



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CRIMINAL APPEAL NUMBER 154 OF 2009
[Consolidated with Appeal Number 153 of 2009]

BETWEEN

THOMAS OTIENO.....1ST APPELLANT

ANTHONY NDUATI.....2ND APPELLANT

AND

THE REPUBLIC OF KENYA.....RESPONDENT

[An Appeal from the Judgment of the Learned Chief Magistrate Mrs. M.A. Odero dated 30th March 2009, in the Chief Magistrate’s Court at Kibera Criminal Case Number 5612 of 2006]

Appeal before Justices Monica Mbaru and James Rika

Thomas Otieno the 1st Appellant appearing in person

Anthony Nduati the 2nd Appellant appearing in person

Ms. Nyauncho Prosecution Counsel for the Respondent

JUDGMENT

1. The two Appellants were faced with very serious offences in the Lower Court. The proceedings are heart-rending, with allegations of extremely barbarous conduct, made against the Appellants. The charges involved robbery with violence, various sexual offences, kiosk breaking and the alternative charge of handling stolen property. The full details of the charges are given below:-

COUNT 1 Robbery with violence contrary to Section 296 [2] of the Penal Code [Both Appellants]

On the 13th September 2006 at [particulars withheld] Drive Kileleshwa within Nairobi Area Province, jointly while armed with offensive weapons namely a club and metal rod, robbed Peter Musyoka cash of Kshs. 8,500, assorted shop goods valued at Kshs. 1,300 and at or immediately before or immediately after the time of such robbery used actual violence against Peter Musyoka.

COUNT 2 Rape contrary to Section 3[1] [3] of the Sexual Offences Act Number 3 of 2006 [1st Appellant]

On the 13th day of September 2006 at [particulars withheld] Drive Kileleshwa within Nairobi Area Province unlawfully and intentionally committed a sexual act by inserting his male genital [penis] into female genital organ [vagina] of C M, a woman aged 23 years.

ALTERNATIVE TO COUNT 2 Indecent act with an adult contrary to Section 11 [6] of the Sexual Offences Act Number 3 of 2006 [1st Appellant]

On the 13th day of September 2006 at [particulars withheld] Drive Kileleshwa within Nairobi Area Province, committed and indecent act by placing his male genital [penis] on the surface of the female organ [vagina] of C M an adult woman aged 23 years.

COUNT 3 Sexual assault contrary to Section 5[1] [a] [i] of the Sexual Offences Act Number 3 of 2006[1st Appellant]

On the 13th day of September 2006 at [particulars withheld] Drive Kileleshwa within Nairobi Area Province, unlawfully penetrated his male genital organ [penis] into the female genital organ [anus] of C M an adult woman aged 23 years.

ALTERNATIVE TO COUNT 3 Indecent act with an adult contrary to Section 11 [6] of the Sexual Offences Act Number 3 of 2006 [1st Appellant]

On the 13th day of September 2006 at [particulars withheld] Drive Kileleshwa within Nairobi Area Province committed an indecent act by placing his male organ [penis], on the surface of the female organ [anus] of C M an adult woman aged 23 years.

COUNT 4 Rape contrary to Section 3[1] [3] of the Sexual Offences Act Number 3 2006 [2nd Appellant]

On the 13th day of September 2006 at [particulars withheld] Kileleshwa within Nairobi Area Province unlawfully and intentionally committed a sexual act by inserting his male genital organ [penis], into female genital organ [vagina], of C M a woman aged 23 years.

ALTERNATIVE TO COUNT 4 Indecent act with an adult contrary to Section 11[6] of the Sexual Offences Act Number 3 of 2006 [2nd Appellant]

On the 13th day of September 2006 at [particulars withheld] Kileleshwa within Nairobi Area Province committed an indecent act by placing his male organ [penis] on the surface of the female organ [vagina] of C M, and adult woman aged 23 years.

