



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Criminal Appeal 201 of 2008

NICKSON OTIENO ODEROAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Musinga & Karanja, JJ.) dated 30th July, 2008

in

H.C.CR.A. NO. 165 "A" of 2005)

JUDGMENT OF THE COURT

NICKSON OTIENO ODERO, the appellant herein, was charged in the court of the Senior Resident Magistrate at Oyugis with two offences of robbery with violence contrary to section 296 (2) of the Penal code, one count of rape contrary to section 140 of the Penal Code and on one count of indecent assault on a female contrary to section 144 (1) of the Penal Code. The facts of the robbery offences were that on 13th January, 2005 at K sub-Location of Rachuonyo District within Nyanza Province, jointly with others not before court robbed RO (PW1) and LM (PW2) specified amounts of money and property and at or immediately before or immediately after the time of such robbery used actual violence on the said complainants. The facts of the rape charge are that the appellant had carnal knowledge of PW1 without her consent while indecent assault on PW1 concerned the appellant unlawfully and indecently touching her private parts.

During the trial of the appellant the prosecution called 7 witnesses and after hearing their evidence as well as the unsworn evidence of the appellant the Senior Resident Magistrate (Ms. R. Ngetich) wrote a judgment which she delivered on 15th November, 2005 by which she found the appellant guilty on all counts, convicted and sentenced him to death on each count of robbery with violence and life imprisonment for the conviction of rape. His first appeal was dismissed (Musinga and Karanja, JJ). He was aggrieved by their decision and hence this second and final appeal.

LM (PW2) is a peasant farmer. He is married with two wives, RO (PW1) and P (PW3). Each of the wives has her own house. They lived at Kodera Forest in Rachuonyo District. During the night of 13th January, 2005 at about 4.00 a.m. PW1 was asleep in her house while PW2 slept in

PW3's house. Suddenly, a gang of robbers with torches burst into PW1's bedroom. Two of the gang members approached her while others went to a store within the house. One person then proceeded to rape her. PW1 testified that she recognised that person as the appellant by means of a torch light from a torch which he had placed on the bed while he continued to rape her. He was her neighbour. Meanwhile PW2 heard a commotion in PW1's house. He woke up and went out. He saw a group of people surrounding the house. He dashed back to PW3's house but the gang followed him in and broke the door. He was robbed of money and clothes. He was also seriously injured. However, he did not identify any of his attackers. PW3 was however lucky for she hid herself behind the door and as the gang entered the house she escaped. She testified that she identified their neighbour, the appellant, as one of the members of the gang from the torch lights which the gang had.

Harrison Okulo (PW4) was at the time the Assistant Chief of K sub-Location. Few hours after the attack at about 7 a.m. PW2 reported to him that his home had been attacked and his wife had been robbed and raped. PW2 further informed PW4 that PW3 was able to recognise the appellant as one of the gang members and who had raped PW1 and robbed both of them. Acting on this information PW4 made a report at Oyugis Police Station and later traced and arrested the appellant.

The appellant's defence was terse. He stated that he was at home when he was arrested for an offence that he did not commit.

On the basis of the evidence of PW1, PW2, PW3 and PW4 the trial magistrate held:

"I find that sufficient evidence was adduced to prove that the accused robbed PW1 and raped her.....PW3 hid behind the door and was able to see and identify the accused from the torches that accused and his colleagues had and that she had known him before."

The trial magistrate proceeded to find the appellant guilty as charged, convicted him and thereafter sentenced him accordingly. The superior court, likewise, in a considered judgment upheld the trial magistrate on the issue of recognition and consequently dismissed the appellant's first appeal.

In his memorandum of appeal which has 4 grounds of appeal and which his counsel Mr. Kirenga relied upon in his submission, the appellant mainly complained about the inadequate and insufficient identification and implication in the commission of the offence; contradiction in the prosecution evidence and the burden of proof. Learned counsel highlighted all these in his address before us and in particular, he complained about the circumstances obtaining at the time the offence was committed which he said were not conducive to a positive identification of the appellant. On the other hand, learned Senior State Counsel, Ms. Oundo, supported the convictions and said the appellant was positively identified with the commission of the offence subject of this appeal and that the case against him had been proved beyond all reasonable doubt and that his conviction was safe.

We will deal first with the issue whether the appellant had been positively identified as a member of the gang that robbed PW2, raped and also robbed his wife, PW1. As was put by this Court in the case of **HUKA AND OTHERS v. REPUBLIC – [2004] E.A 266**, it is incumbent upon the first appellate court to examine afresh the evidence of visual identification of the accused to ensure that any possibility of error is eliminated.

"The court must act with caution in accepting evidence of identification where it is the main basis of the case against the accused."

True, as submitted by Mr. Kirenga, the only source of light in PW1's house were torches whose intensity was unknown. But the appellant had kept the torch on the bed during the rape

ordeal and PW1 was able to recognise the appellant by the torch light therefrom. Moreover, the appellant was known to her as their neighbour and she gave his name to her husband and later to the Assistant Chief. As PW1 was obviously very close to the appellant during the sexual assault there was every opportunity for her to clearly observe the appellant. We are therefore satisfied, in the circumstances, that the appellant was properly identified by PW1 and PW3 as a member of the gang of robbers who carried out the heinous crime upon them.

The appellant, also, through his counsel submitted that he was not accorded a fair trial because the amount of the money allegedly stolen from PW2 was altered midstream by the trial court from Shs.500/= in the charge sheet to Shs.600/= as narrated to the trial court without giving him the opportunity to plead afresh and without affording him the right to comment on the sudden alteration. We have anxiously considered this ground of appeal. Though it may have some merit, we are however of the firm view that the amendment did not occasion the appellant any miscarriage of justice.

In the result we are satisfied that the appellant was properly convicted and we uphold the convictions against him. His appeal must fail and is accordingly dismissed.

Dated and delivered at Kisumu this 7th day of August, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR