



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO. 53 OF 2016

AUGUSTIN NDEREBA MWANGI APPELLANT

versus

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. E. BETT – SENIOR RESIDENT
MAGISTRATE dated 22nd April, 2016, in Nanyuki Chief Magistrate’s Court Criminal Case No.458
of 2014)*

JUDGMENT

1. **AUGUSTINE NDEREBA MWANGI**, the appellant, is appealing against his conviction on three counts before the Nanyuki Chief Magistrate’s Court. On the **first count** he was charged with the **offence of being in possession of firearm contrary to section 89(1) of the Penal Code Cap 63**. On the **second count** he was charged with the **offence of being in possession of ammunition contrary to section 4(1) as read with section 3 (2)(a) of the Firearms Act Cap 114**. On the **third count** he was charged with the **offence of Rape contrary to section 3(1)(a) of the Sexual Offences Act**.

2.This is the first appellate court. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **KARIUKI KARANJA VS REPUBLIC (1986) KRL 190** that:-

“On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such material as it may have decided to admit.”

3.In the appellant’s amended grounds of appeal he has raised the followings:-

(a)That the trial court erred in relying on the identification evidence in the absence of the first report by the complainant;

(b)That the charges he faced were defective;

(c)That the charge of rape must fail because the age of the complainant was not put before the trial court; and

(d)The trial court erred to have rejected his defence.

4.The evidence that supported the first and second grounds above, that of possession of firearm and

ammunition was adduced by **P.C. Peter Njathi (PW 5), C. I. Charles Koregi (PW 4) and Sergeant Boniface Thiswira (PW 7).**

5.**P. C. Njathi** worked at Wamuhu Police Station in the crime section. He knew the appellant for a long time because he used to see him at irrigation at Mwea. The appellant had also approached this officer requesting that he be assisted obtaining a national identity card. The officer on 24th April 2014 had been issued with a Ceska Pistol SR NO. 4512 loaded with 15 round of ammunition to be used by him as he carried out his patrol duty. The issuance of that pistol was recorded in the arms register. After his patrol duty he went home with the pistol. At 10.00 a.m. he went to the shower and left the door into his house unlocked but pulled back. On his return to his house he found his phone, wallet and the pistol missing. On making inquiry from his neighbour, whether they had seen someone enter his house, he was informed that the young man who worked at a hotel in town had entered his house. It was not until 12th May 2014, while he was at work, that he was informed, by telephone that the pistol had been recovered at Naromoru. He eventually was able to identify the pistol at Naromoru Police Station. He also identified it before the trial court.

6.**C. I. Charles Koregi** is a **ballistic examiner** based at C.I.D headquarters. He produced a ballistic report on behalf of Mr. Ndhiwa. The report indicated that Mr. Ndhiwa received a pistol SR No. 4512 and seven rounds of ammunition two of which were spent cartridges. The purpose of the examination was to ascertain whether the pistol was capable of firing and whether the ammunition was capable of being fired from the pistol. The report indicated that the chamber of the pistol was in good mechanical condition. It also noted that the three live ammunition, picked at random, and which was test fired from the pistol successfully fired. The spent cartridges were also found to have been fired from the subject pistol.

7.The evidence of those two police officers was not subjected to cross examination by the appellant because the appellant declined to cross examined them when requested to do so by the trial court.

8.**Sgt. Boniface Thiswira** is police officer based at Naromoru Police Station. He was the investigating officer in this case. Following the commission of the offence of robbery with violence and of rape this officer obtained information that there was a person with a gun residing at Gatwanyaga. On 12th May 2014 a police operation was organized to arrest that person. The police officer arrived at that suspect's house at 5 a.m. and broke down his door. The suspect, who is the appellant before court was in bed. The police officers found in that house handcuffs, items belonging to P.C. Njathi and the subject pistol and ammunition.

