



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 149 OF 2011
DUNCAN GICHUHI MWATURI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Nakuru C.M.CR.C. NO.6058 of 2011 by Hon. D. K. Mikoyani, S.R.M. dated 27th June, 2011)

JUDGMENT

1. The appellant was charged jointly with other on two (2) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He was charged with a third count (count 111) of **rape** contrary to **Section 3(a)(b) Sexual Offences Act No.3 of 2006** and an alternative charge of **indecent act with an adult** contrary to **Section 11(a)** of the **Sexual Offences Act No.3 of 2006**.
2. The appellant was convicted on count 1 of **robbery with violence** and was sentenced to death.
3. He was also convicted on count 11 and count 111 and the sentences were held in abeyance.
4. The appellant being dissatisfied with the decision of Hon. D. K. Mikoyan, Senior Resident Magistrate, Nakuru preferred this appeal and listed the following grounds of appeal in his memorandum of appeal:

A. Grounds of appeal

(i) That the trial magistrate faulted in both a matter of law and failed when he maliciously based my conviction on the purposive evidence of recognition yet the same was manufactured based on a mere allegation of mistaken identity purely framed by prosecution against him.

(ii) That the trial learned magistrate erred in a matter of law and fact when he erroneously based the conviction on the purported evidence of recognition by identification yet the same was not proved beyond all reasonable doubts as required by the law of the land.

(iii) That the trial magistrate faulted both in a matter of the law and failed when he imposed a blanket and discriminatory judgment which mounted discouragement of justice given to the fact that the nature of the offence facing him was a serious offence.

(iv) That the trial learned magistrate finally faulted both in a matter of the law and fact when he erroneously objected his defence without cogent reasons proved and provided by Section 169(1) of the C.P.C. yet the same was remarkably comprehensive in costing considerable doubt to the strength of the prosecution case.

B. Supplementary grounds of appeal:

- i) That the learned trial magistrate erred in both matter of law and facts in relying upon insufficient prosecution evidence which had no nexus to the appellant herein.
- ii) That the learned trial magistrate erred in both matters of law and facts in convicting the appellant in reliance of contradictory and inconsistent prosecution evidence.
- iii) That the learned trial magistrate erred in matters of law and facts in convicting the appellant in reliance of poorly investigated prosecution case.
- iv) That the learned trial magistrate erred in matters of law and facts in disregarding the appellant's defence without giving sufficient reasons as the law demands.
- v) That the trial magistrate erred in both matter of law and facts when he convicted the appellant by relying on the evidence of P.W.2 by stating that she was raped by appellant and his co-accused vide judgment page 6 lines 8, 9, 10 and 11 with having the knowledge of P.W.2 vide proceedings page 63 lines 0 and 11 respectively.
- vi) That the learned trial magistrate gravely erred in law and facts by failing to consider on the appellant request of being served with the O.B. book of 13/10/2009 which he requested on 8/6/2010 to help him during the trial in the law court but the trial magistrate did not consider on the matter of consideration.
- vii) That the learned trial magistrate erred in both matter of law and facts in the face of identification that was considered on the evidence of P.W.1 and P.W.2 that they both identified the appellant with having knowledge that the police statement of P.W.2 indicates that she identified the appellant by relying on a scar on the right cheek vide page 8 lines 23 and 24 while the evidence of P.W.1 indicates that during the time of robbery, the robber had a cap and fear of his face vide page 5 lines 9 and 10 of the statements from police.
- viii) That the learned trial magistrate gravely erred in both matters of law and fact when he based on the evidence of recovered exhibits from Stephen Kioni's residence with having reasons that, there was no any recent and recovery of exhibits that were recovered in the possession of the appellant as per the evidence of P.W.5 who is the arresting officer, vide page 51 lines 11, 12 and 13, lines 21, 22 also vide page 53, lines 20, 21, 22 and also page 54 lines 1, 2 and 3.

