



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

LESIT, KIMARU JJ

CRIMINAL APPEAL NO.329 OF 2012

(An Appeal arising out of the conviction and sentence of C. OLUOCH (MRS.) - PM delivered on 26th November 2012 in Kiambu CM. CR. Case No.1483 of 2011

JAMES NJUGUNA GITAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. James Njuguna Gitau, the Appellant herein was charged with two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 18th July 2011 at [particulars withheld] in Kiambu County, the Appellant jointly with another not before court, where armed with dangerous weapons namely a panga and a piece of wood robbed A J V and Z A C (hereinafter referred to as the complainants) of Kshs.100 and Kshs.36 respectively, and at or immediately or immediately after the time of such robbery either threatened to use violence or wounded the complainants. The Appellant was further charged with **rape** contrary to **Section 3(1)** as read with **Section 3(3)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully committed an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of the 1st complainant A J V. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted on the first count of **robbery with violence** and sentenced to serve life imprisonment. He was also convicted of the third count of **rape**. He was sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

2. In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of contradictory, uncorroborated and unreliable evidence. He took issue with the fact that he had been convicted on the two counts yet the prosecution had not established its case to the required standard of proof. He faulted the trial magistrate for shifting the burden of proof and thereby finding him guilty. He was aggrieved that essential witnesses were not called to testify in the case. He was of the view that if the said witnesses were called, the case would have been determined in his favour. He was of the view that the trial magistrate had relied on extraneous facts which had not been adduced by any witness to convict him. He was aggrieved that he had been convicted yet the trial magistrate had not considered his defence. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentences that were imposed on him.

3. During the hearing of the appeal, this court heard submission made by Mr. Wamwayi on behalf of the Appellant and the response to the submission made by Ms. Ngetich on behalf of the State. Mr. Wamwayi submitted that the 1st complainant's testimony in regard to the alleged robbery of Kshs.100/- was not corroborated by the evidence of the other complainant who was with her at the time the robbery is alleged to have been committed. Mr. Wamwayi doubted that the 1st complainant was indeed robbed. The basis of this doubt was that the 1st complainant never mentioned the fact that she was robbed of the said amount of Kshs.100/- when she met with PW3 and PW4. He was of the view that the subsequent report made to the police by the said complainant that she had been robbed was an afterthought. In his view, no robbery took place. As regard the conviction of rape, learned counsel submitted that no P3 form was produced in court to support the doctor's evidence that indeed the 1st complainant had been raped. He was of the opinion that in the absence of documentary evidence which supports the assertion by the doctor that the 1st complainant had been raped, the trial court fell in error when it convicted the Appellant. He urged the court to allow the appeal.

4. Ms. Ngetich for the State opposed the appeal. She submitted that the prosecution had adduced evidence which connected the Appellant with the offences of robbery with violence and rape. She submitted that the Appellant in the company of another, subdued the 1st complainant by threatening to harm her with a panga before robbing her of Kshs.100/- and thereafter sexually assaulting her. She stated that the 1st complainant's testimony was corroborated by the evidence of the other complainant who narrated how they were both accosted, threatened, robbed and subsequently sexually assaulted by the Appellant and his accomplice. Medical evidence established that indeed the 1st complainant had been raped. She submitted that after the sexual assault, the Appellant escorted the complainants to PW4's house where the Appellant was arrested and later escorted to the police. In effect, it was the prosecution's case that the Appellant was apprehended immediately after the robbery and the rape incident, and therefore there was no doubt as to his identity. It is on the basis of the above facts that the State urged the court to find the appeal without merit and dismiss it.

5. What are the facts of this case?

According to PW1 A J V and PW2 Z A C, on 18th July 2011 at about 2.00 a.m., they were accosted by two men as they were walking home after attending a birthday party. The two men ordered them to stop. They referred themselves respectively as corporal and sergeant. PW1 thought that the two men were police officers. They were ordered to sit down. PW1 and PW2 saw that both men were armed with pangas. They also had torches. They demanded that the two women surrender their phones. They also demanded to be given money. PW1 told them that she did not have any money or phone in her possession. The Appellant dragged PW1 into the nearby bush where he raped her. In a bid to prevent further sexual assault, PW1 offered the Appellant Kshs.100/-. She persuaded the Appellant and his accomplice that she would give them more money, a phone and electronic goods if they escorted her to her house. Instead of taking the Appellant and his accomplice to her house, PW1 took them to her sister's house. On reaching her sister's house, she raised alarm and was assisted by PW3 M W (PW1's sister) and PW4 J W (the husband) to first disarm the Appellant and subsequently apprehend him. The Appellant's accomplice made good his escape. The Appellant was escorted to Karuri Police Station where he was arrested and detained. PW1 was referred to Nairobi Women Hospital where he was examined by Dr. Thuo. The medical report prepared by Dr. Thuo which established that indeed PW1 had been sexually assaulted was produced on his behalf by PW6 Dr. Denis Wambua Mwangi. The panga and torch recovered from the Appellant were produced by PW5 IP. Patrick Macharia of Karuri Police Station into evidence. PW5 was the investigating officer in the case. After concluding his investigation, he formed the opinion that a case had indeed been made for the Appellant to be charged with the offences for which he was convicted.

