REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 98 & 81 of 2007

PETERSON BUNDI WANJIRU.....APPELLANT

Versus

REPUBLIC .....RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO.81 OF 2007

STEPHEN GACHOKI NYAGA .....APPELLANT

Versus

REPUBLIC .....RESPONDENT

(Appeal from original conviction and sentence in Criminal Case No.792 of 2006 of the

Senior Resident Magistrate's Court at Kerugoya by J.N. ONYIEGO - SRM)

J U D G M E N T

The appellants were with three others were jointly charged with one robbery with violence contrary to *section 296 (2)* of the Penal Code. Particulars being that on the 28th May, 2006 at K village in Kirinyaga District jointly with others not before court while armed with dangerous weapons to with pangas and rungus robbed E.C.S cash 8500/=, one radio cassette make Sony valued at Ksh.800/= assorted clothings valued at 6000/=, one hen, one cockerel and ten eggs valued at Ksh.850/= all valued at Ksh.16,150/= and at or immediately before or immediately after such robbery used actual violence to the said E.C.S.

The five again were charged each with two counts of rape contrary to section 140 of the Penal code. The 1st appellant was charged with count VIII for rape committed against E.C and count IX for rape committed against J.C. The 2nd appellant was charged with count VI rape committed against E.C and count VII for rape against J.C on the material night. The particulars of the rape charges were that on the same day and place the appellant and fellow co-accused in their individual capacities unlawfully had carnal knowledge of E.C.S and J.C.C respectively. The appellants were the 3rd and 4th accused respectively. They pleaded not guilty on both counts and their trial ensued.

Briefly stated the prosecution was that on the material night, E.C.S hereinafter referred to as "*the complainant*" and her daughter J.C.C hereinafter referred to as "*the 2nd complainant*" were sleeping in their family house within Kimweas area when at about 3 a.m robbers struck. In the same house was another young child one L.N aged six years. At the time the 2nd complainant was 14 years old. As they slept 1st complainant herd commotions outside the house. Within no time she heard people knocking the window. Soon thereafter they ordered to open pretending to be police officers. She lit her lantern lamp and then proceeded to the sitting room and thereafter opened the door as ordered. Immediately she saw 2nd appellant enter the house in the company of 1st appellant. She knew the two before. The 2nd appellant told her that they were robbers and that they wanted money. They took her to the bedroom. 2nd appellant demanded for cash. She gave them an amount of 8500/= being the proceeds of the French beans she had sold earlier in the day. Immediately thereafter they blew off the lantern lamp. At that time more people came in. They started asking each other who was to start raping her first. She was immediately ordered to turn and get hold of her bed while bending. The thugs then raped her in turns from behind. Others got hold of her daughter, the 2nd complainant who was in the same room and raped her in turns. After finishing with them they cut a bedsheet into pieces and used it to tie them. They were ordered not to scream. As they left the thugs locked the house from outside. She heard those people proceed to her son's

room nearby. When thing calmed down, her young daughter L.N aged six years old untied the 1st complainant. She then called one W her neighbour. W the neighbour laughed her off. When she called for her son her son came out through the window as her house was locked from outside also. Her son J.W (PW4) went to call one K brother to the landlord. Since she was naked as well as her daughter she sent her son to call one to untie them as the son could not do so.

After M untied them she discovered that some of her things among them radio cassette axe, panga and one cockerel were missing plus two crates of eggs. They also stole several clothes. They reported to the assistant chief who referred them to Kianyaga police station. The report was received by P.C. Banyale Nibaka (PW6) of Kianyaga police station. He issued P3 forms to the complainants and late visited the scene. The 1st complainant gave to the police officer the names of the appellants as having been among those who robbed and raped them on the material day. They were looked for and arrested. Upon interrogation they volunteered information that led to the arrest of their co-accused.

The complainants were later examined by Richard Kabiru (PW5) a clinical officer at Kianyaga Health Centre. His examination of the 1st complainant revealed that she had a bruise on the vaginal entrance, she was bleeding via the vagina, there were active spermatozoa. He thereafter filled her P3 form which she tendered in evidence. He also examined the 2nd complainant. His examination revealed increased vaginal secretion. High vaginal swap showed spermatozoa. He filled the P3 form which he tendered in evidence.

The appellants having been arrested, they were together with the co-accused subsequently charged with the offences. Put on their defence, the appellants elected to give unsworn statement of defence and called no witnesses. They all denied having participated in the crime. They all claimed to have been arrested for unknown reasons.

The learned magistrate having considered the evidence on record both for the prosecution and defence, found the case against the appellants proved and proceeded to convict them. However he acquitted the appellants co-accused for want of evidence. Upon convicting the appellants, he sentenced them to hang as required by law on the 1st count and 5 years each on the two counts of rape for each. The sentence was ordered to run concurrently.

The sentence imposed as aforesaid was improper. In saying so, we can do no better than cite the observations by the court of appeal in the case of Abdul Debano Boye & Another V Republic, CR. Appeal No.19 of 2001 (UR).

"We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, 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. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. 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 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 good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentences of death is carried out? We can find no sense at all in such proposition and the long practice which we are aware of is that 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 all the counts and if necessary, impose the appropriate sentence on the cont on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately."

Be that as it may, the appellants were aggrieved by the conviction and sentence. Through Messrs Macharia Muraguri advocates and Wambugu Kariuki & Associates advocates respectively, they lodged separate appeals to this court. The two appeals were however with the consent of the parties consolidated for ease of hearing and as they arose from the same.

For the 1st appellant, Mr. Muraguri, learned counsel submitted that the charge sheet was defective and was never amended at any stage to cure the defect. The particulars in the charge sheet talked of the offence being committed on 28th May, 2006 whereas the witnesses testified that infact the offence was committed on 29th May, 2006. the identification of the appellants was not free from possibility of error as the offences were allegedly committed at night. He submitted that the law governing identification in difficult circumstances is settled. Conditions obtaining must be favorable. The size of the lamp, position in relation to the assailants and its intensity was not inquired into. The period that PW1 had opportunity to see the appellants was not given. Counsel relied on the cases of Maitanyi V Republic (1986) KLR 75 and Karani V Republic (1985) KLR 290 for these submissions. Though PW1 stated that he recognized the 1st appellant, that evidence required corroboration. PW1 reported the incident to the Assistant Chief. However the said Assistant was never called to corroborate PW1's evidence. The evidence of PW1 and PW2 which led to the conviction of the 1st appellant was contradictory. There was no evidence of recovery that would have corroborated the evidence of PW1. with regard to rape charges, counsel submitted that the evidence was insufficient. Counsel relied on the case of James Muriithi V Republic Cr. Appeal No.206 of 1993 (UR). The appellant advanced an alibi which counsel submitted was never investigated. That failure was fatal to the prosecution case. He relied on the case of Ssentale V Uganda (1968) E.A. 365. He concluded his submissions by stating that the sentence of 15 years imposed on the appellant on the rape counts was harsh and excessive.

Mr. Wambugu, learned counsel for the 2nd appellant in supporting the appeal submitted that the 2nd appellant was properly identified. That the lantern light could have sufficed at 3 a.m. The lamp was lit in the bedroom. There was no evidence that she moved with the lamp when she went to open the door. Identification of the 2nd appellant was thus dock identification. Though the appellants were alleged to have been identified by the torches that they had, counsel maintained that, that could not have been possible as the appellants could not have directed the torches towards themselves. No stolen items were recovered from any of the appellants yet they were arrested the following day. Finally

counsel submitted that the evidence of rape was insufficient. It was not possible to tell precisely who raped who.

