REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 163 OF 2010

CHARLES NJUGUNA KIMOTHO……..…..APPELLANT

VERSUS

REPUBLIC …….…….RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kiambu Cr. Case 982 of 2009 delivered by Hon K. Muneeni, PM on 16th March, 2010.)

JUDGMENT

BACKGROUND

Charles Njuguna Kimotho, the Appellant was charged with another with two counts of robbery with violence contrary to **Section 296(2) of the Penal Code**, gang rape contrary to **Section 10 of the Sexual Offences Act** and an alternative charge of committing an indecent act contrary to **Section 11(b) of the Sexual Offences Act.**

In the first count of robbery with violence the particulars were that on 15th July, 2009 at around 11:30 p.m. at [particulars withheld] in Kiambu District, jointly with others not before the court while armed with a dangerous weapon namely a knife, robbed ENK of her wallet containing Kshs. 800/= in cash, National identity card, Equity bank ATM card and a mobile phone make 6070 all valued at Kshs. 9,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said ENK.

In the second count of robbery with violence the particulars were that on 15th July, 2009 at 11:30 p.m. at [particulars withheld] in Kiambu District, jointly with others not before the court, while armed with an offensive weapon namely a knife, robbed RNG of Kshs. 2,000/= in cash and a Samsung mobile phone all valued at Kshs. 6,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said RNG.

The particulars of the third count were that on 15th July, 2009 at [particulars withheld] in Kiambu District, with another not in court, in turns gang raped ENK. With regards to the alternative charge the particulars were that on the aforementioned date at around 11:30 p.m. to 2:00 a.m. at [particulars withheld]in Kiambu District, intentionally and unlawfully did an indecent act to ENK by touching her private parts namely vagina.

At the close of the defence case, only the Appellant who was the 1st accused was convicted. His co-

accused was acquitted for want of sufficient evidence. The learned trial magistrate passed a death sentence in respect of Counts 1 and II and life imprisonment in Count III. The Appellant was dissatisfied with both the conviction and the sentence and he preferred the current appeal. He filed Amended Grounds of Appeal on 29th November, 2016. He faulted the learned trial magistrate for convicting him when he was not properly identified. In addition, he was dissatisfied that the doctrine of recent possession was not properly applied by the trial court. On the charge of rape, he was dissatisfied that the forensic evidence adduced was not sufficient. Further that his mode of arrest was faulty, that investigations were not thorough and the learned trial magistrate rejected his defence without giving reasons.

SUBMISSIONS

The Appellant's written submissions were filed on 29th November, 2016. He submitted that the death sentence was illegal as it took away his right to life. On identification, he submitted that there was no sufficient evidence that he was properly identified so as to link him to the offence. He submitted that although the complainant adduced evidence that he knew him before the robbery, and that therefore the identification was by recognition, there was a possibility that he had mistaken him. Furthermore, the conditions prevailing as at the time of the robbery were not conducive for a positive identification. On the recovered property, he queried the manner in which the same was linked to his possession. According to him, the leso, under pant and shoes were recovered by members of the public and handed over to the police. It was therefore difficult to ascertain that they were in his possession. Further, that the learned trial magistrate did not properly apply the doctrine of recent possession in convicting him.

With regard to the charge of gang rape, he submitted that the medical evidence did not support the allegation by the complainant that she was raped. In particular, he noted that the absence of spermatozoa erased doubts that the complainant was not raped. On the forensic examination done, he submitted that his blood which was blood group AB was not found on the pants and trousers allegedly recovered from his house. There was clear evidence, in the circumstances that he was not linked to both the robbery and the rape offences. As such, he was of the view that he was convicted on circumstantial evidence that was not sufficient. He urged the court to allow the appeal and set him free.

In oral submissions, learned counsel for the Appellant, Mr. Okoji emphasized that the Appellant was not properly identified, that the forensic evidence adduced did not prove that he raped the complainant, that it is doubtful how PW1, a victim of the heinous acts also participated in the arrest of the Appellant and that the evidence adduced on the whole did not prove the case beyond a reasonable doubt.

Learned State Counsel, Ms. Akuja for the Respondent opposed the appeal. She submitted that the case was proved beyond a reasonable doubt. On identification, she submitted that the Appellant was properly identified and that the conditions for identification were conducive. More importantly was the fact that the complainant was with the Appellant between 11.00 p.m. and 2.00 a.m. during which period she could not have mistaken who her assailant was. Besides, she knew the Appellant who used to frequent her pub. On forensic evidence, she submitted that the blood found on the complaint's pant belonged to her which was prove that she had been raped. On arrest, she said that although PW1 participated in it, there was in addition an independent witness PW3 who confirmed that the complainant had properly identified the Appellant. In any event, the complainant had to move fast in arresting the Appellant for fear that he could flee. Finally, she submitted that the investigations were properly carried out. She urged the court to dismiss the appeal.

