REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 109 OF 2014

BETWEEN

RODGERS KIFUNYI...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the judgment of Hon. Susan N. Mwangi,

AG SRM delivered on the 1st day of August, 2014,

vide Vihiga Criminal Case No. 790 of 2014)

J U D G M E N T

Introduction

1. The appellant herein, Rodgers Kifunyi, was arraigned before the Principal Magistrate's court at Vihiga with various offences. In count I, he was charged with robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code, the particulars of which were that on the 6th day of August, 2013 in Vihiga County jointly with others not before court armed with offensive weapons namely pangas and clubs robbed off (sic) P M her mobile phone make Nokia, a pair of shoes, assorted baby clothes, one jacket two blouses, one full women dress and a pair of earring all valued at kshs15,000/= and at the time of such robbery threatened to use actual violence to the said P M.

2. In the alternative charge to Count I, the appellant was charged with handling suspected stolen property contrary to Section 322(2) of the Penal Code, the particulars being that on the 16th day of August, 2013 in Vihiga County otherwise than in the course of stealing dishonestly retained one jacket, one full woman dress, two blouses, a pair of earrings assorted baby clothes knowing at having reason to believe it (sic) to be stolen property.

3. In Count II, the appellant was charged with robbery with violence contrary to Section 295 as read with Section 296(2) of the penal Code , it being alleged that on the 16th day of August, 2013 in Vihiga County jointly with others not before court armed with offensive weapons namely pangas and clubs robbed of (sic) G L of his mobile phone Nokia, 2 pairs of shoes, 1 leather jacket and cash Kshs.1400/= all valued at

Kshs.16,000/= and at the time of such robbery threatened to use actual violence to the said G L.

4. In Count III, the appellant was charged with gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006 the details thereof being that on the 16th day of August, 2013 in Vihiga County in association with others not before court intentionally and unlawfully caused his penis to penetrate the vagina of PM without her consent.

5. In the alternative, the appellant was charged with committing an indecent act with an adult contrary to Section II (A) of the Sexual Offences Act No. 3 of 2006, the particulars of the charge being that on the 16th day of August, 2013 in Vihiga County in Association with others not before court intentionally and unlawfully caused his genital organ to make contact with genital organs of PM without her consent.

6. Count IV was a charge of personating a public officer contrary to Section 105(b) of the Penal Code. The particulars of the charge were that on the 16th day of August, 2013 at Chavakali Township in Chavakali location within Vihiga County falsely presented himself to be a person employed in public service as a police officer and assumed to give escort to PM and G L.

7. On the 19.08.2013 the appellant pleaded not guilty to all the counts, thereby forcing the prosecution to marshal the evidence of 7 prosecution witnesses in an effort to prove the charges against the appellant. Those who testified were PM as PW1 (P) Sammy Chelule, PW2 (Sammy) L G as PW3 (G) and No. 97085774 CPL Reuben Makacha, PW4 (CPL Makacha) while No. 67912 Sgt Farah Mohammed (Sgt Farah) and No. 219685, Chief Inspector Peter Kiema (CI Kiema) testified as PW5 and PW6 respectively. Number 55742 PC Daniel Kemboi (PC Kemboi) of Chavakali Patrol Base testified as PW7.

8. The appellant gave a brief sworn statement in his defence. He denied all the charges levelled against him and stated that on the 16th August, 2013 at around 9.00am, while he was walking to Chavakali Market, he was arrested and handcuffed for no apparent reason. He stated that Sgt Farah is the one who arrested him and further that Sgt Farah had a grudge with him for his refusal to point out a chang'aa den that the police intended to raid. The appellant did not call any witnesses.

Trial Court Judgment

9. After carefully considering the evidence of the 7 prosecution witnesses, together with the appellant's sworn defence, the learned trial Magistrate found the appellant guilty on all the 4 counts and convicted him accordingly. The appellant was sentenced to suffer death on both counts but suspended the death sentence on counts II, III and IV the reason being that a man can only die once.

The Appeal

10. Being dissatisfied with both conviction and sentence, the appellant brought this appeal initially through M/S Kiveu & CO. Advocates who through K. N. Wesutsa & Co. Advocates filed the supplementary Record of Appeal. The petition of appeal consists of the following grounds of appeal;-

1. That the learned magistrate erred in Law in convicting the appellant in total disregard of the law.

2. That the learned trial Magistrate grossly erred in relying on contradictory, non-corroborative and unreliable evidence tendered by the prosecution in convicting the appellant.