COUNT 5 Sexual assault contrary to Section 5[1] [a] [i] of the Sexual Offences Act Number 3 of 2006 [2nd Appellant]

On the 13th day of September 2006 at [particulars withheld] Kileleshwa within Nairobi Area Province, unlawfully penetrated his male genital organ [penis] into the genital organ [anus] of C M an adult woman aged 23 years.

ALTERNATIVE TO COUNT 5 Indecent act with an adult contrary to Section 11 [6] of the Sexual Offences Act Number 3 of 2006 [2nd Appellant]

On the 13th day of September 2006 at [particulars withheld] Kileleshwa within Nairobi Area Province committed an indecent act by placing his male organ [penis] on the surface of the female

organ [anus] of C M an adult woman aged 23 years.

COUNT 6 Kiosk breaking and committing a felony contrary to Section 306 [a] of the Penal Code [Both Appellants]

On the 13th day of September 2006 at [particulars withheld] Kileleshwa within Nairobi Area Province, broke and entered into a Kiosk of one E M and committed a felony namely theft of assorted shop goods and two jackets all valued at Kshs. 30,000 the property of the said E M

ALTERNATIVE CHARGE handling stolen goods contrary to Section 322 of the Penal Code [Both Appellants]

On the 13th day of September 2006 at [particulars withheld] Westlands within Nairobi Area Province, otherwise than in the course of stealing, dishonestly retained assorted shop goods, one jacket, cash of Kshs. 6,450/= knowing or having reason to believe them to be stolen goods.

2. They were both convicted for the offence of robbery with violence; the offence of sexual assault; and for Kiosk breaking. They were acquitted on the offence of rape and indecent act, on the ground that the evidence of the complainant was that she was sodomized, rather than raped. The details in the charge sheet on rape, and alternative to rape were not supported by the complainant's evidence. Having found the Appellants guilty of robbery with violence, the Trial Court sentenced them to suffer death, while sentences on the other offence were kept in abeyance, as the Law requires [*see Court of Appeal Number 258 of 2003 between Peter Gikonyo Nyoike v. the Republic [2005] e-KLR*]

3. PW1 testified on three occasions, which for a woman who went through what she did, was not a very ideal situation. She first testified on 15th March 2007; testified again on 31st May 2007 ostensibly because the prosecution had amended the charge sheet; and lastly on 2nd May 2007 on the ground that the charge sheet had been substituted and a new Magistrate taken over the conduct of the trial. The result was that PW1 was compelled to go through an occurrence that was extremely horrendous thrice over. This must have left her very distressed.

4 She testified that on 13th September 2006, she was asleep in her Kiosk at [particulars withheld] Drive. She was with her husband P M. About 11.30, she heard a bang. Her husband had been hit. Two men came in. One was tall, the other short. They were armed with a rungu and an iron rod. They beat PW1 and demanded for money. She gave them Kshs. 8,500. They told her they would kill her husband and do with her whatever they wished. The kiosk was near a security light and she could see the men clearly. They in fact asked her that she looks at them clearly as they accosted her. She looked at them clearly. They dragged her outside the neighbouring Kiosk, undressed her, asked her to bend over, and sodomized her. She had a two month baby at the time. The robbers said she could have still been bleeding in her birth canal and therefore opted to sodomize her. She tearfully narrated this on the three occasions she testified. The 1st Appellant was the first to deflower her, while the 2nd Appellant followed. They then asked her to defecate. She did so. They ordered her to eat her own faeces. Once they were finished, they vanished into the bushes. She ran back to the Kiosk and found her husband lying bloodied and unconscious. She screamed and Police Officers on patrol came to their assistance. They were both taken to Kenyatta National Hospital.

5. The couple was issued P3 Forms, treated and discharged. PW1 went to Kileleshwa Police Station where she found the two Appellants already in custody. The two robbers stole cigarettes and Kshs. 8,500 from PW1's Kiosk. She identified the items recovered from the Appellants as packets of cigarettes of various brands- three embassy; five supermatch; three sportsman; and two safari. She wore a petticoat at the time of the attack, which she was able to identify in Court. It took about thirty minutes to rob and sodomize her. There was security light, and the whole [particulars withheld] road has street lights. She saw the Appellants clearly. The 1st Appellant was armed with a Masai rungu. He hit PW1 repeatedly with it as he assaulted her. She was injured on her posterior and endured pain whenever she answered a long call of nature.