6. When he was put on his defence, the Appellant denied that he had robbed or raped the 1st complainant. He testified that the 1st complainant was his girlfriend. It was his evidence that on the particular night, he had consensual sexual intercourse with the 1st complainant before they attended a birthday party and thereafter had drinks in a bar at a place called Mugumoini. He attributes his tribulation

to the fact that the 1st complainant's sister and her husband contrived the case with a view to framing him. It was his evidence that the subsequent charge brought against him was a creation of the 1st complainant's sister and husband.

7. This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** and **rape** contrary to **Section 3(1)** as read with **Section 3(3)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

8. We have re-evaluated the evidence adduced before the trial court. We have considered the grounds of appeal placed before us by the Appellant. We have also had the benefit of the submission made on behalf of the Appellant and on behalf of the State. On the first count of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**, it was the prosecution's case that the Appellant, in the company of another, accosted the 1st complainant before robbing her of Kshs.100/- and subsequently raped her. The evidence adduced in support of this charge was that of the 1st complainant. She testified that the Appellant with an accomplice ordered them to stop and sit down. She complied with the order because she thought the Appellant and his accomplice were police officers. The Appellant ordered her to surrender her phone. He also demanded to be given money. The 1st complainant saw that the Appellant was armed with a panga. She told the Appellant that she did not have any money nor the phone. It was then that the Appellant took her to a nearby bush where he removed her clothes before sexually assaulting her. The 1st complainant realized that if she did not act fast, she would again be sexually assaulted. She duped the Appellant by informing him that she would give him her phone which was in her house. She gave the Appellant Kshs.100/-. She also told the Appellant that she would give him her electronic equipment. The Appellant was persuaded. Instead of taking the Appellant and his accomplice to her house, she took them to her sister's house where she knew she would get help. Things went as planned. On reaching PW3 and PW4's house, the 1st complainant raised alarm. The Appellant was disarmed. His accomplice escaped. The panga and the torch that were in the Appellant's possession were produced as exhibits during the hearing of the case. The Appellant disputes this version of the 1st complainant's story. It was his defence that the 1st complainant was his girlfriend. He told the court that he had consensual sex with the 1st complainant. He denied robbing her.

9. Our re-evaluation of the evidence adduced by prosecution leads us to no other conclusion that indeed the prosecution established to the required standard of proof beyond any reasonable doubt that indeed the Appellant and his accomplice robbed the 1st complainant. The prosecution established that the Appellant, while in company of another, and while armed with a panga (which is a dangerous and offensive weapon within the meaning of **Section 295** of the **Penal Code**), threatened the 1st complainant with actual physical harm before robbing her of Kshs.100/-. The ingredients to establish the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** was proved. We find no merit with the Appellant's appeal in respect of his conviction on this count. His appeal on conviction is dismissed.

10. As regard the second count of rape, we also reject the Appellant's appeal. The prosecution established that the Appellant had sexual intercourse with the 1st complainant without her consent. Penetration was established by medical evidence. If indeed the Appellant had consensual sex with the 1st complainant, the 1st complainant would not have sustained injuries on her thighs as shown in the medical report. The assertion by the Appellant that since no P3 form was produced into evidence meant that no credible medical evidence was produced in evidence has no legal foundation. The medical report of Dr. Thuo which was produced into evidence was sufficient to establish penetration. There is no requirement in law that the medical evidence be exclusively contained in a P3 form. The Appellant's claim that he intimately knew the 1st complainant before the material day is not supported by evidence. The Appellant's appeal against conviction on **rape** contrary to **Section 3(1)** as read with **Section 3(3)** of the

Sexual Offences Act lacks merit and is hereby dismissed.

11. The Appeal against sentence similarly lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF MAY 2015

J. LESIIT

JUDGE

L. KIMARU

JUDGE