3. That the learned trial magistrate erred in Law and fact by convicting the appellant on a defective charge sheet

4. That the appellant's Constitutional right to a proper defence collorary of which is timely provision of prosecution witness statements and documents for use in court was not upheld thereby occasioning an injustice.

5. That the trial magistrate erred in fact and law by completely disregarding the appellants case and evidence thereby occasioning an injustice.

6. That the trial magistrate erred in her judgment as she thereby inexplicably arrived at a conclusion that by merely being arrested as a suspect the appellant was guilty as charged.

7. That the trial magistrate's evaluation and treatment of the appellant's evidence was perfunctory.

8. That the trial Magistrates erred by holding that the prosecution had established its case against the appellant beyond reasonable doubt notwithstanding the omission on its part to summon corroborates evidence linking the appellant to the offence charged.

9. That the trial Magistrate erred both in law and fact by imposing a sentence that was not only manifesting high but illegal.

11. The appellant prays that the appeal be allowed, the conviction quashed and sentence set aside so that he is set free.

Duty of this Court

12. As this is a first appeal, this court is under a duty to give the appellant a second hearing of his case, albeit without the benefit of seeing and hearing the witnesses. The privilege of seeing and hearing witnesses is that of the trial court and where any findings of the learned trial magistrate are based on the demeanor of witnesses, this court will be slow to interfere with the same. In the case of **Koech & another- vs – Republic [2004] 2KLR 322** the Court of Appeal made it clear that on a first appeal, such as the present one, the court is mandated not only to look at the evidence on record afresh, but to re-assess and evaluate it a-new with a view to reaching its own independent decision before deciding whether or not to uphold the findings and conclusions of the learned trial court. This is the legal position and I have no option but to follow it.

The Prosecution Case

13. The prosecution case is brief. On 16th August, 2013, P and G left Nairobi for their rural home in Chavakali of Vihiga County. At about 5.00pm the public vehicle in which they were travelling broke down, as a result of which their arrival in Chavakali was delayed until 12.30 am. On arrival at Chavakali bus stage at 12.30am P telephoned her brother OA for directions to his house in Chavakali. P and G were with their 3 month old baby girl whom they were taking home for shaving ceremony. They carried with them their own clothes, shoes and also the baby's clothes.

14. No sooner had P made the call than three men appeared on the scene and introduced themselves as police officers. Both P and G could see the 3 men clearly with the help of security lights at the shops at Chavakali market. The lights were about 3 metres from where P, G and the 3 men were standing. One of the men was armed with a panga the second man had a very long stick curred like a hammer while the third man carried a torch. One of the 3 men, whom P and G later identified as the appellant, wore army attire similar to that won by Administration police. He also wore a cap on his head and had white shoes on his feet.

15. The 3 men then enquired where the couple was going. P talked to her brother again who gave them directions on how to get to his house and that they were to use the road to Chavakali High School. On hearing this, the 3 men informed P and G that because Chavakali was generally unsafe, they would need the help of the 3 "police officers". Since one of the 3 men was dressed like a police officer, the couple decided that they could be escorted.

16. All the five people walked in single file with G leading the way, followed by 2 of the men then P and the third "Policeman" closed the line. By the time they started walking, P and G already had a mental picture of all the three "Police men". The appellant was walking directly behind G and he informed G to

take the path to his right but remembering that her brother had prescribed a different route, P telephoned her brother again to confirm the route. P also informed her brother that there were 3 people who were helping them find their way where upon her brother told her that the 3 policemen were in fact thugs.

17. Immediately thereafter, the appellant took P's phone, make Nokia and switched it off. The 3 "policemen" then ordered the couple to sit down very quickly, and they obeyed. One of the 3 "policemen" took the sleeping baby and placed her on the grass. The appellant then proceeded to remove P's white jacket, tore it apart and cut it into pieces using a panga. He took a piece of the torn white jacket and tied G's hands from behind. The "3 policemen" ordered the couple to remove everything they had carried, including money and clothes. They temporarily untied G so he could remove the money from his pockets. G took out kshs.1400/= and gave it to them. Then all the "3 policemen" went to P and started caressing her all over, while ordering her to remove her clothes. When P told them her dress had no pockets, one of the men grabbed the dress at the neck and tore it until her breasts. According to P, it was the appellant who tore her dress.