EVIDENCE

This being a first appeal this court is under a duty to reevaluate and reanalyze the evidence on record and come to an independent conclusion. It must however take cognizance of the fact that it did not have the chance to observe the witnesses' demeanor. See: ***Okeno v. Republic[1972] EA 32.***

The prosecution's evidence is summarized in the testimony of **PW1(ENK)** who was the first complainant. On the material dates at about 11.00 p.m., she closed her business, a bar at Banana Township. She was accompanied while going home by R K, **PW2** who was also the complainant in count

II. On arrival at Seres Supermarket in Banana Township, they were accosted by three men. He recognized the Appellant as one of them as he used to frequent her pub. The Appellant demanded money and her mobile phone. He robbed her of her purse. He then pulled her to the ground and stole her mobile phone. Her purse had Kshs. 800/=, a national Identity Card and an ATM card. He then removed her trousers and pulled her to a dark path. He warned that if she raised any alarm he would kill her. He was holding a knife with which he threatened to kill her. He also demanded that she removes her underpants and a biker that she was wearing. He then frog matched her while she was naked to a house which was about 1 km away. In the house, he repeatedly raped her between 12.00 midnight and 2.00 a.m. She recalled that at about 1.00 a.m., another man joined the Appellant and he too raped her. They then chased her out of the house at about 2.00 a.m. She left behind her underpants, shoes and a lesso and walked to Banana Town on foot. She then called her sister who in turn called a neighbor (PW3). The three walked back to the house where PW1 was raped where they arrested the Appellant and recovered her shoes, a lesso and the underpants which she identified in court. Thereafter, they arrested and escorted the Appellant to Karuri Police Station. She was treated at the Nairobi Women's Hospital where a medical report was prepared.

PW7, Z N a sister to PW1 corroborated the evidence of PW1. She confirmed that PW1 woke her up on the fateful night at about 2.00 a.m. while crying after a rape and robbery incident. Together with PW3 they went to the Appellant's house where they arrested him and recovered PW1's shoes a lesso and an underpants.

PW2, R K G was in company of PW 1 when they were accosted by the assailants and robbed. He confirmed that the Appellant was armed with a knife which he threatened to stab him with. After the robbers got hold of PW1, he escaped and went to look for help. At the scene, he was robbed of cash Kshs. 2000/, a Samsung mobile phone, an ID card and house keys. When he returned at the scene, he recovered his ID card and house and car keys. He testified that PW1 later returned with two friends who assisted her to arrest the Appellant.

PW3, K N K recalled that at about 2.00 a.m., he was called by PW1's sister in the company of PW1. They informed her that PW1 had been robbed and raped and requested him to accompany him to the scene. They first went to PW1's house where they found PW2 sleeping. PW2 declined to accompany them to the scene as he was still in shock. PW3 looked for a friend and they proceeded to the house where the rape took place. He entirely corroborated the evidence of PW1.

PW4, Dr. Ketran Muhombe of Nairobi Women's Hospital examined PW1 on 16th July, 2009 following the rape incidence. She observed that her blouse was soiled, her right eye was red and had superficial laceration on labia minora. No spermatozoa was seen. A pregnancy test was positive. She prescribed the necessary medical prescription. **PW5, Josephat Munyambu** was a Clinical Officer at Karuri District Hospital who filled and produced PW1's P3 form. He was guided by the medical report prepared at Nairobi Women's hospital. **PW6 Albert Gathuri Mwaniki** was a Government Analyst based at the Government Chemist. He was asked to examine the blood sample of the complainant and her underpants together with a grey-black long trouser belonging to the complainant, blood sample of the Appellant together with his saliva and black underpants. The request was to establish the presence of semen and spermatozoa as well as the blood stains on the said clothing. The clothes of the complainant were not stained with either semen or spermatozoa but stains of blood group A. The pants of the Appellant did not have any stains of blood, semen or spermatozoa. He confirmed that the suspect's blood group was AB whereas that of the complainant was A.

PW8, Police Corporal Francis Obagala of Karuri Police Station investigated the case. He recorded necessary statements. He referred PW1 to Nairobi Women's Hospital for examination and treatment. He also escorted the Appellant to [particulars withheld]Health Centre where his blood samples were taken. In addition, he produced the leso, shoes and underpants that were recovered in the Appellant's house.

After the close of the prosecution's case, the trial court ruled that the Appellant had a case to answer. He was accordingly put on his defence. He gave an unsworn statement of defence. His defence was that on 16th July, 2009, he was at Banana and while at the bus stage was accosted by two men and a woman. The woman told the men that he is the person who had robbed her. They then escorted him to a certain house

where he was forced to stand outside. The woman entered the house and came out carrying a paper bag that had some staff in it. He was thereafter escorted to the police station together with the paper bag which he then realized contained some clothes. The arresting persons informed the police that they had recovered the clothes from his house which was not true. He also stated that at the hospital, his blood and saliva were taken. The police also took away his pants for examination. He maintained his innocence. With regard to 15th July, 2009, he stated that he left his home at [particulars withheld] and went to work at Ruaka.

DETERMINATION

I have considered the evidence on record and the respective rival submissions. I have arrived at the issues for determination to be, firstly, whether the Appellant was properly identified, secondly, whether the doctrine of recent possession was sufficient to found a conviction and thirdly, whether the case was proved beyond a reasonable doubt.

