REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 104 OF 2015

BONIFACE KARIUKI KARANJA.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. J. N. Nthuku – Senior Resident Magistrate delivered on the 26th March, 2015 in Criminal Case No. 3889 of 2011*)*

JUDGMENT

1. The Appellant, Boniface Kariuki, was presented before the Chief Magistrate's Court in Nakuru in ***Criminal Case No. 3889 of 2011*** charged with the following offences. The first count was rape contrary to Section 3(1) (a) of the Sexual Offences Act. The facts were that on 22/10/2011 at [particulars withheld] village in Njoro he intentionally and unlawfully caused penetration of his penis into the vagina of J.M.M. by use of threat. He faced an alternative Count of committing an indecent act with an adult contrary to Section 11(a) of the Sexual Offences Act by causing his penis to touch the vagina of J.M.M. against her will.

2. The Appellant also faced a second Count of robbery with violence contrary to Section 296(2) of the Penal Code. The facts contained in the charge sheet were that on 22/10/2011 at Pwani Village in Nakuru District while armed with a kitchen knife he robbed J.M.M. of her mobile phone make Nokia 1110 valued at Kshs. 2,000/=, one torch valued at Shs. 120 and Cash Shs. 80 all valued at 2,200/= and at or immediately before or immediately after the time of such robbery used actual violence against the said J.M.M. He faced an alternative charge of handling stolen property contrary to Section 322(1) of the Penal Code. The facts were that on 22/10/2011 at [particulars withheld] Village otherwise than in the cause of stealing he dishonestly retained one mobile phone Nokia 1110 valued at 2,000, one torch valued at 120 and cash Shs. 80 the property of J.M.M. having reason to believe it to be stolen property.

3. The accused person denied the charges and the matter proceeded for hearing.

4. The Complainant testified as PW1. She stated that on 22/10/2011 she was sleeping on her bed at home at around 1:00am in the night when she heard someone land on her bed. She asked who it was and the person said "Ni Kariuki". The person then then showed her a knife, covered her face with a blanket, tore her skirt and panties and raped her.

5. The Complainant testified that the attacker took her torch which she had left in her sitting room and went into the bedroom with it. In the course of the rape, the attacker shone the torch on himself and ordered her to follow her to the sitting room. She obliged. At the sitting room, the attacker asked for a newspaper and smoked cigarettes while holding a knife all the while threatening to stab her. The Complainant was categorical that that the light from the torch enabled her to recognize the Appellant. She knew him from the neighbourhood although she did not know his name at the time. The Appellant raped her a second time and then left.

6. The Complainant testified that she discovered that the Appellant had made his way into her house by digging a hole through the mud wall to access the window handle.

7. The Complainant immediately woke up a neighbor – Francis Kiraiyu – who testified as PW5. She told him what had happened and Mr. Kiraiyu took her to the AP Police Post to report the matter. Mr. Kiraiyu in his testimony corroborated this part of the narrative. So did APC Eric Mukui from Mau Narok Police Post, the Police Officer on duty when the Complainant and Mr. Kiraiyu reported the matter at the Police Post.

8. PW2 APC Mukui testified that on 21/10/2011 PW1, accompanied by Mr. Kiraiyu, reported having been raped and robbed by the Appellant. He went with his colleague and arrested the Appellant. During the arrest, they recovered a torch, a pen-knife, a phone and coins for Shs. 80. The Complainant had reported that the Appellant had robbed her of the torch, phone and coins worth Kshs. 80/-.

9. PC Hussein was the Investigating Officer. He testified that the Appellant was taken to the Police Station on 22/10/2011 by AP Officers from Pwani AP Post. They also took a knife, phone, Shs. 80 and a torch which the complainant identified as hers. When he visited the scene

of the crime, PC Hussein testified that he say the hole in the mud through which the Appellant allegedly gained access to the window into the Complainant's house. Att he scene, he found a black skirt and white torn panty which PW1 said were torn by the Appellant during the incident.

