



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NO. 148 OF 2010

PATRICK SAMBULI ERODEAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence of L. O. Onyina SRM Vihiga, Criminal Case no 511 of 2006)

JUDGEMENT

The appellant herein Patrick Sambuli Erode was charged before the SRM's Court Vihiga with 3 offences. On count 1, he was charged with the offence of robbery with violence contrary to Section 296(2) of Penal Code. Particulars of the offence are that on the 29th March 2006, at [particulars withheld] in Vihiga District within the Western Province, while armed with offensive weapon namely; knife, robbed M M of one mobile phone make Nokia, one umbrella and one post bank book all valued at Ksh 6,150/= and at or immediately before or immediately after the time of such robbery, used or threatened to use actual violence to the said M M.

On count 2, the appellant was charged with rape contrary to Section 140 of the Penal Code. Particulars of the offence were that on the 24th day of March 2006 at [particulars withheld] in Vihiga District within Western Province had carnal knowledge of M M without her consent.

On the 3rd count, the appellant was charged with the offence of committing an unnatural offence contrary to Section 162(a) of the Penal Code. Particulars were that on the 29th day of March 2006, at [particulars withheld] in Vihiga District within Western Province had carnal knowledge of M M against the order of nature.

Alternatively, the appellant was charged with handling stolen goods contrary to Section 322(2) of the Penal Code. Particulars of the offence are that on the 2nd day of April 2006 at Shikambi village, Makuchi Sub-Location, Shaviringa Location in Vihiga District within Western Province otherwise than in the course of stealing dishonestly received or retained one post bank book knowing or having reason to believe them (sic) to be stolen goods.

The appellant denied all the charges. The prosecution called 5 witnesses. PW1 – M M testified that on 29.3.2006, she was going home from work. She left work at about 6 pm. The path to her house passes through Kaimosi forest. As she walked home along this path a rope with a loop was thrown at her. She heard the person ordering her to put everything down. She struggled and set herself free from the loop that had gotten around her neck and started running. She fell down then the person punched her from behind and put the rope around her neck. The person was the appellant. She followed him as he pulled the rope around her neck. The witness PW1 was carrying a basket with her wares. She was led into the forest where the appellant loosed the rope around her neck and tied her onto a tree. He then took

PW1's basket. He removed her pant and started raping her. She tried to resist and the appellant hit her and told her that he also had a knife. PW1 said that the appellant made her bent down before he sodomized and raped her from 6 pm to 8 pm. When he finished, he wiped himself with her part. PW1 pleaded with him and he told her he would kill her if she ever told anybody. He untied her and led her out of the forest following her from behind. Her basket had vegetables, mobile phone charger – Nokia 1100, the phone itself and her pass book which the appellant took and gave her the basket and the vegetables. He also took her umbrella. After the appellant escorted her out of the forest, she met a person who told her that he is called J who escorted her to the college where she narrated her ordeal. She was then escorted to Kaimosi Mission Hospital for treatment. She reported to Cheptulu police station and then went home. The following day she took her clothes back to the police station.

On 2.4.2006, PW2 had send his son to buy paraffin at 7 pm. Along the way, the boy was robbed of his radio and the paraffin. He screamed and people responded to the screams and pursued the robber and apprehended him. He was the appellant herein. He was taken to the police station and on being searched PW5, the police officer who had earlier on received PW1's report found him with PW1's posta pass book. Later the PW1 went to the police station after appellant's arrest and identified her pass book and also the appellant. The PW1's clothes, pass book, P3 form and treatment notes were all produced in court as exhibits. PW4 produced the P3 form. The witness PW1 further told court that when she went to the police station, she was able to see the appellant and identified him as the person who robbed and raped her and she said she became familiar with him as he was with her for almost 2 hours and raped and sodomized her for almost one hour. She told court that she saw him well as it was 6 pm and no dark.

