



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 44 OF 2008

as consolidated with NO. 45 of 2008

LESIT, MAKAU JJ

BORU BALLA.....1ST APPELLANT

SHUKRI HUSSEIN.....2ND APPELLANT

V E R S U S

REPUBLICRESPONDENT

(An Appeal from original conviction and sentence In Principle Magistrate Court at Isiolo in Criminal Case No. 1400.2007 by Hon. Ms M. R. Gitonga SPM delivered on 27th March, 2008)

JUDGMENT

1. The two Appellants were jointly charged before the Senior Principal Magistrate's Isiolo with one count of robbery with violence contrary to section 296(2) of the Penal Code. The 1st Appellant faced a second count alone of rape contrary to section 3(1)(a), (c), as read with section 3(3) of the Sexual Offences Act and in the alternative with one count of indecent act with an adult contrary to section 11(6) of the Sexual Offences Act. After trial both Appellants were convicted in all counts facing them. Both of them were sentenced to death in the 1st count while the sentence against the 1st accused in the second count was held in abeyance.
2. Both Appellants were aggrieved by the conviction and sentence and therefore filed this appeal. When the appeal went before Hon. Emukule J. both appeals were summarily rejected under section 352(2) of the Criminal Procedure Code. Both Appellants appealed against the summary rejection of the Appeal by Hon. Emukule J. and in their judgment dated 31st October, 2013 the Court of Appeal allowed the Appeal by the Appellants and remitted the same for hearing before this court.
3. The Appellant filed supplementary grounds of appeal through their advocate Ms J Nelima. That Petition raises three grounds of Appeal as follows:
 - a. **That the learned trial judge erred in law and in fact in convicting the Appellant based on evidence of PW1, PW2, and PW3 which evidence was insufficient and contradictory in nature.**
 - b. **That the learned Judge erred in law and fact in failing to comply with the provisions of section 19 of the Oaths and Statutory Declaration Act while taking the evidence of PW3.**

- c. **That the learned magistrate erred in law and in fact in relying on the evidence of PW3 when the same was not properly received.**
- d. **That the learned trial judge erred in law and in fact in convicting the Appellant based on the evidence of identification of PW1 which was not free from error as the circumstances were not conducive for proper identification.**
- e. **That the learned trial judge erred in law and in fact in relying on the P3 form in convicting the Appellants when the same was not supported by the evidence of the prosecution witnesses.**
- f. **That the conviction of the Appellants was against the weight of evidence.**
- g. **That the ingredients of the offence of robbery with violence were not proved.**

4. The prosecution called 5 witnesses. The brief facts of the prosecution case were that at about 3 am on the 14th July, 2007, the complainant was sleeping in her bedroom with her 4 children aged between 6 years and 10 months with her lights on. She said she woke up to find a man holding her neck with a knife placed on her neck. The man had tied his head with a head scarf but as she struggled with him the head scarf fell off she was able to see him and recognize him. The complainant PW2 was raped by this man as three others walked around the house felling goods downstairs. PW3 a brother to the complainant aged 10 years and PW4 a sister to the complainant were also sleeping in the same house but in different rooms. They also saw the Appellants inside the house during the incident.
5. The 1st Appellant in his unsworn defence put forward an alibi. He said that on the material night he worked the whole day after which he went and slept with his wife. He said that he was arrested and taken to the Police Station where he was shown to the complainant and eventually charged with this offence. The 1st Appellant stated that the complainant did not mention his name anywhere in her first report to the police.
6. The 2nd Appellant denied the charge and in his defence dwelt on the events leading to his arrest. He said that he was walking home when he met with two people. Those two people took him to his house which they searched and recovered nothing. He was then taken to the Police Station and charged with this offence. The 2nd Appellant stated that he worked for the complainant as a watchman. He said that the complainant spent her time trying to seduce him as she was a young woman married to a man who was 80 years who was always travelling. He stated that he reported the complainant to her husband but that eventually he was sacked for alleged stealing. The 2nd Appellant alleged that the complainant brought the case against him at a time when the husband was away.
7. Ms Nelima argued this appeal on behalf of the Appellants. In this Judgment we shall consider the issues that she raised. Mr. Moses Mungai prosecution counsel urged the appeal on behalf of the state. He opposed the appeal.
8. We have carefully considered this appeal and have subjected the entire evidence adduced before the lower court to afresh analysis and evaluation while bearing in mind that we neither saw nor heard any of the witnesses. We have drawn our own conclusions by bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance for the same.
9. We are guided by the Court of Appeal decision in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic** Criminal Appeal No. 272 of 2005 as follows:-

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs. Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for that fact that the trial court has had the advantage of hearing and seeing the witnesses.”

