



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 116 of 2015.

BETWEEN

BONIFACE KIPSANG SODA.....APPELLANT.

AND

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's

Court at Makadara Cr. Case No. 1784 of 2013 delivered

by Hon. E. K. Nyutu on 7th July, 2015).

JUDGMENT

Background.

1. The Appellant herein was charged in 3 counts. Count I was for the offence of robbery with violence contrary to Section 295 as read with 296(2) of the Penal Code. The particulars of the offence were that on 19th April, 2013 at [particulars withheld] area, Kariobangi North Estate in Nairobi within Nairobi County, jointly with others not before the court, while armed with a dangerous weapon namely a knife robbed M.A.O. of Kshs. 1,100/- in cash, a mobile phone make ZEED and shopping all valued at Kshs. 3,445/- and at the time of such robbery used actual violence to the said M.A.O.
2. Count II was for the offence of rape contrary to Section 3(1)(a)(b) as read with Section 3(3) of the Sexual Offences Act, No. 3 of 2006. It was alleged that on 19th April, 2012 at [particulars withheld] Area, Kariobangi North Estate in Nairobi within Nairobi County, unlawfully caused his penis to penetrate the vagina of M.A.O. without her consent.
3. Count III was for committing an unnatural offence contrary to Section 162(a) of the Penal Code. The particulars of the offence were that on 19th April, 2013 within Nairobi County, had carnal knowledge of M.A.O., against the order of nature.
4. There was also an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No. 3 of 2006 in that on 19th April, 2013 in that he intentionally touched the vagina of M.A.O. with his penis against her will.
5. The Appellant was found guilty for the three main counts. He was sentenced to suffer death in the first count, 20 years imprisonment in the 2nd count and 10 years imprisonment in the 3rd count. However, the sentences in counts II and III were held in abeyance. Being dissatisfied with the conviction and sentence, he filed the present appeal. The grounds of appeal were filed contemporaneously with the written submissions. In summary, they were that he was not properly identified as the identification was based on dock identification of a single witness, that the offence of rape was not proved, that the charge sheet was defective and that the death sentence was harsh, unfair and violated his rights under Articles 29(f) and 25(a)(c) of the Constitution.

Submissions.

6. The Appellant was in person whilst the Respondent was represented by learned State Counsel, Ms. Sigei. The Appellant relied on written submissions while Ms. Sigei made oral submissions. On identification, the Appellant submitted that the same was not full proof. He cited that the conditions for identification were not conducive as the offence took place at night. In addition, that the complainant could not have had time to identify his attackers as she claimed she was held by the neck and attacked from the back. That whereas the complainant testified

that there was light at the carpenter's shop no inquiry was made as to the distance of the same and its intensity from the point of attack. Further, that the second scene where she was raped was also not properly described and so the prevailing conditions of identification were not described. It was his submission that the identification being of a single witness, the court ought to have warned itself before relying on it. He submitted that the trial magistrate did not administer sufficient caution in relying on the evidence.

7. Further on identification, the Appellant faulted the same as the complainant did not give the description of any of his attackers in the first report he made to the police. In that respect, her subsequent identification of him in court lacked merit. In addition, the youths she purportedly described his attackers to were not called to testify. There was therefore doubt as to how she identified him amongst some youths who had been arrested at the police station.

8. The Appellant also cited inconsistency in the evidence relating to his arrest. This was with respect to PW3 and PW5. He submitted that the evidence by PW3 was that they arrested the Appellant while committing another crime but did not account how that offence was related to the instant case.

9. On the defective charge sheet, he submitted that the same was occasioned by drawing the same under both Sections 295 and 296(2) of the Penal Code. He stated that this nullified the entire trial. He relied on **Joseph Njuguna Mwaura & others v. Republic[2013] eKLR** to buttress this submission.

10. Finally, he submitted that the death sentence was unconstitutional and contravened Article 29(f) of the Constitution., which fact has been upheld by the Supreme Court of Kenya in **Francis Kariuki Muruatetu & another v. Republic[2017] eKLR**.

11. Ms. Sigei in opposing that appeal submitted that the case was proved beyond a reasonable doubt. She submitted that the Appellant was properly identified as there was sufficient lighting at the scene. Further that PW1 also knew where the Appellant lived and informed the police of the same. That the Appellant was also arrested with a mobile phone belonging to the complainant and that an identification parade was done where the Appellant was positively identified. Contrary to the Appellant's assertion, she submitted that the trial court warned itself before relying on the evidence of a single identifying witness. She therefore submitted that the conviction was safe.

