



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 149 & 150 of 2010

(APPEAL FROM ORIGINAL CONVICTION AND SENTENCE FROM C.M'S CRIMINAL CASE NO.125 OF 2009

1. FREDRICK OTONDI OMOLLO.....1ST APPELLANT

2. JACOB ODHIAMBO OWUONDA.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

The prosecution case was that on 8/2/09 at about 9.45 p.m. L.A (PW1) alighted from Eldoret Express bus which was coming from Nairobi and begun to walk home. Two strange men with panga and rungu came to her and demanded money and phone. She had a handbag and a travelling bag. She gave the bags to them. They held her. One had put a panga on her neck and threatened to kill her if she screamed. She pleaded with them to leave her but they instead dragged her into the bush. The night had moonlight. In the bush they took out from the bag her Nokia phone and charger, motorolla phone and charger, perfumes, jeans, spray, cream, toothpaste, hair-clip, black shoes and wallet that had Kshs.7000/=. One of the men ran into the bush with the items. She was left with the other who ordered her to remove her trousers. She complied and was raped by him. He followed the first man. She was left with her empty bags. She went home and found her mother G.M (PW2) to whom she narrated the incident. They were joined by neighbours who helped comb the bush but could not trace the attackers. She reported to Ahero and Kisumu Police Stations. She went to hospital where she was treated and discharged.

Next morning she reported to her local chief. She returned to Nairobi. On 12/2/09 Assistant Chief SOLOMON ODHIAMBO (PW4), who was with the chief when PW1 made the report, was led by an informer to arrest the 1st appellant who comes from his area. He escaped but was later re-arrested. PW3 found the 1st appellant with PW1's pair of jeans (Exh.2).

JUSTUS OBUKA ONDOLA (PW3) is a farmer and had since October, 2008 employed the 1st appellant to guard his home and house. On 13/2/09 he was in Awendo wherein he received a report that police were looking for the 1st appellant. He returned home but found the 1st appellant was missing. He opened into the house and found strange items. They were hair spray (Exhibit 6), fair lovely lovely cream (Exhibit 7), hair clip (Exhibit 3) and Nokia charger (Exhibit 4). He called the Assistant Chief Lawrence Onyango Owano (PW5) who took them to police. He found out the items belonged to PW1 who had been robbed of them and raped. On 1/3/09 PW5 arrested the 1st Appellant who led him to arrest the 2nd appellant.

P.C. FLORENCE KOECH (PW6) of Kisumu Police Station investigated the case. When the Appellants

were handed to her she arranged an identification parade which was conducted on 9/3/09 by Inspector EVANS MWANGI (PW7) of the station. PW1 picked the appellants in the parade following which they were charged with robbery with violence c/s 296(2) of the Penal Code. The 1st appellant was charged with handling suspected stolen property c/s 322(2) of the Penal code in the alternative, and in count 2 with rape c/s 3(1) and 3(3) of the Sexual Offences Act No.3 of 2006. In the alternative, he was charged with indecent assault c/s 11(6) of the Sexual Offences Act No.3 of 2006.

Each appellant made sworn defence and did not call witnesses. The 1st appellant denied that he was working for PW4, or that he was found with the items. He denied taking part in the robbery or rape. He further denied leading to the arrest of the 2nd appellant. The 2nd appellant denied that he was in the incident.

The trial court considered the evidence and reached the conclusion that the prosecution had proved the charges in counts 1 and 2 beyond any reasonable doubt. The appellants were jointly convicted and sentenced to death in count 1. In count 2, the 1st appellant was sentenced to 12 years in jail. They were aggrieved by the conviction and sentence and each appealed. The appeals were consolidated.

The appellants attacked the trial court's finding that each had been positively identified during the attack. They contended that the circumstances for accurate and positive identification did not exist. It was complained that PW1, a single identifying witness, had not described her attackers during her first report to the police to enable their arrest. The other complaint was that the evidence of recent possession relied upon to convict the 1st appellant was insufficient. Lastly, it was their contention that the defence sworn evidence had not been considered by the trial court.

MR. MEROKA for the state submitted that there was ample evidence on which the court convicted the appellants on the charges; that PW1 had positively identified the appellants during the attack and had picked each in a subsequent identification parade held. In relation to the 1st appellant, counsel submitted that the identification had been further confirmed by PW1's robbed goods being found in his possession soon thereafter.

