



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 99 OF 2014

(Being an appeal arising from conviction and sentence

in Kitale Criminal case No. 2632 of 2014 delivered

by J.A. Owiti Principal Magistrate on 12/9/2014)

KELVIN WAFULA NYONGESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

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 night of 19th and 20th October 2012 within Trans Nzoia County jointly with others not before court while armed with offensive weapons namely knives and rungus robbed P O O of her Nokia mobile phone valued at Khs 4,000/- , cash kshs 4,000/- and immediately after the time of such robbery wounded the said P O O.**

2. He was equally charged with the 2nd count of **Gang rape** contrary to **Section 10 of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on **the night of 19th and 20th day of October 2012 within Trans-Nzoia County, in association with others not before court, intentionally and unlawfully caused his penis to penetrate the vagina of P O O without her consent.**

3. He was convicted and sentenced to death. He has filed this appeal citing several grounds. First of all it shall be worthwhile to summarise the proceedings at the trial court.

4. PW1 the complainant stated that she was asleep in her house together with her boyfriend on 19/10/2012 when at around 3 am he woke up and found herself under attack together with her boyfriend. He did not identify any of the assailants who were using a spot light. She lost consciousness and when she regained she found herself atop a motorcycle heading towards Kitale direction. She had suffered injuries including loss of her teeth and stab wounds on her buttocks. She was wrapped in a bedsheet. She was dropped on the ground and when she regained her consciousness she saw a person beside a motorbike and people surrounding him. She was taken to Kitale District hospital where she was treated and issued with a P3 Form. She did not identify the robbers.

5. PW2 Moses Osengai Osuru was a neighbour to the complainant who was alerted about the incident

by one Priscilla a neighbour too. He followed the motorcycle and managed to rescue the complainant who was wrapped with a bed sheet. He managed to hold on to one of the riders as the members of the public came. The person arrested was the appellant who was found armed with a knife. He said that he had a spotlight which he flashed at the appellant.

6. When cross-examined he said that he saw 3 people at the rear seat of the motorcycle and that the complainant had no clothes.

7. PW3 Patrick Osuru Kwanusu is the village elder who was equally alerted by Priscilla on 19/10/2012 at 3 am. He rushed to the road and found the complainant bleeding, naked and covered by a bedsheets. A person whom he identified as the appellant had been arrested. The police were called and they came and picked the appellant.

8. PW4 Benson Wafula Kalibo was a neighbour to the complainant living about 5 metres apart. He said that he heard a knock at her door and he went outside. Two men were standing next to a motorcycle. They held the complainant and placed her on the motorcycle and left the scene. He called one Moses the brother to the complainant who intercepted the rider and with the help of the rest of the members of public arrested the appellant. He said that he pleaded with the members of the public not to lynch him. On cross-examination he said that a knife was recovered at the scene. That by the time the complainant came out of her room she had been assaulted and had in fact lost her tooth.

9. PW5 Linus Ligare a clinical officer produced the P3 form on which he filled after examining the complainant. He found that she had lost a tooth on the upper jaw, face was swollen and both lips. The left eye was reddish and the buttocks had wounds on the sides. Her hymen was torn and old looking.

10. When put on his defence the appellant gave unsworn evidence detailing his itinerary on 19/10/2012 using his motor bike which took him to Suam, Endebess and Matisi later in the evening. On his way home he met 3 people and a lady who accused him of committing crimes in the area. They forced him to carry the complainant but he declined and raised alarm. He was beaten and regained his consciousness at Matisi police post. He was later charged.

Analysis and Determination

11. I have carefully perused the proceedings herein as well as the submissions by the parties on record. The appellant has poked holes into the prosecution evidence dwelling majorly on the fact that there was no proper identification given the time of the incident, that the court failed to consider his alibi and that the exhibits were not produced.

12. The state has conceded to this appeal only to the extent that the charge of robbery with violence was not established and this court should consider reducing it to assault.

13. Before looking at this line of concession by the state, I did not find any difficulty in placing the appellant at the scene. All the witnesses especially PW2, PW3, and PW4 clearly rescued the complainant from the scene. There was no reason contrary to his unsworn evidence why the appellant was at the scene at that particular time.

14. Although the exhibits were not produced especially the motorcycle and the knife, it is not disputed that the appellant was riding the motorcycle that night with his accomplices and with them was the injured and bleeding complainant naked and covered with a bedsheets. In fact the complainant's evidence was consistent throughout. After the attack she regained her consciousness after being rescued by the members of the public. Were it not for them and especially one Priscilla who woke up the neighbours she would not have known her attackers.

15. There was significant lights from the torches and the moon that enabled the witness arrest and identify the appellant who was handed over to Matisi police post.

16. The injuries sustained by the complainant were consistent with what Linus Ligare the clinical officer found when filling the P3 form.

17. I agree with the learned state counsel that nothing was stolen from the complainant. The critical ingredient of robbery with violence includes theft of the victims property. In this case the complainant did not testify that she lost anything.

18. It is consequently clear that he sustained serious injuries and despite the fact that the exhibits were not produced in court, the injuries she sustained clearly emanated from the attack she sustained while asleep inside the house. The clinical officer found that a sharp object had been used.

19. In the premises I shall exercise the discretion of this court as provided under Section 179 of the Criminal Procedure Code and reduce the charge from Robbery with Violence to Assault causing actual bodily harm as provided under Section 251 OF the Penal Code.

20. Consequently I shall dismiss this appeal for being unmeritorious. I however reduce the charge to assault pursuant to Section 251 of the Penal Code. The sentence therein is provided as a maximum of 5 years. The appellant from the record available was arraigned in court on 25/10/2012. He was convicted on 30/7/2014. Taking the totality of the period in custody I am satisfied that he has served the term. He is hereby set free unless lawfully held.

Delivered, signed and dated at Kitale this 12th day of April 2018.

H.K. CHEMITEI

JUDGE

12/4/18

In the presence of:

Mr Kakoi for the State

Appellant – present

Court Assistant – Kirong

Judgment read in open court.