REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 97 OF 2016

BRAMWEL ESEKON ……. APPLICANT

VERSUS

REPUBLIC …….…… RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. C. N. NDEGWA –PRINCIPAL MAGISTRATE dated 1st December, 2015 in Maralal Principal Magistrate's Court Criminal Case No. 205 of 2015)

JUDGMENT

1. BRAMWEL ESEKON has approached this court with his appeal against conviction on two counts before Principal Magistrate's Court Maralal. He was convicted of the **offence of robbery with violence contrary to section 296(2) of the Penal Code;** and of the **offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.**

2. I will begin by reminding myself of the duty of this court as the first appellant court. That duty was restated in the case **NYANDO MUKUTA MWAMBANGA V REPUBLIC (2008) eKLR** as follows:-

> ***"This court as the first appellate court has a duty to re-appraise the evidence and come to its independent finding. In doing so we have to appreciate that we do not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that* - Soki v Republic (2004)2 KLR 21*;* Kimeu v Republic (2002) 1 KLR 756. *Moreover, we are guided by the principle that the first appellate court should not interfere with the findings of the trial court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that the findings of the trial court are erroneous in law* (Republic v Oyier)[1985]2 KLR 353; Burn V Republic [200] 2 KLR 533).**

3. The trial court in its considered judgment found that the prosecution had proved both counts beyond reasonable doubt. The prosecution adduced evidence of BNK (PW1) who stated that on 16th February 2015 at 2.00 a.m. she was walking and on her way home from her place of work, the 'White House Bar'. She was accompanied by her husband (PW 2). As they walked they saw three boys who requested her husband for a cigarette. The husband obliged and gave them a cigarette. One of those boys grabbed BNK's mobile phone. The boys began to beat her and then two of them took her to a trench, removed her clothes and raped her. One of them covered BNK's mouth with a T-shirt to prevent her from screaming. The rape took place from 3 a.m. to 4 a.m. and it only stopped when a motor vehicle passed by causing the boys to run away. BNK was taken home by the driver of that car. She reported the matter at the Maralal Police Station the following day and she attended Maralal District Hospital thereafter.

4. Two days later BNK in the company of her husband spotted the appellant in the company two other boys at Kajificheni Bar. The two other boys run away but the appellant was apprehended and restrained behind the bar counter until his re-arrested by police.

5. The husband of BNK corroborated the evidence of BNK. He narrated an exchange at the scene on the day the offences were committed as follows:-

> "**The accused (the appellant) came to me and asked me to give him a cigarette. I complied and gave him a cigarette. Accused had a rungu and a knife one of his accomplices told accused to leave me alone since he knew me as Isaac."**

6. PW 2 then stated that it was the accused and one other boy who grabbed BNK and pulled her to the trench. PW 2 was ordered by the boys to lie down which he did. When he later got up the boys had gone away.

7. PW 4 was the Senior Clinical Officer at Maralal District Hospital. He produced the P3 form in respect to BNK. On examining BNK he found no discharge or spermatozoa in BNK's genitalia. He however noted that BNK was swollen on her back of the head on the right shoulder, and right part of the upper limb.

8. The appellant in his sworn defence stated that he was nineteen years old and was a student at Loikas primary school attending class seven. On 15th February 2015 he had attended a family function at Baragoi where he stayed for two days. He was given a lift back to Maralal but the person insisted that he pay fare. When he could not pay the person took him to Maralal Police Station and he was later charged with the offences of robbery with violence and gang rape. He denied having committed the offence and denied being at Kajificheni bar on the 18th of February 2015. On being cross examined appellant stated that he attended school on 15th February 2015 before going to Baragoi on 16th February 2015. The prosecutor put it to the appellant that 15th February 2015 was a Sunday but the appellant stated in response that 16th February was a Thursday. On further cross examination the appellant stated, contrary to his testimony in chief, that he was arrested at a bus stage.

9. The appellant was convicted of the two offences and was sentenced to suffer death for the count of robbery with violence and his 20 years sentence on the second count of gang rape was to be held in abeyance.

10. The appellant has appealed against both conviction and sentence his grounds of appeal raise the following issues:

> **(a) Did the trial court err in accepting the identification evidence?**
>
> **(b) Did prosecution fail to call crucial witnesses?**
>
> **(c) Was rape proved?**
>
> **(d) What are the consequences of failure to produce the appellant before court within 24 hours?**
>
> **(e) Did the trial court fail to consider the appellant's defence?**

11. On the **first issue** there is no doubt that the circumstances of identifying, culprits respect of the evidence of BNK, and recognition, as per the evidence of PW 2, were difficult in view of the fact that the incidents took place at 3 A.M. The trial magistrate well appreciated those difficult circumstances and stated this in his judgement:-

> ***"From the evidence of the two witnesses, I am satisfied beyond reasonable doubt that conditions***

at the scene of crime were good for identification. Besides PW 2 knew the accused (the appellant) before because he used to see him in town. This is therefore not just a case of identification but recognition which is more reliable than identification. It is therefore my finding that the identification of the accused was one of the persons who attacked PW 2 on 16th February 2015 is free from error."

