REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 208 of 2009

CONSOLIDATED WITH

Criminal Appeal 207 of 2009

(From the original conviction and sentence of the Chief Magistrate's Court at Kiambu in Criminal Case No.1351 of 2007 – G.W. Macharia)

PETER NJAU KOIBATA ----------1ST APPELLANT

BENSON GICHERU NJENGA ----------2ND APPELLANT

VERSUS

REPUBLIC---------- RESPONDENT

JUDGEMENT OF THE COURT

Omirera - State Counsel

1st appellant - in person

2nd appellant – in person

1. The appellants, Peter Njau Koibata (1st appellant) and Benson Gicheru Njenga (2nd Appellant) were charged with two counts and an alternative charge, that of robbery with violence contrary to section 296(2) of the penal Code, attempted rape contrary to section 4 of the Sexual offences Act No. 3 of 2006 and the alternative charge of indecent assault on a female adult contrary to section 11(b) of the Sexual Offences Act No. 3 of 2006. The particulars of the charges were that on the 6th day of June 2007 at Njoro village in Kiambu District of Central province, jointly with another not before court being armed with offensive weapons namely knives robbed JANE WANGARI NGIGE of one mobile phone make Motorola c261 and cash Kshs.2000/= all valued at Kshs.7000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said JANE WANGARI NGIGE. At the time of the robbery of Jane Wangari Ngige, the appellants attempted to have carnal knowledge of her without her consent and or alternatively the appellants unlawfully and indecently assaulted Jane Wangari Ngige by touching her private parts, her vagina. The appellants pleaded not guilty to the charges and to the alternative charge. After a full trial, the appellants were found guilty of the offence of robbery with violence and the alternative charge of unlawful and indecent assault. They were sentenced to death for the offence of robbery with violence and for given a suspended sentence for the alternative charge of unlawful indecent assault. Being aggrieved by their conviction and sentence, each appellant filed a separate appeal against his conviction and sentence. At the hearing of the appeals, the two separate

appeals filed by the appellants were consolidated and heard as one.

Grounds of Appeal

2. The appellants raised more or less similar grounds of appeal in their petitions of appeal. They were aggrieved that the trial Magistrate had convicted them in reliance of fabricated and contradicted evidence. They faulted the trial Magistrate for convicting them and in not finding that some essential witnesses were not availed in court to testify despite their roles in the fabrication of charges violating section 143 of the Evidence Act. The appellant were aggrieved that the trial Magistrate had failed to consider their alibi defence before reaching the determination to convict them and that the imposed sentence is harsh, unjust and totally contravenes Article 26(1) and (3) as read together with Article 2(1) and (4) of the Constitution. At the hearing of the appeal, the appellants with the leave of the court presented their written submissions in support of their appeals. The appellants also made oral submissions in support of their appeals and urged the court to find their appeals have merit and allow them. For the State, Learned Counsel, Mr. Omirera opposed the appeals and urged the court to uphold the conviction and sentence of the trail Magistrate.

Facts

3. Briefly the facts herein are that on 6/6/07, Jane Wangare Ngige, the Complainant (PW1) and then manager at Ruaka Coffee Factory was at 8.10a.m going to work along Banana/Ndenderu road and at Wamuti Wamuhungi she saw 3 men coming towards her and she recognised Gicheru (2nd appellant) and Njau (the 1st appellant) who work at the same factory with her as night watchmen, she did not recognise the 3rd man. As they all walked along, 2nd appellant was left behind and asked PW1 whether she was going to work while the 1st appellant and the other man went away through a path. The 2nd appellant also told her that he had something to tell her and asked her to follow him through the same path the 1st appellant had taken and upon reaching a place with nippier grass he insisted they go further on but she refused, he hit her on the head causing PW1 to fall down and 1st appellant with the other man came back and held her, dragged her further inside the bushes, PW1 was screaming but nobody came to assist her, 1st appellant was kicking her with his legs and blows and started removing her clothes and tore her skirt while the other man was holding a knife and removed her skirt. 1st appellant removed her biker (short) and she felt him pouring oil on her head and then removed her underpants and together with his friend (the 3rd man) held her legs apart and she felt something being poured in her vagina. The 2nd appellant was standing by watching. The other man slapped her and asked her to pray and told her that he had been sent to kill her, he removed her Motorola c51 phone from the pocket and Kshs.2000/= and then the three men run away. PW1 was screaming and two boys came by but when they saw her they run away. A man came along, she told him that the 1st appellant has assaulted her and asked him to go to the factory where she worked and call Lucy to come and take her to hospital and then she lost consciousness. When she came to she was in the hospital. She was released on 7/9/07 when she recorded her statement and learnt that both appellants had been arrested. In court, PW1 made her sworn statement and produced the bag she had which stains of the oil had poured on her, the biker she wore that was torn, and the container with black oil.