6. PW2 P M confirmed she was sleeping at his Kiosk with his wife on the night of 12th /13th September 2006. Around 11.30 a.m. he heard a bang on the door. The door opened. PW2 came out and was met by a tall black man wearing a cap and a black jacket. PW2 took a good look at the man. The assailant shone a torch on PW2. He hit PW2 on the forehead with a metal rod. PW2 fell down unconscious. He regained consciousness at Kenyatta Hospital. He lost cigarettes and cash of Kshs. 8,500. Later police officers from Kileleshwa told him they had arrested the suspects and recovered his merchandise. He confirmed his Kiosk was well lit. He was only able to see the 1st Appellant. This robber wore a black jacket and a dark cap. PW3 E M operated a Kiosk next to PW2's. At 7.30 p.m. on 12th September 2009, he closed his Kiosk and went home. The following day at 6.00 a.m. he found the padlock had been cut open. An assortment of goods were missing from the Kiosk- sugar, cooking oils, clothes, lessos, pencils e.t.c. He went to his neighbour's Kiosk, and found him [PW2] on the ground bleeding. He was confused and could not talk to PW3. Police Officers from Kileleshwa Police Station came. They took PW3 to the Station where he found his flour, sugar, royco, biros, assorted goods and his clothes had been recovered. He was able to identify his items in Court.

7. PC Joseph Ondicho who testified as PW4 told the Court he was attached to Kileleshwa Police Station on the material day. He went on patrol with PC Michael Awiti at Westlands area. At midnight he received a radio call that a robbery had taken place at the Kiosks situate at the junction of [particulars withheld] Road and [particulars withheld] Road. They rushed and waited at the junction of Rhapta and Mkopo roads. At 4.00 a.m. two men emerged carrying paper bags and a bale of maize flour. There were street lights and the Officers could see the two men well as they emerged. The two men spotted the Officers and took to their heels. The Officers gave chase, fired in the air and ordered the two men to stop. The two did not stop but continued running and dropped what they were carrying. The Officers managed to arrest the Appellants with the assistance of the security guards at the area. The 1st Appellant had a black jacket which was identified by the Officer in Court. Among the items recovered from the Appellants, beside the shop merchandise, were a rungu, pliers, and cash of Kshs. 6,300. The arresting officers handed over the suspects to Kileleshwa Police Station. PW5 PC Michael Awiti corroborated the evidence of PW4. PW6 Inspector John Mwaniki served as the Deputy OCS Kileleshwa Police Station. He received a radio call from Nairobi Area Controller that a robbery/ rape had taken place at the Kiosks at the junction of [particulars withheld] Drive and [particulars withheld] Road. He proceeded to the scene and found PW2 lying on the ground, badly injured and unconscious. PW1 was crying, saying the robbers had broken into their Kiosk, killed her husband, and raped her. PW6 had alerted Officers on patrol about the incident. At about 5.30 a.m. he was informed by his Officers that two suspects had been arrested.

8. The stolen items were recovered from the two suspects. PW6 took the Appellants underwear and trousers for analysis. The police surgeon took blood and saliva samples from the Appellants. He also collected the petticoat PW1 wore on the night of the attack. These were passed onto the government chemist. The Appellants were later charged with the offence. PW7 Albert Gathuri Mwaniki testified he worked as an analyst attached to the government chemist. On 20th September 2006, he received the following items from the OCS Kileleshwa:-

[a] blue and white petticoat belonging to PW1.

[b] green shorts belonging to the 1st Appellant

[c] Grey underwear belonging to the 1st Appellant.

[d] coloured shorts belonging to the 2nd Appellant.

