



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 29 OF 2009
(CONSOLIDATED WITH CRIMINAL APPEAL NO.30 OF 2009)

DOMINIC KIBET CHIRCHIR.....1ST APPELLANT
BENARD KIPCHUMBA CHIRCHIR.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(An Appeal from original conviction and sentence in
Molo P.M.CR.C.NO.606/2008 by Hon S.M.S. Soita,
Principal Magistrate, dated 29th January, 2009)**

JUDGMENT

The appellants, **Dominic Kibet Chirchir** and **Bernard Kipchumba Chirchir** were charged jointly, in the first count with **robbery with violence** contrary to **section 296(2)** of the **Penal Code** and in the second count with **gang rape** contrary to **section 10** of the **Sexual Offences Act No. 3 of 2006**.

According to the particulars of the offence, the appellants are alleged to have robbed Hezbon Omore, the complainant in the 1st count (Hezbon) on 26th April, 2008 at Kuresoi, of a mobile phone, make Nokia 1200 valued at Kshs.2,700/= and that at or immediately before or immediately after the time of robbery used actual violence to the said Hezbon Omore. It is further stated that on the very day of the offence charged in the 1st count and at the same place, the appellants gang-raped HWK, a child under the age of 18 years.

The prosecution led evidence that on the day in question at around 4p.m. as the complainants were walking towards the trading centre three men, known to them emerged from the bush armed with a rungu (club) and a knife. One of them, identified by the witnesses as the 1st appellant got hold of HWK and dragged her into the bush and defiled her as the other robber, identified as the 2nd appellant attacked and robbed Hezbon of his mobile phone. It is also the prosecution case that the 2nd appellant later joined the 1st appellant and also defiled HWK. The matter was reported to the police and the appellants arrested on 12th May and 12th June, 2008 respectively.

Meanwhile, HWK was examined by P.W.1 Philip Mukai, a clinical officer, who confirmed that HWK

was penetrated. He also assessed her age as 16 years.

Both appellants gave unsworn statements in defence. The 1st appellant stated that on 12th May, 2008, he was attending a friend's party when the police arrested him without disclosing why. That he learnt of the offence charged when he appeared in court. He maintained that on 27th April, 2008 he was also at his place of work. The second appellant, similarly, maintained that he was not involved in the robbery and that on 27th April, 2008 he was also at his place of work. We note at this stage that the offence was committed on 26th April, 2008.

The learned trial magistrate evaluated this evidence and arrived at the conclusion that it did not implicate the 1st appellant with the offence of robbery with violence and he was, as a result, acquitted. The learned magistrate however found that the evidence proved beyond reasonable doubt that the 1st appellant participated in the offence of gang rape and on the other hand, that the 2nd appellant participated in the offence of robbery with violence as charged in the 1st count.

The 1st appellant was consequently sentenced to 20 years for the offence of gang rape while the 2nd appellant was sentenced to death in respect of the robbery with violence charge. The sentence of gang rape was ordered to be held in abeyance.

The appellants were aggrieved and have appealed on more or less similar grounds, mainly on the issue of identification, inconsistencies and contradictions, in the prosecution case. They have also complained of the language used at the trial. Finally they have argued that the case was not proved to the required standard.

Learned counsel for the respondent supported the conviction and urged us to dismiss the appeal for the reason that it lacked merit. That the appellants were identified by people who knew them and the attack was in broad daylight.

Before we consider the appeal, we remind ourselves of our duty as the first appellate court to re-evaluate the evidence presented in the court below in order to arrive at our own independent conclusion bearing in mind that we neither saw nor heard the witnesses testify.

We find as a fact that the complainants were ambushed, attacked and robbed. HWK was gang raped in the process. It is also common ground that the attackers were three and; that they stole Hezbon's mobile phone. In the circumstances, **robbery with violence** contrary to **section 296(2)** of the **Penal Code** was committed. We will be saying something about the charge of gang rape later in this judgment. But the main question that fell for determination before the trial court and which must also be answered on this appeal is whether the appellants were clearly and positively identified as part of the gang that robbed Hezbon and raped HWK.

It was the testimony of the complainants that they were accosted by persons known to them. It is therefore a question of recognition. It has now been settled on the authority of **Anjononi & others Vs. Republic**, (1980) KLR 59, among other authorities that the proper identification of robbers is always an important issue and that recognition as opposed to identification is more satisfactory, more assuring and more reliable than identification of a stranger because recognition depends upon personal knowledge of the assailant in some form or other.

