



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Criminal Appeal 99 of 2007

DAVID ONGAYI ALELA.....1ST APPELLANT

ENOS KALO AKUTE.....2ND APPELLANT

MELAZADECK KENGO KHAMATI.....3RD APPELLANT

ELIAKIM ELISHE JOHN.....4TH APPELLANT

ELPHAS KENGO ONYANGO 5TH APPELLANT

AND

REPUBLIC.....RESPONDENTS

(Appeal from judgment of the High Court of Kenya at Kisumu (Mwera & Mugo, JJ) dated 27th March, 2007

in

H.C.C.R.A. NO. 96 OF 2004)

JUDGMENT OF THE COURT

DAVID ONGAYI ALELA, the 1st appellant, **ENOS KALO AKUTE**, the 2nd appellant, **MELAZADECK KENGO KHAMATI**, the 3rd appellant, **ELIAKIM ESICHE JOHN**, the 4th appellant and **ELPHAS KENGO ONYANGO**, the 5th appellant, were after trial jointly convicted by the Senior Resident magistrate's court at Maseno on two counts of robbery with violence contrary to **section 296(2)** of the Penal Code and on one count of rape contrary to **section 140** of the Penal code and upon their conviction they were duly sentenced to death as the law prescribes for convictions on robbery with violence and ten years imprisonment for the convictions on rape.

Their respective appeals to the superior court which were consolidated resulted in the convictions on the robbery charges being upheld, and the convictions on the rape charge being quashed and the sentences thereof set aside on the ground that the charge was fatally defective in that a "joint charge of rape" cannot be envisaged.

The five appellants now come to this Court by way of a second and final appeal, and that, being the

position **section 361 (1)** of the Criminal Procedure Code restricts the jurisdiction of the Court to dealing only in matters of law.

The appellants through their learned counsel Ms Arati complain; firstly, that the two courts below erred in failing to consider the fact that there was no positive identification of the appellants in that the intensity of the light in the houses in which the complainants were attacked was not considered; and secondly, that the case against the appellants had not been proved beyond all reasonable doubt as is mandated by law.

During the nights, of 28th and 29th of October 2003 a gang of robbers armed with crude weapons and torches carried out a series of raids within the two small and sleepy **particulars withheld** at Vihiga District within Western Province. The robbers first attacked the homestead of IO(PW1). He had been sleeping with his wife DK(PW6) when he heard a commotion outside his house. He quickly got up and rushed out. He came across a group of people who claimed that they were administration police officers on an official raid. When he asked what kind of raid it was, the robbers descended upon PW1 with blows. PW6 sensing danger quickly locked the door. However, the robbers smashed it open and took PW1 inside the house and started ransacking it. It is the evidence of PW1 that when his wife PW6 first heard that there were people outside their house she lit a lamp and by means of its light and that of his torch which he had flashed on the robbers he was easily able to identify the 4th appellant (Eliakim Esiche John) and the 2nd appellant (Enos Kalo Akute) among others. He had known the two for over a period of three years prior to the robbery incident. During the robbery PW1 suffered serious injuries, mainly cuts, in the head and legs as a consequence of which he was admitted for three days at Kima Mission Hospital.

It would appear that the gang after attacking PW1 and his wife swiftly moved to the house of R.A. (PW2), the complainant in the second count of robbery with violence. She was asleep in her grandmother's house together with her young brothers and sisters. She heard noises in the nearby cowshed. She woke up her sister GA (PW3) and together with the aid of a torch they went out to check what was making noise. She flashed the torch and by its lights PW2 was able to identify the 4th appellant (Eliakim Esiche John), the 5th appellant (Elphas Kengo Onyango) and the 3rd appellant (Melazadeck Kengo Khamati). This witness told the trial court these three people were her immediate neighbours and she had known them since childhood. PW2 proceeded to testify that when she attempted to run away the 4th appellant tripped her and she fell. Together with the other robbers he gagged her and carried her shoulder high into a bush at Ebutongoi where they repeatedly raped her in turns. The gang of robbers had torches and when they were raping her they were flashing them at her. PW2 testified:

“Enos Kalo Akute (the 2nd appellant, 5th accused in the trial court) was the first to rape me followed by Eliakim Esiche John (the 4th appellant, 1st accused), Elphas Kengo Onyango (5th appellant), David Onganyi Alela (the 1st appellant) and Melazadeck Khamati, 3rd appellant. I was able to identify them by their voices and physical appearances as they were talking to each other and when they were raping me as they were lying on top of me”.

This witness further testified that:

“They raped me from 1.00am to 5 a.m. and I had sufficient time to recognize them”

It is significant to note that the appeals on the rape charge having been allowed as stated in the earlier part of this judgment, the evidence of this witness only remains in the light of the robbery charge wherein it was alleged that she was robbed of her torch when the 5th appellant snatched it from her in her grandmother's house. PW2 had testified that the 5th appellant had moved in front of her and in the process was able to see him. The torch was recovered in the 5th appellant's house and he gave no explanation as to how he came by it.

PW3 testified that she had accompanied PW2 to check in the cowshed and when PW2 flashed her torch she was able to identify their neighbours, the 4th and 5th appellants. She got frightened and ran back

into the house. They locked themselves up in their house until the next morning when PW2 returned and reported having been gang raped by the appellants whose names she gave to their grand mother, and also later to the police. On his part, their younger brother, AA (PW3) stated that when the noises occurred outside he ran there with a torch. He flashed his torch and he was able to see the 5th appellant who was standing in the homestead together with one other person called Absalom Shikuku who is said to be at large.

