REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 4 OF 2012

JOSEPH MAINA NDOGO.....….....APPELLANT

VERSUS

REPUBLIC……...…….....……..…PROSECUTION

(Being an Appeal from the Conviction and Sentence by P.T. NDITIKA Senior Resident Magistrate Kerugoya in Criminal Case No. 1402 of 2005 on 8th August 2007)

J U D G M E N T

JOSEPH MAINA NDOGO the appellant was jointly charged with another with two counts of **Robbery with Violence Contrary to Section 296(2) of the Penal Code.** They both denied the charges. The case proceeded to full hearing and eventually the appellant was convicted while his co-accused was acquitted of the 1st count where the complainant was PW1. They were both acquitted of the 2nd count where PW2 was the complainant. The appellant being aggrieved by the judgment of the trial court filed this appeal citing the following grounds:-

1. ***The learned trial magistrate erred in points of law and facts in basing his conviction upon uncorroborated evidence of PW1 of identification in unfavourable conditions without buttressing the same with the first report.***
2. ***He erred in points of law and facts in basing his conviction on flawed identification parade without observing that there existed other evidence indicating that the complainant knew him before, thus violating chapter 46(c) and (d) of the Force Standing Orders.***
3. ***He failed in points of law and facts in failing to observe that he was detained for nineteen days in police custody, thereby violating his constitutional rights.***
4. ***His defence was not give due consideration as stipulated under Section 169 (1) of the Criminal Procedure Code.***
5. ***The prosecution failed to prove a prima facie case to the required standard.***

The case of the prosecution was that PW1 and PW3 were asleep in their house on the night of 30/10/2005 when they were attacked by people who broke and entered their house. They had torches and pangas. They took Shs.300/= from PW1. They again took Shs.1,000/= from the wardrobe. PW3 was left guarded in the bedroom while his wife (PW1) was raped in turns on the table. This ordeal of rape took each rapist about 3 minutes. The next day, a report was made to Sagana police station and PW1 was also taken to hospital. On 9/11/2005, she attended identification parades where she identified the appellant and his co-accused. PW3 was not able to identify any of the attackers.

PW5 on 8/11/2005 found the appellant and co-accused at Makutano. One of them was chewing miraa while the other was sleeping. The two persons were new in the area and he wanted to know who they were. He called people among them PW4. They took the appellant and his co-accused to Sagana police

station. A Clinical Officer (PW6) confirmed that PW1 had been assaulted and raped. He produced medical cards and P3 forms in respect of the patient who had been treated at various hospitals. (EXB5-8).

PW7 C.I. Joseph Njoroge conducted the identification parades in respect of the appellant and called 2 witnesses. The identification parades were conducted on 9/11/2005 and 11/11/2005. The first identification parade was in respect of the appellant's co-accused (Jenaro Gachori). The only witness who identified him was PW 1. The appellant did not appear on any identification parade that day. On 11/11/2005 an identification parade was carried out in respect of the appellant and the only witness was Pauline (PW2). She did identify the appellant. No other witness identified him.

The investigating officer (PW8) explained the reports and the arrest of the appellant. He admitted that the reportees (PW1 & PW2) did not give any names or descriptions of the attackers. All he said was that the reportees said they could identify the attackers if they saw them. The appellant in his sworn defence denied the charges. He said he was not described by the witnesses and he relied on the Occurrence Book of 30/11/2005. He was arrested in Makutano.

When the appeal came before us for hearing, the appellant presented us with written submissions. The gist of his submission is that the conditions at the scene were not favourable for a positive identification. He also cites contradictions in the evidence of PW1. The State through the learned State Counsel Mr. Sitati opposed the appeal. He submitted that the witnesses saw the appellant well and even identified him on identification parades. Secondly, there was sufficient light from the torches.

This is a first appeal and we are enjoined to re-consider and evaluate the evidence afresh and arrive at our own conclusion. We are also aware that we did not have the advantage of seeing or hearing the witnesses. This was the holding in the cases of :-

1. ***OKENO VS REPUBLIC [1972] EA 32***

2. ***JARED ONDANDA OGUYO VS REPUBLIC [1982-88] 1 KAR 1043***
3. ***GABRIEL KAMAU NJOROGE VS REPUBLIC [1982-88] 1 KAR 1134***

We have carefully considered the submissions by the appellant and the State plus the grounds of appeal. We have equally considered the evidence on record. The first issue to determine is whether the offence of robbery with violence was committed. Section 295 read together with Section 296(2) of the Penal Code defines what constitutes the offence of robbery with violence . The first ingredient is theft. The theft must be accompanied by either of the circumstances outlined in Section 296(2) of the Penal Code. PW1 and PW3 have confirmed that indeed Shs.300/= was taken from PW1. Both confirm that the attackers were more than one. PW1 was also assaulted and even raped. This confirms that actual violence was used. PW3 was threatened by a panga being placed on him as he was guarded. We are therefore satisfied that the offence of robbery with violence was committed.

