REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NOs. 95,96 &97 OF 2017

KEVIN ALUDA.....1st APPELLANT

BONIFACE ASIANJE.....2nd APPELLANT

AUGUSTINE ANALO.....3rd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by M.L. Nabibya , SRM , in Hamisi SRMC CR. NO. 759 of 2014 delivered on 26/7/17) .

J U D G M E N T

1. The three appellants were convicted of the offence of robbery with violence contrary to section 295 as read with section 296(2) of the penal code. The 1st and 2nd appellants who were minors at the time the offence was committed were sentenced to be held at the president's pleasure while the 3rd appellant , Augustine Analo was sentenced to suffer death as provided by the law . The appellants were aggrieved by the conviction and the sentences and filed three separate appeals. The grounds of the appeals are basically that the appellants were not identified during the robbery and that they were convicted when there was no sufficient evidence against them.

2. The appeal was opposed by the state.

3. The particulars of the charge against the appellants was that on the 25th day of July, 2014 at [particulars withheld] Village, Cheptulu sub-location in Hamisi sub – county within the Vihiga county , jointly with others not before court , being armed with offensive weapons namely pangas and rungus robbed V L of cash the sum of Kshs. 25,000/= , a mobile phone make Nokia C3, two pairs of sports shoes , twenty packets of supermatch cigarretes and assorted clothes all valued at Kshs. 9200/= the property of the said V L and during the time of the robbery gang – raped L N and D M.

4. The prosecution case is that the complainant (PW3 in the case) is the mother to the referred to L N (PW1 in the case) and D M (PW2 in the case). That on the material day at 12.30 am the complainant and her daughters were sleeping in their house when they were attacked by a gang of about 8 people. The people broke the door to house. They were armed with a panga. They harassed them while demanding for money. They raped the two sisters. They robbed the complainant of cash of Kshs. 25000/=, a mobile phone, 2 pairs of sports shoes and packets of cigarattes. After robbing them they went away. The complainants screamed. Neighbours responded. They reported at Cheptulu Police Post. The girls were treated at Shiru Health Centre. They were issued with P3 forms that were completed at Serem Health Centre by a clinical officer, PW4.

5. It was the evidence of L PW1 that she had identified the three appellants during the robbery. D stated that she identified the 2nd and 3rd appellants during the robbery. The complainant PW3 stated that she had identified the 3rd appellant during the robbery. Later the appellants were arrested. They were charged with the offence. They denied the charge. During the hearing the clinical officer PW4 produced the treatment notes and the P3 forms issued to L and D as exhibits. However the policemen who investigated the case never turned up to testify in the case.

Defence Case.

6. When placed to their defence the appellants gave sworn evidence. The 1st appellant stated that on the material night he was sleeping at his home at [particulars withheld] Village. He did not go anywhere. He said that the charges were framed.

7. The 2nd appellant stated that on the material night he was sleeping at his home at Kisasi . He was later arrested and charged.

8. The 3rd appellant similarly stated that on the material night he was sleeping at his home. Later he was arrested by policemen. He was told that he had raped somebody. He was taken to Cheptulu then to Serem Police Station. He said that the charges are a frame up.

Submissions

9. The advocate for the appellants, **Mr. Nandwa** submitted that the evidence on identification was wanting. The witnesses did not clearly explain how they managed to identify the appellants at night. That the charge was defective and the elements of the charge were not proved. That the violence meted on PW1 and 2 cannot support a charge of robbery with violence against their mother PW3 who was named as the complainant. That the trial magistrate relied on evidence of identification parade when there was no identification parade conducted.

10. The state did not make any submissions. They relied on the decision of the lower court.

ANALYSIS AND DETERMINATION

11. This is a first appeal. It is the duty of a first appellate court to look at the evidence presented before the trial court afresh, revaluate and re-examine the same and reach its own conclusions. The court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant – See ***Kinyanjui Vs Republic*** (2004) 2KLR 364.

13. It was the evidence of L PW1 that she was sleeping in her room with her sister D when she heard a bang on the door. The rear door was broken and some people entered into the house. Her cousins who were sleeping in a separate room were brought into her room. All of them were tied up with lesos. The people started to ransack the place. They had a panga and a torch. One of them raped her in the room. She was taken outside the room and another one raped her. The person who had raped her before did it again. The person put a panga on her neck and said that he would have killed her if it were not that he knew her. She recognized the person as Agostino Analo, the 4th accused (now 3rd appellant after the case against the 3rd accused was withdrawn). The people then untied her and took her to the sitting room where her mother was. The people were threatening to kill her mother and her younger sister. Shortly after, her sister came in screaming. She then saw the Augustino Analo and another called Shiriani. They flashed a bright light. The people then escaped. They reported at Cheptulu and were treated at Shiru. Some people were arrested. An identification parade was organized. She identified the 1st appellant in the parade. The people had during the robbery taken her outside where there was moonlight. She had identified the 1st appellant in the moonlight. She had also seen him earlier in the day wearing a black T- shirt and grey trousers. That the 2nd appellant was identified wearing a black T- shirt that was recovered. That she identified the 3rd appellant because she knew him. She used flash lights to see the 3rd appellant and she identified him while they were outside as he had talked to her. That the 3rd appellant is one of the people who raped her. He is the one who placed a panga around her neck and threatened to kill her.

13. D PW2 testified that she was asleep when some people entered into her room. Two of them took her behind the toilet and one of them raped her. The people then went away. They reported to the police. Some people were arrested. An identification parade was organised at Serem Police Station. In the parade she identified 3 people -the 2nd and the 3rd appellants and the one whose case was withdrawn. That she had seen their faces. That the one whose case was withdrawn and the 3rd appellant are the ones who took her behind the toilet wherein the 3rd appellant raped her. The 3rd appellant did not talk to her. That during the incident she had seen the 2nd appellant. He was wearing a black T- shirt and a black trouser. He was talking and calling himself corporal. That he tied their hands. She had known the 2nd appellant before. She also knew Kevin Analo. She used to meet him on the road. They used to talk. That the 3rd appellant is the one who told her mother to give out the phone.

14. V L PW3 testified that the people broke the door and one person entered into her room. Another went to the girls' room. The person who was in her room demanded for Kshs. 50,000/= .He told her to face down, took her leso and tied her hands. He took her phone (Nokia), a pair of sports shoes and a solar lamp. He left the room and went into the girls' room. He went back into the room and took Kshs. 25,000/=. The people left with the girls. A small boy started to scream. The girls came back and said that they had been raped. She called the police who went to her home.

15. It was further the evidence of V that during the incident she managed to identify one person, the 3rd appellant. That she used to know him before. He is a neighbour and used to eat at her house. He is the one who tied her up.

16. The clinical officer PW4 testified that he completed the P3 forms for L PW1 and D PW2 on the 28/7/2014 at Serem Health Centre. The two had been treated at Shiru Health Centre. On examination PW1 had blunt injury on the back and chest and bruises in the vagina. The hymen was missing and there was whitish discharge. A laboratory examination was done. Pregnancy test was positive. PW2 had dried blood stains on the thighs and bruises and bleeding on the vaginal walls. The hymen was missing. The clinical officer classified the degree of injury in both cases as harm.

17. The first question is whether the charge against the appellants was defective. The charge against the appellants was robbery with violence. The advocate for the appellants submitted that the elements of robbery with violence were not proved as PW2 and PW3 did not say that the assailants were armed. That there was no evidence that the assailants wounded, beat, struck, or used violence against the complainant PW3. That if there was any violence it was used against PW1 and PW2 who are not the complainants as the complainant is their mother PW3. That the penal code does not envisage a situation where violence meted out on a third party can be transferred to the victim of robbery. That there was no evidence to prove rape as the appellants were not charged with rape.

18. The learned trial magistrate referred to the case of **Oluoch Vs Republic (1985) KLR 549** where the Court of Appeal set out the ingredients of robbery with violence and held that:

" Robbery with violence is committed in any of the following circumstances:

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

(b) The offender is in company with one or more 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.

The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the penal code. It is also to be noted that violence does not have to be visited on the complainant but it can be " to any person".

19. L PW1 stated that the people were armed with a panga . That one of them, Agostino Analo placed a panga on her neck and threatened her that he would have killed her if it were not that he knew her. The other two witnesses PW2 and 3 did not say whether the people were armed with any weapons. During the evidence they were not asked whether the people were armed. The fact that they did not say that the people were armed does not mean that PW1 is lying that the people were armed with a panga. It is clear from the evidence of PW1 that the people were armed with a panga. One of them threatened PW1 with a panga . A panga is an offensive weapon. The first ingredient of robbery with violence stated above was therefore proved.

20. All the prosecution witnesses stated that the people who entered into the house were many. PW1 stated that she saw 3 people. PW2 said that 8 people entered into her room while PW3 said that she saw 3 people in the house. The people were therefore more than one . The second ingredient for robbery with violence was proved.

21. The Black's law Dictionary defines violence as " the use of physical force". It also defines " personal " as " of or affecting a person". Personal violence therefore means the use of physical force on a person. Rape is committed when the consent to sex is obtained by force. I would therefore hold that rape is a form of personal violence.

22. Were PW1 and 2 raped? The P3 forms indicated that the two witnesses had bruises on their vaginas. An offence of rape need not be proved by medical evidence. It can be proved by oral evidence as was held by the Court of Appeal in **AML Vs Republic (2012) eKLR** that :

"the fact of rape or defilement is not proved by a DNA test but by way of evidence ."

There was credible evidence by the two witnesses PW1 and 2 that they were raped. That there were bruises in their vaginas corroborated the evidence of the witnesses they were indeed raped. I therefore find that the fourth ingredient of the offence of robbery with violence was proved.

23. V PW3 was named as the complainant in the charge while the charge stated that violence was visited on L and D. As section 269(2) talks of " use of personal violence to any person", it is my considered view that the robbery may be done on one person and violence during the time of the robbery done to another person. In this case, the offence of robbery was committed against V PW3 while the violence was done to PW1 and PW2.There was thereby no defect in the charge.