18. P and G were then ordered to get up and take the footpath. The appellant led the way with G in tow though hands were still tied, followed by a second man, P and the baby and then a third man. As they walked, P asked then men to give back at least Kshs.300/= plus some baby clothes. The appellant assured the couple not to worry.

19. When they got to a small bush along the footpath, the 3 "policemen" shone them bright torches, sat G down and tied his legs together. The hands were still tied. The child was then placed between G's legs, warning him of dire consequences if he tried anything funny. The appellant then ordered P to remove her clothes quickly. When P sought to know from him whether he wanted to rape her, he told her to first undress quickly. She complied and was ordered to lie down on the ground. When she sought to know whether he wanted to rape her in front of her husband he ordered her to lie down or else he would rape her using the panga. G started crying telling the appellant not to rape her, but he was warned to shut up or risk being cut up into pieces.

20. The appellant was the first to rape P as the other 2 men kept watch over G and for any intruders. The Appellant asked P to behave the same way she did during intercourse with her husband, but she told him she could not and that he was hurting her. As the appellant was still in the act, the second man came to where the rape was taking place and shore his torch on the appellant, telling him to hurry up so that he (2nd man) could also have a chance to rape P. P stated she saw the appellant even more clearly under the torch light. The appellant ejaculated into P.

21. The second man put on a condom before raping P, citing HIV/Aids as a great threat. The third man did not rape P. After the rape ordeal, the appellant and his accomplices slowly selected clothes from the baby basket, P's dress, G's safari boots, his leather jacket plus P's shoes, baby medication and her ID. The trio then walked away slowly after laughing at G. Apart from the rape and the threats, they did not hurt P and G in any other way.

22. After they had been left free, P used a good Samaritan's phone to call her mother, MI (Not called as a witness) who informed P's brother of their whereabouts at Diani Hotel in Chavakali. Soon thereafter, P's brother arrived with police officers. P and G were taken to Chavakali Patrol Base where they recorded their statements before being escorted to P's brother's house. In the morning P went back to the patrol base and then to the hospital where she was seen by Sammy, a senior clinical officer at the hospital. According to Sammy, P was psychologically depressed. Sammy did vaginal examination and super-public area, but there was no visible stain. Rubbing of the scarred hymen was noticeable with both sides of the labia minora and Labia Majora being swollen with visible reddening. The physical examination was painful. Routine tests and the HIV high vaginal swab and Syphilis tests were all negative Sammy produced the following exhibits; Treatment sheets PEXH 10, laboratory request and report form PEXH 11, PRC form PEXH 12, P3 form – PEX 13. According to Sammy, his examination of P revealed that there had been forceful intentional gang rape resulting in vaginal penetration that was unprotected and unconsented to. Sammy also noted that as at the time of the examination, P was 23 years old and had not taken a bath or passed urine since incident. There was no noticeable discharge.

23. On 17th August, 2013, both AP CPL Makacha and Sgt Farah received reports that the appellant had been seen at Chavakali Market. The two officers followed the lead and found the appellant seated at the market. They arrested him and took him to Chavakali police Patrol Base. The appellant took the officers to some place where the appellant and his 2 accomplices had allegedly shared the loot stolen from P and G. While some clothes were recovered at the said place, some other items were recovered at the appellants' mother's house where they had been hidden under a mattress. Even the appellant's white shoes were found there. After the recoveries and recording of statements, the appellant was charged with the various offences.

The Defence Case

24. The appellant gave sworn evidence. He denied the charges and stated that on 16th August, 2013, he left for Chavakali Market at around 9.00am but a few metres to the market, he met with Sgt Farah and other people. They stopped him and handcuffed him. They took him to a chang'aa den before taking him to Chavakali police Patrol Base. He stated that the only reason why he was arrested was because of being found in possession of a court bond on his person.

25. During cross examination, the appellant stated that he had a grudge with Sgt Farah because he (Sgt Farah) was present once when he (appellant) had been arrested by members of the public on suspicion that he had taken part in a robbery.

Submissions

26. M/S K.N. Wesutsa, Counsel for the appellant filed written submissions in which he urged this court to set the appellant free on grounds that the prosecution had not proved any of the charges against the appellant.

27. On his part, prosecution counsel Mr. Juma Ochieng submitted that the evidence on record clearly pointed at the appellant as one of the perpetrators of the violent robberies and the gang rape against P. He urged this court to make a finding that the appellant's appeal on both convictions and sentence has no merit and to dismiss it altogether.

