



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 136 OF 2015
BETWEEN
GEOFFREY IKAITA KABIMBA.....APPELLANT
AND
REPUBLICRESPONDENT

(Being an appeal against original conviction and sentence of death by Hon. S. Wahome SPM Kakamega CMCR. Case No. 1721 of 2013 for the offence of gang rape and robbery with violence contrary to section 8(1) (4) as read with Section 10 of the Sexual Offences Act and Section 296(2) of the Penal Code.)

J U D G M E N T

Introduction

1. The appellant herein Geoffrey Ikaita Kabimba alias Ndusi was arraigned before the chief Magistrate's court on 23.08.2013 faced with two offences. in Count I, he was charged with robbery contrary to Section 296(2) of the Penal Code, the particulars being that on the 12th day of August, 2013 at [particulars withheld] Village within Kakamega County, Jointly with others not before court, while armed with offensive weapons namely pangas and rungas robbed cash kshs.4,000/- property of RL and at the time of [the] said robbery threatened to use actual violence on the said RL
2. In Count II, he was charged with gang rape contrary to Section 8(1) (4) as read with Section 10 of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that on the 12th day of August, 2013 at [particulars withheld] in Kakamega South District within Kakamega County in association with others not before court intentionally and unlawfully caused his penis to penetrate the vagina of S.A.M a girl aged 19 years.
3. The appellant pleaded not guilty to both counts as a result of which the prosecution was forced to marshals evidence from 6 witnesses. The complainant (S.A.M) testified as PW1 while her grandmother, RS B (R) testified as PW2. Gerald Mukanzi (Gerald) and Godfrey Wanjala, the Clinical Officer (Godfrey) testified as PW3 and PW4 respectively. The last 2 witnesses were Patronilla Busieka (Petronilla) and Number 72999 CPI Ashjoid Murigi, the Deputy in charge of Isulu Patrol Base (CPL Murigi) testified as PW5 and PW6 respectively.
4. At the close of the prosecution case, the appellant was found to have a case to answer and was put on

his defence. He gave sworn evidence in which he denied committing the alleged offences. He called 2 witnesses: IK who testified as DW2 and MK as DW3. DW2 and DW3 are mother and wife to the appellant in that order.

Judgment of the learned trial Magistrate

5. After hearing all the evidence from both the prosecution and the defence, and after carefully considering and evaluating the said evidence, the learned trial Magistrate was satisfied that the evidence adduced by the prosecution against the appellant was so overwhelming that there was no other option left for the court but to find the appellant guilty as charged and to convict him accordingly on both counts. The appellant was sentenced to suffer death as by law provided on count 1 and to life Imprisonment in respect of Count II.

6. Before I move further there is one important point to mention with regard to the sentences. There is no doubt that a person can only die once. In this regard, having sentenced the appellant to death in respect of count II should have been held in abeyance pending execution or otherwise of the sentence in respect of count I.

The Appeal.

7. The appellant was dissatisfied with the entire judgment of the learned trial magistrate and filed this appeal which is premised on ten principal grounds as set out in the petition of appeal. Grounds 1 and 12 in the petition of appeal are mere statements and are therefore not grounds of appeal. The import of all these grounds of appeal shall become apparent during the analysis of the evidence and submissions made during the hearing of the appeal.

8. This is a first appeal and on this appeal, the appellant is entitled to a fresh and close reconsideration and evaluation of the evidence on record before this court can either uphold or reverse the judgment of the learned trial Magistrate. In carrying out this function, this court must remember that it had no opportunity of seeing and hearing the witnesses who gave evidence during the trial. What this means is that any issues raised in this appeal touching on the demeanor of witnesses must rest on the considered opinion of the learned trial Magistrate who had the singular privilege of hearing and seeing the witnesses. for the above propositions generally see **Mwangi – vs – Republic [2004] 2KLR 28** where the court held, inter alia, that “it is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings would be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness[es]”

9. I shall now proceed to set out the entire evidence, analyse it afresh before determining whether or not the findings and conclusions of the learned trial Magistrate are standing on solid ground.

