REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 31 OF 2015

(Being an appeal from Judgment of Kitale Chief Magistrate V.W. Wandera

delivered on 6/3/2015 in criminal case No. 2610/2013)

E W S } ….....APPELLANTS

M K }

JOSEPH OCHOLA MUKA }

VERSUS

REPUBLIC .....RESPONDENT

J U D G M E N T

The appellants were charged with the offence of **Robbery with violence contrary to Section 296(2) of the penal code.** The particulars of the offence were that on the **10th day of October 2013 within Trans Nzoia County, jointly robbed A N M of her mobile phone make Nokia valued at Kshs 4,999/- and cash Kshs 70/- and immediately before the time of such robbery wounded the said A N M.**

They were also charged with the offence of **gang rape contrary to Section 10 of the Sexual Offences Act NO. 3 of 2006.** The particulars were that Joseph Ochola Muka on the **10th day of October 2013 within trans Nzoia County in association with E W S and J M K intentionally and unlawfully caused your penis to penetrate the vagina of A N M without her consent.**

The appellant were convicted and sentence to suffer death hence this appeal. At the time of hearing this appeal all the three appeals were consolidated and heard simultaneously.

The case at the lower court can be summarised as hereunder.

PW1 A N M aged 37 year left her place of work [particulars withheld] in corner Mbaya Kisumu Ndogo within Kitale town at around 10 pm, on the material day 10/10/2013. As she walked home she was apprehended by three person who assaulted her and dispite her pleas she was forcefully ferried using a motorcycle upto a certain house.

In the house they proceeded to rape her in turns. One of the young persons they found in the house managed to reach the house of the village elder who came and rescued her. The 1st and 2nd appellant were arrested at the scene while the 3rd appellant escaped. She then went to the hospital for treatment. She was categorical that they were the appellants who kidnapped and raped her. In the process they stole

her mobile phone as well as Kshs 70/-. Later the 3rd appellant was arrested and she identified him at the identification parade.

PW2 PC Silvia Muthoni was the arresting officer. After she received the information from Matisi police post she went to the scene with other colleagues where they found the complainant and several other people. They arrested the 1st and 2nd appellants. She also found PW1 bleeding from her forehead. They were then brought to the police station.

PW3 Francis Buluma Paulo is the village elder at Jerusalem Mitume. He testified that at around 11.30 pm while asleep he was woken up by O and E who were his neighbour's sons. They informed him of what was taking place in the house. He accompanied them back to the house where he found the 1st and 2nd appellants together with the complainant all half naked. The complainant was crying for help as she was injured and had a swollen face. There were 2 other young fellows who had assisted in locking the 1st and 2nd appellant in the house to ensure they didn't escape. He then telephoned the area chief who called the police and who arrived and took the 1st and 2nd appellant away.

PW3 John Koima the clinical officer produced the P3 form in respect to the complainant. The same was filled on 14/10/13 and it showed that she had already changed her clothes. There were bruises on the forehead and the eyes were swollen. There were bruises on the forearm and the right knee. There was no evidence of rape. She was found to be HIV positive and taken to counselling and drugs provided to her.

PW5 Sergent Joseline Wambire was the investigating officer. She took statements from the witnesses and was satisfied that from the evidence on record the appellants were positively identified by the complainant and that the 1st and 2nd appellants were arrested at the scene.

PW4 Chief Inspector Patrick Gogo carried out the identification parade on the 3rd appellant. He was positively identified by the complainant and he did sign the form indicating that he was satisfied with the process.

When put on his defence the 1st appellant gave unsworn evidence denying the charge. He said that he left his place of work at 9 pm and went to the house where his brother J O M lived. It was a rental place. He found him together with the 2nd appellant and when he wanted to sleep he found out that there was a woman sleeping in their common bed. He said that he was a visitor of his brother. A dispute ensued and his brother went out and was accompanied after about 10 minutes with 4 men. They proceeded to assault the appellant. The lady said that she had been robbed of her phone and cash. The police were called and he was arrested and subsequently charged.

The 2nd appellant moreless gave the same version of defence as the 1st appellant.

The 3rd appellant denied being at the scene. He said that on 21/10/2013 he was called to the office of the chief opposite the AP Camp at around 11.30 am when the chief arrived he was taken to Kitale police station by Kenya Police Reservist where he stayed upto 23/10/2013. He said that he was picked from among 25 suspects and his finger prints taken and charged with the offence.

The appellants did not call any witness to testify on their behalf.

At the start of the submissions the learned state counsel raised a fundamental issue concerning the ages of the 1st and 2nd appellants. According to him the evidence on record showed that at the time of the offence they were below 18 years a fact which the trial court ought to have determined before the trial began. He however argued that the 3rd appellant was found to have been over 18 years at the time of the offence.

I find this preliminary point very crucial as it would in one way determine this appeal. I have perused the court records and indeed the trial court at the time of sentencing sought to inquire into the ages of the

appellants. One Pharis Silali confirmed that the 1st appellant was aged 17 years and the 2nd appellant was aged 17 years too at the time of assessment. The court in an attempt to dispell any doubt ordered for a 2nd age assessment at Moi Teaching and Referral hospital where one Doctor Rono on behalf of Doctor Kimutai concluded that by their X- ray analysis which was more superior then that of Kitale District hospital, the ages of the 1st and 2nd appellants were above 18 years. In fact he stated that

> ***" Joseph Mukas X- ray features showed the bones were fused and he is therefore above 18 years."***

While E W S he stated

> ***"After performing X- rays Doctor Kimutai made a report indicating that the featured were suggestive of a person aged over year 18 years."***

Consequently both were found to be about 18 years or above. The earlier one which was based on dental assessment found that they were about 17 years.

Taking into consideration the above facts it appears that at the time of the commission of the offence on 10/10/2013 the 1st and 2nd appellants were not above 18 years. Even if one was to take an average of both assessments the probable age of the two would not exceed 18 years at the time of the commission of the offence.

Considering that the appellants were charged with such grave offences it would have been proper that they be offered legal aid pursuant to the provisions of Section 77 of the Children's Act 2010.

Further S. 190 of the Children Act restrains the punishment due to Children and does not include death sentence.

On the above score alone I find that the trial Court did misdirect itself as it ought to have enquired into the question of the appellant age before the trial began or at least at the earliest opportunity.

As regards the 3rd appellant it appear from the court records that a similar pattern followed where he was assessed at Kitale district Hospital and found to be over 18 years. By his own admission during his defence hearing and at the mitigation stage he said that he was aged 20 years meaning that at the time of the commission of the offences he was about 19 years or thereabouts.

In his submission he argued that he was not found at the scene and that the identification parade was not proper as he had been seen by PW1. He went on to state that the complainant at the time of the incident did not report or described the assailants to the police and that no other witnesses who were in the house were called.

The evidence of PW1 however states otherwise. She testified that

> ***" The 3 suspects who pushed me inside the house were the 1st, 2nd and 3rd accused persons."***

She said that she was able to identify them courtesy of a hurricane lamp. That when the village elder arrived the 3rd appellant escaped leaving behind his trouser and cardigan on the table but the 1st and 2nd appellants were arrested.

She maintained the same position namely that she saw the appellant at the scene when he cross examined her.

She said;

> ***" I knew you on the 10/10/2013 when you assaulted me and raped me."***

On cross examination of the parade officer the said witness PW4 stated

> ***" The witness said she saw you for the first time on the material date and could identify you if she saw you again. That is why I conducted an ID Parade to find out if the witness could identify you."***

Is it then possible that there was a mistake identify ? I do not think so. The complainant in my view had sufficient time with the assailants whom I find were all the three appellants. There was a lamp which was light during the gang rape. In any case I do not find any reason why the complainant would target the 3rd appellant alone and leave the other two. Surely they must have been together.

It is conceded by the learned state counsel that the charge of gang rape was bungled. There was poor investigation and the same could not be sustained. That leaves the charge of robbery with violence. Did the prosecution proof the same?

Section 296(2) provides that;

> ***" If the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more other person or persons or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

From what is on record as testified by the complainant there was no weapon used by the assailant except blows and kicks. The same was confirmed by the P3 form produced. It does not explain however whether the 3rd appellant beat him or which of the appellants. I think it would have been better for the complainant to have specified who really assaulted her.

Secondly on this score the complainant alleged that she was robbed of her mobile phone and Kshs 70/-. There was however no much effort on her part to establish that she owned a phone.

In my view the proper charge which ought to have been charged against appellants generally was robbery as defined under Section 295 of the Penal Code. The charges of capital robbery is not sustainable based on the evidence on record.

At least the complainant should have been in a position even to recall her phone number when she was cross-examined.

In the premises under the provision of Section 179 of the Criminal Procedure Code I would reduce the charge to robbery under Section 205 as read with Section 296(1) of the Penal Code. As conceded by the learned state counsel the charge of gang rape if it trully took place as testified by the complainant was poorly handled by the investigators.

In light of the above observation I do make the following orders;

(1) The charge of robbery with violence under the provision of Section 296(2) of the penal code is hereby reduced to simple robbery under Section 296(1) of the Penal Code.

(2) The 1st and 2nd appellants by nature of their age and the Mistrial explained above are hereby set free unless lawfully held.

(3) The sentences of death accorded to the 3rd appellant is hereby quashed and reduced to a custodial sentence of 5 years.

(4) Owing to the fact that the 3rd appellant has been in custody since 26/10/2013 the computation of the afore stated 5 years shall run from the said 26/10/13.

Orders accordingly.

Delivered tis 31st day of October, 2016.

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H.K. CHEMITEI

JUDGE

In the presence;

Kakoi for the state

Appellant present

Kirong – Court Assistant