REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 166 OF 2009

IBRAHIM BATOK ETYANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence of Hon. L. W. Gitari (Principal Magistrate)

in Eldoret CM.CR. No. 1633 of 2000 delivered on the 15th October 2002)

JUDGMENT

It was on the 3rd September 1999 that the appellant, **IBRAHIM PATEL ETYANG, also** known as **IBRAHIM BATOK ETYANG** and others appeared before the Principal Magistrate at Eldoret charged with two counts of robbery with violence contrary to S. 296 (2) of the Penal Code.

In addition, the appellant was separately charged with defilement of a girl contrary to S. 145 (1) of the Penal Code.

It was alleged that on the night of 23rd/24th August 1999 at Trans Nzoia District while armed with pangas and rungus robbed M.W.M.of one motor vehicle Reg. No. K[....] Peugeot 504 P/up matatu, several kitchen utensils, one National radio cassette and Ksh. 11,000/- cash all valued at Ksh. 820,000/- and also robbed J.K.K of Ksh. 700/- cash and at or immediately before or immediately after the said robberies used actual violence to the said M.W.M.and wounded the said James Kuria Kariuki.

It was also alleged that on the night of 23rd/24th August 1999 at Trans Nzoia District, the appellant had carnal knowledge of J.M.G. , a girl under the age of 14 years.

After pleading not guilty to the charges, the appellant was tried and convicted. He was sentenced to death for the offences of robbery with violence and to fourteen (14) years imprisonment for the offence of defilement.

In **BORU & ANOTHER VS. REPUBLIC [2005] 1 KAR 649**, the Court of Appeal held that where an accused person is convicted on more than one capital charge, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment.

It was also held that the reason for that is simple, in case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over, he can only be hanged once and hence the necessity for leaving the sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. Further, once a sentence of death is imposed once, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the Court dealing with the appeal would consider the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed.

It follows therefore, that the learned trial Magistrate was in error to impose a term of imprisonment on the fourth count facing he appellant whereas she had already imposed the death sentence on count one. The sentences on the remainder of the counts ought to have been held in abeyance.

Be that as it may, the appellant was aggrieved and dissatisfied with the conviction and sentences imposed upon him. Consequently, he preferred the present appeal on the basis of the grounds enumerated in his petition of appeal filed herein on 23rd September 2003.

The grounds are essentially complaints on the prosecution evidence of identification which the appellant considers to have been insufficient, unreliable and inconsistent. There is also the complaint that the appellant was convicted of defilement in the absence of medical evidence on his part.

At the hearing of the appeal, the appellant represented himself and opted to rely on his written submissions.

The learned **SENIOR DEPUTY PROSECUTION COUNSEL, MR. OLUOCH**, represented the State/Respondent. In his submissions, the appellant implied that the conditions for the identification of the offenders were not favourable for PW 1, PW 2 and PW 4 to have positively identified him.

In contending that PW 6 had nothing to offer with regard to his alleged identification, the appellant implied that the learned trial Magistrate erred in convicting him on the basis of the evidence of identification given by PW 1, PW 2, PW 4 and PW 6. The appellant noted that the aforementioned witnesses allegedly identified him in identification parades yet the officer who conducted the parades did not testify in Court.

The appellant also contended that the purpose of holding an identification parade is to test the correctness of a witness identification of a suspect at the time of the alleged offence. This is an essential requirement to exclude the possibility of mistaken identification. With regard to the charge of defilement, the appellant contended that the actual culprit was not reliably and properly identified in view of the contradictory evidence in respect thereof. In support of his submissions, the appellant relied on decisions made by the Court of Appeal in the case of **AUGUSTINO NJOROGE & ANOTHER VS. REPUBLIC CRIMINAL APPEAL NO. 99:1936 (Sic) (C/A)** and the case of **GEOFFREY NGUKU VS. REPUBLIC CRIMINAL APPEAL NO. 106 OF 1983 (C/A) KISUMU**.