9.In support of ground (b) of the petition of appeal the appellant submitted that the counts relating to possession of firearm was defective because it was no supported by the prosecution's evidence. The basis of making that submission was because the serial number of the pistol stated in the first count was No. F. 4512. The evidence of C.I. Koregi (PW 4), and of P.C. Njathi (PW 6) however referred to a pistol serial No. 4512. This court has in the past had to consider what is a defective charge in the case **STANLEY MURIUKI V REPUBLIC (2016)eKLR** viz:-

“Having failed to bring out the specific act that was undertaken by the appellant the court finds that the prosecution brought a defective charge. It was defective because it failed to meet the standards under section 134 of the Criminal Procedure Code. That section provides as follows:-

“Every charge of information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charge, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

9. What constitutes a defective charge was discussed in the case **YOSEFU & ANO VS UGANDA(1960) EA 236**. The East African Court of Appeal held as follows:-

“The charge was defective in that it did not allege an essential ingredient of the offence”

In the case of SIGILANI V REPUBLIC (2004) 2KLR 480 it

was held as follows:-

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

10.Can the count one be said to be defective because prosecution’s witnesses failed to state serial number with the prefix ‘F’. In my view that failure did not render count one defective at all. The prosecution’s witnesses quoted the correct serial number namely No. 4512. The failure to state the prefix ‘F’ is curable under section 382 of the Criminal Procedure Code.

11.Appellant by his oral submissions faulted prosecution’s case by pointing out that the investigating officer failed to produce before court the recovery form, showing the pistol and ammunition were recovered from his house. He also submitted that the prosecution should have produce photographs to prove that recovery and should have had the pistol and ammunition dusted to determine whose finger prints were on them.

12.I respond by stating that the failure to have recovery form, photographs and dusting of pistol and ammunition did not in any way prejudice the appellant and did not affect the clear, consistent evidence of the prosecution on the recovery made at the appellant’s home by the police officers.

13.On ground (a) of the appellant’s appeal faulted the prosecution’s evidence on the ground that the complainants in respect to the count of the offence of robbery with violence and the count in respect of the offence of rape, that the complainants thereof failed to give description of the perpetrator in their first report at the police station.

14.**Naftali Njau Muini (PW 1)** was the complainant in respect to the cunt of the offence of robbery with violence. He stated in evidence that he was a boda boda (motor cycle) operator at Naromoru. He owned motorcycle, make Captain, registration number KMDG728L. On 28th April 2014 at 12.30 p.m. he was hired by the appellant who requested to be transported to an area known as Makaa. They agreed a fare of Kshs. 100/=. He informed the court that that customer was the appellant. While they rode to their destination appellant requested him to stop because he, the appellant, wanted to relieve himself. When the appellant return from relieving himself he came pointing a pistol at PW 1. PW 1 was able to identify that pistol as the pistol before the trial court. The appellant then handcuffed PW 1 and ordered him to move away from the motorcycle. Appellant stole from PW 1 his cell phone make Techno 511 valued at Kshs.4,500/=. Appellant then demanded the keys of the motorcycle and rode away while he informed PW 1 that he would find his motorcycle at the police station. The motorcycle was valued at Kshs.85,000. The motor cycle was recovered later at Kanu grounds in Nanyuki. PW 1 was able to pick out the appellant at a police identification parade.

15.**Inspector Peter Mihisi** on 12th May 2014 at Naromoru Police Station conducted an identification parade. He confirmed PW 1 pointed out the appellant who was standing between the 2nd and 3rd person on a line of nine people. The appellant signed the identification parade form which with the notation thereof that PW 1 had previously seen him when he was arrested.

16.CMK (PW 2) was on 26th April 2014 at 6 p.m. walking home from work. As she walked she realized there was someone behind her. That person gave his hand to her to greet her. She declined to greet him. After a few steps the person asked her to go back. She did not. The person produced a gun and ordered her to turn back. She turned back but was pleading with him to let her go. Although she tried to resist he pushed her to the ground and tore her skirt. The person handcuffed her. The person undressed himself and raped her for 60 minutes. He thereafter removed the handcuffs, shot in the air which scared PW 1. When PW 1 arrived home she informed her parents of what had occurred but because it was late they were unable to report the matter to the police until the following day. She was referred to the hospital.

PW 2 was able to identify the pistol and handcuffs before court as the ones appellant used on that day. PW 2 also confirmed the appellant was the person who raped her. PW 2 explained to the court that she was unable to participate in the identification parade because she inadvertently saw the appellant while he was in the cells and he was therefore disqualified from participating in the identification parade.