Issues of Determination

28. After carefully reconsidering all the evidence on record, and noting that the alleged offences were committed at night from around 12.30am, the following issues arise for determination:-

a) Whether the appellant was properly and positively identified as being among the robbers in respect of all the offences

b) Whether the prosecution proved the offence of gang rape to the required standard including the issue of whether there was penetration.

c) Whether the evidence on record proved beyond doubt that the appellant impersonated a police officer.

Determination

29. A look at the facts and the evidence on record clearly shows that the success of the prosecution case is dependent on whether or not the appellant was properly and positively identified by both P and G during the robbery which took place around 12.30am. The courts have said time and again that where the question of identification arises, especially when such identification is under difficult circumstances, the court making the determination has a duty to warn itself of the inherent dangers of such evidence, and must consider such parameters as "the conditions prevailing at the time of identification and the length of time for which the witness had the accused person under observation together with the need to exclude the possibility of error" even when the accused person is well known to the witness. Generally see R**- Vs**

_ Turnbull [1976]3 All ER 549 and Nzaro – vs – Republic [1991] 2 KAR 212

30. As regards the instant case, counsel for the appellant submitted that the identification of the appellant was less than satisfactory for reasons that the record does not bear evidence of any inquiry by the trial court as to the intensity of light, its location in relation to the gang and the time taken by both P and G to observe the gang as to be able to identify any of its members. Reliance was placed on **Nyeri Court of Appeal CRA No. 59 of 2013 Charles M'Tomugaa M'Tomauta – vs – Republic** in which the learned judges of Appeal reiterated the above stated principles.

31. This court has carefully reconsidered and evaluated the evidence afresh and I am satisfied that the appellant was positively and properly identified by both P and G. This is why I say so. P said in part of her evidence in chief." We alighted at Chavakali at 12.30am and the vehicle stopped ----------at that time I saw 3 people who appeared. I saw the 3 people using security lights. One was armed with a panga, the other had a very long stick that had been curved like a hammer and the other had a torch. All the 3 had each a torch. One had worn the army attire like an AP as he also had cap with white shoes.-----------Only one of them was talking as the others were supporting him.------------ I had clearly identified all the 3 of them before we left the stage due to the security lights and they also had very bright torches---------- The one clothed in army clothes was behind my husband. He had white shoes on." P went further to testify as follows just before the appellant and his accomplices gang-raped her. "They untied my husband so that he could remove the money, from his pockets and he gave them kshs.1,400/=. They came back to me all the 3 of them caressing me ordering me to remove my clothes as they used to check everywhere------------ One of them grabbed my dress from the neck and tore it till my breasts. That was the one clothed in the army uniform. -----------we got to a small forest and it was dark, but they had their bright torches so we saw where we were----------the accused person at the dock was the one clothed in the army uniform--------- the other came with the torch next to my head where I was lying shone the torch light on him where I was lying, shone the torch light on him telling him to hurry up so that the one carrying the torch could also rape me. I told them to leave me alone as they had also stolen from us. With the help of that torch, I was able to see him clearly.---------"

32. From all the above, P had all the time, proximity and sufficient light to observe and see the appellant clearly. The appellant talked to her clearly. The appellant talked to her even as he threatened to use the panga to rape her if she did not let them rape her using their penises. In effect the appellant's complaint that there was no indication as to the intensity of the light, its location in relation to the gang and the time taken by P to observe the gang has no basis. In any event, there was sufficient time for P from the time the gang, approached them up to the time they raped her and thereafter sorted the items to take away from the couple.

33. The Court will now consider the evidence of G regarding the appellant's identification. G stated as follows in part of his evidence in chief:- " As we were there 3 men appeared. We saw them suing security lights on the road and it was bright. There was also light from the hotel. They were around 3 metres from where we were standing so we saw the people well. We even talked to them. I didn't see any weapon then. 2 of them had pangas while the other had a rungu. One had white spot shoes and army jacket and police ballet/cap…………. One with the spot shoes and army uniform raped her first. They had torches and I saw their faces. I was still talking to them."

34. In my considered view, the evidence on identification of the appellant by both P and G was without error as the two witnesses had both the proximity and the time not only to see but to also talk with the appellant as he led them towards Chavakali High School and even during the rape ordeal. The appellant also submitted that the identification parade conducted by CI Kiema who was the commanding officer Mudete Police Station was so flawed that it should have been rejected by the trial court and that it should therefore be rejected by this court. Counsel for the appellant submitted that neither P nor G gave a description of the appellant with the first report, and that as such, the identification evidence should be disregarded.

35. In his evidence in chief, CPL Makacha testifying of the recoveries they had made of some of the stolen items, said, "-------- He led us to his home and recovered more assorted baby clothes. He sleeps in

his mother's home. They were under a mattress. The white sport shoes he had worn the previous night as had been described by the complainants--------." During cross examination, Cpl Makacha stated:- " The complainants' identified the sport shoes which had a heel like wheels. That's how it was described to us and the complainant's identified them."

36. Sgt Farah stated the following on the issue of first report; "In this case, I interrogated the complainant who was called P M and her husband G L who said they could identity the 3 robbers if they saw them that one had dread locks and the other had the army jungle jacket with a casual trouser and white sport shoes. Sgt Farah further testified that following the report given to them by P and G, the appellant was traced and arrested in the morning at Calabash bar within Chavakali Township. I find that this first report by the complainants to the police was truthful and accurate because there was no time lapse between the occurrence of the robbery and time of the report within which the complainants could have made up a story about the appellant. See the case of **Terekali & Another – Vs – Rex[1952] EACA.**

37. Furthermore, and even if the identification of the appellant had any problem, the doctrine of recent possession was sufficient to nail down the appellant to the commission of the offence of robbery against both P and G. In the case of **Isaac Nganga Kahiga alias Peter Nganga Kahiga – vs – Republic Cr. A NO. 272 of 2005(UR) (Unreported),** the Court of Appeal held, and I entirely agree with the court, that, " ……….it is trite that before a court can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof first that the property was found with the suspect, secondly that the property is positively the property of the complainant. Thirdly that the property was stolen from the complainant and lastly that the property was recently stolen from the complainant. The proof as to time as has been stated over and over again, will depend on the easiness with which the stolen property can more one the person to the other."

38. In the instant case, on the very morning after the appellant's arrest, a pair of a child's shawl, one dress for the baby, one brown wallet belonging to G were recovered. The wallet contained G's national identity card. All these items were identified by both P and G. The items had been stolen from the complainants at around 12.30am the same day. In fact the items were yet to change hands with all the above information, I am satisfied beyond doubt that the appellant was one of those who perpetrated the robbery against P and G.

39. On the basis of the above analysis and bearing in mind the fact that the appellant was in the company of 2 other persons, and being armed with pangas and other offensive weapons, the offence of robbery with violence contrary to Section 296(2) of the Penal Code was proved. According to the decision in the case of **Oluoch –vs – Republic [1985] KLR 549** all that the prosecution needs to prove is any of the 3 circumstances set out under Section 296(2) to prove the offence of robbery with violence.

40. Having made the above findings I do not think that it would serve any useful purpose to go into the issue of the identification parade or the purported confession made by the appellant. I now proceed to the next issue.

Whether the offences of gang rape and impersonation were proved.

41. I shall start with the offence of impersonation. There is no doubt in my mind that this offence was proved. The appellant was dressed in AP were jungle uniform and according to both P and G, he is the one who told them (P and G) that the 3 of them were police officers and that they would assist them to find their way to Chavakali High School. The appeal on the said charge therefore has no merit.

42. With regard to the offence of gang rape, Section 10 of the Sexual Offences Act No. 3 of 2006 (SOA) provides that;-

> " 10. Any person who commits the offence or 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."

43. Appellant's counsel submitted that the offence of gang rape was not proved because the provisions of Section 36(1) of the SOA were not complied with, in that the appellant was not taken for medical examination for purposes of ascertaining if indeed the appellant committed the offence. I have carefully read through the above stated Section of the SOA, and find that the requirement for medical examination is not mandatory. It is within the discretion of the court to make such a direction for the purpose of forensic and other scientific testing. In the instant case, the learned trial Magistrate did not find it necessary to make such a direction after it was satisfied with the evidence given by Sammy confirming penetration and that it was the appellant who caused the penetration. I am equally satisfied with the learned trial court's findings and would therefore place no weight on the complaint raised by the appellant regarding Section 36(1) of the SOA

Conclusion.

44. In light of the above, I find and hold that the appellant's appeal on both conviction and sentence on all the 4 counts has no merit and is accordingly dismissed. Right of appeal to court of Appeal within 14 days of this judgment.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 13th day of October, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

………Mr. Amasakha for Mr. Kundu (Present)…………for Appellant

………Mr. Ngetich (present)……………………………..for Respondent

………Polycap………………………………………Court Assistant.