PW2 gave evidence and testified how they arrested the appellant after he robbed and assaulted his son whom he had send to buy paraffin. They pursued him after the boy screamed. They handed him over to the police. At the police station, a pass book belonging to M fell from his short. He told court that he knew the appellant before this day as he was their neighbour. PW3 is the chief who arrested the appellant from members of public who had arrested him. The people said they arrested him for stealing a radio. They took him to the police station and before he was put in cells, he was searched and a pass book belonging to one M was recovered from him.

PW4 is the witness who examined complainant and treated her and also filled her P3 form. The last witness was PW5, the officer who investigated this case. He had received complainant's report. He then preferred these charges against appellant. He also recovered complainant's pass book from him when he was arrested on 2.4.2006 and he produced it as exhibit.

In his defence the appellant said he was walking home along the road at 7 pm when he was arrested by members of public for no reason. He was taken to the police post at Cheptulu and then he was brought to Vihiga and charged for offences he didn't know. He told court that PW2 gave false evidence against him because of a previous grudge he had against him.

At the end of the hearing the trial magistrate found the appellant guilty of each of the three main counts and convicted him to serve death on count 1 with other sentences on count 2 and 3 being held in abeyance.

The appellant has now appealed on both conviction and sentence on the grounds that:-

- 1. The charge sheet was defective as it did not provide necessary particulars needed to be framed.**
- 2. That evidence of witnesses was inconsistent and contradictory on various issues.**
- 3. With circumstances prevailing at scene of crime, identification was not conducive and PW1 was a single witness and frightened and so could not identify him.**
- 4. That no identification parade was done in this case as required.**
- 5. Evidence adduced did not support conviction.**
- 6. No inventory was done at the time the pass book was recovered.**
- 7. No DNA was done to ascertain he was the rapist.**

We will consider these grounds one by one. As to ground one, the charge sheet as presented to court stated the necessary particulars to warrant knowledge of a detailed explanation of what transpired. The charge includes detailed explanations of the time, place and events complained of and the assertion by the appellant that it is defective is not supported by any proof.

The appellant has also stated that evidence of the witnesses was contradictory and inconsistent. The appellant did not point out which areas of the evidence was contradictory. We have not found any contradictions whatsoever in the evidence. The appellant pointed out the issue of how the pass book was recovered from him. Indeed PW2 said it was from his inner short and PW3 said it came from the pocket referring to the short pocket. In our view there is no contradiction in this evidence.

The appellant faulted the trial court for relying on evidence of a single evidence in convicting him. In cases of this nature where the rapist is alone with the culprit, to expect an eye witness would be an exercise in futility. So long as the trial court is able to believe the witness then that would suffice. In this case, the single witness stated that she was in appellant's company for almost 2 hours from 6 pm to 8 pm and it was still bright for her to see him. She was able to identify him later and with her pass book being found on the appellant that strengthened the position that the appellant was the assailant.

It is true that no identification parade was carried out but this would not have been prudent given that the complainant saw the appellant at the police station. In fact the complainant told court that the appellant talked to her and begged her to forgive him. Her evidence that was not rebutted in any way.

The circumstances under which a court can convict a suspect on evidence of visual identification and particularly a single witness is well enunciated in the case of **Abdulla Wendo & Another VS R [1953] 20 EACA 166**. Such evidence must be tested to eliminate a possibility of a mistake. The evidence in this case was indeed tested.

In our analysis, we found that though complainant was alone at the time the incident occurred, the evidence of the doctor proved that she was indeed raped. PW2 and PW3 were also present when the appellant was arrested and he was found in possession of the pass book stolen from complainant at the time she was raped and robbed. This strengthens the case against the appellant as tested.

It is our finding that the DNA testing was not required in this case and neither was an inventory necessary given that only the pass book was recovered from the appellant. We do find that the evidence adduced supports conviction of the appellant. We confirm the conviction and sentence and dismiss this appeal accordingly.

DATED THIS 11TH DAY OF DECEMBER 2013

GEORGE DULU

HELLEN S. WASILWA

JUDGE

JUDGE

DELIVERED THIS 11TH DAY OF DECEMBER 2013

S. J. CHITEMBWE

JUDGE