PW1. In fact, having led evidence to show that PW1 had contracted an STI from her assailant, it would have been prudent for the prosecution to table evidence showing that the appellant had a similar STI.

68. Before signing off, let me just say that there are two witnesses who were left out by the prosecution and who in my view, would have shed more light in this matter. There was Mr. Sila, who opened for the minors and the farmhand who was at the center of the ordeal.

69. From the foregoing, I am inclined to agree with the appellant that indeed, the judgment of the learned trial magistrate was not reflective of the facts presented by the parties. Had he properly analyzed the evidence on record, I do not think he would have arrived at the conclusion that he did.

70. As for the retrial, it is my view that the evidence on record is not overwhelming against the appellant. A retrial will be prejudicial and may not serve the interests of justice.

CONCLUSION

71. In my view, the appeal has merit.

1) The conviction is hereby quashed and the appellant set at liberty unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED THIS 30TH DAY OF APRIL, 2018.

C. KARIUKI

JUDGE

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