



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NO. 286 OF 2012

STANLEY MWALE MUSINYA 1ST APPELLANT

BENJAMIN SHITSUKANE SHIVACHI 2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence of E. Mig Moranga. PM, at Kakamega CM's Court, Criminal Case No. 441 of 2011)

JUDGEMENT

The appellants herein were charged with six counts. On count 1, the appellants were charged with robbery with violence contrary to Section 296(2) of the Penal Code. Particulars of the offence are that on the 2nd day of May 2011 at [particulars withheld] in Sabatia District within Western Province, jointly with others not before court, while armed with crude weapons namely; pangas, and bright spotlights robbed E L off one mobile phone make Nokia 5300, purse containing cash Ksh 1,000/=, 5 US dollars, Equity and KCB ATM Cards, National Identify Card, voters card, jeweleries and a suit case containing assorted clothes all valued at Kshs 16,000/= and immediately before the time of such robbery used actual violence to the said E L.

On count 2, the appellants faced the charge of robbery with violence contrary to Section 296(2) of Penal Code. Particulars of the offence are that on the 2nd day of May 2011 at [particulars withheld] in Sabatia District within Western Province, jointly with others not before court, while armed with crude weapons namely; pangas and bright spotlights robbed A M off one mobile phone make Motorola, C113, wrist watch make Seiko, Equity ATM Card, national identity card and assorted clothes all valued at Ksh 7,000/= and immediately before the time of such robbery used actual violence on the said A M.

The 1st appellant, Stanley was charged on count 3 with offence of gang defilement contrary to section 10 of Sexual Offences Act No. 3 of 2006 Laws of Kenya. Particulars were that on the 2nd day of May 2011 at [particulars withheld] in Sabatia District within Western Province, in association with Benjamin Shitsukane Shivachi and others not before court intentionally and unlawfully caused his penis to penetrate the vagina of P M A, a child aged 17 years with his penis.

Alternatively the 1st appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. Particulars are that on the 2nd day of May 2011 [particulars withheld] in Sabatia District within Western Province, in association with Benjamin Shitsukane Shivachi and others not before court, intentionally contacted the vagina of P M A a child aged 17 years with his penis contrary to Section 10 of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. Particulars of the offence are that on the second day of May 2011 at [particulars withheld] in

Sabatia District within Western Province in association with Stanley Mwale Musinya and others not before court intentionally contacted the vagina of P M A a child aged 17 years with his penis.

On count 5, the appellants were charged with robbery with violence contrary to Section 296(2) of Penal Code. Particulars of the offence are that on the 3rd day of May 2011 at [particulars withheld] in South Kakamega District within Western Province, jointly with others not before court, while armed with crude weapons namely pangas, robbed N K S off one handbag containing cash Ksh 1,500/= and assorted clothes all valued at Ksh 2,800/= and immediately before the time of such robbery used actual violence to the said N K S.

On count 6, the appellants were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Particulars of the offence are that on the 3rd day of May, 2011 at [particulars withheld] in South Kakamega District within Western Province, jointly with another not before court while armed with crude weapons namely; pangas robbed A M off his mobile phone make Motorola C113 and assorted clothes all valued at Kshs 2,500/= and immediately before the time of such robbery used actual violence to the said A M.

The prosecution called 11 witnesses whose evidence was that, on the 2.5.2011 at about 10 to 11 pm, the 1st, 2nd and 3rd complainants were in the 1st complainant's house. The 1st complainant PW1 is a mother of PW3, the 2nd complainant and an aunt of PW4. The three were in the house sleeping when they were attacked by robbers. They woke up to find the robbers in the house who robbed them of items as per the charge sheet. However, PW3 was in the process defiled by two of the robbers. It is the prosecution's case that the 1st, 2nd and 3rd complainants were able to identify the robbers who had torches and beamed on each other. PW1 told court that he knew the attackers and that the appellants were well known to him before the robbery and he told the police he could identify all the thugs if he saw them.

According to PW3, he identified the robbers and he was able to identify the appellants on an identification parade. Her evidence was that the 2nd appellant had a twisted mouth and that is how she knew him and the first appellant had scars on his face.

PW4 also told court that she saw the 1st appellant well and he was dark in complexion and had spots on his cheeks. She also identified the 2nd appellant as his mouth looked deformed. The robbers spend almost an hour at the complainant's home. She too identified the appellants on the identification parade.

In respect of counts 5 and 6, it is the evidence of the prosecution that on 3.5.2011 at 5 am, PW2 was escorting N K S PW5. The 2 were in the company of PW6. Near the stage, they met 2 people armed with pangas. They asked them where they were going and whether they had bhang or illicit liquor. The complainants answered that they had no such items. E PW6 was carrying a basket which he was ordered to open and they were all ordered to sit down. Another man joined the 2 who ordered the complainants to hand over mobile phones and money. They proceeded to rob the complainants of items as per the charge sheet. They also undressed the complainants and took all their clothes and ordered them to go back where they had come from. They sought help from a neighbour's house where they were given some clothes. They also called the Assistant Chief. One robber hit E on the head with a panga. Police came and started searching for the robbers and PW2's long trouser, jacket, T-shirt and pants were recovered at the scene plus PW5's shoes. PW2 told court that he recognized 1st appellant during the robbery and that 1st appellant is from their village. The appellants were arrested that morning and the complainants recorded their statements. In cross examination PW2 told court that he mentioned the name of the appellants to the police and he did not attend any identification parade. PW5 told court that she recognized the 2 appellants as they had bright torches which shone lights on them. She told court that the 1st appellant had scars on his face and the 2nd one a black mouth. That she knew them before as she had seen them at the stage before. PW6 told court that he identified the 2 appellants and when they reported to the Assistant Chief, he mentioned their names and that he knew 2nd appellant since their youth as they come from the same area.