We note that on a first appeal from a conviction from a magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its decision thereon (KARIUKI KARANJA .V. REPUBLIC [1986] KLR 190). Secondly, PW1 was a single identifying witness. The court was required to receive the evidence of identification with the greatest care particularly where the circumstances were difficult and did not favour accurate identification. Now that PW1 was a single identifying witness great circumspection and scrutiny of that evidence was required, and ultimately what was needed was other evidence, either direct or circumstantial, pointing to the guilt of the appellants from which the court could reasonably conclude that the identification was accurate and free from the possibility of error. (ODHIAMBO .V. REPUBLIC [2002] KLR 241).

From the judgment of the learned magistrate it is clear that he was aware of the danger of convicting on the evidence of a single identification witness and made reference to the decided cases of RORIA .V. REPUBLIC [1967] E.A. 588 and REPUBLIC .V. TURNBULL[1967] 3 ALL ER 549. Ultimately, he found that PW1 had positively identified the appellants.

We have anxiously considered PW1's evidence. She was alone at night and was suddenly attacked by two strange men who had a panga and rungu. They threatened to kill her and dragged her into the bush where one of them raped her. The circumstances were certainly difficult. PW1 must have feared for her life. The trial court made no reference to the fact that PW1 was faced with a difficult situation. She stated that there was full moon and that she clearly saw her attackers whom she said were the appellants. From the record PW1 was confronted on the road and then dragged into the bush where she was left with the 1st appellant who raped while the 2nd appellant had disappeared. The incident did not appear to have taken long as she was co-operative, as it were. She was not asked whether her view was still clear in the bush.

PW1 was not there when either appellant were arrested. She was called to identify them after the

arrest. She stated that in the attack the 1st appellant had akala shoes and beige jacket while the 2nd appellant was dressed in black, including black marvin. The men had shaggy hair, were slender and tall. Her testimony was that she described the attackers to area chief and to police. PW4 and PW5 were assistant chiefs who said they were with the area chief when PW1 made the report. PW4 stated that PW1 described the attackers to him which led him to look for the appellants. PW5 testified that PW1 told him that the attacker who had raped her had rasta and was tall. He knew the 1st appellant to have rasta hair which he had recently shaved. PW1 talked of the attackers having had shaggy hair, but did not make reference to rasta hair. In any case, if the 1st appellant shaved his rasta hair after the attack then such hair was not the reason for having being picked on the identification parade. When the 1st appellant cross-examined PW1, she stated that she told the police that she described him to the police to be abit tall, taller than the other attacker. She stated that she was told that in all three persons had been arrested in connection with the attack. Who was the third person? Why was he arrested? Did he fit the description she gave?

PW5 testified that he had two suspects before he arrested the 1st appellant. Who were they and what became of them? Were they arrested because of the descriptions given by PW1?

It is apparent that the totality of the prosecution evidence did not exclude the possibility of error or mistake in PW1's identification testimony.

That left the evidence of recent possession of PW1's goods. The 2nd appellant was not found with any such 8000/=, and, without positive identification, he was entitled to an acquittal on the charge of robbery with violence c/s 296(2) of the Penal Code in count 1.

The evidence of recent possession came from PW3, PW4 and PW5. PW3 stated that he had employed the 1st appellant who was taking care of his house. He had gone to Awendo and while there he learned that the police were looking for the appellant. He returned home. The appellant was not at home. He checked the house and found strange items which turned out to belong to PW1. They were exhibits 3, 6 and 7. PW5 testified that PW3 came to tell him about the items and the two went together to find the items in the house. The items were in PW3's bedroom.

In the sense that PW1's recently stolen goods were recovered in PW3's house in his bedroom made him a suspect. He blamed the 1st appellant for the goods but did not see him put the items there. The appellant denied having the items. The prosecution witnesses did not say that they knew the appellant to work for PW3. There was need for material corroboration of PW3's evidence against the appellant. The court did not look for it and none was available (NGUKU .V. REPUBLIC [1985] KLR 412).

PW4 stated that he was led by one JACK ABONDO to find the 2nd appellant with PW1's jeans trousers. It was at night. The appellant dropped a paper bag on seeking him and ran away. The trousers were in the paper bag. PW4 used a torch light to identify the appellant as he ran away. There was no violence regarding whether the light fell on PW1's face. JACK ABONDO was a material witness whom the prosecution inexplicably did not call to testify. The usual presumption is that had JACK ABONDO been called he would have given evidence adverse to the prosecution.

Our own consideration and evaluation of all the evidence shows that the prosecution did not call sufficient and doubtless evidence to connect the 2nd appellant with the attack.

The result is that the appeal is allowed. The conviction against each appellant is quashed and sentence set aside. Each appellant is ordered to be released forthwith unless he is otherwise being lawfully held.

Dated, signed and delivered this 14th day of May 2013

A. O. MUCHELULE

H. K. CHEMITEI

JUDGE

JUDGE