3. Joseph Kombo (PW2) responded to the screams of PW1 who told her 1st appellant had assaulted her and went to the factory to find Lucy (PW4) and repeated what PW1 had said and together with Hanna Njeri (PW3) went to the scene and took PW1 to Karuri Police Station, then went to Karuri health Centre, then to Kiambu District Hospital and later to Nairobi Women's Hospital. The appellants were arrested and charged with the offences against them.

Submissions.

4. In submissions the appellants supported the appeals that the witnesses contradicted themselves and were inconsistent and court could not rely on it as held in the case of ***Ramkrishan Pandya virus Republic [1957] EACA 339***. That the case against the appellants was a fabrication as PW1 did not show any motive

that led to her attack by people who worked under her noting that there was supposed to be a meeting to discuss PW1 suspected theft of fencing wire, poles and security bulbs and that the chairman had alerted her to a meeting where she was a suspect. That PW1 was aware she was a suspect and the key witnesses were the appellants. That all the witnesses called were either friends or relatives of PW1 hence fabricated the evidence against the appellants. The evidence of Dr. Malombe (PW8) contradicted that of Clinical Officer from Kiambu Hospital as he stated that PW1 had no bruises, injuries or lacerations and hence PW1 was never sexually assaulted.

5. The appellants further submitted that the phone stolen was Motorola c261 as PW1 stated but the charge read Motorola c51 and that there was no proof of ownership of the phone produced creating doubt as to what was stolen from PW1. That the court descended into the arena of the trial against what was held in ***Muriu and others versus Republic [1955] 22 EACA 417*** as the husband to PW1 was never called who played a key role in the investigations, he led PW6 to the scene of crime and caused the transfer of PW1 from Kiambu Hospital to Nairobi Women's Hospital and hence had conspired to fabricate the case against the appellants. The clinical officer at Karuri health centre who first attended to PW1 was not called and thus these were crucial witnesses never summoned. The court failure to consider the alibi in defence was never challenged and that there was an existing grudge that was not interrogated.

6.In support of the appeals, the appellants also submitted that the death sentence was allowed under section 296(2) of the Penal Code but after the coming into force of the Constitution (2010) according to Article 26(1) and (3) every person has the right to life and should not be deprived this life intentionally and no part of the Constitution sanctions deprivation of life and under Article 2(1), the Constitution binds all persons and all state organs and thus the provisions of section 296(2) are unconstitutional and void and invalid to the extent of this inconsistency. That the court should re-evaluate the evidence and reject the verdict of the trial magistrate and allow the appeal.

7. Mr. Omirera for the state opposed the appeals and submitted that the appellants worked in the same farm with PW1 and the theory advanced by the appellants that there was bad blood between them but this does not explain the crime committed. The appellants were people well known by PW1, she recognised them when they met along the road and lured to the forest, PW1 had no reasons to suspect any ill motive by the appellants who accosted her, sprayed her with oil all over her body and private part and in the process robbed her while armed with a knife. She was immediately able to state that had attacked her which formed the basis of the arrest. Even though PW1 husband was not called, the court visited the scene of crime and was able to relate with the evidence. The defence that PW1 had stolen from the factory was challenged as the appellants had not reported such a case to the police and only claimed to have informed the committee.

Determination of the issues

8. We understand the issues raised in this case to be whether there was contradictory evidence, whether essential witnesses were not called, whether the defence of alibi was sufficient and the question of whether the death sentence is unlawful.

9.The appellants were both charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code, the offence of rape contrary to section 4 of the Sexual offences Act and an alternative charge of unlawful and indecent assault contrary to section 11(6) of the Sexual Offences Act. On the charge of robbery with violence, we note the contents of section 296(2) of the Penal Code which reads;

> *If the offender is armed with any dangerous or offensive weapon or instrument, or in company with one or more other persons or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.*

10. Our understanding of section 296(2) of the Penal Code is that a charge drawn under this part should disclose an offence if the following key elements and brought out thus;

i. *The offender is armed with any dangerous or offensive weapon or instrument, or*
ii. *The offender is in the company with one or more other person or persons, or*
iii. *If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.*

