



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CRIMINAL APPEAL NO. 327 & 328 OF 2012

JOSEPH KIMUYU KING'OO.....1ST APPELLANT

CORNELIUS MULILI MBUI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal No. 939 of 2009 of the Chief Magistrate's Court at Makadara before Hon. T. Okello, Senior Principal Magistrate on 18th December, 2012).

JUDGMENT

These appeals are consolidated. The two appellants were charged jointly and severally with offences of robbery with violence contrary to Section 296 (2) of the Penal Code, attempted robbery with violence contrary to Section 297 (2) of the Penal Code, gang rape contrary to Section 10 of the Sexual Offences Act and being in possession of an imitation of a firearm contrary to Section 89 (1) of the Penal Code as read with Section 34 (1) and (2) of the Firearms Act Cap 114 Laws of Kenya.

They denied the offences but after a full trial both appellants were found guilty and convicted of the first count of robbery with violence contrary to Section 296 (2) of the Penal Code. The 2nd appellant was also convicted of gang rape as set out in count 3 and robbery with violence as set out in counts 4 and 6.

The first appellant was also found guilty and convicted in count 5 of the offence of attempted robbery with violence contrary to Section 297 (2) of the Penal Code. He was however acquitted of gang rape as set out in count 2 and being in possession of an imitation of a fire arm as set out in count 7.

The learned trial magistrate imposed a death sentence in respect of counts 1,4,5 and 6; 15 years imprisonment against the 2nd appellant in respect of count 3. Having imposed the death sentence as set out above in count 1 the sentences relating to count 4, 5 and 6 were ordered to be held in abeyance. We add that the sentence of 15 years imprisonment imposed upon the 2nd appellant with respect to count 3 should also have been held in abeyance.

The evidence adduced before the learned trial magistrate related to a spate of robberies visited upon the complainants set out in counts I, 4, 5 and 6. The gang rape charge in counts 1 and 2 related to the complainant in the robbery charge in count 1.

This case was first heard by Hon. M. Muya who recorded evidence from 9 prosecution witnesses and then Hon. T. Okelo who took over the matter after his predecessor was promoted. In compliance with Section 200 of the Criminal Procedure Code, both appellants exercised their rights to continue their case from where Hon. Muya had stopped. Hon Okelo then recorded the evidence of P.W. 10 and finding that a prima facie case had been established against both appellant's proceeded to take their respective defences.

P.W. 1 had stopped her car at Pipe line Estate along Outering road at about 7 p.m. waiting for her brother in law. Her children were in the car. As she waited three people appeared from behind all wearing jackets. Two had guns and one held a Maasai sword. She also noticed that two were wearing caps and the 3rd a marvin. However, their faces were not concealed. It was her evidence that she was able to see these people with the aid of moonlight and lights coming from other motor vehicles.

These people entered her car and forced her to the back seat, pressed her head and covered her with a jacket. Her car was taken over and driven along a muram road while the attackers demanded money. She was robbed of her personal effects set out in count I of the charge sheet. She told the court that it was the 2nd appellant who drove the car while the 1st appellant sat on the passenger seat. The 3rd man who was not in court sat with her at the back seat.

As he drove the 2nd appellant would look back and she was able to see him. She was told to call someone to send the robbers money and they also threatened to sell her car. The car was driven to some dark place and switched off where after the 2nd appellant ordered her out leaving the 1st appellant in the car with the children. The 2nd appellant and another led her to some place with a heap of soil and demanded to have sex with her. She told the 2nd appellant that she was HIV positive but he went ahead and raped her while holding a sword. The other person who was not charged also raped her. They returned to the car and ransacked it.

When they left, P.W. 1 drove to the road and then proceeded to Mlolongo Police Station where she made a report. She then called her husband who came and took her to Nairobi Women hospital where she was treated. The suspects were arrested and at the first identification parade P.W. 1 identified the 1st appellant, and later at another identification parade identified the 2nd appellant. The ordeal took about 40 minutes and she saw the robbers well. They talked as they drove in the car and when they walked together to the scene where she was raped. At the scene where she was raped there was moonlight and lights from a quarry.

P.W. 2 Robert Muteti Mutambuki was the complainant in the 6th count. He was also robbed by people who were armed with a pistol. The time of the robbery was 6.30 p.m. and he was able to identify the 2nd appellant as the person who robbed him as he was very near.