The Prosecution Case

10. From the 6 prosecution witnesses, the prosecution case is as follows; on 12th August, 2013 at about 8.00pm, Gerald was in his house when he heard dogs barking near R’s house. He went out of his house to check on what was happening. Gerald and R live in the same compound. On reaching outside he saw four people, among them the appellant whom he referred to as Ndusi and another person known as Polycap. The two persons got hold of Gerald and tied his hands at the back, using a rope. They beat him on the back and also ordered him to tell R to open the door. Gerald complied. The four people made Gerald to be down at the gate as three out of the four people entered R’s house. The fourth man kept watching over Gerald as the three entered R’s house. Gerald stated that he was able to recognize the appellant with the help of moonlight. he also stated that the appellant who hails from Malinya area was known to him and he gave appellant’s name as Kabimba Ndusi, and that he (Gerald) clearly recognized the appellant as he (appellant) tied him; and that when he was being tied he was standing face to face with the appellant.

11. During cross examination, Gerald again stated that there was moonlight which enabled him to recognize the appellant who had not camouflaged his face with anything.

12. Inside R's house was R and her granddaughter SAM plus P when the robbers entered at about 8.30pm on 12th August, 2013 when the gang entered, they asked R for money. She had Kshs.4,000/- which she gave to them. As soon as they took the money, they tied R hand to foot and also tied her mouth before throwing her on a seat.

13. S.A.M stated that when R hesitated in opening the door, there was aloud knock at the window ordering R to open the door or else the same would be broken down. As soon as the assailants entered the house, they demanded money from R who initially said she did not have any. The robbers tore the window curtains and used the strips therefrom to tie her and R. R was punched before she gave out Kshs.4,000/=, but the robbers complained that the money was not enough.

14. After taking the keys for Maurice, Misongo's house one of the robbers took P with him. The three who remained inside R's house tied SAM's mouth hands and legs and took her to R's bedroom from where they raped her in turns as she lay on R's bed. SAM could not talk because her mouth was tied. The robbers took about one hour raping her after they had removed her skirt and underpant. When they were done, the three robbers, whom SAM could not identify left although soon after, one of them returned to the bedroom and ordered SAM to get down from the bed. He removed the blood stained beddings from R's bed and also took SAM's underpant and fled with them. The others locked P in one of the rooms.

15. After the robbers had left P managed to untie herself and then climbed up to the ceiling which was made of mats and fell in the corridor of R's house. She managed to untie R, who was in the sitting room and also untied SAM who was in Rosa's bedroom. SAM was found bleeding from her private parts and was unconscious.

16. The neighbours came to the house after P had contacted one of her brothers by telephone. The Chief of the area was informed of the incident and he in turn called the police from Malinya Police Station.

17. P testified that when the robbers entered R's house, a lantern was alight and that the robbers also had torches which they were flashing around. She also said the robbers carried pangas. CPL Murigi received the report of the robbery. He informed the deputy OCS of Malinya Police Station and together they went to the scene where they noticed R's house had been vandalized. After interviewing R, P, SAM and Gerald, the police carried out a search at the scene. CPL Murigi testified that on that same night Gerald gave him the names of two suspects – Ndusi and Polycap. CPL Murigi and IP Francis Kariuki advised R, SAM and Gerald to go to Shibue Hospital for treatment. On 21st August, 2013, the appellant was taken to the Malunya AP camp by members of the public. CPL Murigi subsequently charged the appellant with the two offences. CPL Murigi also testified that he had established there was enough light at the scene from two lanterns for identification purposes.