[e]saliva and blood samples from both Appellants

He analyzed the items and did a blood and saliva grouping. He reached the following findings:-

[i] PW1's petticoat had seminal stains of group 'A', excreta as well as degenerated sperms

[ii] The underwear and shorts belonging to the 1st Appellant had blood stains of group 'A'.

[iii] The clothes of the 2nd Appellant had no blood stains.

[iv] The blood and saliva of the 1st Appellant was group 'A' while 2nd Appellant's samples were of the 'O' group.

PW7 did not receive the blood sample from the complainant. The witness formed the opinion that PW1 was involved in sexual activity with a person of group 'A,' most likely the 1st Appellant. PW8 Police Surgeon Dr. Zephania Kamau examined PW1 on 18th September 2006. He filled her P3 Form. There was tenderness in her posterior. He also examined her husband PW2, and confirmed he had five days old injuries inflicted by blunt objects. He collected the saliva and blood samples from the Appellants.

9. Placed on their defence, the Appellants opted to give unsworn statements. The 1st Appellant told the Court he was a cleaner at Catholic Consolata Church. On 13th September 2006, he left his house for work at 6.08 a.m. At the roundabout at the mall, a police car stopped. PC Michael Awiti and PC Onditi came out. They bundled the 1st Appellant in the police car. He was taken to Kileleshwa Police Station. He was assaulted while there, and detained for 22 days as the police looked for an offence to charge him with. He denied being involved in the offence. The 2nd Appellant stated he worked in a hotel at Westlands. On 13th September 2006, he left his house for work at 5.00 a.m. He took a shortcut route at Rhapta Road. As he approached Westlands, he met two Police Officers on foot. They demanded for his identity card. He only had the Police Abstract Form. He was arrested, put in a police car and booked at Kileleshwa Police Station. He was in the cells for 23 days. He denied the charges.

10. The Trial Court was satisfied that the evidence presented by the prosecution revealed an offence of robbery with violence was committed against PW1 and PW2 on the night of 12th / 13th September 2006. The robbers were armed with an iron bar and rungu. They grievously injured PW2, beat and sodomized PW1. They stole their merchandise. The scene of the crime was well lit, the kiosk being under a security light, and the entire [particulars withheld] Drive being served by street lights. Both PW1 and PW2 saw their attackers well, and were able to describe and the clothes they wore. The descriptions given matched the Appellants. The robbers took about thirty minutes before fleeing. The Trial Court was convinced the Appellants were properly identified by PW1 and PW2 as the persons who robbed them. The Court was persuaded the same robbers broke into, and stole from, the Kiosk belonging to

PW3.

11. In addition to this, the Appellants were arrested close to the scene of the robbery hardly four hours after the robbery occurred. They were arrested at 4.00 a.m. carrying bagfuls of similar merchandise as the one stolen from the two Kiosks. The Trial Court posed the question where two men would be coming from carrying bagfuls of groceries at 4.00 a.m. Neither of the Appellants suggested they had purchased the items recovered from them. Their behaviour when ordered by the Police to stop was consistent with their guilt; rather than stop, they threw away what they were carrying and fled. A search carried out on them revealed they had numerous packets of cigarettes which, in the words of the learned Trial Magistrate, would not be expected even in the pocket of a most hardened smoker. They had a substantial amount of coins, the sort one would expect from a retail business. The Trial Court found the demeanour of PW1 honest and truthful. She narrated in graphic details how she was sodomized and made to eat her own human waste. Apart from the evidence of identification, there was sufficient corroborative and credible evidence implicating the Appellants.

12. Forensic evidence supported the evidence of PW1. Her petticoat was examined against samples of saliva and blood taken from the Appellants. The petticoat had seminal stains of blood group 'A' same as the group found to belong to the 1st Appellant. PW1's posterior cavity was tender, consistent with a sodomy attack. PW7 concluded PW1 has sexual activity with a person in blood group 'A' most likely the 1st Appellant. PW1's petticoat had stains of excreta as well as degenerated sperms. The forensic evidence

placed the 1st Appellant at the centre of the crime. The Appellants were unable to shake the evidence of PW1. The Appellants were similarly found with a red and black jacket which PW3 identified as his. They were found carrying an assortment of goods, similar to the ones stolen from PW3's Kiosk which had been broken into at the time of the robbery, and was adjacent to PW1's and PW2's Kiosk. The doctrine of recent possession similarly tied down the Appellants to the crime.

13. The Appellants were dissatisfied with these findings and conclusions and filed these grounds of Appeal:-

[a] The Learned Trial Magistrate wrongly accepted evidence of eyewitness identification.

[b] The Learned Trial Magistrate erred by accepting uncorroborated evidence from the prosecution

[c] The Appellant's respective statements made in defence were not adequately considered.

14. The Appeal was heard on 18th October 2013. The 1st Appellant submitted that the evidence of PW1 and PW2 was contradictory. PW1 testified the door was broken into, while PW2 stated he opened the door. The two witnesses alleged there was street lighting, and also testified the attacker used a torch. PW1 alleged she was raped, but never sought medical assistance. There was no formal identification save for dock identification. PW2 was unconscious and could not identify the Appellants. The evidence of the arresting officers was equally contradictory; one officer testified they were on foot patrol, the other stated they were driving. Medical evidence stated the Appellant to be blood group 'A'; PW1's blood was not analyzed. The 1st Appellant testified he was not at the locus quo. He is an innocent citizen. The 2nd Appellant submitted there was no description of the attackers by the victims made to the Police. There were no blood stains found on the garments taken from the 2nd Appellant. The 2nd Appellant said he worked at a hotel, but police never investigated if this was true. The items stolen were said to have been recovered by members of the public; no member of the public was called to testify. The Appellants asked the Court to allow their consolidated Appeal, and set them at liberty.

15. Ms. Nyauncho urged the Court to uphold the decision of the Lower Court. The Appellants broke into the complainants' Kiosks. There were street lights. They sodomized PW1. The Trial Court also relied on the doctrine of recent possession. They were arrested carrying stolen items. They were identified by the complainants. PW1 and PW2 corroborated their evidence. The arrests were made while the Appellants wore the same clothes. PW1's clothes had seminal fluid. This was found to be from blood group 'A', same as that of the 1st Appellant. The Appellants were convicted on proper evidence.

16. Our role as the first Court to which this Appeal had been submitted is to re-evaluate evidence, make our own findings and conclusions, while cautioning ourselves that the Trial Court always has the advantage of hearing and observing witnesses [*see Shantilal M. Ruwalia v. the Republic [1975] E.A. 570 and Peters v. Sunday [1958] E.A. 424*]

17. There is no doubt in our mind that PW1 and PW1 were on the night of 12th /13th September 2006, subjected to a horrendous aggravated robbery, which left the couple injured, ravaged and dispossessed of the goods from their Kiosk. PW1 was in particular taken through a very traumatizing experience. She witnessed her husband brutally assaulted in an attack that left him bleeding profusely and unconscious. She was beaten with a club, ordered to eat her own human waste, and sodomized. She was at the time nursing a two month old baby. PW1 and PW2 lost property and money from their small roadside investment. There is no doubt the offence of robbery with violence under Section 296[2] was committed. There can be no doubt PW1 was sodomized, the only question raised by the Appeal being whether the wrong perpetrators of the crime were identified, arrested, charged, tried and brought to justice. Can the evidence relied upon by the Lower Court be faulted and were the respective unsworn statements made by the Appellants adequately considered? These are the narrow issues generated by the Appeal