11. In this case PW1 gave evidence that she recognised her attackers from the 3 men who attached her, 2 of them, the 1st appellant and the 2nd appellant worked with her at Ruaka Coffee Factory as night watchmen. He appellants together with the third man all attacked PW1, they inflicted injuries on her and also indecently assaulted her and while robbing and attacking her had a knife, used kicks and blows. This was 8.10a.m in the morning as PW1 walked to work. In their defence, the appellants stated that after their night duty they took tea with Kiarie Kimari at Kahugia hotel, this was around 8.30 to 8.45a.m and then the appellants left for the factory where they had meetings. This draws the inference that the appellants and PW1 were on the same path on their way to work. This therefore satisfies the various ingredients of section 296(2) of the Penal Code even where the ownership and make of the stolen phone is not proved. We are alert to the requirements that proof of any one of the ingredients of robbery with violence is enough to base a conviction under section 296(2) of the Penal Code and Court of Appeal decision in ***David Othiambo et al versus Republic, Criminal Appeal No. 5 of 2005,*** a decision that was quoted with authority in a case with similar facts as this appeal in ***Criminal Appeal No. 6 of 2011, Abdirahman Ali et al versus Republic, paragraph 11.***

12. We have carefully evaluated the evidence of PW1 and warned ourselves that she was a single identifying witness, she recognised her attackers as these were people well known to her as workmates and before she became unconscious she was able to communicate and state who her attackers were. there is evidence that the appellants were both at the scene and jointly with another assaulted the appellant, there is a medical report and the evidence of PW8 to confirm PW1 was assaulted and this is supported by PW7, Clinical Officer Karuri who immediately examined PW1 and even though she had no cuts, she was unconscious with oil all over her body and observed gravel in her vagina, evidence that was consistent with that of PW1. This evidence satisfied the ingredients of section 296(2) of the Penal code as well as those of section 11(6) of the Sexual Offences Act. Apart from the assailants having a knife, personal violence was used on PW1. We wish to restate what the Court of Appeal in ***David Odhiambo and Another versus Republic, Appeal No. 5 of 2005 (Mombasa)*** held;

> *… there are other ingredients or elements under section 296(2) [Penal Code] such as being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements …*

13. The Judges in *David Odhiambo case* above, went on to quote ***Johana Ndungu versus Republic, Criminal Appeal No. 116 of 1995*** to explain the various elements or ingredients which must be proved under section 296(2) of the Penal Code and any of which, if proved, there would be no discretion on the part of the trial court but to convict under section 296(2).

14. On the charge of rape and in the alternative unlawful indecent assault, we have little difficulty in coming to the conclusion that the appellant were convicted on sound evidence with regard to the alternative charge of unlawful indecent assault which was proved beyond reasonable doubt. The offence took place around 8.10a.m in the morning, it was in broad day light and the appellants enjoyed the confidence of PW1 who was a work colleague to lure her to the forest on the basis that they had something to tell her and they proceeded to perform the orgy of pouring dark oil on her, removing her clothes and underpants and pouring the same oil and gravel to her vagina and then left and abandoned her in the forest. When PW1 was examined by a clinical officer that same morning, she was unconscious and had gravel to her private parts, vagina and was in obvious trauma which was consistent with sexual assault. PW1 had no difficulty in her recognition of her assailants especially the two appellants who she knew well. We cannot interfere with this finding.

15. With the above evaluation, the alibi in defence of the appellants must fail. Whether there was a grudge or a report made against PW1 on theft of farm property does not support the offence committed of

robbery with violence or the indecent assault on her. This defence is not tenable in the circumstances of this case.

16. We have addressed our minds to the issue of death sentence being unconstitutional. Taking into account the provisions of Article 26(1) and (3) of the Constitution that guarantee every person the right to life and that no one should be deprived of life intentionally except to the extent authorised by the Constitution and other written law. Under written law, the Constitution allows deprivation of life in circumstances as set out under section 296(2) of the Penal Code which prescribes death penalty as the only sentence to impose where one is convicted of robbery with violence. Although a death sentence is harsh, it remains the mandatory sentence as under section 296(2) of the Penal Code and unless and until the law is amended, the Constitution as outlined under section 26(1) and (3), the right to life will be deprived of a persons under this law, section 296(2) of the Penal Code. The death sentence may not be the best punishment for a person who has committed a crime as serious as robbery with violence and unlawful indecent assault, but this remains in the mandatory sentence.

17. In conclusion, having carefully analysed and determined all the issues raised, we are of the view that the 1st appellant and the 2nd appellant were correctly sentenced by the trial court. On our part, we have examined all the evidence afresh and satisfied that the grounds of appeal raised by the appellants have no basis. We therefore reject the appeals, uphold the conviction and sentence. It is so ordered.

Signed dated and delivered at Nairobi this 18th Day of December 2013.

M. Mbaru **J. Rika**

Judge **Judge**

In the presence of

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