18. Godfrey examined SAM at Shibue Sub-county hospital. On examination Godfrey established that SAM's skirt was blood stained and that she was unable to walk well. On further examination, Godfrey established that SAM's pubic hair was blood stained and there was still alot of bleeding. The hymen was absent and the clitoris was swollen. The laboratory examination conducted by Godfrey confirmed defilement. Godfrey filled the P3 form and signed it on 22nd August, 2013. Godfrey also filed a post rape care form in which it was indicated that SAM's assailant did not use a condom during the ordeal and further that after the ordeal the assailants carried away SAM's underwear. The P3 form and the Post care form were produced as PExhibit 1(a) and 1(b) respectively.

The defence case

19. When the appellant was put on his defence, he elected to testify under oath. He testified that on the day in question, he was arrested from his home where he was with his wife and children. He denied committing the offence and stated that all the evidence adduced against him was a pack of lies, and that

he only learnt of the allegations made against him after arrest.

20. The appellant's first witness, DW2 was Immaculate Karimba, mother to the appellant. Her testimony was that the appellant never went anywhere during the day of the alleged offences and that the appellant left her house at about 8.00pm. She could not say whether or not he went anywhere else after leaving her house.

21. DW3, Maureen Khatambi agreed with the testimonies given by appellant and DW2 only adducing that up to about 4.00am on 12th August, 2013, the appellant was in the house asleep. The appellant closed his case with the testimony of DW3.

The Submissions

22. The appellant filed his written submissions dated 16th February, 2017. He highlighted the same when the appeal came up for hearing, contending first that Gerald did not give his name to the police with the first report nor did he describe the clothes which the appellant was wearing at the time of the alleged offence. He concluded his submissions by saying that there was a grudge between Gerald and himself and urged the court not to believe the evidence given by Gerald.

23. Prosecution counsel Mr. Juma opposed the appeal on the ground that the prosecution proved its case against the appellant beyond any reasonable doubt and that the appellant who was a relative and well known to the prosecution witnesses was positively recognized both by name and by appearance. Counsel also submitted that from the evidence, the appellant was in the company of one Polycap who is still at large. That the said Polycap was also well known to the prosecution witnesses. Counsel also submitted that the entire prosecution evidence which was corroborated was not shaken in any way by the appellant's defence.

24. Regarding the issue of rape, counsel submitted that the medical evidence which confirmed the presence of blood on SAM's pubic area, and continuing bleeding at time of examination together with swollen clitoris was enough to prove the fact of rape and that it had also been proved that it was the appellant who raped SAM.

25. On the issue of sentence, counsel submitted that the sentences imposed upon the appellant by the learned trial court were lawful. Counsel urged the court to dismiss the appeal in its entirety for lack of merit.

Issues for determination

26. Upon a careful reconsideration and evaluation of the evidence on record, and taking into account all the submissions made by both the appellant and the respondent and further upon careful consideration of the law, the following issues arise for determination;-

- a. Whether Gerald gave the name of the appellant with the first report
- b. Whether the charge sheet was incurably defective, thereby rendering the whole judgment a nullity.
- c. Whether the appellant was clearly and positively identified during the alleged robbery.
- d. Whether the trial court erred in law by convicting the appellant without the help of identification parade evidence.
- e. whether the prosecution evidence was contradictory
- f. Whether the learned trial magistrate failed to consider the appellant's alibi defence.

g. Whether in the final analysis the prosecution proved the case against the appellant beyond any reasonable doubt.

Analysis and Determination

27. I now proceed to consider the above issues in light of the evidence on record.

(a) Whether Gerald gave the appellant's name with the first report.

28. It is trite that in cases where an offence is alleged to have been committed under difficult circumstances such as night time whether questions as to sufficiency of light arise, It is important that whoever alleges to have witnessed the incident either describes the appearance of the accused or gives the name of such accused with the first report to the police or some other person of authority. in the case of **Terakali & another – vrs – Rex [1952] EACA** the court said the following on the issue: *“Evidence of first report by the complainant to a person in authority is important as it provides a good test by which the truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishment or made – up case. Truth will always come out in first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others.....”*

29. In the instant case, Gerald stated the following in part of his evidence in chief: “ there were four people. I recognized Ndusi and Polycap. They came and held me then tied my hands at the back using a rope. They beat me up on the back and then ordered me to tell my mother (pw2) to open.”In his evidence CPL Murigi stated. “.....There was also one Gerald who said that he was able to identify two of the assailants a Polycap and Ndusi. “ The evidence on record therefore shows that Gerald, who is the key witness in this case, gave the appellant's name to the police when the police visited the scene the very same night of the attack. It is therefore not true as alleged by the appellant that Gerald did not give his (appellant's) name to the police with the first report.