On the issue of identification, the appellant submitted that the complainant did not have sufficient time to identify him. On the part of the Respondent, the attack having taken place outside a supermarket which was well lit with security lights, PW1 had an opportunity to clearly see who her attackers were. There is no doubt that PW1 was attacked in the company of PW3 and that their evidence was that there was sufficient lighting at the scene. They also testified that the appellant was well known to PW1 as she used to frequent her pub. That being the case, the only logical conclusion that one would arrive at is that the identification was by way of recognition. In that case, it would be expected that when PW1 went to report at the police Station, he would have told the police who her attackers were. The contrary is attested by the record as PW1 did not report that he recognized one his attackers.

Further on identification, PW1 was attacked at 11.00 p.m. and was with the assailants until 2.00 a.m. This would give more emphasis to the fact that she would have told the police, PW1, 2 and 3 to whom she reported the incident that her attacker was the appellant; or at best would have been able to recognize him if he saw him again. Unfortunately, it is on record that she did not tell any of those witnesses that one of the attackers was the appellant. She did not also describe to them the physical appearance of the appellant so as to assure this court that the person who was arrested was indeed amongst the attackers. This leads me to conclude that it is not full proof that although the appellant was allegedly arrested in a house where the exhibits were recovered, he was one of the attackers.

The courts have often held that a witness can easily mistake an assailant even where he believes he knew the attacker. This would occur more particularly when conditions for identification are difficult. In such circumstances, the evidence of identification by recognition must be treated with the greatest caution. See the case of ***Dzombo Chai v. Republic[2006] eKLR,*** *where it was stated:*

> ***"This court has said it on many occasions that the evidence of identification or recognition of an accused person should be tested with the greatest care and should be watertight to justify a conviction. It is also recognized that there is a possibility for a witness to be honest but mistaken and for a number of witnesses to be all mistaken (see Kiari v Republic [1984] KLR 739). Further, although evidence of recognition is more satisfactory, more assuring and more reliable than the identification of a stranger(see Anjononi v R[1980] KLR 50), such evidence should not only be credible but should be free from any possibility of error before it can be relied on to implicate an accused person."***

This is buttressed by the holding by the East African Court of Appeal in ***Mohamed bin Allui v. Rex[1942] EACA 72****;*

> ***"That in every case in which there is a question as to the identity of the accused, the fact that there having been a description given and the terms of that description are matters of the highest importance of which evidence ought to be given; first of all, of course, by the person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."***

In the same case the court stated that:

> ***"In the absence of evidence regarding any description of the [accused] by the persons who purported to identify him …, that identification loses much of its value."***

I am inclined to make a conclusion that this is likely to be a case of mistaken identity given that although PW1 testified that he used to see the Appellant he did not describe to anybody how he looked like. She also did not mention that one of the persons who attacked are raped her was familiar to her. Again, although it is said that the scene of the robbery was outside a supermarket which was well lit, it was not described the intensity of the light. Further, the distance the witnesses stood from the light at the time of the attack was also not described. I would then conclude that the conditions for identification were not as conducive as PW1 described them. In sum, I hold that the identification of the appellant was not cogent; and a conviction on the ground that he was positively identified was not safe.

This leads me to determine whether the recovery of the exhibits in the house where the appellant was arrested automatically proved that he was one of the attackers. According to PW1, 2 and 7, the recovered exhibits being a leso, an under pant and shoes belonging to PW1 were in the house where PW1 was raped. This is also the house where the Appellant was found sleeping. It was the evidence of PW1 that the person who removed the clothes from her was the Appellant. That is why the police undertook to conduct a DNA analysis on the exhibits so as to rule out whether or not the Appellant was involved in the offences. Therefore, if the appellant had anything to do with the rape, the only evidence that would have hammered him was that of PW6, the Government Analyst who conducted the DNA examination. In my view, the results that were produced before the court were of no value to the prosecution case. His testimony was that the appellant's blood group was AB and that of PW1 was Blood Group A. He also testified that the blood stains on the recovered pants was Blood Group A and therefore concluded that it was that of PW1. No other DNA profiles were done. If indeed the appellant had had any physical contact with PW1, a DNA profiling would have linked him with both the robbery and rape. However, the evidence of the expert witness did not assist the court in unraveling who the assailant was. I accordingly find and hold that the doctrine of recent possession could not apply in founding a conviction against the Appellant.

From the foregoing, I am of the view that notwithstanding that the appellant is alleged to have been sleeping in the house where the recoveries were made, the evidence adduced in linking him to the offences in this regard was insufficient. It follows that the appeal must succeed. In the end, I allow the appeal, quash the conviction and set aside the death penalty. I order that the appellant be and is hereby forthwith set free.

I also find prudent to comment on the sentence. The trial court passed death sentence in Counts I and II and a life imprisonment in Count III. The correct position was that once the death sentence was passed on the first count, all other sentences remained in abeyance because one cannot die twice and no other sentence can be execution when the convict is on death row. But since I have quashed the conviction, I shall not make a finding on the sentence.

Dated and Delivered at Nairobi this 28th day of February, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in Person.

2. M/s Kimiri for the Respondent.