C. Amended grounds of appeal

- i. That the learned trial magistrate erred in both law and facts and misdirected himself by basing my conviction on the purported evidence of P.W.1 and P.W.2 that of visual recognition even by name for many years, failing to consider adequately in a case of this nature, evidence of the first report given to the police was crucial as to establish the truth of the matter, whereas no descriptive identity of the assailants was given to police upon report as they indicated "unknown thugs" at Elburgon police station on 13/10/2009, though the prosecution failed to avail the O.B. report from the above stated police station of the same date as per my application vide the coram dated 8/6/2010. The same report was made at Njoro police station on the same date. There was no supply of the O.B. report made by P.W.2 and P.W.3 of Elburgon Police station in support of my arguments.
- ii. That the learned trial magistrate erred in both law and by relying on the evidence of identification by P.W.1 and P.W.1 without first of all excluding the possibility for the existence of an error or mistake on the part of P.W.1 and P.W.2 more so in view of the prevailing circumstances at the scene of crime by the time of attack.
- iii. That P.W.1 and P.W.2 were not trustworthy witnesses if their evidence is viewed in the light of ground (1) above coupled with the fact that their evidence is inconsistent and contradictory as proved by their former statements to the police.

- iv. That my defence statement vis a vis the prosecution evidence was not properly considered taking into account that my arrest was not satisfactory.

D. Further supplementary grounds of appeal

- i. That the learned trial magistrate erred in law and fact in convicting the appellant herein of the offence of robbery with violence relying on the uncorroborated evidence of P.W.1 and P.W.2 who are man and wife on their knowledge of the appellant herein before the offence was committed.
- ii. That the learned trial magistrate erred in law and fact in relying on the uncorroborated evidence of P.W.1 and P.W.2 that they knew the appellant herein before the offence was committed while disregarding the request of the appellant that the O.B report be produced in court.
- iii. That the learned trial magistrate erred in fact and law in convicting the appellant herein of the offence of rape ignoring the fact that both the P.3 and the medical report did not show any indication that the crime of rape was committed.
- iv. That the learned trial magistrate erred in law and fact in failing to consider the evidence of P.W.4, No.54197 Sgt. George Owuor, given on 5/4/2010 that there was one suspect by the name George Kabage Ndungu who may have been involved in the rape encounter.
- v. That the learned trial magistrate erred in law and fact in convicting the appellant without taking into consideration the evidence of the investigating officer as the investigating officer in this case clearly stated that he did not investigate the 1st accused person.
- vi. That the learned trial magistrate erred in both law and fact by ignoring the fact that P.W.2's clothing was not presented for examination by a government analyst and not produced as exhibits in court to corroborate the charge of rape.

5. At the hearing of the appeal, counsel for the appellant and Prosecuting Counsel for the State, both made oral submissions.

6. Upon consideration of the submissions made by both counsel, we find the following issues for determination:

- i. Identification – robbery and rape
- ii. Recent possession/constructive possession
- iii. Rape
- iv. Sentence.

7. This court being the first appellate court, it is incumbent upon this court to re-assess and re-evaluate the evidence and arrive at an independent conclusion. We are guided by the case of **Okeno V. Republic** (1972) E.A. 32.
8. The first issue relates to identification. The incident occurred at night and the test for identification under unfavourable conditions and circumstances is set down in the renowned case of **Republic V. Turnbull & others** [1976] 3 All E.R. 549.
9. On sufficiency of lighting, P.W.1 and P.W.2 testified that there were three (3) sources of lighting. The first was the gate security lights where they were accosted by the robbers.
10. The second source of lighting was from the car head lights which were used to examine the ATM cards.
11. The third source of light was the car cabin light which the appellant and his accomplice (2nd accused) used to count their spoils, the proceeds of the robbery.
12. The three sources of light enabled P.W.1 and P.W.2 to see and recognize the appellant.
13. On proximity and observation, P.W.1 and P.W.2 stated in evidence that they were driven around by the appellant for one (1) hour and the duration of the robbery was from 9.00p.m. to 5.00.a.m.
14. The two witnesses were seated in the back seat of the vehicle behind the appellant who was the driver and that he commandeered the vehicle throughout the robbery incident.
15. The two witnesses went further to state in their testimonies that they had previously and on many occasions encountered the appellant at the Njoro matatu stage where the appellant worked as a tout.
16. We find after re-evaluating the evidence that there was no inconsistency or contradictions in the