Each of the two complainants explained why they believed they had been attacked by the appellants. For instance, HWK stated in the relevant parts of her evidence as follows;

“Three persons who were known to me physically emerged from the bush. They stopped us and asked what relationship we had. The person who asked is the second accused.”

In cross-examination by the 1st appellant, she went on to say:

“I was dragged like from here to the police station (about 500m) I was able to identify you because I had been seeing you at Kioo.”

To the 2nd appellant she said:

“I know you physically. You were at the scene.”

For his part, Hezbon testified thus:

“I know all the three. One I know by his nick-name of Rugut. I had known the other physically. They ordered me to remove everything I had..... I told the police I knew the attackers My attackers did not conceal their faces. The first accused is the only one who grabbed H and dragged her to the bush. The second is the one who beat me with a rungu with a nut. He is the one who took my phone..... The person I know by the nickname is the first accused.”

In cross examination, he was categorical to the 1st appellant, saying:

“I know you very well. I had known you for a year. You were residing in the plot at Kilel..... When I reported, I described how you were dressed..... I did not give the physical appearance of the attackers. You were wearing a cap. Your colleague was wearing a Marvin. I gave the name of the 1st accused. I could not give your name as I did not know your name. I was seeing you at Chepsion. I did not know your name. It is you who beat me up.”

From the above evidence, we come to the conclusion on this aspect of the appeal that the appellants were not strangers to the complainants. They recognized them. They spent ample time together as the attackers sought to know their relationship, demanded and took Hezbon’s mobile phone and assaulted him. They wore a cap and a Marvin but this did not conceal their faces. The 1st appellant pulled HWK for a distance of nearly 500m into the bush. He ordered her to remove her clothes. He too removed his and proceeded to defile her.

When it was the 2nd appellant’s turn, HWK estimated that he was on her for about 30 minutes. But significantly, all this took place at 4p.m., in broad day light. The incident was reported to the police and the complainants separately confirmed they were attacked by known people. Hezbon gave the nick-name of the 1st appellant. P.C. Augustine Juma confirmed that Hezbon reported that he knew the assailants and it was on that report that the appellants were traced and arrested.

We come to the same conclusion as the learned trial magistrate that the circumstances for identification were conducive and that the appellants were properly and positively identified. Their *alibi* defence was displaced by the prosecution evidence that placed them at the scene. Their defence did not give account of their whereabouts on 26th April, 2008, the date of the attack.

We turn to say something about the charge of gang rape. The appellants are charged that they:
“..... jointly with others not before court raped HWK”

It has been held time without number that it is impractical for rape to be committed jointly and simultaneously. For instance in the case of **Bernard Umunda Marichuada and 2 others Vs. Republic**, Criminal Appeal No.259 of 2002, the Court of Appeal emphasised this point saying:

“The Learned Senior Principal State Counsel conceded the appeal in respect of counts 6 and 7 on the ground that the charges were defective as they purported to charge more than one person for jointly raping a victim. There can be no question of two or more people “jointly raping a victim”

For these reasons the counts relating to rape must be allowed. It follows that the conviction and sentence in respect of these two counts must be and are hereby quashed and set aside.”

We agree and are bound. The charge of gang rape was defective and we shall and do hereby allow the

appeal on that score in respect of count II. The conviction is quashed and the sentence of 20 years set aside. The appellants are acquitted on that count which means that the first appellant who was convicted only on that count shall be set free unless for any other lawful reason held.

Before we conclude, the appeal also raises issues like the effect of failure to call the investigating officer, whether a clinical officer is qualified to carry out examination on victims of sexual violence, the contradiction and inconsistencies, if any, in the prosecution case and the language used at the trial. We can dispose of the issue of the clinical officer by stating that it is not relevant having dismissed the charge of gang rape. We also note that the contradictions spelt out by the appellants are not significant and have not occasioned miscarriage of justice. On the language, it is enough to note that the court record is clear that there was a Kiswahili interpreter. We also observe that the appellants cross-examined witnesses, gave statements in defence and made various applications in the course of the trial.

Finally, as was held by the Court of Appeal in the case of **Harward Shikanga & Another** Vs. **Republic**, Criminal Appeal No.102/2007, failure to call the investigating officer is not necessarily fatal to the prosecution case as circumstances of each may differ. Our reading of the evidence of P.C. Augustine Juma confirms that he was the investigating officer.

For these reasons and to the extent stated in this judgment, we find no merit in the appeal by the 2nd appellant in respect of count 1. His appeal is dismissed.

Dated, Signed and Delivered at Nakuru, this 30th day of November, 2010.

**ANYARA EMUKULE
JUDGE**

**W. OUKO
JUDGE**