24. V said that from her room the robbers took cash Kshs. 25,000/=, a mobile phone and 2 pairs of sports shoes. The complainant was thereby robbed and in the course of the robbery personal violence was used on her daughters. The submission by the advocates for the appellants that the elements of robbery with violence were not proved does not hold water.

25. The second question is whether the prosecution witnesses identified the appellants during the robbery. This question should answer the rest of the grounds of appeal. The trial magistrate in her judgment found that the appellants were identified by aid of moonlight and the torches that they were flashing.

26. The incident took place at night. L PW1 stated that she identified the 1st and the 3rd appellants during the robbery. She said that she knew the 3rd appellant before while earlier on, on the day of the robbery she had seen the 1st appellant.

27. D PW2 said that she identified the 2nd and the 3rd appellants. That she knew the 3rd appellant before whom she used to meet on the road and they would talk. She also knew the 2nd appellant though she did not elaborate how she knew him.

28. V PW3 stated that she knew the 3rd appellant who was her neighbour and used to eat in her house.

29. The courts of law have always held that identification especially where it takes place in difficult circumstance should be scrutized carefully and ruled to be free of the possibility of error before the court basis a conviction on such evidence In **Wamunga Vs Republic(1989) KLR** the Court of Appeal stated that:

"It is trite law that where the only evidence against a defendant is evidence of identify of recognition , a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from the

possibility of error before it can safely make it the basis of conviction".

30. In **Lesarau Vs Republic (1988) KLR 783** , the same court cautioned that even where identification is based on recognition by reason of long acquaintance, the court should be wary of the possibility of mistaken identity. The court in the case referred to the English case of **R Vs Turnbull (1976) 3 A11 ER 551** where Lord widgery C.J observed that :-

> **"recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**

31. In **Maitanyi Vs Republic (1980) KLR 198** the same court emphasized that where the identification is at night the evidence on the lighting has to be such that it clearly enabled the witness to identify the accused. The court said that:-

> *"…... but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves''.*

32. In this case the three prosecutions witnesses did not clearly state how they were able to identify the appellants. L PW1 stated that she saw the 3rd appellant in aid of a flashlight from the assailants' torch . That she saw him in the moonlight when she was taken outside. That she also saw the 1st appellant in the moonlight. However she did not elaborate as to where the flashlight was directed when she saw the 3rd appellant. She did not elaborate on the strength of the moonlight that enabled her to identify the 1st and the 3rd appellants. Though the witness said that the 3rd appellant talked to her outside she did not state what he said or whether she identified his voice and what made her identify the voice.

33. D PW2 did not state in her evidence what enabled her to identify the 2nd and the 3rd appellants. She stated that she picked them in an identification parade at Serem Police Station but no evidence on parade identification was produced in court. In any case the witness stated that she knew the two people before so a parade identification was unnecessary.

34. Similarly V PW3 did not elaborate on what enabled her to identify the 3rd appellant.

35. In the premises the evidence of the three prosecution witnesses was not tested to prove that they identified the appellants beyond all reasonable doubt. The policemen who investigated the case did not testify. No explanation was given as to why they did not testify. As far as the evidence stands now it is not known whether the witnesses mentioned to the police those who were known to them when they reported the incident to the police. This was crucial evidence which would have corroborated the evidence of identification.

36. The magistrate held that the PW1 identified the 1st and the 3rd appellants in an identification parade when there was no evidence of an identification parade. She said that the 2nd appellant was identified by a recovered T- shirt when there was no such T-shirt produced in court. She held that the appellants were identified by facial appearance yet she did not consider whether there was sufficient moonlight and torchlight. The trial magistrate thereby convicted the appellants on insufficient evidence.

37. The appellants put up alibi in their respective defences. The onus of proving that an alibi is false is on the prosecution- **Kiarie Vs Republic (1984) KLR 741**. The prosecution did not prove that the alibi were false. Therefore the conclusion by the trial magistrate that the appellants were among the people who robbed the complainant was not based on conclusive evidence.

38. The 1st and 2nd appellants were minors at the time that the offence was committed. The trial court upon convicting them should have dealt with them in accordance with section 119 (1) of the Children's Act. Nothing in that section provides for a sentence of being held at the president's pleasure. I am not aware of any other law that provides so. The sentence imposed on the 1st and 2nd appellants was thereby illegal.

39. In the foregoing and for the prior said reasons, the charge against the appellants was not proved beyond reasonable doubt. The conviction is thereby quashed and the sentences set aside. The appellants shall be set at liberty forthwith unless lawfully held.

Delivered, dated and signed at Kakamega this 30th day of July, 2018 .

J.NJAGI

JUDGE

In the presence of:-

Mr. Nandwa……...for appellants

Mr. Juma…….….for respondent/state

Mr. George……..…Court assistant

Appellants ….....present

14 days Right of Appeal explained.