



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEALS NO. 46 OF 2017

STEPHEN ODHIAMBO OMUDHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction, Judgment and Sentence imposed in Maseno Criminal Case

Number 1073 of 2014 by Hon. R.S.Kipngeno(SRM) on 31.8.17)

JUDGMENT

The Trial

1. Appellant has filed this appeal against sentence, judgment and conviction on a charge of robbery with violence contrary to section 296(2) of the Penal Code Cap 63 Laws of Kenya and attempted rape contrary to section 4 of the Sexual Offences Act.

PROSECUTION CASE

2. The prosecution called a total of three(3)witnesses in support of their case. Complainant recalled that on 19.8.14 at about 9.30 pm, she was returning home when she was accosted by 2 men who stole her Nokia phone valued at Kshs. 2,000/- and a Safaricom wallet containing Kshs. 1,500/-. That one of the robbers walked away and the other one, who was short and had a jacket remained behind, hit her on the left eye, tore her blouse and skirt, sat on her stomach and started to strangle her. That she managed to escape screaming as a result of which appellant was apprehended by a mob and she returned to the scene and identified him as one of her assailants. **PW2 James Edgar Balania** testified that he was attracted to the scene of crime by complainant's screams and that upon arrival; he found a group of people pulling appellant from the complainant who was lying on the ground. **PW3 PC Robert Sigei**, stated that he took over the case long after appellant had been charged. He produced complainant's P3 Form, blue skirt and black blouse, marvin given to him by the investigating officer, PC Nzuki, as exhibits.

DEFENCE CASE

3. At the closeoftheprosecutioncase,appellantwasruledtohaveacasetoanswer andwasplaced onhisdefence. In his sworndefenceappellant stated that on the material night at about 9.30 pm, he was going home from watching a football match with his girlfriend when he was attacked by his girlfriend's brother and two others who injured him. That his girlfriend reported the matter to police who visited the scene and escorted him to hospital. That he was later handed over to police officers from Maseno Police station and charged with offences he did not commit.

4. On31.8.17,thelearnedtrialmagistratedeliveredajudgmentinwhichheconvictedappellant of both counts and sentenced him to suffer death in the 1st count and 5 years in the 2nd count.

The Appeal

5. Aggrieved by this decision, appellant lodged the instant appeal. In his supplementary grounds of appeal filed on 19.4.18, appellant raised 5 grounds as follows: -

1. The learned trial magistrate did not warn himself before relying on the evidence of a single identifying witness

2. The learned trial magistrate relied on contradictory evidence of PW2

3. *The learned trial magistrate relied evidence of PW3 who the investigating officer was not*

4. *Defence was not considered*

5. *The learned trial magistrate erred in sentencing appellant to death*

6. Ms. Alinaitwe, learned counsel for the appellant chose to wholly rely on submission filed by the appellant on 9.3.18. She urged court to re-sentence appellant if it finds that he was properly convicted. Ms. Wafula, learned Counsel for the state, submitted that appellant was positively identified by complainant as one of the persons that robbed her and further that appellant had undressed complainant an indication that he wanted to rape her.

ANALYSIS AND DETERMINATION

7. This being a court of first appeal, I am guided by the ruling of the Court of Appeal decision in the case of ***OKENOV'S REPUBLIC [1972] E.A. 32***. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

In dealing with this appeal, I will consider the grounds of appeal as follows: -

a. Identification of appellant

8. In the case of ***Maitanyi –vs- Republic (1986) KLR 198*** the Court of Appeal stated: -

***“.....That may sound too obvious to be said, 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.*”**

9. This position was restated in the recent case of ***John Muriithi Nyagah v Republic [2014] eKLR***, where the Court of Appeal held: -

“in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”

10. It is on record that PW1 did not know appellant before the material date. The incident took place at about 9.30 pm. Complainant told court that the night was dark and there was no moonlight or electric lighting at the scene. She further stated that her assailants had a bright torch which they were flashing on his eyes to confuse her. Appellant also stated that she was hit on the left eye as a result of which she fell to the ground. Evidently, the complainant did not in her testimony clarify how she was able to identify appellant that was unknown to her in such circumstances. I find that had the trial court made an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the appellant, it would have arrived at a different conclusion. In my considered view, the quality of identification evidence was critical and the trial magistrate erred in placing reliance on identification that was flawed.

b. Weight of PW2's evidence

11. Complainant told court that after she was robbed and her clothes torn, she managed to escape screaming as a result of which appellant was apprehended by a mob and she returned to the scene and identified him as the one of her assailants. PW2 James Edgar Balania on the other hand stated that he was attracted to the scene of crime by complainant's screams and that upon arrival; he found a group of people pulling appellant from the complainant who was lying on the ground.

12. Clearly, complainant's evidence contradicts PW2's evidence that appellant was arrested in the act. The evidence by PW2 was obviously untrue and therefore of no probative value.

c. Weight of PW3's evidence

13. I find no fault in the trial court's observation that PW3 PC Robert Sigei's duty was to produce exhibits handed over to him by the investigating officer.

d. Was appellant's defence considered?

14. As stated hereinabove, appellant stated that he was returning home on the material night at about 9.30 pm when he was attacked by his girlfriend's brother and two others who injured him. That his girlfriend reported the matter to administration police officers who visited the scene and escorted him to hospital. Members of the mob and Administration Police Officers that complainant alleged apprehended appellant were not called as witnesses and the link as to the cause and under what circumstances appellant was arrested is missing from the prosecution case. That leaves appellant's defence unchallenged and I am of the considered opinion that the learned trial magistrate ought to have appropriately considered the defence and given the appellant the benefit of the doubt.

d. Death Sentence

15. The decision in Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR was rendered after appellant was convicted and sentenced. Had appellant been properly convicted, he would have had a right for re-sentencing.

Decision

16. From the foregoing, it is clear to this court that the evidence of identification could not be safely relied upon. I find that the prosecution failed to discharge its burden of proof. The learned trial magistrate erred in convicting and sentencing the appellant when there was no evidence to warrant or sustain a *conviction*. Accordingly, I quash the conviction and set aside the sentence and unless otherwise lawfully held, order that appellant shall be released and set free forthwith.

DATED, DELIVERED AND SIGNED THIS 26TH DAY OF JULY 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Present in person

For state - Ms. Barasa