The next critical issue to deal with is whether the appellant was identified as one of the robbers. As we deal with this issue we shall be merging all the grounds of appeal as they relate to the evidence of witnesses. We however wish to point out that since the 2nd count where PW2 was the complainant was dismissed, the evidence of PW2 is not of any relevance to the 1st count on which the appellant was convicted. This is because PW1 and PW2 were attacked at different places. The findings of the learned trial Magistrate on the strength of which the appellant was convicted are found at page 35 lines 8-25 where he stated:-

> ***"The 1st complainant did not know the 1st accused persons before. While in the house they had torches. It took sometime while raping her as she used to see them before she could positively identify them. Her evidence was corroborated by that of PW8 who conducted the parade. The torches they had and the duration taken to rape her is enough for her to have identified the 2nd accused. The 1st accused person did use force while robbing the complainant. They had pangas and axes. They also stole money and mobile phones. The accused in their defences did deny having committed the offence. Accused 2 relied on the O.B.***

of 30.10.2005 that he was not described. Though I do believe this in itself, I also believed that he was positively identified. He stated that he was not identified which is a lie.

The 1st accused stated that he was arrested as the in-charge had sworn to punish him. It will be noted that whether there were grudges or not the said offence is so serious that no fabrication can be done. The upshot I believe is to disbelieve the 2nd defence and convict the 2 accused person under Section 215 of the Criminal Procedure Code for count 1 and acquit accused 1 on the count".

He did find that both the appellant and his co-accused were involved in the robbery. He however went ahead to convict the appellant and acquit his co-accused. There is no reason given in his judgment for this. The evidence against the appellant is based on his identification by the witness (PW1) and the identification parade by PW8. PW1 in her evidence said she identified the appellant and his co-accused at identification parades. The evidence of PW8 who conducted the parade is that PW1 attended one parade only where she identified the appellant's co-accused. This is also confirmed by the identification parade forms produced as EXB9 at page 52. The learned trial Magistrate therefore erred in making a finding that PW8 who conducted the parade confirmed that PW1 had identified the appellant. And if at all any such identification parade was conducted in respect of the appellant where PW1 identified him, such evidence was not availed to the Court as its not borne by the record.

We are then left with the evidence of PW1 to consider. Can that evidence alone be sufficient to found a conviction? PW1 knew the appellant's co-accused prior to this incident. She did not however give his name to the police and that is how she was taken to an identification parade to identify him which ought not to have been the case. This witness did not give any description of the other attackers to the police. This is what she stated in cross-examination by the appellant at page 18 lines 21-28

"I had identified you as you had a mark. At the police station I stated that if I could see you I could identify you. I had seen you during the night. I did not describe you to the police."

Several times in cross-examination she repeated that she did not give any description to the police. The appellant severally requested for the Occurrence Book for 1/10/2005 and 30/10/2005 of Sagana Police Station. The said Occurrence Books(OBS) were never availed in Court inspite of the Court order for their production. The appellant in his defence relied on the said OBS. The learned trial Magistrate even made a finding them it in his judgment through he had not had an opportunity of seeing them. This was an error!

The issue of description in a case where visual identification is relied on is very important. In the case of ***SIMIYU & ANOTHER VS REPUBLIC [2005] 1 KLR 192*** the Court of Appeal stated the following on such evidence.

1. ***It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial Court's findings and conclusions.***
2. ***In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.***
3. ***The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity.***
4. ***In the present case, neither of the two courts below demonstrate any caution. Further, there was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error.***

If indeed PW1 had noted any special mark on the appellant, she should have described it to the police and/or recorded it in her statement. Her failure to do so meant that she was not sure of what she was telling the court. Her identification of the appellant in Court amounted to dock identification which is of no probative value. ***GABRIEL KAMAU NJOROGE VS REPUBLIC (Supra),*** the Court of Appeal had this to say of such an identification;

> ***"A dock identification is generally worthless and the Court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."***

We therefore find that the identification of the appellant amounted to dock identification which was not preceded by any identification parade. It could not therefore be relied upon. The arrest of the appellant and his co-accused was also questionable. PW5 arrested them because they were new in his area of operation. The appellant was sleeping while his co-accused was selling miraa. They were then taken to the police station. No one had complained against them. Identification parades were then conducted. What was the basis of these identification parades? We find none. And secondly the appellant was not identified on any of the identification parades.

Our finding is that the learned trial Magistrate failed to properly analyze the evidence before him thus arriving at erroneous findings. He had no reason for convicting the appellant and acquitting his co-accused over the same evidence. We find that the appeal has merit. We allow it and quash the conviction. The death sentence is set aside. The appellant is to be released forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KERUGOYA THIS 21ST DAY OF FEBRUARY 2014.

H.I. ONG'UDI

J U D G E

C.W. GITHUA

J U D G E

In the presence of:-

Mr Sitati for State

….....for appellant

Mbogo Court Clerk