- evidence of P.W.1 and P.W.2.
17. We find that under the circumstances, the conditions were conducive and that P.W.1 and P.W.2 were able to see and observe the appellant for a period of time and were able to positively identify and recognize the appellant.
 18. The next issue relates to recent/constructive possession. The evidence of Sgt. George Owuor (P.W.5) confirms the recovery of the Co-operative Bank ATM card in possession of the appellant's 2nd co-accused within a month after the robbery incident.
 19. The appellant's 2nd co-accused was found in possession of the stolen card and had also been positively identified by P.W.1 and P.W.2 as one of the robbers and he was also convicted for the offence of robbery with violence committed jointly with the appellant.
 20. The doctrine of recent possession applied to both the appellant and the 2nd co-accused notwithstanding the fact that the appellant was not found in actual or direct possession of the stolen ATM card and the motor vehicle.
 21. We are persuaded by the case of **John Kioko Mwau V. Republic**, H.C.CR.A. No.32 of 2010 where Asike, J (as he then was) observed:

“.....constructive possession is where a person is not in direct or physical possession of the stolen goods, non-the-less he retains control over it wherever it is.....”

22. We concur with the learned judge's observation that the doctrine of recent possession would still apply even though the appellant did not have actual or physical possession of the ATM card he still retained possession by way of remote control.
23. The next issue relates to the raping of P.W.2. Her evidence was that the appellant and his 2nd co-accused were livid due to the fact that her husband (P.W.1) had provided them with a wrong PIN number for the K-Rep Bank ATM Card, thus leading to its capture.
24. It was P.W.2's testimony that it was the appellant and the 2nd co-accused who raped her into submitting the correct PIN number for her Cooperative Bank AMT card.
25. The evidence of Dr. Onchere (P.W.6) was that upon examining P.W.2, he did not find any evidence to support the fact that the witness, P.W.2 had been raped.
26. The trial magistrate made an observation that:

“..... Having so examined H's (P.W.2) evidence, noting her demeanour and this been (sic) sole evidence of rape, I am satisfied that indeed P.W.2 was raped....”

27. We find that though the said trial magistrate had the advantage and opportunity in seeing the demeanour of the witness (P.W.2) there nevertheless existed no cogent evidence to support or corroborate her claim of having been raped by the appellant.
28. We find that this ground of appeal has merit and we find the conviction for the offence of rape to be unsafe.
29. The last issue relates to the sentences imposed for counts 1 and 11 for the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.
30. An appellate court can interfere with the sentence imposed if the sentence is found to be harsh and excessive. Refer to the case of **Wanjema V. Republic**, (1971) E.A. 493.
31. The sentence herein was imposed on the 27th June, 2011 which is after the promulgation of the new Constitution.
32. The sentence imposed can be described as harshly inhuman and degrading and violates the Fundamental Rights and Freedoms of individual and goes against the letter and spirit of the Constitution 2010.
33. Even though the Penal Code has not been amended, we are guided by the Court of Appeal decision - **Godfrey Ngotho Mutiso V. Republic** [2010] eKLR where it was held that the death penalty is no longer the mandatory sentence for serious crime offenders.
34. For the reasons stated above, we find that there is need to interfere with the sentence imposed.

FINDINGS:

35. The trial magistrate reached a correct finding that the appellant was positively identified by way of recognition. We find the convictions on counts I and II on the basis of identification to be safe and uphold the conviction.
36. The trial magistrate reached a correct finding on recent possession.
37. The death sentence is no longer the mandatory sentence. The sentences on counts I and II are hereby commuted to life imprisonment.
38. The conviction on count III is quashed and the sentence set aside.

CONCLUSION

- i. On count III, the appeal is hereby allowed.
- ii. On count I and II, the appeal against conviction is hereby dismissed.
- iii. The sentences for both counts I and II commuted to life imprisonment with effect from 27th June, 2011 and to run concurrently.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 30th day of August, 2013.

R. P. V. WENDOH

JUDGE

A. MSHILA

JUDGE