P.W. 3 was a passenger in a motor vehicle driven by Aggrey Sule P.W. 5 when they were accosted by two people who attempted to rob P.W. 5 of his motor vehicle. In the process P.W. 3 was pulled out of the car. P.W. 5 also managed to leave the car but returned to get his phone. He saw the person who was wearing a red pullover because there was light from the car when the door was opened. There was also light from the petrol station. He identified this man as the 1st appellant. P.W. 5 then drove to Mlolongo Police Station and after a short while P.W. 3 arrived in company of the police and the 1st appellant who had been arrested.

P.W. 4 Philip Munywoki Kilonzo is the complainant in count 4. On the date of the robbery at about 10.00 P.M. he slowed down to answer a phone call when five people approached and demanded money and phone. One had a gun. He gave them money and phone and then ran out of the car. He later returned for his motor vehicle and drove home. On the following day he made a report at Mlolongo Police Station.

About three weeks thereafter he was called by the police and informed that a suspect had been arrested.

He went to Mlolongo Police Station and managed to identify the 2nd appellant at an identification parade. When he reported at the Police Station earlier, he gave the description of the attacker, facial outlook and stature. The 2nd appellant was arrested by P.W. 6 upon information provided by an informer. He was then alleged to have led the police to some bushes where a sword and a toy pistol were recovered. The identification parades were arranged and conducted by P.W. 8. who noted that the 2nd appellant refused to take part in the parade where P.W. 2 was the witness.

Dr. Ambrose Nyangau worked at Nairobi Women hospital and gave evidence on behalf of Dr. Thuo who had examined P.W. 1 following a report of gang rape. He knew Dr. Thuo and had worked with him for approximately one year. He was familiar with his signature and proceeded to produce the report relating to the complainant. The report confirmed sexual assault.

In their respective defenses the 1st appellant said he was a businessman selling ground nuts, cigarettes and sodas in a kiosk. He denied committing the offences. The 2nd appellant on the other hand said he was employed at a pool table business and denied committing the offences. The learned trial magistrate was persuaded that the offences were proved against the two appellants to warrant the convictions.

In these appeals the two appellants have filed identical grounds of appeal. They have faulted the learned trial magistrate for relying on the evidence of visual identification which was not free from error due to difficult circumstances that prevailed during the ordeal. They also faulted the learned trial magistrate for relying on the evidence of identification parades which was conducted in breach of force standing orders. Further that crucial witnesses did not testify thereby contravening Section 150 of the Criminal Procedure Code. Finally that their defences were rejected without proper reasons.

As the first appellate court we have examined the record and evaluated the evidence with a view to arriving at independent conclusions. The witnesses who were victims of robbery remained firm under searching cross examination by the appellants. P.W. 1 was alert enough to notice the dressing of the three assailants who ambushed and entered her car. They communicated when they asked for money and also asked her to call someone to send them money.

When she was removed from the car and led to where she was raped she communicated with her assailants and told them she was HIV positive. At the scene there was moonlight and lights from the quarry. The act of rape though distressing involves close proximity. She then walked back with her assailants to her car. At the identification parades she was able to pick the 1st and 2nd appellants. We are persuaded that the length of time taken with the assailants and the circumstance prevailing aided her to positively identify the two appellants.

The other two complainants P.W. 4 and P.W. 5 also stood firm in their respective testimonies. Although the attacks upon them were sudden there was light from the petrol station and the streets that aided them to identify the two appellants. They had no reason to implicate the two appellants if they were not involved in the robberies. It is not a coincidence that P.W. 1, P.W.4 and P.W. 5, all robbed at different times, were able to identify the same people. Their respective defences were mere denials. The two appellants must have been involved in those offences and we are not surprised that they were all within the same vicinity.

In all the robbery offences leveled against them there were more than one person. The appellants and all their colleagues were armed with dangerous weapons with which they threatened their victims. The offences under Section 296 (2) and 297 (2) of the Penal Code were proved beyond any reasonable doubt. The offence of gang rape against the 2nd appellant was also proved against him going by the evidence of P.W. 1 and the medical evidence of P.W. 7.

We are persuaded that the convictions were well founded and that the sentences were legal. These appeals are therefore dismissed.

SIGNED DATED and DELIVERED in court this **28th** day of July, **2014**.

MBOGHOLI MSAGHA

JUDGE

L. ACHODE

JUDGE 0