17. **Yusu Murigo Karanja clinical officer** in charge of Naromoru central filed the P3 form dated 9th December 2014 which reflected the finding of the examination of PW 2 when she was seen at the hospital on 27th April 2014. The examination revealed that there was forceful penetration which was supported by presence of spermatozoa.

ANALYSIS AND DETERMINATION

18. It is correct to state that Naftali, PW 1, did not state in his evidence that he gave description of the appellant when he first made his report at the police station. If indeed PW 1 had not picked out the appellant at the identification parade such failure to give appellant's description at the first report might have struck a fatal blow to the prosecution's case. The fact however is that PW 1 did pick out the appellant at the identification parade. Further PW 1 while being cross examined by the appellant he stated that he observed the appellant's appearance as he boarded his motorcycle and also when appellant went to relieve himself. PW 1 said; **"I saw your face clearly"**.

19. The prosecution presented strong evidence of identification by PW 1. PW 1's identification of the appellant was not based on fleeting glance but was based on prolonged period that PW 1 spent with the appellant. The identification of the appellant by PW 1 was of high quality.

20. CMK (PW 2) was unable, as stated above, to participate in the identification parade involving the appellant. It is however incorrect of the appellant to submit that PW 2 did not give description of the person who raped her when she reported the matter to the police. The appellant when submitting his defence produce defence Exhibit No. 2, that is the statement of CMK (PW 2) recorded by the police on 12th May 2014. In that statement PW 2 stated:-

"I was able to identify the culprit physically he was black in complexion, slim and young"

21. This court had the opportunity to observe the appellant. Those physical characteristics stated by PW 2 were observed by this court. It ought to be noted that there is no rule of law that an identity parade must be mounted. The prosecution cannot be faulted for not having mounted an identity parade for PW 2 for the reasons stated herein above. The evidence of PW 2 was consistent and clear and it was not tainted by lack of an identification parade. Her evidence was corroborated by the recovery of spent cartridge at the scene where she was raped.

22. It is of no consequence to the prosecution's case that PW 2 did not state whether she was injured by handcuffs, while the rape ordeal proceeded. That line of submission by the appellant is wholly rejected. Similarly the age of PW 2 had no consequence to charge of rape under section 3(2)(a) of the Sexual Offences Act.

23. Similarly appellant's submission that the trial court erred to have failed to note that prosecution did not call the parents of PW 2, to testify that PW 2 informed them she had been raped, and also that the prosecution failed to require all the police officer involved in the recovery of the pistol and the ammunition at the appellant's home to testify is rejected. The strong evidence of the prosecution was unaffected by failure to call those witnesses, and no prejudice was suffered by the appellant.

24. Appellant after the trial court found he had a case to answer offered a defence under oath. He stated that on 12th May 2014 he was on his way to work when he was stopped by police officers who were in a vehicle. He said the officers who were armed, requested him to enter the vehicle promising that if they found the person they were looking for they would let the appellant go but if not they would take him to

the police station. That indeed that is what happened. That the officers took him to Narumoru police station where he was detained and taken to court the following day. The officers, as they took him to the court, told him to plead guilty to the charges before court so that their bosses would see that they were doing their job. That as a consequence he pleaded guilty to count one and two and only changed his plea later on being advised by his fellow remandees. He denied having committed the robbery or having raped PW 2. In respect to both counts three and four he stated he did not commit those offence because he was at his place of work.

25. That defence was essential alibi defence. An accused person who puts forward an alibi as answer to the charges does not in law assume any burden of proving that answer. It is sufficient if the alibi introduces a doubt. See **KIARIE V REPUBLIC (1984) KLR**. In the case **AMM –V- REPUBLIC (2015) eKLR**, the Court of Appeal stated:-

“We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (See KARANJA vs REPUBLIC [1983] KLR 501). In this case, however the two courts below rejected the appellant’s alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant’s guilt was established beyond all reasonable doubt. The appellant’s complaint that his defence was not considered is therefore without merit and we reject it.”

26. Similarly in this case the appellant did not raise his alibi defence during the prosecution’s case. The appellant cross examined Naftali (PW 1) when Naftali testified in respect to the theft of his motor cycle but the appellant did not lead evidence in the cross examination of Naftali to suggest that on the day the motor cycle was stolen he was at his place of work.

27. The defence offered by the appellant, in this court’s view, was not plausible. It did not show logic or common sense because if one was to accept it, it would mean that everyone, from the officer who lost his pistol, to the officers who raided the appellant’s house and recovered the pistol and handcuffs, to Naftali the owner of the motorcycle, to CMK who was raped and up to the officer who mounted the identification parade were in a conspiracy to fabricate a case against the appellant. If indeed all these persons were intent on fabricating a case against the appellant the officer who mounted the identification parade and who declined to allow CMK to take part in identifying the person who raped her, because she saw the appellant in the police cell before going to the designated room where the identification parade was taking place, would have allowed CMK to take part in that identification parade notwithstanding the fact she saw the appellant in the cell. On the whole the appellant’s alibi defence was vague and short on details. It did not create any doubt in the prosecution’s case. The conspiratorial defence of the appellant failed to displace the strong prosecution’s case.

28. The trial magistrate in his well-considered judgment isolated the issues for his determination covering each count. He proceeded to discuss each and found that the prosecution had proved each count. In doing so the learned magistrate found the appellant’s defence to be fabricated. This is some of the trial magistrate’s findings of that defence:-

“The court disagree with this line of defence and note that prior to his (appellant) arrest he accused (appellant) and the prosecution witnesses did not have a past grudge to want to frame him up with such grave charges.

In fact PW 1 (Naftali) PW 2(CMK) and PW 7 (The investigating officer) who implicate the accused confirm they had not known the accused prior to this incident.”

29. It is this court view that the appellant was rightly convicted on all counts. The trial court’s conviction is therefore upheld.

30. The appellant very emphatically pleaded with this court at the hearing of this appeal to allow him have a re-trial. The reason the appellant sought a new trial was because during trial on his own volition he

refused to cross examine the prosecution's witnesses from PW 2 (CMK) up to PW 7. The appellant was disruptive and uncooperative as the trial proceeded. It is clear from the trial court's proceedings that the intention of the appellant was to disrupt the prosecution's case. This is evident from the proceedings where the trial magistrate noted:-

“The accused (appellant) makes a lot of noise protesting on his case refusing to proceed.”

Appellant as he submitted before this court at the hearing of his appeal admitted having behaved badly during the trial and having, on his own volition failed to cross examine the prosecution's witnesses. He therefore requested this court to grant him a new trial. This is what he stated before this court:-

“I would not repeat my misbehavior during my fresh trial.”

31.The courts have set out under what circumstances a new trial would be ordered:-

In the case ***David Mwangi Njoroge –v- Republic [2015]eKLR*** the court considered under what circumstances a retrial would be ordered as follows:-

In the case of Opicho –vs- Republic the court held that:-

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice requires it.”

Other decisions cited were ***Muiruri –vs- Republic (2003), KLR, 552, Mwangi –vs- Republic (1983) KLR 522 and FatehaliMali –vs- Republic (1966) EA, 343*** that:-

“Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and order for a retrial should only be made where the interests of justice requires it.”

32.There is no basis bearing the above decision in mind, to order for a retrial. The trial before the magistrate court was not illegal nor defective. Indeed looking at the proceedings the trial magistrate gave a lot of leeway to the appellant and entertained any application made by the appellant including for prosecution's witnesses statements to be supplied, even though he had previously been supplied with such statements. The trial magistrate even entertained an application to disqualify the prosecuting police officer and even allowed appellant adjournments. There was no defect in the trial court's proceedings. There is therefore no basis to order a new trial. That prayer is rejected.

33.The sentences meted out by the trial court are within the boundaries or the respective sections of the law and do not attract interference by this court.

34.Accordingly appellant's appeal against conviction and sentence is dismissed. The trial court's conviction is upheld. And the sentences are confirmed.

DATED AND DELIVERED THIS 24TH DAY OF MAY 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Appellant: Augustin Ndereba Mwangi

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE