



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 91 OF 2013

BETWEEN

CHARLES MWANGI MAINAAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from original conviction and sentence in the SPM's Court at Karatina in Criminal

Case No. 1326 of 2013 dated and delivered on 10th July, 2013– Hon. D.N. Musyoka, Ag. PM)

JUDGMENT

The appellant Charles Mwangi Maina was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** the particulars of which were that on 11th day of December 2012 at 3.00 p.m at [particulars withheld] sub location in Mathira East District within Nyeri County while armed with a dangerous weapon namely a panga robbed **L W W** of cash 1500/=, one Nokia phone, national identity card and assorted clothings all valued at Kshs.20,000/= and at the time of such robbery wounded the said **L W W**.

On count two he was charged with the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act No.3 of 2006** the particulars of which were that on the 11th day of October 2012 at [particulars withheld] sub location in Mathira East District within Nyeri County in association with another not before the court, intentionally and unlawfully caused his penis to penetrate the vagina of **L W W**.

He pleaded not guilty to the charges, was tried and convicted and sentenced to death on count one and then 40 years imprisonment on count two with the second sentence being held in abeyance.

Being dissatisfied with the said conviction and sentence he filed this appeal and raised the following grounds of appeal:

- a. *The trial magistrate erred both in law and fact in failing to note that he was arrested by members of public, he was not found with any exhibit at the time of arrest.*
- b. *His defence was never considered.*

When the appeal came up for hearing before us the appellant who was not represented filed an amended grounds of appeal and written submissions and raised the following grounds:-

- a. *His identification was not proper.*

- b. *Prosecution case against him was not proved beyond reasonable doubt.*
- c. *His rights under **Article 49 (1) (i) and (ii) of the Constitution** were violated.*
- d. *His defence was rejected without reason being given for the rejection contrary to **Section 169 of CPC.***

Mr. Nyamache appeared for the state and opposed the appeal herein.

Submissions

It was submitted by the appellant that he was convicted on the evidence of one identifying witness without the trial court considering the circumstances at the time of the alleged attack were not ideal for identification and reliance was placed on **Wamunga -vs- R. [1989] KLR 424**. It was further submitted that PW1 never gave initial description of the attackers to anybody and therefore there was possibility of mistaken identity. The case of **Joseph Ngumbao Nzaro -vs- R. KLR [1991]** was submitted in support.

It was further submitted that the circumstances leading to the arrest of the appellant were unclear and that none of those who arrested him were called as witnesses, it was further submitted that the prosecution case was full of contradiction such as the amount of money taken from PW1. It was further submitted that the prosecution case was not proved to the required standard.

It was submitted that the appellant was kept in custody from the 11th to 17th day of December 2012 more than the constitutional provision of 24 hours without any justifiable reason and therefore his constitutional rights were violated. It was finally submitted by the appellant that his defence was never considered by the trial court.

On behalf of the state Mr. Nyamache submitted that the complainant PW1 positively identified the appellant since the attack took place at 3 p.m. and she had adequate time with the attackers. It was submitted that PW1 identified the appellant on arrest. On the issue of breach of the appellant's constitutional rights it was submitted that there was a delay of three working days and that the appellant did not raise the issue in the trial court to enable the respondent respond to the same.

This being a first appeal, we are by law required to re-evaluate the evidence tendered before the trial court and to come to our own conclusion though taking into account the fact that we did not have the advantage of hearing and seeing the witnesses as did the trial court.

It was **PW1 L W W's** evidence that she was in her farm when the appellant together with another person armed with a panga strangled her and took her to her house which was nearby hit her on the chest and raped her on the table before she lost consciousness. When she gained consciousness she found herself on the table. She testified further that when she went to open her door she found it locked from outside.

She stated that when she managed to open the door, she crawled upto the road where she reported to Wangui and Wamuyu who took her to hospital and to Kamunyaka police post where the incidence was reported. When she went back home she found her Kshs.15,000/=, Nokia phone and Id/card all the items stolen. Under cross examination she identified the appellant as the one who raped her. She further stated that the appellant was arrested coming from the bush and that his companion was killed by the mob.