PW7, the assistant Chief told court that on 3.5.2011 at 5.30 am he was at his home asleep when J K called him on his phone informing him that A M had reported to her house naked and reported a robbery

incident with 2 other people. After a while the complainants PW2 and PW5 also came and reported to him the robbery. They told him that they had been robbed by some people and had managed to identify Stanley Mwale and Benjamin Shitsukane. PW7 called I/C of Iguhu for assistance. They met at J's gate and recovered some Kid's clothes there. The Aps from Iguhu arrived and they went to the stage and found the 1st appellant Stanley who they arrested. They went to his house and a search was conducted and nothing was recovered. They also went to the 2nd appellant's house and found him sleeping in the kitchen. It was around 8 am. Police found a photograph in one briefcase that was recovered. It was for A and her family (PW1). Other items belonging to complainants (PW1, PW3 & PW4) were also recovered from appellants house.

PW8 is the officer who conducted the identification parade on the appellants on 8.5.2011. the proper procedure for conducting an identification parade was followed and the appellants were identified by PW1, PW3 and PW4. He produced the identification parade form. The complainant PW3 was 17 years old then. PW10 investigated this case and charged the appellants accordingly. PW11 was the arresting officer. He told court that he was on foot patrol on 3.5.2011 around 5.05 am. He was called by Cpl. Aden Bashii and informed that some people had been stripped naked at Lusui stage. When he got to the stage he got Stanley Mwale and Benjamin Shitsukane with a bag of clothes and they re-arrested them. The complainants A, E and N identified the 2 appellants as the person who stripped them naked. They were taken to the police station at Kakamega.

Put on their defence, the appellants denied the offence. 1st appellant said he was at work at Lusui stage on 3.5.2011 when he was arrested. He said on the night of 3.5.2011 he had been home with his wife and children. He denied robbing the complainants.

The 2nd appellant also denied the offence and stated that he was arrested and taken to the police station for no apparent reason.

The trial magistrate heard this case and after close of defence case, had PW1 recalled to produce P A's birth certificate. He relied on Section 150 of CPC. The trial court found the appellants guilty as charged and this was based on the fact that there was a robbery at PW1's house; where some personal effects were stolen. The robbers were armed with pangas and torches and they were many. That there was positive identification and therefore both incidents qualified as robberies. He found that there were conducive circumstances for recognition .

The appellants have now appealed before this court on both conviction and sentence on the grounds that there was no basis for the identification parade as no witness gave the description of the attackers to the police. Furthermore, the appellants submitted that the attack occurred at night and the attackers had strong torches and so it was not possible to identify several attackers. The appellants also submitted that when appellants were arrested, they travelled in the same vehicle with the witnesses and so the parade was a sham. The appellants also submitted that in the middle of writing her judgment, the trial magistrate called a witness to produce more evidence which shows that she was in doubt.

The prosecution opposed the appeal. Having heard submissions from both sides, the issues for determination are as follows:-

- 1. Whether there is proof of robbery/defilement as per the charge.**
- 2. Whether the appellants were properly identified.**
- 3. Whether the identification parade was properly conducted.**
- 4. Whether it was proper for the trial court to summon PW1 to give evidence after closure of defence case.**

On 1st issue, there is evidence that the offences of robbery in respect of the 2 incidences did occur because there was violence meted out on the victims, the robbers were armed and were more than one. This fits in the description of robbery as espoused vide S. 296(2) of Penal Code.

The issue of identification is however key to this case. The PW1, PW3 and PW4 have explained that they

were attacked and robbed and because the attackers stayed in the house for over one hour, they were able to identify them. They beamed torch lights on each other. PW3 who says she was defiled in the process said she saw her attackers well from the torch lights they beamed at her private parts as she lay down in the process. The appellants were also from the same village and were able to be recognized by the victims who later identified them on the identification parade. It is our finding that the circumstances were conducive for identification.

PW4 who was not raped and who was a bystander as PW3 was raped, saw what happened and even identified the attackers. The identification parade officer followed the rules set for conducting an identification parade. The witnesses who attended the parade told court that when they went to the police station, they found the appellants already arrested and PW1, PW3 and PW4 never had contact with them. It is only PW2, PW5, and PW6 who met the appellants after arrest and they never participated in the parade. It is our finding therefore that the parade was never compromised in any way and it was positive.

On last issue of re-calling PW1, the trial court exercised her discretion under S. 150 of CPC. However, this Section entitles the court to recall a witness during the course of the trial. It would however be improper and prejudicial to recall a witness to fill up a gap and after the defence has closed up their case. It is our finding that, the recalling of PW1 was prejudicial to the appellant's case and therefore the effect of the evidence of PW1 as recalled would not be acceptable. If this evidence is left out, there is no proof of the age of the PW3 – as a child. It was therefore unsafe to convict the appellants on the main charges of gang defilement without proof of the age of the victims. We therefore set aside the conviction and sentence on counts 3 and 4 accordingly.

We however find that the trial magistrate directed herself properly on other charges and dismiss the appeal. We confirm the conviction and sentence accordingly.

DATED THIS 16TH DAY OF DECEMBER 2013

SAID J. CHITEMBWE

HELLEN S. WASILWA

JUDGE

JUDGE