(b) Whether the charge sheet was incurably defective, thereby rendering the whole judgment a nullity.

30. The appellant's argument on this issue underground number 5 of the petition of appeal is that the charge sheet does not set out the proper particulars of the charge in Count II namely whether the appellant was charged with rape or defilement or gang rape. The charge of gang rape is preferred under Section 8(1) as read with Section 8(4) of Sexual Offences Act, No. 3 of 2006 (SOA) Section 8 of the SOA is on defilement of children up to eighteen years. on the other hand, Section 10 of the SOA is on gang rape and it is stated in the following words;-

“10. Any person who commits the offence of rape or defilement under this Act in association with another or others, or any Person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.”

31. A look at the charge sheet clearly shows some confusion as to whether the appellant was charged with defilement under Section 8 of SOA or gang rape under section 10 thereof. In my considered view, the offence cannot be defilement because SAM was said to be 19 years. I note however that neither the appellant nor the respondent's issue of the charge sheet; but I want to say this: that from the evidence on record, the proper charge that should have been preferred against the appellant is one of gang rape, since the appellant was said to be in the company of three other people who has the common intention to commit the offence against SAM. They tied her hands and legs and also gagged her mouth so that she had no way of calling for help.

32. The question that begs for an answer is whether the way the charge sheet was framed caused prejudice to a failure of justice. Section 134 of the Criminal Procedure Code provides that a charge sheet should be drafted in such a way that;-

i. it discloses an offence known in law

ii. the offence is disclosed and stated in a clear and unambiguous manner such that the accused person pleads to a specific charge which is easily understood so as to also enable the accused person prepare the defence; and

iii. The charge should contain all the essential ingredients of the offence.

33. In the instant case, it is not clear whether the appellant was charged with defilement or gang rape, and in any event, there was no justification for reading Section 8(1) and (4) of the SOA with Section 10 which is a standalone provision. I would therefore uphold the appellant's complaint that the charge sheet as drafted with regard to count II was so unambiguous that it was not easily understandable and did not therefore offer the appellant the opportunity to prepare his defence. For this reason, the appellant's appeal on Count II of the charge sheet succeeds. I allow the same quash the conviction and set aside the sentence of life imprisonment imposed upon the appellant.

(c) Whether the appellant was clearly and positively identified during the alleged robbery

34. The issue of identification or recognition is central to the prosecution's case against the appellant, basically because the alleged robbery is alleged to have taken place at around 8.30pm on the material night. Further, the issue is critical because it was only Gerald who is said to have identified the appellant. SAM said she did not know the assailants. R stated that she could not tell if the accused was among them [robbers]. P also stated that she did not know the people that Gerald identified, though she stated that people came while out lantern was on burning. But she did not identify the robbers.

35. What the above analysis shows is that the available evidence on identification is that of a single witness. The law is clear on how courts should treat the evidence of a single identifying witness and the inherent dangers that can arise from such evidence. Even where there are more witnesses from one growing evidence on identification or recognition, the court should receive such evidence on identification with the greatest care, and more so when the circumstances under which the identification takes place are difficult. See the case of **Odhiambo – vrs – Republic [2002] KLR 241**. The Courts have also held that where the evidence rests on a single witness under difficult circumstances, then other evidence either direct or circumstantial pointing to the guilty of the accused must adduce.