PW1's evidence was corroborated by **PW2 Purity Wamuyu** who found her near the road from her house and to who she reported that she had been attacked by two young men and raped. **PW3 Francis Maina Gacheru** testified that he went to take the complainant to hospital and she told him that one Gathigua and another young man had attacked her and raped her.

PW5 David Gikandi Ruita a medical officer at Karatina District Hospital testified and produced P3 form confirming that the complainant had soft tissue injuries and swelling on the neck area, her two incisor teeth had been knocked out. Her perineal area had a second degree tear with blood in the vagina. He classified the injury as harm. **PW6 PC Wycliffe Odhiambo** received PW1, 2 and 3 at the police station where the report was made. He therefore investigated the matter and charged the appellant.

When put on his defence the appellant gave sworn statement and stated that on 11th February 2012 he left home for Karatina to sell some fruits. At 4 p.m. he went to Iriani area where he met many young men who accused him of coming from Kirinyaga and a member of the proscribed vigilante groups. He gave out his identification card but they were not satisfied. They started hitting and cutting his head causing him to loss consciousness until 12th December 2012 at 4 pm. Under cross examination he stated that he did not know the complainant and her home and further that he did not know the person who was killed.

From the evidence herein and the submissions we have identified the following issues for determination:-

- a. *Whether the appellant was positively identified by the complainant.*
- b. *Whether the appellant's constitutional rights were violated.*
- c. *Whether the prosecution case against the appellant was proved beyond reasonable doubt.*

From the evidence tendered the attack took place at 3.00 p.m in broad day light. The attackers were with the complainant at the farm before taking her to her house where she was raped until she lost consciousness. It was her evidence that while at the farm the appellant and one Gathigua attacked her and that she saw their faces. She had seen the appellant before passing through the area.

PW1's evidence was corroborated by that of PW3 who testified that the appellant was always with Gathigua and that he was arrested together with the said Gathigua by the members of the public. It was PW3's evidence that he pleaded with the members of the public not to kill the appellant and that he had earlier been with the said Gathigua when the car of PW3 was vandalized.

It is therefore clear that the prosecution case against the appellant was based purely on circumstantial evidence and the principles upon which an accused person may be convicted on circumstantial evidence were stated in **Abanga alias Onyango -vs- Republic Criminal Appeal no.32 of 1990 (UR)** where the Judges of Appeal had this to say:-

“It is settled law that when a case rest entirely on circumstantial evidence, such evidence must satisfy that test: (i) the circumstances from which an inference of Guilt is sought to be drawn, must be cogently and firmly established (ii) those circumstances should be of a definite tendency unwillingly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain to complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

Applying the above principles we find that the complainant positively identified the appellant at the scene of the attack, she knew Gathigua and had seen the appellant before though she did not know his name. The appellant was arrested together with the said Gathigua who was killed by the members of the public and PW3 stated that the appellant was always with the said Gathigua. It is also clear that they were arrested together soon after the commission of the offence. We therefore find that the prosecution's case against the appellant was proved beyond reasonable doubt and that his conviction was safe.

On the issue of the violation of the appellant's constitutional rights to be taken to court within 24 hours of arrest, from the appellant's evidence he lost consciousness on 11th December 2012 upto 12th December 2012 and was in the hospital upto 15th December 2012 when he was taken to the police station for his finger prints to be taken before being arraigned in court on 17th December 2012.

Taking into account the state of the appellant, it was not possible for the same to be taken to court while he was still admitted and therefore we find that the delay was not inordinate nor unreasonable and would therefore dismiss this ground of appeal.

In the final analysis we find no merit of the appeal herein which we hereby dismiss.

Dated and signed on this day of 2015

J. WAKIAGA

J. NGAAH

JUDGE.

Delivered by Justice J. Ngaah on this 19th day of March 2015

J. NGAAH

JUDGE.

In the presence of:

----- for Appellant

----- for Respondent