10. Ms Nelima raised five issues for consideration in this appeal. We shall deal with each issue at a time. The first issue was whether or not the 2nd Appellant took a plea in the trial before the lower court. Ms Nelima referred to page 6 of the proceedings where the plea is recorded and submitted that there is no prove that the 2nd Appellant ever took a plea in this case.
11. Page 6 of the recorded appeal bears the record of plea taking by the lower court. The manner in which that plea was taken shows that it was only the 1st accused who took plea. The record shows as follows:

Accused 1: Count 1: it is not true

Count 2: It is not true

Accused 1 Count 2: It is not true

Accused 1 alternative count it is not true

Plea of not guilty. Hearing on 5.9.2007

Accused We pray for witness statement

Order Supply witness statement to accused 1 and 2.”

12. We have considered page 6 of the record of appeal where the plea is recorded and have come to the conclusion that there were errors in the recording of the plea. Considering that there were two persons charged with the 1st Count at the beginning the plea where the words “Accused 1” appeal would only make sense if it read count 1. Where count 1 and 2 follows that it would only make sense if it read 1st accused and 2nd accused. The rest of the record was correct. Our finding is that there was an error in the record as a result of which the words accused 2 did not appear against any of the counts as plead in the charge. It gives the impression that the 2nd accused did not plead to any charge and that is fatal to the proceeding in regard to the 2nd accused.
13. Ms Nelima raises two issues in regard to the evidence of the doctor. The 1st issue is a technical one that PW1 Elias Muhindini was a Clinical Officer. He produced the P3 form that were filled by one Mohammed Duba who he said was his colleague. It was Ms. Nelima’s submission that the requisite test which should have been applied before allowing PW1 to produce the P3 form on behalf of Mr. Mohammed was not applied.
14. Section 33 of the Evidence Act provides for admission of statements made by persons who cannot be called as witnesses and provides as follows:

“33. Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—“

15. The relevant provision to the matter at hand is sub section (b) of this section which relates to statement made in the cause of business which stipulates as follows:

“(b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;”

16. Before admitting the P3 forms in respect of PW2 and 3 the court should have enquired from PW1 where the maker of the two documents was in order to satisfy herself that the requirement set out under section 33 of the Evidence Act had been met. Under that section the only instance when PW1 would have been allowed to produce the P3 forms on behalf of the maker Mr. Mohamed Duba was for reason either he has become incapable of giving evidence or his attendance cannot be procured or that his attendance could not be procured without an amount of delay or expense which to the court appears to be unreasonable. The learned trial magistrate did not satisfy herself as to whether the maker of the P3 forms could not be availed to produce them before allowing PW1 to adduce them in court. That is an irregularity but we doubt that it has any fatal effect to the prosecution case as PW1 was a colleague of the maker and therefore qualified to adduce such evidence.
17. The other issue raised in regard to the evidence of PW1 was that there were contradictions in the two P3 forms filled in regard to injuries suffered by PW2 and 3 at the time of this incident. Without belaboring this point we do agree that there is an apparent error or mistake in the P3 forms for reason that whereas both witnesses were allegedly injured in respect of the same incident which occurred on the 13th of July, 2007 and were examined one day after the incident the doctor found the injuries suffered by PW2 were about 3 days old while those found on PW3 were 10 days old. We do think that if the doctor was honest about the age of the injuries he found on the two complainants then those injuries were totally unrelated to the incident of 13th July, 2007. These were injuries the complainant suffered three days and ten days respectively before the date of the incident. We have come to that conclusion in respect to PW3 nowhere in his evidence did he say that any one attacked him or confronted him or injured him during the incident. The only person who claimed that PW3 was injured was PW2 who claimed that the 1st Appellant pressed him on the chest with his knee. No such injury was found by the doctor when he examined PW3 it is therefore clear to us that there was untruth presented before the court in regard to the injuries and that the only explanation would be that PW2 lied regarding the injuries.
18. Ms Nelima raised other issues in regard to other contradictions in the evidence adduced before the court. Ms. Nelima raised issue with the fact that while PW3 said that he was in a room upstairs where he used to sleep PW4 said that PW3 was sleeping down stairs. Mr. Mungai for the state stated that the evidence of PW3 and 4 corroborated each other and was therefore credible.
19. We have examined the evidence of these witnesses and are very clear on our minds that PW3 contradicted himself in his own evidence on the one hand he said that he saw the 2nd Appellant carrying things from upstairs and taking them downstairs. He said that he was upstairs when he saw that and then changed and said in fact his room was down stairs next to the stairs and that from that position he saw two people in the sitting room whom he did not know. PW3 contradicted himself and at the end of his evidence it is not clear whether his room was upstairs or down stairs during the time of the incident. He however maintained that whatever he saw he was positioned at the door of his bedroom. Having found so he did not agree with Mr. Mungai that PW3 who contradicted himself could have corroborated any other evidence. Besides PW3 was a child of 10 years and therefore a child of tender years whose evidence required to be corroborated by other independent evidence. Such evidence cannot be used to corroborate other evidence.
20. The other issue raised was that of voire dire examination that the same was not carried out as required. Mr. Mungai on the other hand maintained that examination was carried out but the only mistake made was that the questions that were put to PW3 during that examination were not recorded.
21. Voire dire examination is an examination conducted by a trial court of a child witness to ascertain three things. One whether the child understands the meaning of oath; two whether the child understands the duty to tell the truth and thirdly whether he/she is possesses of sufficient knowledge to testify. These are explained in the leading case of **Muiruri vs Republic [1983]**

Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

22. We have examined the record of the proceedings. The learned trial magistrate carried out some examination of PW3 after which he made a short ruling stating that she was satisfied that the witness was intelligent and even though a child she could give evidence on oath. The questions that were put to the child were not recorded as is required that would assist the court to assess whether based on the question put the child and the answers given that the learned trial magistrate came to the correct conclusion. There was a procedural flaw in the record; secondly the learned trial magistrate misdirected herself when she set out to satisfy herself regarding only the intelligent of the child witness. The learned trial magistrate should have gone further to examine the child in order to form an opinion whether the child understood the duty of speaking the truth and the nature of an oath. All 3 considerations had to be considered in order to make a conclusive opinion regarding the weight to be given to the evidence of the child and whether or not to receive the evidence and if so whether such evidence would be taken on oath or not. All these were missing. It means that the evidence of PW3 is not of any value as the tests that needed to be applied in order to make the evidence safe were overlooked.
23. The last issue raised by Ms Nelima was that of identification. In the learned counsel's submissions she contended that PW2 could not have been able to see the 2nd accused at the time the 1st Appellant was allegedly raping her because at that time she must have been in distress. Ms Nelima submitted that the nature of the light in the house was not inquired into. Counsel also submitted that the complainant did not give any names of her attacker's either to PW3 and 4 or to the police. Counsel relied on two cases **Mbaabu and Rungua vs Republic CA No. 83 of 2001** in support of that contention. We have considered the cited case.
24. Mr. Mungai for the state contended that both the nature and the intensity of the light was inquired into and that it was not an issue. Regarding the complainant's ability to identify her attackers Mr. Mungai argued that the complainant was able to see and identify her attackers before she was raped. Mr. Mungai submitted that the act of rape followed after a sequence of events. Counsel submitted that the incident took 20 minutes which was long enough to identify the attackers. He also submitted that PW2 told the police that she was able to identify her attackers.
25. The issue of identification is important regarding the lighting conditions which the complainant and PW4 said that there were electric lights on inside the bedroom of the complainant. However the nature of the lights were not described. The complainant testified that she kept the lights on because she had young children she did not however state whether the light was from clear bulbs or whether they could have been deemed or something. The importance of this factor is due to the evidence of PW4 who testified that from her room which was next to that of the complainant she was able to see inside the complainant's room. PW4 stated she identified 2 people as the two Appellants and a third person who was armed with a gun inside the complainant's room.
26. We have already found that the complainant did not tell the truth regarding injuries she alleged to have suffered and those which were suffered by PW3 her credibility is questionable. We noted that details she gave regarding the events inside her bedroom were contradicted by PW4. For instance while the complainant said she woke up to find a man holding her neck with a knife the only other person in her room was the 2nd Appellant who she says was busy carrying out household goods from her house. She did not see any person with a gun. PW2 said that she saw 3 other people walking around the house as the 1st Accused raped her. PW4 on the other hand just

- saw people in the room and they were 3 and apart from the 1st and 2nd Appellant whom she recognized the other one had a gun. She did not see them doing anything they were just standing.
27. Considering the evidence of PW2 and 4 there are glaring contradictions in the evidence which in our view amounts to inconsistency. We find these inconsistencies could not be resolved. We have come to the conclusion that there is a likelihood that the case against the 1st and 2nd Appellants could have been trumped up charges, the inconsistencies in the evidence, the obvious exaggerations and dishonesty all create a doubt as to whether the incident took place as alleged. The 2nd Appellant's defense that the complainant had a grudge against him because of an attempt to seduce him cannot be all together overruled especially given the fact that the case appears to be a fabrication. The 2nd Appellant cross examined the complainant at length regarding the seduction.
28. We noted that the report given to PW5 by the complainant was that PW3 was injured by the 1st Appellant as the 1st Appellant struggled with the complainant before raping her. At the same time PW2 who is supposed to have been injured by the 1st Appellant during the incident said clearly that the only person he saw and recognized was the 2nd Appellant. In addition to all these the doctor found that the complainant had bacterial infection in the genitals after genital examination and lab tests. It could have been very easy to prove whether the 1st Appellant had raped the complainant by having him tested. According to the Investigating Officer he took the 1st Appellant to the doctor for examination. The results of the examination were never produced in court. The only explanation for that is that producing them in court would have tended to be adverse against the prosecution case. That creates further doubt whether the 1st Appellant raped the complainant as she alleged.
29. We have come to the conclusion that the prosecution case was full of contradiction and inconsistencies which could not be resolved within the evidence. We find that the prosecution had not proved the case against the Appellant to the required standard accordingly we find merit in both Appellants appeals. Accordingly we allow these appeals and quash the convictions and set aside the sentences. The Appellants should be set at liberty forthwith unless they are otherwise law fully held.

DATED AT MERU THIS 19TH JUNE 2014

J. LESIIT

J. A. MAKAU

JUDGE.

JUDGE.