REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 199 OF 2014

KEVIN KISWIKI KYONGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment, conviction and sentence of Honourable P.N. Gesora- SPM and M K Mwangi Ag. SPM respectively on the 12/9/14 and 8/10/2014 respectively at Chief Magistrate's Court, Machakos in criminal case no. 772 of 2013)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

KEVIN KISWIKI KYONGI.....ACCUSED

JUDGEMENT

1. The appellant, **Kevin Kiswiki Kyongi**, was charged in Chief Magistrate's Court, Machakos in Criminal Case No. 772 of 2013, in Count 1, with the offence of Robbery with Violence contrary to section 296(2) of the ***Penal Code*** the particulars being that on the 18th day of April, 2013 within Mwala District of Machakos County, the appellant with another not before court robbed **CNI** of one mobile phone make Nokia 1200, skirt, blouse, two kikois, handbag, wallet and cash Kshs 5,300/= all valued at Kshs 16,400/= and at or immediately before or immediately after the time of such robbery wounded the said **CNI.**

2. In the second count the appellant faced the charge or Rape contrary to section (1)(a) and (b) of the ***Sexual Offences Act*** in that on the same day at the same place, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **CNI** without her consent.

3. The accused person was convicted as charged and he was sentenced to death in respect of Count I while the sentence in count II was kept in abeyance.

4. Not being satisfied with the conviction and sentence the appellant lodged this appeal were based on the following grounds:

> **1) That the appellant's conviction in reliance on the suspicious evidence by PW2 and PW3 was unsafe and not capable of sustaining a conviction, hence his conviction was manifestly unsafe.**
>
> **2) That the learned trial magistrate erred both in law and facts and misdirected himself by holding that this was a case of recognition whereas the complainant faithfully informed the court that she never knew the appellant neither did she see her attackers as she was hit from behind and fell unconscious.**
>
> **3) That the charge against the appellant was not proved beyond reasonable doubt as required in law.**

5. According to the prosecution's case, on 18th April, 2013 at 6.00pm, PW1, **CNI**, the complainant herein was walking home from her work place, [Particulars Withheld] Secondary School, along Mtuu-Machakos Road when before Miu Bridge, she saw a lorry coming from Mchakos Direction towards Matuu. The said lorry met with a motor bike which was at high speed. As the complainant gave way to the lorry, PW2, **Esther Nzilani Muia** and her daughter, PW3, **Mwende Muia**, whom she knew caught up with her and they talked briefly.

6. As PW1 was crossing the bridge, she was hit on her head and lost consciousness immediately. She regained consciousness hours later in the bush, screamed for help and some people went and assisted her. Thereafter her nephew, **MM**, carried her on a motor bike to Mwala Dispensary where she was treated. According to her, she sustained cuts on her head and face and was bleeding a lot. Her head was also swollen as a result of which her head was sutured. She also discovered that she had been raped though during the ordeal she was numb and did not recognise anything. When she regained consciousness she felt pain all over her body and her clothes were soaked in blood. She however lost her phone, cash, handbag, skirt, blouse, kikois and wallet all worth Kshs 16,400/=. It was her evidence that the police picked her pant which was exhibited in court as well as her handbag strap.

7. The complainant testified that when PW2 and PW3 visited her in hospital she asked then who was following her and they said it was **Musyoka Kiswili** but that across the bridge was Mapesa son of Kiswili a.k.a Shei, whom she identified as the appellant. According to her the appellant disappeared from the vicinity and she only saw him after he was arrested in July. However the appellant threatened her that he would kill her.

8. According to PW2, **Esther Nzilani Muia**, on the said day at 6.30pm she was from Kasoo Market with her daughter, **Gladys**, PW3. When they were approaching Miu Bridge, she saw the appellant on top of a fig tree. Upon seeing the person her daughter became fearful and ran across the bridge. She eventually caught up with her daughter, PW3 who was talking to the complainant. Thereafter they parted ways and they went home. The following day she got information that the complainant had been injured after being attacked on the bridge after they parted ways. She then informed the complainant that she had seen the appellant on top of the tree and that they had also met one **Musyoki**. According to her the appellant had the habit of climbing on top of the tree and one time charged at her daughter. According to her the appellant had been threatening passers-by.

9. PW3 corroborated PW2's evidence that on the material day she was with her mother, PW2 when they saw the appellant who was with **Musyoki** on top of a tree carrying a stick. According to her she recognised the appellant because there was sufficient lighting.

10. PW4, **Justus Wambua**, a clinical officer at Mwala Dustrict Hospital produced the complainant's P3 form which showed that her clothes were soaked in blood and was unconscious with deep cut wound on the scalp that was bleeding on the back of the head while her right eyelid and the neck had scratch marks. According to him the probable weapon used was blunt. The complainant also gave a history of the appellant trying to rape her though her genitalia was intact and no spermatozoa was noted.