Dorina Khatenje (PW6), the wife of (PW1), testified that she and her husband were attacked on the night of 28/29 October 2003 while they were asleep in their house. The robbers beat up the couple and stole from it. On her part PW6 identified the 4th appellant (Eliakim) and the 3rd appellant (Khamati) in the flash lights of the torches the robbers were flashing on each other as they looked for what to steal and also there was light from a lamp which she had lit when she heard a commotion outside their house.

The appellants in their respective defences before the trial court denied committing the offences charged. In his defence, the 1st appellant told the trial court that he was on 2/11/2003 cutting a tree which fell on PW4 shamba. PW2 with another person were in PW4's home. All started a row over this fallen tree and the 1st appellant and the Alelas could not settle the dispute. PW4 decided to complain to the police who later arrested the 1st appellant but then he was charged with the present offences. We however, note that when both PW2 and PW4 testified, the 1st appellant did not bring this issue of a falling tree in cross-examination.

The 3rd and 4th appellants in their unsworn testimony told the trial court that while at home with their families on 5/11/2003 at about 7.30 police officers went there and arrested them for an undisclosed offence. They were surprised when charged with these charges.

R K (DW 6) testified on behalf of her husband, the 5th appellant. She told the court that he was arrested on 2/11/2003 at about 8.30p.m and later charged. She stated that 5th appellant worked in Nairobi and did not stay in the rural areas. She did not know Ibrahim (PW1) or RA (PW2). On the material day the 5th appellant had arrived home and had only stayed for 2 hours when police came to arrest him.

The 2nd appellant, likewise denied committing the offences charged and called his wife P O K (DW 7) to testify on his behalf. She stated that the 2nd appellant had been at home with her husband when the police came and arrested him for an offence they did not disclose.

In convicting the appellants the trial magistrate after carefully analyzing and evaluating the evidence concluded:-

“Each one of the accused persons were at least identified more than once by the various prosecution witnesses. Considering that the offences were committed following each other and considering that those accused persons identified by PW1 and PW6 are also the same ones identified by PW2, PW3 P4 and PW5 it can only be inferred that same suspects committed the offences charged. I do find accused person guilty as charged and they are all convicted as charged in count 1,II, III under Sec. 215 C.P.C.”

On its part, the superior court after a lengthy and analytical judgment concluded:-

“On our part, from the evidence of PW1, PW2, PW3, PW6 and PW7 (i.e. I O, RE and GA, D or D K, AA) we are satisfied that the appellants are the people who committed the robberies in counts 1 and 2 here. They took place at night, yes, but we think they were identified. PW1 and 6 saw them in the torch lights they flashed on themselves as they looked for what to steal in their house. There was even a lamp lit by PW6 (D) burning in the house before Eliakim (appellant 3) put it off. The couple knew their attackers (the appellants), as villagers and neighbours.

PW2 and 3 gave evidence of how they identified the appellants first in the torch light they had and

more particularly that all the appellants raped PW2 for over 5 hours, all the time talking among themselves and flashing torches. She recognized the appellants by their voice. After all they were all neighbours known to one another for long. We are satisfied that even without describing the intensity of the torch or lamp light and how far the appellants were from either, all the circumstances of this case taken together point to none other than the appellants. They beat and robbed Ibrahim (PW1) and RA (PW2) of the respective properties set out in counts 1 and 2.

The evidence from GA (PW3), AA (PW5), the police officers and even Dr. Maingi (PW10) was that the witnesses especially RA (PW2) identified/named the assailants and police acting on that and such other information as they would come by during investigations, led to the arrest of the appellants followed by charges.”

Thus, there were concurrent findings of fact by the two courts below that the appellants were the persons who raided the homesteads of the complainants, indeed their close neighbours, broke into their houses, gang raped PW2 for over five hours, assaulted and injured their victims and robbed them of their property.

As premised herein above a second appeal is confined to points of law and this Court cannot upset those findings of fact unless satisfied that the findings were based on misdirections of such a nature that it is reasonably probable that without them, the appellants could not have been convicted. See **Karingo v Republic [1982] KLR 213.**

In the case before us, there is concurrent finding that the appellants were particularly identified by PW2, the gang rape victim, and the other complainants, PW1, PW3 and PW6. All the appellants resided in the same village with the complainants and had known each other since childhood. The account of how the robberies were committed had no discrepancies in the testimony of the prosecution witnesses. In the circumstances, the findings of the two courts below that the appellants were sufficiently identified cannot be faulted.

The appellants in their respective grounds of appeal before this Court attack their convictions and sentences on two main grounds, firstly, that the two courts below erred in failing to consider the fact that there was no positive identification in that the intensity of the light which enabled the witnesses to identify the appellants was not considered; and secondly, that the prosecution never discharged its burden of proof as is required by law. These grounds of appeal were contained in the supplementary memorandum of appeal and were argued by Ms Arati, advocate, who represented all the appellants before this Court. On the question of identification, Ms Arati is in effect asking this Court to depart from concurrent findings of facts by the two lower courts. We decline this invitation for there are no compelling reasons for us to do so. The findings by the said courts, in our view, are based on sound evidence and in the circumstance we cannot interfere with their decision. We accordingly reject this ground of appeal.

We are satisfied that the trial and the first appellate courts cannot be faulted for reaching the conclusions that they did. More so, the first appellate court which reconsidered the evidence on record, evaluated it and made its own conclusion especially on the question of identification. It was satisfied that the identification of the appellants by the witnesses was positive and free from fault. On our part we agree.

For these reasons, we are satisfied that all the five appellants were properly convicted. We uphold the convictions of each and every one of them. Accordingly, their appeals are rejected. We dismiss this appeal in its entirety.

Dated and delivered at Kisumu this. 16th day of January, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR