REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 5 OF 2017

JEREMIAH ANYONE NYABUGA..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

[Being an Appeal against the Judgement and Decree of Hon. J. Were – SRM delivered on 10th November 2011 in Keroka SRM Court Criminal Case No. 281 of 2005]

JUDGEMENT

On 10th November 2011 the Senior Resident Magistrate at Keroka sentenced the accused to 10 years' imprisonment for Robbery with violence contrary to Section 296 (2) of the Penal Code and 10 years' imprisonment for Rape contrary to Section 140 of the Penal Code (now repealed). This was after finding the appellant guilty on the two offences in one of which, robbery with violence, he was charged jointly with his brother and others who were not before the court.

On the charge of Robbery with violence contrary to Section 296 (2) of the Penal Code, the particulars were that on the nights of 22nd/23rd July 2005 at Nyansiongo Location in Nyamira District within Nyanza Province, jointly with others not before court, being armed with dangerous weapons namely an axe, robbed R N O of her mobile, Erickson valued at Kshs. 6,000/= and at or immediately before or immediately after the time of such robbery murdered her husband, S N O and her baby A K N.

On the charge of Rape, it was alleged that on the same date, time and place the appellant had unlawful carnal knowledge of E M without her consent.

The appeal which was filed out of time pursuant to the leave of this court granted on 8th May 2013 is premised on the following eight grounds: -

> **"1. That my lordship the learned trial magistrate erred in law and fact by convicting and sentence (sic) the appellant without discovering that I was not examined by any medical officer to engage me with the allegation.**
>
> **2. That my lordship the pundit magistrate erred in law and facts by not taking into account that the medical officer who did examine the complainant did not get any spermatozoa which proves the evidence of sexual intercourse as it was said.**
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> **3. That my lordship the learned trial magistrate erred in law and facts by just relying on the prosecution chain of evidence which was much contradictive as it was said.**
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> **4. That my lordship the learned trial magistrate erred in law and facts by not realizing the allegation was committed at night hence there was no any vital prove which was adduced to bind me with the allegation in the side of identification.**
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> **5. The learned trial magistrate erred in law and facts by not considering the evidence adduced by the prosecution witnesses who stated that they made recoveries some miles from the scene.**
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> **6. That my lordship the learned trial magistrate erred in law and facts by discovering that my right was violated at the police station whereby I was not satisfied with the identification parade which was conducted.**
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> **7. That my lordship the learned trial magistrate erred in law and facts by dismissing my defence which was worthy but not tested to be proved unworthy as it forbidden by law.**
>
> **8. That my lordship the pundit magistrate erred in both law and facts by not discovering that the prosecution side failed to**

take the exhibit like an axe to be pathologised to prove the contamination with the allegation.

9. ……"

At the hearing of the appeal the appellant relied on written submissions in which he stated that during his trial his case was transferred from Keroka Law Courts to Kisii Law Courts and back to Keroka without a proper reason. He stated that after his arrest he was held at Keroka Police Station for more than 24 hours in contravention of the law; that this was a case of mistaken identity and further that as the complainant did not testify the sentence is questionable. He contended that the prosecution's evidence was full of contradictions and that he was never informed of his right to recall the witnesses. He contended therefore that his right to a fair trial under Article 50 (2) (k) of the Constitution was violated.

The appeal was vehemently opposed. Mr. Ochieng, Learned Counsel for the State submitted that there was no need to examine the appellant as he was arrested days after the commission of the offence and medical evidence would have not helped as in any case the evidence adduced was enough to prove the complainant was raped. He contended that the absence of spermatozoa did not negate the fact of defilement. He submitted that it was not necessary that ejaculation be present to prove sexual intercourse. Mr. Ochieng submitted that other medical evidence was adduced which confirmed the victim was raped. He submitted that the witnesses provided flawless testimony and there was no contradiction. He contended that that evidence remained unshaken even upon cross examination. He further stated that the trial court properly cautioned itself on the identification at night. He described the evidence of the victim of rape as detailed and fortified by an identification parade done at Keroka Police Station and stated that the appellant had expressed his satisfaction at the outcome of the parade. Counsel submitted that the appellant's defence was an afterthought; that his alibi was not tested and the appellant did not call witnesses to support it. Counsel contended that the evidence of the prosecution witnesses was overwhelming. He pointed out that other than the rape of Pw5, two people lost their lives as a result of injuries inflicted by the appellant and his accomplices. He urged this court to dismiss the appeal and consider enhancing the sentence.

In reply the appellant pleaded with this court to assist him and prayed that his sentence be considered from the time he was convicted.

I have considered the submissions by both sides carefully and also re-evaluated the evidence before the trial court so as to arrive at my own conclusion. I have in so doing made provision for the fact that I neither heard nor saw the witnesses give evidence.

The trial of the appellant and his co-accused begun in the Senior Resident Magistrate's Court at Keroka but on 18th May 2006 the appellant and his co-accused expressed their lack of confidence in that court and applied for its transfer to Kisii Senior Principal Magistrate's Court which was allowed. The record shows that the case was adjourned several times until the then Chief Magistrate Kisii transferred it back to Keroka Court. The averment by the appellant that the case was moved from court to court without a reasonable explanation is therefore baseless and lacking in merit as it is him and his co-accused who sought the transfer.

Having perused the record of the lower court I did however notice that the complainant in the charge of Robbery with violence (Count I) was not called to testify and even the witness, May Moraa (Pw1) who gave evidence concerning that count was not recalled even though the court had granted the appellant's wishes for her recall. The charge of robbery with violence was therefore not proved. Learned Prosecution Counsel did not address himself to this issue in his submissions. I do therefore agree with the appellant that the trial magistrate erred in convicting him on a charge for which no evidence was adduced.

I am however satisfied that the charge of defilement was proved beyond reasonable doubt. The complainant vividly narrated how the appellant went to her room and raped her. She described him and testified that she was able to identify him because he kept looking at the roof and because he had a torch whose light was bright enough she was able to see his face. This was confirmed by her ability to pick him out at the identification parade. I have considered the manner in which the parade was conducted and I am satisfied that it was conducted according to the law. Although there was no need for corroboration medical evidence was adduced which confirmed that the complainant was raped. Whereas the offence was conducted at night I am satisfied the circumstances were conducive to a positive identification. I believed the complainant. It is not mandatory to prove ejaculation in a charge of rape. It is enough that penetration was proved in this case. The evidence in this case was neither inconsistent nor contradictory. To the contrary it was cogent, reliable and credible and I am satisfied that the appeal on this court cannot succeed. The evidence given by the appellant much as it was given on oath could not withstand the weight of such cogent evidence. His saying that he had been released on a bond to keep peace on that very day only makes it more credible that he committed this offence. This is because of the evidence that that bond was found close to the house where the offence was committed on that night.

Everything that could be done to secure the rights of the appellant at the trial was done. This included postponing the trial until he and his co-accused got legal representation, transfer of the case when they expressed their desire for that to be done and recalling of the witnesses who had already testified. The submission by the appellant that his right to a fair trial was violated does not therefore have merit. The appellant was properly convicted on the count of rape and the conviction and sentence are therefore upheld.

The appeal on the charge of robbery with violence is however allowed and the conviction is quashed and sentence thereat set aside respectively. The appellant shall be left to continue serving the sentence on the charge of rape only.

It is so ordered.

Signed, dated and delivered in open court this 31st day of October, 2018.

E. N. MAINA

JUDGE