18. There is always a duty for the trier of fact to ensure there is a proper identification of robbers,

particularly when the suspect says he is the wrong man. The oft-cited decision on this is **Anjononi and others v. the Republic [1980] KLR** in which the Court stated “ *the proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused.*” Where identification is in issue, the Court must weigh carefully the factors that may have affected identification, and isolate and analyze matters that may have reasonably have undermined the reliability of identification evidence. The need for certainty of eyewitness testimony in capital offences was restated in **Elizabeth Gitiri Gachanja and 7 Others v. the Republic [2011] e-KLR**, where their Lordships stated, “ *the evidence relied upon to convict in capital offences must be of high quality, credible and beyond reasonable doubt...if evidence is on identification of a person who says he was not properly identified, the Court must examine such evidence with the greatest of care before relying on it to convict.*”

19. The factors that would have undermined positive identification in the present case are these: the robbery took place around midnight. PW1 and PW2 had retired to bed in their Kiosk. The attackers announced their arrival with the loud banging of the door. There would be in such an attack a stupefying effect, with the victims possibly not fully seized of their entire range of cognitive ability. The other factor that could have undermined proper identification included the injuring of PW1, almost immediately the door was broken. He was rendered unconscious, giving him little chance to observe his attackers. The evidence of PW1 also suggested the robbers had a torch. The consistent evidence of PW1 and PW2, however was that their Kiosk was right beneath a security light. The entire [particulars withheld] Drive was well lit with street lighting. The only person, who would need a torch, was a person who had probably walked from dark alleys elsewhere, and would require the torchlight to return to those alleys. The torch was in the hands of the 1st Appellant, and its presence at the scene of the robbery cannot conceivably be taken as evidence of the general lack of illumination at the scene of the crime, on the night of the attack. The fact that the robbery took place at midnight, would have no effect on the illumination of the area, there being sufficient security and street lighting. The effect of the violence on the identifying witnesses appears quite minimal. PW1 was honest to say he did not see any other attacker, other than the 1st Appellant. He took a good look at the 1st Appellant before the 1st Appellant knocked him cold. He registered details of the tall man, and the clothes he wore. He did not see the 2nd Appellant. PW2 however saw both Appellants clearly. She corroborated the evidence of PW2 that their business operated under the cover of sufficient lighting. The 2nd Appellant told her to look at his face clearly as he dragged her out to sodomize her. PW1 and PW2 were observed to be truthful and honest witnesses. PW2 seems to have been the first victim to encounter the robbers, while his wife followed. She had a better chance to observe both Appellants. The couple’s evidence was consistent, and corroborative. The factors that would have undermined positive identification while isolated and analyzed, pale into insignificance, compared with the factors that enhanced proper eye-witness identification.

20. The Appellants were arrested within the scene of the robbery, a few hours after the robbery, and at a time when few souls would be walking the streets of Nairobi. They were arrested while in possession of goods that fitted the description of goods lost the same night in the two Kiosks. There were hardly any shops open at the time. Forensic evidence suggested strongly that the 1st Appellant had imposed his beastiality on the person of PW1. There was in our view strong physical and testimonial evidence, leaving no doubt that the two Appellants were neither apprehended, nor arraigned in Court, on mistaken identity. Credible and very consistent witnesses were adequately supported in their statements by physical evidence. When asked by the Police to stop, the two Appellants took to their heels, throwing away all their newly acquired possessions. This was not the conduct one would associate with innocence. When called upon to defend, they tired the Court with cock and bull stories. The 2nd Appellant suggested in his submission that the police never investigated whether he worked at a hotel in Westlands. It was not the duty of the police to collect evidence for the Appellants, and if the Appellants desired such statements be investigated, they ought to have given intimation before the prosecution closed its case. In our view, the Appellants were convicted on sound factual and legal basIs. What the Appellants did to PW1 and PW2 was the epitome of man’s inhumanity to man. This was a crime committed with a groundbreaking form of savagery. We can only hope that as the Appellants relive this crime in prison, someday they will find it in their hearts to seek forgiveness from this couple. **We reject the entire Appeal and uphold the decision of the Lower Court.**

Dated and delivered at Nairobi this 20th day of November 2013

Monica Mbaru

Judge

James Rika

Judge