10. The Complainant identified the torch; pen knife; phone – Make Nokia 1100; torn skirt and panties when testifying.

11. Finally, Dr. Emmanuel Wekesa testified as PW3 and produced the P3 Form on behalf of Dr. James Nondi. He did not examine or treat the Complainant. It was Dr. Nondi who did that. However, Dr. Nondi had, by the time of the trial, gone for further studies. Dr. Wekesa testified that he was familiar with Dr. Nondi's handwriting having worked with him for three years. The Accused had no objection to the production of both the P3 Form and the Post Rape Care Form. The P3 Form indicated that upon examination, Dr. Nondi found inflamed introitus and no hymen. He also found sticky whitish discharge on the genitalia – a sign of recent sexual intercourse.

12. Against this Prosecution evidence, the Accused, when put on his defence, gave a direct denial and a conspiracy theory. He did not rape or rob the Complainant, he stated. Instead, the Complainant had framed him with the trumped up charges because she had shown secondary romantic interests in him and he had rebuffed her. The false charges, stated the Appellant, was revenge by the Appellant for the rebuff.

13. The Learned Trial Magistrate disbelieved the Appellant's narrative. By the same token, she found the Prosecution witnesses to be truthful and the charges to have been proved beyond reasonable doubt. She convicted the Appellant of both rape and robbery with violence. She sentenced the Appellant to suffer death for the conviction of robbery with violence; and to serve a prison sentence of ten years for the rape.

14. This Court is the Appellant's next step. He is dissatisfied with both the conviction and sentence.

15. The Appellant filed two sets of Grounds of Appeal. The most recent ones, he termed "Supplementary Grounds of Appeal." They are as follows:

> *i. "The trial Magistrate erred in law and fact by failing to appreciate none of the cardinal ingredients of robbery with violence were proved beyond any reasonable doubt by the prosecution evidence to allow or sustain conviction of the accused.*
>
> *ii. That the trial Magistrate erred in law and fact by failing to appreciate the medical evidence and the supporting P3 evidence produced before the court did not support the charge.*
>
> *iii. The trial Magistrate erred in law and fact by failing to appreciate that the prosecution evidence produced before the court in respect of handling of stolen property was not conclusive to allow for conviction.*
>
> *iv. The trial Magistrate erred in law and fact by convicting and sentencing the accused in a case of such a magnitude by relying on the unccollaborated (sic) evidence of a single witness."*

16. His original Petition of Appeal contained the following grounds:

> *i.* ***"THAT,*** *the learned Magistrate erred in law and fact by failing to appreciate that the P3 produced before court by the medical court by the medical officer could not be a representative evidence of a rape allegedly committed on 22/10/2011 in which the complainant was examined and the P3 filled on 9th January 2012.*
>
> *ii.* ***THAT,*** *the learned Magistrate erred in law and fact by failing to consider that the penknife produced by the prosecution as the weapon that the accused was armed in was disowned by the complainant and the prosecution did not produce any evidence to prove that the penknife belonged or was with the accused (no finger prints).*
>
> *iii.* ***THAT,*** *the learned magistrate erred in law and fact by failing to appreciate that the investigating officer did not produce any evidence in form of fingerprints to prove or associate the accused with the broken window of the complainant house with the accused.*
>
> *iv* ***THAT,*** *the learned Magistrate erred in law and fact by failing to consider that the complainant claimed my phone to be hers yet she did not produce any document to prove it was hers."*

17. The State opposed the appeal. Mr. Motende appeared for the State. He argued that the Appellant had been positively identified by the Complainant when she made the Complaint. He was found sleeping in his friend's house with the exact same things the Complainant had described. Mr. Motende therefore argued that the evidence of the Complainant linked the Appellant to the robbery directly. On the ownership of the goods, Mr. Motende argued that the Complainant had given description of the goods when the attack happened. The same items were recovered from the appellant.

18. On the issue of identification, the State argued that the Complainant knew the Appellant by name. She recognized his voice when he attacked her and that, therefore, the identification was properly proved. The complainant gave the description to the police and the chief immediately after the incident. She gave the name of the appellant to them as well as to a neighbor. It was evidence of recognition.