12. With respect to the defect in the charge, Miss Sigei submitted that the same was curable under Section 382 of the Criminal Procedure Code.

13. On sentence, she submitted that the same was legal and proper and there was no ground to justify interference. She urged the court to note the seriousness of the offence and more so that the sexual assault would haunt PW1 for the rest of her life. It was her view that the Appellant's defence lacked merit and prayed that the entire appeal be dismissed.

14. The Appellant, in reply, submitted that it was not true that he was arrested in possession of the complainant's phone. He added that he was arrested at a bar and not while committing an offence. He therefore urged the court to allow the appeal.

Evidence.

15. The prosecution's case was that the Appellant and others accosted the complainant who was on her way home. That after they robbed her the Appellant led her to a nearby church where he proceeded to commit the sexual offences charged.

16. **PW1**, M.A.O., the complainant recalled that on 18th April, 2013 she had alighted from a matatu at around 11.00 p.m. and was walking home when she saw three people ahead of her near a carpenter's shop. She thought that the carpenter was working late and was therefore not afraid. That there was enough light from the lamp post and as she approached the three men she realized they were not known to her. One of the men approached her and held her by the neck. She identified this man as the Appellant. He ordered her to shut up and led her towards a nearby church. That she was carrying milk, bread and some food from the restaurant in a paper bag. The Appellant's colleagues took the foodstuff. That the Appellant took a Kshs. 1,000/- note that was in her pocket and a mobile phone which he later returned to her. He then asked her to take her clothes off which she refused. He forcefully removed her trouser and panties at knife point after tackling her to the ground. He then proceeded to rape her. That he started with her vagina and after he was finished he took a short rest near her before proceeding to rape her through her anus. After a brief rest he raped her a third time through her vagina. He gave her back her sim card before ordering her to dress up and leave. That when she got home she woke up her parents and informed them what had happened. Her mother advised her to report the matter the following morning.

17. She recalled reporting the matter the following day at Kariobangi Police Station and also going to MSF hospital where she was examined and treated. Her mother informed her that a person had been arrested and a phone similar to hers recovered. She went to the police station where she identified the Appellant as the one who raped her. She testified that she had approached some of the young men in the estate and described her assailant to them and the youth arrested the Appellant. She learnt that the Appellant had gone to sell the phone in the neighbourhood. She testified that she also went to a government doctor who filled a P3 form.

18. In cross examination she stated that she identified the Appellant with the help of light emanating from a nearby chapel. Further, that at the police station she was shown several people and asked to identify who among them raped her and she positively identified the Appellant

19. **PW2**, Irene Ngagwachi a Clinical Officer at MSF in Mathare examined PW1 on 19th April, 2013. She noted no injuries to her vagina although there were drops of blood. That her anus had moderate tears all around the edges and there was swelling in the left anal entry which was rubbery and not tender. There was also reduced muscle tone. The anal sphincter was normal. Laboratory tests were negative and a vaginal swab did not disclose the presence of spermatozoa. The complainant was given treatment. A medical certificate and Post Rape Care Form was also filled.

20. **PW3**, PC Harold Gatobu of Kariobangi Police Station arrested the Appellant on 19th April, 2013. He was on patrol along Kamande road with his colleagues when they heard screams from a woman. They approached the scene and were told a group of young men was used to robbing people. On arrival at the scene the three men started running away with PW1 in pursuit. One of the men was the Appellant who was arrested in a house he had run to hide in. He was escorted to Kariobangi Police Station where PW3 learnt that a complaint had been lodged against him and his accomplices. According to PW3, the woman who had been attacked leading to the Appellant's arrest never made a report to the station.

21. **PW4, Dr. Zephania Kamau** of police surgery further examined PW1 on 23rd April, 2013. He did not find injuries on the vagina or pre-vaginal bleeding. There was no discharge from the vagina and he noted that the patient had received treatment from MSF hospital. He produced a P Form respectively. **PW5, PC Merciline Ngonje** the investigating officer summed up the evidence of the prosecution witnesses. She also visited the scene which was near a church. She confirmed it had security lights. On the following day the complainant shared information that she was familiar with the man who raped her. She then summed PW1 to Kariobangi Police Station where she positively identified the Appellant among a group of young men who had been arrested.