12. The Learned trial magistrate in finding that recognition was more reliable correctly stated the case law. A case in point is **R –v- TURNBULL & OTHERS 1976 3 ALL ER 549** where the court had this to say in respect to recognition:-

"Recognition may be more reliable identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made ……

All these matters go to the quality of the identification evidence. If the quality is good and remain good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."

13. Identification under difficult circumstances by one witness, requires corroborative evidence as was stated in the case **ODHIAMBO v REPUBLIC [2002] 1 KLR 241** where the Court of Appeal held;-

"1. Courts should receive evidence on identification with the great circumspection particularly where circumstances are difficult and to not favour accurate identification.

2. Where evidence of identification rests on a single witness and circumstances of identification are known to be difficult, what is needed is other evidence, either direct or circumstantial, pointing to the guilt of the accused person from which, the court may reasonably conclude that identification is accurate and free from the possibility of error."

14. In this case identification and recognition was by two people, as stated by the trial court. BNK stated that she did not know the appellant prior to her being attacked. She however stated that on that night there was a bright moonlight. She noted that the appellant was wearing the same clothes, in court, as he wore on the night in question. She further stated:-

"Your face (appellant's face) **was not covered and I saw your face clearly. You were a gang of three people."**

15. PW 2 in his evidence in chief, as reproduced above in this judgment, previously knew the attackers and they too seemed to know him. PW 2 stated that he used to see the appellant at Maralal town. While at Kajificheni bar on, 18th February 2015, BNK saw the appellant and two of his accomplices walk in. She screamed and got hold of the appellant and his accomplice called Eshma. Eshma escaped but appellant was apprehended by those present.

16. PW 2 on being cross examined stated that appellant was the first one to stop BNK and him. The appellant asked PW 2 for cigarette. PW 2 gave him a cigarette. PW 2 further confirmed that the appellant was wearing the same clothes in court as he wore on the day they were attacked.

17. It is clear from the above discussion that the trial court cannot be faulted for having found that the appellant was adequately identified and recognised. It is worth reminding myself that the trial court had the opportunity to see the demeanour of the prosecution's witnesses and thereby was suited to examine the honesty and reliability of those witnesses. It is also the finding of this court that the prosecution adduced evidence which proved that the appellant was correctly identified as being one of those who robbed and raped BNK. There is no reason to doubt the evidence of BNK and PW 2 on identification and recognition. The incidents, both of asking for a cigarette and of gang rape, required the attackers to be at close proximity with BNK and PW 2. Since there was bright moonlight and security light the identification was watertight.

18. On issue **(b)** of appellant's appeal appellant submitted that the witnesses who were present at Kajificheni bar should have been called to testify. Section 143 of the Evidence Act provides:-

> ***"No particular number witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

In the case **BUKENYA v UGANDA [1972] EA 549** the court stated that where crucial witnesses are not called the court is entitled to draw an adverse inference on the prosecution's case.

19. In this court's view the people who witnessed the apprehension and re-arrest by police of the appellant were not crucial witnesses to the prosecutions or defence case. Failure therefore not call them does not attract adverse inference at all. The prosecution ought to have, however, called the driver who drove BNK home after her attack. Failure to call that witness, however does not lessen the weight of the prosecution's evidence. The prosecution called BNK and PW 2 who were able to confirm the robbery of BNK mobile phone and the rape of by the appellant and his accomplices. The appellant's submissions on issue (b) is therefore rejected.

20. On issue **(c)** the appellant submitted that rape was not proved by the prosecution. The Learned trial magistrate in his considered judgement set out **Section 10** and **3(1)** of the Sexual Offence Act then stated:-

> ***"There are therefore two ingredients of the offence of gang rape. Firstly there must be rape and secondly, the rape must be committed in association with others …….. In the present case, it is clear PW 1 (BNK) did not consent to have sex with any of her attackers. That is why she refused to have sex with them and the attackers had to forcibly drag her to a trench and forcibly remove her clothes before having sex with her. This falls within the definition of rape as defined by section 3 of the Act. The fact that the people who raped PW 1 were more than one and had a common intention of having sex with her without her consent makes it gang rape."***