36. In the instant case, the single witness is Gerald and his evidence on identification is as follows;-

“There were four people. I recognized Ndusi and Polycap. They came and held me then tied my hands at the back using a rope. They beat me up on the back then ordered me to tell my mother (PW2) to open.It is accused in the dock and Polycap who beat me. I saw him when they were tying me. There was moonlight. Accused was arrested as the others escaped. I did not recognize the others. Accused comes from Malinya which is neighbouring our area. We had not differed.”

37. During cross examination, Gerald stated clearly that he knew the appellant's name as Kabimbo Ndusi, and that he was at the scene. Gerald also stated thus concerning the appellant;-

“ I saw accused as well as he tied me. Because it is them who tied me.there was moonlight when they tied me. I was standing.”

38. From all the above, I am satisfied as the trial Court was right that Gerald clearly and positively recognized the appellant whom he knew as hailing from the neighbouring village. Though the appellant has alleged on appeal that there was a grudge between him and Gerald, no such issue arises during cross examination of Gerald. I am also satisfied that Gerald clearly saw the appellant with the help of moonlight when the appellant and Gerald stood face to face as the appellant and Polycap tied Gerald. I am satisfied that reliance on the evidence by Gerald did not cause any prejudice to the appellant whom Gerald knew by name. In the circumstances. The appellant's complaint. That he was not properly

identified has no basis and is accordingly dismissed.

(d) Whether the trial court erred in law by convicting the appellant without the help of identification parade evidence.

39. Having reached the conclusion that the appellant was well known to Gerald by name, it was not necessary for an identification parade to be conducted as such evidence would have added no value to the prosecution's case. The trial court was thus perfectly in order to convict as he did without the evidence of identification parade.

(e) whether the prosecution evidence was contradictory

40. From the analysis of the evidence on record, I see no indication of contradictory evidence by the prosecution. The evidence pinning down the appellant to the crime scene was given by Gerald and Gerald alone. The other prosecution witnesses could not identify the assailants.

(f) whether the learned trial Magistrate failed to consider the appellant's alibi defence

41. When the appellant was put on his defence, he stated that he did not leave his home at all from morning till night. In her judgment, the learned trial magistrate stated the following.

“I have considered the alibi raised by the accused. In as much as the onus on him is not the prior his claim his version of what happened and who his witnesses said did not add up. They seemed to be referring to events on the date of his arrest rather than the date the offence was committed, it is not convincing.”

42. From the above, the appellant's complaint against the learned trial court is misplaced. I have also myself carefully reconsidered the alibi and find that it did not displace the prosecution's evidence against the appellant. That ground of appeal also fails.

(g) Whether in the final analysis the prosecution proved its case against the appellant beyond any reasonable doubt

43. From an analysis of the entire evidence on record, I am satisfied that the prosecution proved its case against the appellant beyond reasonable doubt. First and foremost, there is no doubt that a robbery took place at Rosa's house on the night of 12th August, 2013. Gerald confirmed and both the trial court and this court have accepted that the appellant was present at the scene and took part in the robbery. The appellant was in the company of three other people and during the robbery, Gerald was beaten. The appellant and his accomplices were armed with pangas, so with the issue of identification settled, and the ingredients of the offence of robbery with violence also confirmed, the prosecution case against the appellant is on safe ground. The trial court was satisfied that Gerald was a credible witness.

Conclusion

44. From the above analysis I make the following findings. One is that the appellant's appeal against both conviction and sentence on Count II succeeds. I allow the same quash the conviction and set aside the sentence of life imprisonment. As regards Court I, I find that the appeal lacks merit and is accordingly dismissed on both conviction and sentence. To the extent stated above, the appellant's appeal fails. The appellant still has his right of appeal to the Court of Appeal within 14 days from the date of this judgment.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 21st day of September ,2017

RUTH N. SITATI

JUDGE

In the presence of;-

Present in Person.....for Appellant

Mr. Jamsumba (present).....for Respondent

Polycap Mukabwa..... Court Assistant.