22. In defence, the Appellant denied he committed the offences. He said that on 19th April, 2013 at around 4.00 p.m. he was at a chang'aa den when three people entered the den and the customers ran away. He remained behind and was arrested by people who identified themselves as police officers. He was taken to the station where he was kept in the cells for three days before being interrogated by some people who were brought to identify him but failed to do so. He stated that he came to learn about the offence in court after being charged. He added that he did not know the complainant until he saw her in court.

Determination.

23. In the exercise of its appellate mandate this court is under a duty to reanalyze and reevaluate the evidence afresh before arriving at its own independent findings. See **Pandyav Republic (1957) E.A.336, Kariuki Karanja v Republic (1986) KLR109**. After hearing the submissions of the parties and considering the record of appeal I have concluded that the following issues arise for determination: whether the charge sheet was fatally defective, whether the Appellant was positively identified and whether the offences were proved beyond reasonable doubt.

24. The Appellant submitted that the charge sheet was defective as it was framed under both Sections 295 and 296(2) of the Penal Code which rendered it duplex. The Appellant relied on the case of **Joseph Njuguna Mwaura(Supra)** to buttress this submission. No doubt the charge sheet as drawn was duplex as each of the provisions of the law provide for a distinct offence. The test however, is whether the duplicity occasioned any injustice to the Appellant. The Court of Appeal in **Paul Katana Njuguna v. Republic[2016] eKLR**, held that:

“As we have already noted the rule against duplicity is to enable an accused know the case [he/she] has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.”

25. In the present case, there was **“no risk of confusion in the mind of the”** Appellant who was clearly aware of the offence facing him and aptly cross examined the witnesses. He set up a defence against the charges facing him. He also took plea for the offences charged for which he defended himself. As such, no injustice was occasioned to him and so this ground of appeal is rendered moot.

26. On identification, the Appellant submitted that the same was mere dock identification. He went ahead and questioned the circumstances under which the identification took place raising issues with the prevailing conditions at the scene. He submitted that the trial magistrate erred in finding that he was positively identified.

27. I note that the learned magistrate exercised caution in relying on the evidence of a single identifying witness. There is no doubt in my mind that there were lights at the scene as the investigating officer upon visiting the scene confirmed the same. I bear in mind that the length of the interaction at that location was seemingly fleeting, although a contrast may be inferred at the second scene where she (PW1) was raped when she would have had ample time to form an impression of the Appellant's features.

28. But again, it was at night and the rape was perpetrated under duress when concentration on identifying the assailant can also be hazy. Clearly then this was a case in which the need for an identification parade was not negotiable. It is the only means through which the court could erase doubt that PW2 truly identified the Appellant. Apparently, the trial court found that there a parade in which the Appellant was identified. Nothing can be further from such a conclusion. The circumstances under which the Appellant was identified were pretty unprocedural. The Appellant had been arrested amongst a group of young men after robbing a woman. It coincided that PW1 had also made a report of the instant incident. She was called by the investigating officer to the police station to go and try to identify her assailants. That is how the Appellant and those arrested with him were shown to PW1 who ostensibly identified him.

29. Suffice it to note, PW1 had not told the investigating how she would be able to identify the Appellant. She neither had described him in the first report to the police. Even in court she did not attempt to describe the physical appearance of her assailants. It then begs how she picked on the Appellant as her assailant. In my view, this was bad identification based on guess work. The trial court erred in holding that there was positive identification. In fact, no parade was conducted in accordance with Police Standing Orders that gave rise to the conclusion by the trial court that identification of the Appellant was pursuant to a parade.

30. On the issue of the first report to the police, PW5, who recorded PW1's complaint, testified that the complainant informed her that she was familiar with the man who raped her. But PW1 fell short in describing what features of the attacker were familiar to her. And so, even if she subsequently informed the medical officers that she was familiar with her attacker, the same did not amount to identification that met the threshold to found a conviction. I conclude therefore, that any subsequent identification of the Appellant did not amount to a recognition. The conviction was certainly not safe.

31. Having faulted the identification, it follows that the Appellant could not be linked to the offences. I entirely concur that the elements of the three main counts were established but for want of positive identification, this appeal must succeed, I find that the prosecution did not prove their case beyond all reasonable doubt. I accordingly quash the conviction, set aside the death sentence and order that the Appellant be forthwith set free unless otherwise lawfully held.

DATED and DELIVERED this 13th day of **JUNE, 2018**.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant present in person.
2. Miss Atina for the Respondent.