Mr. Omwenga, learned Senior State Counsel opposed the appeals. He submitted that *Section 382* of the Criminal Procedure Code cured the differences as to when the offences were actually committed. The appellants were identified by recognition. They were known to PW1 as they came from the same village. On light, counsel submitted that there was a lamp. The appellants took sometime before they blew it off. The magistrate correctly warned himself of the dangers of convicting the appellants on identification of a single witness. PW1 mentioned the names of the appellants to the police on whose strength the appellants were arrested. It is not in doubt that PW1 knew and recognized the appellants. PW4 had more time to identify the appellants. There was no need to conduct Voire Dire examination of PW2 as she was not a child of tender years. She was after all aged 14 years old. The prosecution discharged its burden on the alibi. The prosecution evidence displaced the alibi. There is no legal requirement that stolen items must be recovered in order to sustain a conviction. Many robbers were after all involved. On the rape charges, counsel submitted that there was no legal requirements that the appellants should have been examined.

In a first appeal such as this one, the appellate court is under a duty to consider all the evidence tendered and statements read at the trial, re-evaluate the same, draw its own conclusion of course without overlooking the findings of the trial court and also bearing in mind that it, unlike the trial court, did not see or hear the witnesses testify as to be in a position to fully assess their credibility. It is the court must perform and an appellant is entitled to such an analysis and re-evaluation of the evidence and statement. It will be considered a denial of justice of such a duty is not performed. See generally Okeno V Republic (1972) EA.32.

The conviction of the appellants was wholly based on the evidence of recognition. That the appellants were recognized by PW1 and PW4 as the offences were committed. It is the testimony of both PW1 and PW4 that they knew the appellants as they came from the same village. The testimony of PW1 was to the effect when she was awoken at 3 a.m by the robbers she put on the lantern and walked from the bedroom to the sitting room where she opened the door. There is no evidence that once she lit the lantern she left it behind in the bedroom as suggested by the learned counsel for the 2nd appellant. What would have been the purpose of lighting the lantern if it was not to enable her see her way to the door. When she opened the door she first saw the 2nd appellant enter the house alongside the 1st appellant. These are people she knew very as they used also to visit some of their friends within the plot. As soon as they entered the house they engaged her in a discussion claiming to be robbers and that they wanted money. Thereafter they took her to the bedroom. It was after they had been given ksh.8,500/= by PW1 in the bedroom that they blew off the lantern. In our view these being people PW1 knew and having seen them enter the house and walk with her to the bedroom, was sufficient time for PW1 to have been able to positively recognize them. The following day she reported the incident at K police station and gave out their names. Indeed she was present when they were arrested. Infact he pointed them out to the police. Under cross-examination by the 1st appellant, she stated that;

"….I knew you before. I knew you as a villager from K. You are a frequent at K market…….I saw you physically. I could no mistake you for somebody else. I talked with you as you demanded cash. I told the Assistant Chief the people I saw. I named you to the police….I have never had a grudge without…."

Under cross-examination by the 2nd appellant, she stated that;

"…..I saw you as I was opening the door. I had a lantern…..It was you and Peter (accused) who entered first. The two of you took me to the bedroom…"

From the foregoing, it is quite clear that PW1 was very alert and knew exactly who between the appellants did what. She could not therefore have faulted in the recognition of the appellants. There was no grudge between herself and the appellants as would have catapulted to frame up the case against the appellant.

The learned magistrate found PW1 "to be extremely honest, and consistent witness in her testimony. I have no reason to doubt her…" this is a finding on the credibility a witness. It is a principle of law that the first appellate court should not interfere with the findings of the trial court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that the findings of the trial court are erroneous in law. See Republic V Oyier (1985) 2 KLR 353, Burn V Republic (2005) 2 KLR 533. Having gone the evidence of this particular witness we are satisfied that the learned had every reason to conclude that she was a honest witness. Yes, there may be some discrepancies between her evidence and PW2. However they were minor contradictions which did not go to the root of the prosecution case. And as correctly pointed out by Mr. Omwenga, the 2nd complainant was a young girl and could not appreciate events the same way as her mother, the 1st complainant.

The learned magistrate appreciating that perhaps, he may be dealing with evidence of a single identifying witness in difficult circumstances duly warned himself as required of the dangers of convicting on such evidence. The learned magistrate bore in mind the edicts in Abdullahi Bin Wendo VR 1953 Vol.20 EACA 166 and Gerald Ngari Nderitu V R Cr. App. No.32 of 1985 (UR). The learned magistrate having duly warned himself as aforesaid nevertheless went ahead to act on such evidence having been satisfied that such evidence would not occasion any miscarriage of justice. We have on our part reviewed the evidence of PW1 and PW2 and we are in complete agreement with the position taken by the learned magistrate.

It is trite law that a fact may, subject to well known exceptions, be proved by a testimony of a single witness, however when it comes to identification in difficult circumstances, such evidence of identification must be tested with the greatest care. The magistrate is expected to make inquiries regarding the nature of the light available, the size of the lamp and its position relative to the assailant. See Maitanyi V Republic (1986) KLR 75. In the circumstances of this case, there was no doubt a lantern that was it. That is the source of light in the village. The appellants took some time before they blew it off. It was not immediate. Much as the learned magistrate should inquired as to its size and the intensity of the light it emitted, we do not think that in the circumstances of this case, such non enquiry was fatal. Afterall this was a case of recognition as opposed to visual identification. However, we are not saying that in cases of recognition, the need for testing with greatest care evidence of identification in difficult circumstances is lessened.

Besides PW1, PW4 too recognized the appellants. He is the son of the 1st complainant staying in the same compound but in a separate house. He was able to identify the appellants through the torches they had and which they kept flashing around the house. PW4 categorically stated that "there was enough light from their torches" He positively identified them as they came from the village. Cross-examined by the 1st appellant, the witness stated that they were using the torches as they were searching whatever they were looking for. That he was the one who hit him with an exe on the leg. He had known him for 3 years and he even gave his name to the police. As for the 2nd appellant, the witness stated that he saw him that night and that he came from the village. The totality of the foregoing is that PW4 was able to positively recognize the appellants during the robbery. The magistrate again failed to carry out some inquiries in terms of Maltanyi (supra). However, we do think that such failure occasioned a miscarriage of justice taking into account the evidence of the 1st complainant on the issue.

We have no doubt at all that the appellants were positively recognized by PW1 and PW4 at the scene of crime. In the case of Kenga Chea Thoya V Republic, Criminal Appeal No.376 OF 2006 (UR) the court of appeal observed;

"….This was clearly a case of recognition rather than identification and as it has been observed severally by this court, recognition is more satisfactory more assuring and more reliable than identification of a stranger – see Ajononi V Republic (1980) KLR 59.…."

In the present appeal, we are satisfied that the evidence of recognition of the appellants by PW1 and PW4 was free from any possibility of error. We find that the appellants were rightly convicted and sentenced.

With regard to the submission that the charge sheet was defective having particular regards to the particulars thereof and evidence tendered, we do not find any merit in this submissions. The charge sheet talks of the offences having been committed on 28th May, 2006. However the evidence is that the offence was committed at 3 a.m on the nigh of 28th May, 206. so it can either be on 28th or 29th May, 2006. In any event section 382 of the criminal procedure code is available to cure such differences in time and dates.

On the question of alibi defences advanced by the appellants, it should be noted that it was raised to late in the day to accord the prosecution time to investigate the same. It was raised in unsworn statement of defence. In any event pitted against the prosecution evidence, the alibi defence pales into this air. The prosecution evidence displaced the Alibi defences set up by the appellant.

With regard to the rape charges, we would agree with learned counsel that, the evidence on the same was insufficient. It was committed in darkness and none of the complainants could pin point who between the appellants and the co-accused raped them. The complainants cannot categorically say that it was the appellants who raped them. It may well be possible that they were raped by the co-accused who were acquitted. In view of the foregoing, we would hold that the offence was not proved as against appellants.

The upshot of the foregoing is that we allow the appeal, quash the conviction and set aside the sentence imposed on the appellants on the rape charges. However in so far as capital robbery charge is concerned, we find no merit at in the appeal. Accordingly the two appeals are dismissed.

Dated and delivered at Embu this 29th day of October, 2009.

M.S.A. MAKHANDIA

JUDGE

WANJIRU KARANJA

JUDGE