11. PW5, **Cpl Moses Mathenge**, testified hat on 18th April, 2013he was on patrol with his colleagues in Mwala Town when one **MM** reported that his aunt had been attacked and injured at the bridge and was in hospital. They proceeded to the bridge where they found marks on the ground as if someone had been dragged into the bush. Upon following the said marks they found a lot of blood and a lady's inner pant which they picked. They then proceeded to the hospital where they found the complainant injured and her clothes were blood stained but had no inner pant. She identified the inner pant discovered as hers. Based on the evidence of PW2, they arrested the appellant while the other suspect, **Musyoka Kaveli** ran away. The witness produced the items in Court as exhibits.

12. Upon being placed on his defence, the appellant gave an unsworn statement in which he stated that on 13th July, 2013, he left his house after he was called by the AP officers. He was then arrested and charged with the offence in question.

13. In his judgement, the learned trial magistrate found that the appellant was unable to shake the evidence that he was on top of the tree at the time. It was the Court's view that the appellant ought to have given an explanation of what transpired otherwise the court would have no option but to conclude that he attacked the complainant as the circumstances clearly pointed to him with mathematical exactitude required by law linking him to commission of the offence.

14. In this appeal the appellant has submitted that the offence against him was not proved as there was no evidence linking him to the offence. Apart from that the circumstantial evidence relied upon fell short of the standards required in law for the same to prove the commission of an offence by a suspect.

15. The appeal was conceded to by **Ms Mogoi**, learned State Counsel who submitted that the evidence fell short of the standards required to prove that the said offences were committed by the appellant. I must however point out that it is trite that a mere concession by the State does not automatically lead to the decision of the lower court being upset. This court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

> **"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence".**

Determination

16. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

17. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus;

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

18. In this case the main issue for determination is whether the prosecution proved to the required standards that the appellant was guilty of the offences with which he was charged. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''**

19. According to ***Halsbury's Laws of England***, 4th Edition, Volume 17, paras 13 and 14:

> ***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."***

20. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated that:-

> **"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

21. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 320** suggested the following explanation:-

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."**

22. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

> **"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."**

23. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated:-

> **"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond**

reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

24. The judgement of the Trial Court was clearly based on circumstantial evidence. While recognizing the dangers in relying on circumstantial evidence without exercising this caution the Court in **Teper v. R [1952] AC at p. 489** had this to say:

"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."

25. In **Sawe –vs- Rep [2003] KLR 364** the Court of Appeal held:

"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

26. In **R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

"The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

27. In **Abanga Alias Onyango vs. Rep CR. A No.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

28. In **Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA** and **Chesoni Ag. J. A**. held:-

"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused."

29. It is not in dispute that the case by the prosecution is purely circumstantial. For this court to sustain his conviction it must find that the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of **Simon Musoke vs. Republic [1958] EA 715** and **Teper vs. Republic [1952] AC 480** as follows:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

30. According to the Learned Trial Magistrate, the appellant ought to have given an explanation of what transpired otherwise the court would have no option but to conclude that he attacked the complainant as the circumstances clearly pointed to him with mathematical exactitude required by law linking him to commission of the offence. The "mathematical exactitude" that the Learned Trial Magistrate alluded was however not pointed out by the Court. It would seem that what the Learned Trial Magistrate referred to as "mathematical exactitude" was the failure by the appellant to explain what transpired. However the burden of proof was not on the appellant to do that. If the prosecution's case was weak, his failure to explain what happened cannot be taken to prop up such a weak case. In this case there was no direct evidence that it was the appellant who committed the offences in question. The appellant was only arrested, charged and convicted of the said offences, according to the Learned Trial Magistrate, based on his inaction at the time of the offence in question was committed. No one saw the appellant come down from the tree where he was seen by PW2 and PW3 and no one could say at what time, if at all, he came down from the said tree and which direction he took. There was another person who was at the scene by the name of **Musyoki**. Can it be conclusively ruled out that this person had nothing to do with the offence and that the evidence conclusively point out to the fact that the appellant was the one who committed the offences in question? With due respect I disagree. The presence of the said person alone in my view is a co-existing circumstance which weakened and destroyed the inference of the appellant's guilt.

31. This is a case where the appellant seems to have been convicted merely on suspicion. However as was held by the Court of Appeal in **Sawe –vs- Rep [2003] KLR 364**:

"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable

doubt."

32. In **Mary Wanjiku Gichira s. Republic, Criminal Appeal No 17 of 1998,** the same court held that:

> **"suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."**

33. A similar view was expressed by the Tanzania Court of Appeal in **R vs. Ally (Criminal Appeal No. 73 of 2002) [2006] TZCA 71** where it was held by the Tanzania Court of Appeal that:

> **"Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted."**

34. It is therefore my view that the conviction of the appellant, based as it was on circumstantial evidence was unsatisfactory and is unsafe. It cannot be sustained or supported. The Learned Prosecution Counsel, **Ms Mogoi**, therefore, quite properly in my view, did not support the conviction of the appellant.

35. Consequently, I allow the appeal, set aside the appellant's conviction, quash his sentence and order that the he be released forthwith unless otherwise lawfully held.

36. Right of Appeal 14 days.

37. Orders accordingly.

Judgement read, signed and delivered in open court at Machakos this 29th day of November, 2018.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in Person

Miss Mogoi for the Respondent

CA Geoffrey