That finding of the trial court was incompliance with Section 10 of the Sexual Offences Act. The trial court in quoting the case **ANDREW APIYO DUNGA & ANOTHER v REPUBLIC [2010]eKLR** made a finding that the fact there was no spermatozoa found when BNK was examined did not mean that BNK was not raped. This was also the finding in the case **MARK O IRURI MOSE v REPUBLIC [2013]eKLR** where the Court of Appeal made a finding that:-

> ***"……. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not required that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ ……."***

21. The law does not require the presence of spermatozoa and it follow that the fact BNK did not have spermatozoa did not mean that she was not raped. It is also possible that the absence of spermatozoa is attributed to the fact that BNK went to the hospital the next day, after her attack, which she said was due to the fact that she was scared to report the rape the night it occurred because her attackers had threatened to kill her. The evidence supporting the count on gang rape was supported by evidence of BNK and PW 2. They both testified that BNK was dragged into trench by her attackers amongst whom was the appellant. BNK then stated that she was raped by her attackers consecutively for one hour until the appearance of a motor vehicle at the scene. That issue (c) of the appellant is therefore reject.

22. On issue (d) of the appellant's appeal the appellant argues that he was held, in police custody, before being produced to the trial court, beyond 24 hours as required under Article 49(1)(f) of the Constitution. That Article provides that an arrested person should be presented before court as soon as reasonably possible but not later than 24 hours.

23. The appellant was arrested on 18th of February 2015 and was presented before the trial court on 23rd February 2015. 18th February 2015 was a Wednesday. The appellant, in accordance with Article 49(1)(f)

ought to have been presented to court within 24 hours, that is by 19th February 2015. No explanation was given by the prosecution why there was delay in producing the appellant. The Court of Appeal has however held that the prolonged detention does not always lead to an acquittal, even where there is a violation of the arrested persons rights. The violation however which can lead to an acquittal is one that affect the fairness of ensuing trial. The above was stated by the Court of Appeal in the case **DOUGLAS KOMU MWANGI V REPUBLIC [2013] eKLR** viz:-

> **"There are many instance in which courts have held that a delay in arraigning a suspect in court beyond 24 hours does not necessary entitle the suspect to an acquittal.** *(See Dominic Mutie Mwalimu – v – R Criminal Appeal No. 217 of 2005; and Evanson K. Chege –v- R Criminal Appeal No. 722 of 2007).* **This court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In** *Julius Kamau Mbugua –v – R Criminal Appeal No. 50 of 2008,* **this court stated that:-**
>
> ***"A trial court takes cognizance of pre-charge violation of personal liberty, if the violation is linked to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g where an accused has suffered trial related prejudice as a result of death of an important witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police*** *per se* ***is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of criminal court and which is by section 72(6) expressly compensatable by damages.'***
>
> **In *Julius Kamau Mbugua –v- r Criminal Appeal No. 50* of 2008, this court upheld the proposition that even where violation or right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and that a prosecution would only be a nullity, if any of the circumstances stated exist. In the present case, the appellant has not demonstrate that he has suffered a trial related prejudice to warrant an acquittal. This ground of appeal has no merit."**

24. The appellant herein similarly has failed to show how the prolonged detention may have affected his trial. For that reason issue (d) is rejected.

25. On issue **(e)** of the appeal of the appellant submitted that the trial court failed to consider his defence. That submission is far from truth. The trial Magistrate considered the appellant's defence in his judgment. After setting that defence out the learned trial Magistrate considered it in the light of the prosecution's evidence and rejected it.

26. That as it may be this court being the first appellant court is obliged to consider all the evidence adduced at trial, which must include the defence.

27. The defence offered by the appellant, as noted by the trial court, was alibi. In the case of **KIARIE V REPUBLIC [1984] KLR 739** the court stated this about alibi defence:

> *"**An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."***

28. Although the appellant bears no burden to prove his defence that defence in the light of the prosecution's evidence which was consistent displaces that defence. Further the appellant having only raised his alibi defence as he defended himself, and did not raise it as he cross examined prosecution's witnesses, his defence can be termed as an afterthought. Further the appellant wrongly stated that 15th February, 2015 was a Thursday while indeed it was a Sunday. Accordingly the appellant defence was correctly rejected by the trial court.

29. The appellant's appeal against conviction fails. The trial court's conviction is upheld. The appellant was sentenced to suffer death for the offence of robbery with violence and to 20 years imprison for the offence of gang rape, the latter sentence being held in abeyance. The sentence of death is in accordance with Section 296 (2) of the Penal Code. The sentence on the offence of gang rape is also within the range provided under Section 10 of the Sexual Offences Act.

Accordingly the appellant's appeal against sentence is also rejected. The trial court's sentences are confirmed.

Dated and Delivered at Nanyuki this 24th MAY 2017

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue/Maria Stella

Appellant: Bramwel Esekon

For state: ……

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE