



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRA NO.19 OF 2010

(Appeal arising from original BGM CM. CR. NO.243 of 2009)

MARTIN SHIKUKU MASINDE.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Martin Shikuku Masinde was convicted of two offences by Bungoma Senior Resident Magistrate. Count 1 is an offence of robbery with violence where the Appellant was sentenced to death. In the second count the Appellant faced a charge of gang-rape and was sentenced to twenty years imprisonment. This appeal is against both conviction and sentence.

The grounds of appeal focus on lack of positive identification and failure to establish the ingredients of the offence. In addition to the death sentence, the Appellant challenges the second sentence of imprisonment as unlawful.

The facts of the case are that in the night of 23rd January 2009 around 2.00 a.m, the complainants who are mother and daughter were asleep in their one-roomed house at M[...] Estate in Bungoma town when a gang of three men struck. They forced the door open and demanded money and mobile phones from PW2. She gave them cash Ksh.1,000/= and a Samsung mobile phone valued at Ksh.2,800/=. PW1 the daughter of PW2 who is also the complainant in count II was lying on the bed. The assailants forced her to go away with them. She was taken to the nearby S[...] forest where she was gang raped by the Appellant and his two accomplices.

PW1 and PW2 testified that the assailants were armed with pangas, rungas and had torches which they flashed around the room. They threatened the complainant to surrender her cash and mobile phone threatening to harm her if she failed to do so.

When PW1 was being led to the forest, she testified that there was bright moonlight and she was able to recognize the Appellant whom she knew as Martin. The Appellant was a water vendor in the area. He was dressed in black clothes being a jacket and trouser. He also wore a knitted headgear which did not cover his face. PW1 said the other two thugs also wore knitted headgears which covered their faces. PW1 was not able to identify them due to the concealed faces. In the forest, the Appellant ordered PW1 to lie on the ground and he pulled off her pants. He raped her and the other two assailants followed in turns. When PW1 went home, she found her mother PW2, PW3 a neighbour and other people searching for her. She told them what had happened and that she had recognized one of the assailants as Martin the water vendor. As PW1 was taken to hospital, neighbours arrested the Appellant in his house and handed him over to the police around 4.30 a.m. On examination, the doctor concluded that there was evidence of rape. PW4 who produced the P.3 form said that due to time lapse, there was not much clinical findings available.

The Appellant in defence denied the offence. He testified that he was at home that night until 4.00 a.m when people stormed in his house and arrested him alleging that he had gang raped someone. The Appellant was frog marched to the home of PW1 and later handed over to the police. This was after PW1 confirmed that he was one of the men who raped her and robbed her mother of her property.

PW1 was present when her mother PW2 was robbed by the gang of three men. Inside the house, it was dark and both PW1 and PW2 did not recognize any of their assailants. The three had torches which they flashed around. However, when PW1 was dragged outside by the three men, she identified the Appellant with the aid of the bright moonlight. According to her, the appellant was the one who robbed her mother of the cash and mobile phone in the house. PW1 also recognized the Appellant as the man who first raped her in the forest that night before his accomplices took their turns. PW1 was the single identifying witness. The magistrate in his judgment warned himself for relying on the evidence of a single identifying witness. The court noted that it had observed the demeanor of the witness and satisfied itself that she was a credible witness. The trial court further noted that there was sufficient illumination from the moonlight to aid PW1 to identify the Appellant. PW1 knew the Appellant as a water vendor in the area. When PW2 saw the Appellant under arrest, she recognized him as the

water vendor she had been seeing in the area for the last three months before the incident.

We have carefully considered the evidence in support of count I. The Appellant was in the company of two others when he committed the offence. The trio were armed with pangas and rungas which are dangerous weapons. Violence and threats were used on PW1 and PW2. The Appellant grabbed PW1 from her bed and dragged her outside. She was forced to go with the Appellant and his accomplices to the forest. It is our finding that all the ingredients of robbery with violence were proved beyond any reasonable doubt.

On count II, the P.3 form shows that there was rape. The doctor did not explain what he found on examination for him to form the conclusion that rape had taken place. It appears no laboratory tests were done to detect the existence of spermatozoa or other organisms. This evidence was not sufficient to convict the Appellant of rape. However, the evidence of the complainant on what happened to her in S[...] forest proves a lesser offence of indecent assault. We find the Appellant guilty of indecent act contrary to section 11 A of the Sexual Offences Act, 2006 and convict him accordingly.

We are satisfied that the appellant was properly convicted of count I of the offence of robbery with violence. The conviction in count I is hereby upheld. In view of the provisions of the new Constitution, we substitute the sentence of death with one of life imprisonment.

It was wrong for the magistrate to sentence the Appellant to imprisonment in addition to the death sentence. The imprisonment sentence in count II ought to have been held in abeyance.

Now that the death sentence has been quashed in count I, we quash the 20 year imprisonment sentence in count II and substitute it with five (5) years imprisonment. The sentences to run concurrently.

The appeal is therefore partially successful.

D. A. ONYANCHA
JUDGE

F. N. MUCHEMI
JUDGE

Judgment delivered this 19th day of July, 2011 in the presence of the Appellant and the state counsel Mr. Ogoti.

F. N. MUCHEMI
JUDGE