The respondent conceded the appeal on the basic grounds that evidence of identification by PW 1, 2, 4 and 6 was insufficient and unreliable as those witnesses had not previously known the appellant therefore prompting the identification parade in which they allegedly identified him. And since the officer who conducted the identification parade did not testify and produce the necessary parade forms, the alleged identification of the appellant was mere dock identification.

The respondent contented that the failure to call the officer conducting the parade and the failure to produce the parade forms was fatal. In that regard, reliance was placed on the decision of the Court of Appeal in the case of **IBRAHIM KIGAME AGEVI & ANOTHER VS. REPUBLIC CRIMINAL APPEAL NO. 298 OF 2009 AT ELDORET**. The respondent's second ground for conceding the appeal is that there was no recovery of the stolen items. What was recovered was some money change which PW 2 allegedly belonged to her. In finality, the respondent contended that the appellant's conviction by the learned trial Magistrate was unsafe.

Having considered all the foregoing submissions by both the appellant and the respondent, it behoves upon us, as a first appellate Count, to reconsider the evidence adduced at the trial, evaluate it and draw our own conclusions in deciding whether or not the Judgment of the trial Court should be upheld, as well as to deal with any questions of law raised on the appeal (See, **BORU & ANOTHER VS. REPUBLIC (Supra) and OKENO VS. REPUBLIC (1972) EA 32**).

In that regard, the prosecution case was briefly that on the material date at about 11.30 p.m., **M.W.M (PW 1)**, **M.W.G (PW 2)**, J.M.G. **(PW 4)** and **J.K.M (PW 6)**, all members of one family, were at their M[...] in Kitale when a group of about six men armed with pangas (machetes) and whips invaded the homestead and firstly proceeded to the house occupied by M.W.G (PW 2) and (PW 4) from where they removed M.W.G (PW 2) and forced her to lead them to the house of M.W.M (PW 1) within the same compound. They ordered M.W.G (PW 2) to call

M.W.M (PW1) and when she (PW 1) opened the door, the intruders entered the house along with M.W.G (PW 2). Inside the house, they picked the keys of a motor vehicle Reg. No. K[...] P Peugeot 504 pick-up matatu from the top of a cupboard. They asked but could not get the keys of another motor vehicle Reg. No. K[...]Isuzu Tougher. They were told that the keys of that second vehicle were in the house occupied by J.K.M (PW 6). They ordered M.W.M (PW 1) to take them to that house within the same compound. M.W.M (PW 1) called out for James and he opened the door. The intruders entered the house and found a uncle to J.K.M. They (intruders) assaulted the two occupants and demanded money. They found and took away Ksh. 700/-. They demanded and were given the keys to the second vehicle. One of them made an attempt to start the vehicle but in vain. They ordered J.K.M (PW 6) to start the Peugeot vehicle and after he did so, they all entered the vehicle and drove off having stolen several items and also having raped M.W.M (PW 1) and (PW 4). An attempt to also rape M.W.G (PW 2) did not succeed.

At the time of the offences, there were hurricane lamps which lighted the scene aided by flashes from torches in possession of the intruders.

The witnesses (PW 1, PW 2, PW 4 and PW 6) said that the lamps and the torches made it possible for them to identify the appellant and the rest of the intruders. They (witnesses) also said that they again identified the appellant in an identification parade conducted on the 27th August 1999 at the Kitale Police Station.

P.C MERCELLOUS OCHINDO (PW 3) of Kitale Police Station received the report of the offences on the material date at about 2.30 a.m. On the way to the scene accompanied by his colleagues they met other colleagues who had already visited the scene and confirmed the occurrence of the offences. P.C Ochindo returned to the Police Station and followed up the matter. In the process, a suspect was arrested by a village elder and his youth wingers. The suspect led to the recovery of some of the stolen items. More suspects were arrested and additional stolen items recovered including the Peugeot motor vehicle. The appellant was among those arrested. He was found at a house with others drinking traditional liquor (changaa). He was searched and found with Ksh. 2,790/-. He and the other suspects were later arraigned in Court. Superintendent of Police **FRANCIS LEMANGI (PW 7)** conducted identification parades respecting two suspects who did not include the appellant.

BERNARD GICHERU (PW 5), a Clinical Officer at the Kitale District Hospital examined (PW 1), (PW 4) and James (PW 6) and confirmed that they had suffered injuries during the offences. He also confirmed that (PW 1) and (PW 4) had been raped.

The appellant was placed on his defence on the basis of the foregoing evidence by the prosecution witnesses. He denied the offences and said that he knew nothing about them. He said that he was arrested for drinking changaa and lumped up with people he did not know. His money Ksh. 2,890/- was taken from him by the police who did not return it. He said that on the 23rd August 1999 he was at work at a posho mill in Kitale. He worked upto 6.00 p.m. and returned home. On the following day he went to work and in the process a power black out engulfed the area. He had to wait for normal power supply to resume. In the meantime, he proceeded to a nearby changaa den and joined others in the drinking of the liquor. It was there that Police officers arrived and arrested him only to later charge him in Court with the present offences.

At the conclusion of the trial, the learned trial Magistrate considered all the evidence placed before her and finally arrived at the conclusion that the charges facing the appellant had been proved beyond reasonable doubt. Consequently, the appellant was sentenced to death and to a term of fourteen (14) years imprisonment with hard labour and ten stokes of the cane.

It was the learned Magistrate's finding that the appellant and others were responsible for the offences committed against the complainant.

In so finding, the learned trial Magistrate relied heavily on the evidence of PW 1, 2, 4 and 6 to hold that the appellant was positively identified at the scene of crime in circumstances which were favourable for such identification.

The learned trial Magistrate found that the hurricane lamps at the scene of the offences and to some extent the flashes from the torches in possession of the offenders provided sufficient light for the positive identification of the appellant and others.

The learned trial Magistrate further found that the recovery of some of the stolen items in the possession of the suspects including the appellant was sufficient evidence to incriminate them with the offences.

In our view, after subjecting the evidence to a fresh scrutiny, the direct evidence of identification against the appellant was not watertight and reliable and more so, considering that difficult circumstances existed at the time of the offences. The intruders were strangers to the complainants and although they (complainants) may have had adequate opportunity to see and probably identify the appellant and others, we doubt whether the light available from the lamps and torches provided conducive circumstances for positive identification. There was no

comprehensive description by the complainants of the prevailing circumstances at the scene of the offences. There was no mention of the position of the appellant from the lamps. There was also no mention of the intensity of the light from the lamp and torches. All these are normally vital and relevant factors for consideration in offences committed in the hours of darkness. With respect, we do not think that the learned trial Magistrate accorded careful and adequate consideration to the circumstances prevailing at the scene and time of the offences.

The circumstances in our view, were not favourable for a positive identification of the appellant. The complainant's identification of the appellant at the scene of the offences was thus not cogent and reliable. His subsequent identification at an identification parade was of no consequences. In any event, there was no evidence of the conduct of the identification parade from the responsible officer. Such evidence was vital for the Court to determine whether or not the identification parade was properly conducted in accordance with the set rules.

The failure by the prosecution to lead evidence on the conduct of the identification parade was detrimental to its case and in effect, rendered the identification of the appellant mere dock identification.

In **NJOROGE VS. REPUBLIC (1987) KLR 19**, the Court of Appeal held that "***a dock identification is worthless and a court should not rely on such an identification unless it has been proceeded by a properly conducted identification parade. A witness should be asked to give a description of the accused and then a fair identification parade should be arranged***." (See also, **IBRAHIM KIGAME AGEVI & ANOTHER VS. REPUBLIC CRIMINAL APPEAL NO. 289 OF 2009 AT ELDORET**).

With regard to the indirect evidence based on the doctrine of recent possession, we opine that the doctrine could not apply in this case for the simple reason that there was no proof of the ownership of the money found in the possession of the appellant.

Ultimately, we hold that the conviction of the appellant by the learned trial Magistrate was not based on sound evidence. Consequently, this appeal is allowed to the extent that the conviction is quashed, sentence set aside and appellant set at liberty unless otherwise lawfully held.

Ordered accordingly.

J. R. KARANJA

JUDGE

A. MSHILA

JUDGE

[Delivered and signed this 19th day of October 2011]