19. Finally, on sentencing, Mr. Motende conceded that there should be rehearing on the sentence. He recommended 30 years imprisonment for the offence of robbery with violence.

20. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R (1957) EA 336***, ***Ruwala vs. R (1957) EA 570***.

21. The Appellant was, firstly, convicted of the offence of robbery with violence.

22. Section 296 (2) of the Penal Code provides that:-

> *If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death***.**

23. Under this section, therefore, the Prosecution is required to prove one of the following in order to successfully establish the offence charged:

> *i. That the offender was armed with any dangerous or offensive weapon or instrument; or*
>
> *ii. That he was in the company with one or more other person or person; or*
>
> *iii. That at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other violence to any person.*

24. In the present case, the Complainant gave clear and un-impeached evidence that she recognized the Appellant when he attacked her in his house.

> xxv. It is true that our case law calls for caution in receiving identification evidence because of the grave possibility of a miscarriage of justice occasioned by misidentification. The predecessor to the Court of Appeal plainly stated in ***Roria v R [1967] EA 583***, that "a conviction resting entirely on identity invariably causes a degree of uneasiness." And, the Court of Appeal reminded us in ***Kiarie v Republic*** that "it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken." Finally, the famous ***Charles Maitanyi v R [1986] 1 KLR 198*** admonished courts to exercise the greatest caution and circumspection before convicting on testimony of identification especially where the evidence is that of a single identifying witness as was the case here.

25. Our decisional law has adopted the guidelines for receiving and considering identification evidence set out in the famous English case of ***Regina v Turnbull [1976] 3WLR 445*** to assist in the careful analysis of identification evidence. The ***Turnbul*** factors are nine as follows::

> *i. How long did the witnesses have the accused under their observation?*
>
> *ii. What was the distance between the witnesses and the accused person?*
>
> *iii. What was the lighting situation?*
>
> *iv. Was the observation impeded in any way, as for example, by passing traffic or press of the people?*
>
> *v. Had the witnesses ever seen the accused person?*
>
> *vi. If the witnesses knew the accused prior to the current transaction, how often?*
>
> *vii. If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness have any specific reason for remembering the accused?*
>
> *viii. How long elapsed between the original observation and the subsequent identification to the police?*
>
> *ix. Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?*

26. In the case at hand the evidence was one of identification by recognition. It is important to recall that the Complainant identified and described the Appellant to the people she reported to first about her attack: PW5 and PW2. The information she provided led directly to the arrest of the Appellant.

27. Secondly, the Complainant testified that the Appellant shone a torch on his face so she was able to see him properly. This evidence is strengthened by the production of the torch in evidence because it was found in the possession of the Appellant during his arrest.

28. Third, the Complainant had a long time to see and recognize the Appellant. This is was not just a fleeting view. The Appellant spoke to

her, tore her clothes and then forcibly had sex with her at the bed. He then asked her to go to the sitting room, where he lit a cigarette, smoked it, and then had another round of forced sex with the Appellant. That was plenty of time for the Complainant to really see him.

29. Fourth, the Complainant also recognized the Appellant by voice.

30. Fifth, the evidence of identification by recognition is doubly strengthened by the evidence of recent possession. When arrested, the Appellant was found with at least one identifiable item which was stolen from the Complainant: the Nokia Phone.

31. In ***Gideon Meitekin Koyiet v Republic [2013] eKLR (Criminal Appeal No. 297 Of 2012)*** the Court of Appeal stated that the doctrine of recent possession is applicable where the Court is satisfied that the Prosecution have proved the following:

a) That the property was found with the suspect;

b) That the property was positively identified by the complainant;

c) That the property was recently stolen from the complainant.

33. In the present case, the Nokia Phone was found with the Appellant. The Complainant positively identified it as hers. She had told the Police that the Appellant had stolen the phone, and, indeed, the phone was found on her. The fact that the phone belonged to her was not seriously challenged at trial – and the belated attempt by the Appellant to raise this as an issue by claiming that documents of ownership were not produced must fail. Even oral evidence of ownership in certain circumstances is enough to establish that this element of the doctrine. Finally, the Complainant credibly testified – backed up by reports of her first report to the Police – that the phone had been stolen from her by the Appellant.

34. In the face of all these, there can be no reasonable doubt that the Appellant was the person who attacked the Complainant on the night of 22/10/2011.

35. Having established the offence of robbery with violence, it was eminently easier for the Prosecution to prove the count of rape. To prove rape, under section 3(1) of the Sexual Offences Act, the Prosecution needed to prove three elements:

a. That there was intentional and unlawful penetration (as defined in section 2 of the Sexual Offences Act);

b. By the Accused Person; and

c. That there was no consent to the penetration or that the consent was obtained by force, threats, intimidation or duress.

36. The Appellant's primary complaint about his conviction on the count of rape is that there was no medical evidence proving rape. He is wrong on that. The evidence in the P3 Form produced by Dr. Wekesa showed that the Complainant had been recently penetrated. The Complainant testified that she positively identified the Appellant as the person who raped her. The Learned Trial Court believed her – and, as analyzed above, there were good reasons for the Learned Trial Magistrate to believe the Complainant's narrative.

37. Finally, I have considered the Appellant's complaint that the P3 Form was dated well after the initial date of the examination. Dr. Wekesa explained that the original P3 Form had been lost and that Dr. Nondi filed a new one using the Post-Rape Care Form. I find this explanation credible and persuasive.

38. The bottom line, then, is that the conviction of the Appellant on both counts of robbery with violence and rape was well-founded and justified on the facts. Both convictions are hereby affirmed.

39. On sentence, Mr. Motende conceded that in light of the recent jurisprudence by the Supreme Court, the Court should substitute the death penalty imposed with a prison sentence. He recommended thirty years. Mr. Motende was speaking about the Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR***. In that case, the Supreme Court held that mandatory death penalty for murder is unconstitutional. The Court of Appeal extended the reasoning to all similar mandatory death penalties in ***William Okungu Kittiny v R [2018] eKLR***.

40. The law of the land as it stands today, therefore, is that the maximum penalty for both murder and robbery with violence is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances.

41. So what is the appropriate sentence in the circumstances of this case? First, it is true that all the elements for the offence of robbery with violence were proved. However, there are no truly aggravating circumstances which would lift this case to the scales of the death penalty. Death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. That is not the case here. The Appellant did not use excessive force; and neither did he unnecessarily injure the Complainant during the robbery. He was not armed with a firearm; and he was alone. However, he compounded his offence with the primary offence of rape. I would sentence him to twenty years for the robbery with violence. Given that "simple" robbery under section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment, it seems logical that the minimum sentence for robbery with violence should begin at fifteen years imprisonment. Aggravated by the rape here, twenty years imprisonment is a fair and proportionate sentence given that, as I reason below, I will order that the sentence for this count runs concurrently with the sentence for the rape conviction.

42. For the conviction of rape, the Learned Trial Magistrate imposed the minimum sentence of ten years imprisonment. I see no reason to interfere with that sentence. I would hold that this sentence should run concurrently with the sentence for robbery with violence. This is because, while the robbery and the rape were separate transactions each consisting of separate offences, it seems clear that the Appellant's primary intent and motive was not to rob the Complainant. The robbery was, it would appear, a troubling if nefarious externality to the primary offence he intended: rape. In my view, the compounding of his offences has already been adequately punished by enhancing his sentence for the robbery with violence conviction to twenty years imprisonment.

43. **The upshot, then, is that the appeal against conviction is dismissed as unmeritorious. However, the appeal against sentence succeeds. The sentence imposed on the Appellant for the conviction for the offence of rape (Count I) is upheld. However, the sentence for the conviction for the offence of robbery with violence (Count II) is set aside. In its place, a prison sentence of twenty years imprisonment is imposed. The two sentences will run concurrently**.

44. Orders accordingly.

Dated and delivered at Nakuru this 21st day of June, 2018

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(PROF.) J. NGUGI

JUDGE