



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRA NO.117 OF 2011

(Appeal from Senior Resident Magistrate Hon. R. O. Oigara in Kimilili court in Cr. no.1769 of 2009)

PAUL FUCHAKA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

At about 9.30 p.m on 13/12/2009 in Bungoma North District of the Western Province Mfami Mwavite (PW1), E.A (PW2) and Sheila Wafula (PW5) were at the house of Pastor Susan watching T.V. PW2 went out to pour water and when coming back she saw three people who surrounded her. One had a knife. She ran back to the house screaming. They followed her into the house. Another attacker had a metal bar. They ordered those in the house to lie down and produce money. They assaulted the complainants and took their property. They raped PW2 in turns and left the house after ransacking it. The house was lit using electricity and the lights were on. The complainants screamed for help and neighbours came and took them to hospital for treatment at Kimilili District Hospital. The incident was reported at Kimilili Police Station. On the morning of 14/12/2009 the police arrested the Appellant who was charged before the Senior Resident Magistrate with two counts of robbery with violence contrary to section 296 (2) of the Penal Code, one against PW1 and another against PW2, gang rape contrary to section 10 of the Sexual Offences Act no.3 of 2006 against PW2, and assault causing actual bodily harm contrary to section 251 of the Penal Code against PW5. He was tried and convicted of the robbery with violence in the two counts and of assault causing actual bodily harm, but was acquitted of gang rape. He was sentenced to death. That is when he filed this appeal to challenge the conviction and sentence. The appeal was opposed by Mrs. Leting for the State.

PW1 did not identify or recognize the attackers. PW2 and PW5 told the trial court that they each identified the Appellant in the attack and it was on that evidence that he was convicted. The Appellant was arrested by P.C. Stem Siaya (PW4) at about 9.a.m. PW4 was going to the scene following the report when he met the complainants who pointed out the Appellant who was at a stage here and said he was one of the attackers. He was arrested. Nothing was recovered on him.

The Appellant denied the charges in unsworn defence and stated that he was a pupil in class 7 at Biko Primary School and that on this day he was going to the home of his brother when he was arrested.

In the grounds of appeal and in the written submissions, the Appellant attacked the evidence of identification which he said was not water-tight. He complained that his identification had not been described to the police during the initial report by the complainant's and also that no identification parade had been arranged following his arrest. The arresting officer had correctly pointed out during his evidence that he could not arrange a parade in this case when it was the complainants who had led to his arrest.

It was the evidence of PW2 during cross-examination that when she first made a report about the incident she told the police that she could identify the Appellant if she saw him again and that she had indicated he was wearing a black cap in the attack. PW4 was not the officer to whom the report was initially made. He found the report having been made and entered in the Occurrence Book. The officer to whom the description was allegedly made was not called to testify and therefore the trial court did not have the benefit of his testimony. PW4 did not say that the report in the Occurrence Book had the description. It should be remembered that the attackers were strangers and the police were going to rely on their description to trace and arrest them.

It is considered that PW5 testified that throughout the attack the Appellant kept following her; that she was with the attacker for about ½ an hour. She testified that when she ran back to the house screaming she was followed by the attackers who made her lie down and to produce money. PW1 asked her to pick the purse which was on the bed and which had money and to give it to the attackers. She went to the bedroom and brought the purse which she handed to PW1 who gave it out to the attackers. She came back to the sitting room where PW2 was lying down. PW2 asked her to get money from her jacket which she did. She gave it to her attacker who asked if she had slept with any man. She kept quiet. The attacker her and took her to the sitting room and was ordered to remove her clothes. She was pushed to the bedroom by her attacker who ordered that she removes her clothes. She declined. They struggled but she was not raped. The attackers took the items and left. It is this attacker who kept with her whom she said was the Appellant.

PW2 testified that the attackers raped her in turns after they had got money from PW1, and PW5 had brought her mobile phone and Ksh.500/= which they took. She was ordered to remove her clothes and was raped. The attackers were armed and were beating the complainants threatening to kill them. She identified the Appellant whom she said was with PW5. She said the attack lasted for about one hour. Both PW2 and PW5 said the attackers faces were not covered.

These were the circumstances under which PW2 and PW5 said they identified the Appellant. It is material that the court did not caution itself about the danger of convicting on the evidence of identification at night and to carefully consider the evidence to make sure that it was water tight and safe to justify a conviction

(R. V. Eria Sebwato [1960] E. A. 174). The court believed PW2 and PW5 that they saw the Appellant in the attack. It did not, however, consider that a witness may be honest but mistaken **(Roria v. Republic [1967] EA 583)** and that a number of honest witnesses could all be mistaken **(R. v. Turnbull and Others [1976] 3 All ER 549).**

We further consider that the court did not appreciate the difference between identification and recognition. This is what it said:

“However PW2 and 3 in their evidence confirmed to the court that they were able to recognize the attackers that is the accused before court being the fact that he had not covered his face and there was sufficient lights inside the house when they met him next day at Kimilili town did not have any difficulties in recognizing him.”

This was a case where the complainants did not know the attackers before and therefore the court was

dealing with identification and not recognition. Where a witness says that his attacker was known to him before the attack such evidence, of recognition, is usually more satisfactory, more assuring and more reliable than the identification of a stranger (**Anjononi v. Republic [1980] KLR 59**).

This is an unfortunate incident of robbery and rape, but we are unable to find that the evidence of identification by PW2 and PW5 was, without more, safe and compelling enough to justify the conviction of the Appellant. We allow the appeal, quash the conviction and set aside the sentence. The Appellant is ordered to be set at liberty forthwith unless he is otherwise being lawfully held.

Dated and delivered at Bungoma this 28th day of March, 2012.

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A. O. MUCHELULE

F. N. MUCHEMI

JUDGE

JUDGE