



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL 119 OF 2006

ROBINSON MURIITHI NJOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No.1092 of 2006

of Senior Resident Magistrate's Court at Kerugoya by J.N. Onyiego SRM)

JUDGMENT

The appellant was charged tried and convicted on a charge of Robbery contrary to Section 296 (2) Penal Code. He was sentenced to death. He has filed this appeal raising 4 grounds of appeal namely:-

1. That the circumstances surrounding the identification were not satisfactory
2. That his rights were violated as he was kept in cells for more than 14 days provided under the constitution before being taken before a court
3. That it was an error for the Trial Magistrate to act on the evidence of rape when the evidence of examiner was not corroborated and the appellant was examined by same physician.
4. That the Appellant defence was not given consideration it deserved and it was dismissed.

The Appellant was tried with other suspects but it is only him who was convicted. The evidence of prosecution against the appellant was that himself and others forced themselves into the complainant's house on 9/7/2006 at about midnight. The complainant Agnes Watiri Muchiri PW2 saw Appellant enter and demanded cash and keys to her motor vehicle. She said she knew Muriithi Njogu she had known him since he was born. He is her neighbour. There was no light in the house. He pushed her into the house on to a bed. Complainant was alone in the house and at that time the Appellant was alone. He raped her inside the house and outside the granary. Then she screamed and people responded. He run away carrying her bag with 200/=. She was then taken to Kerugoya Hospital and later reported to police. She attended police identification parade where she identified the Appellant. She said at night there was moonlight. She also said she identified his voice.

PW3 the complainant's worker was sleeping in his house in the compound. He heard the noise outside. He was not able to get out of his house until he could hear no noise and then he got out through the window. He found complainant seated outside behind the granary crying. It was dark. She said she

was raped and was bleeding from the head. He did not identify any of the robbers. PW4 a police officer received information of the night incident and learnt that the complainant was in hospital. He visited her in hospital. Complainant aged 70 years was being treated. She gave the name of attacker and his name. On 12/7/2006 the appellant was arrested. Appellant gave names of other persons who were present with him at the incident.

As can be seen above there was no evidence against the accused numbers 2-6 inclusive. The Trial Magistrate acquitted them and set them free. However the Trial Magistrate found the appellant guilty of first count of Robbery with violence and count 2 of rape. There was an identification parade conducted by PW5 but it was not of much value as the complainant already knew the appellant and she picked him from the members of the parade. In his defence the appellant gave a statement in which he disclosed that at the Identification parade the complainant knew him before. He also alleged that at the material time he was watching the T.V on world cup until 1 a.m. that night. He heard in the morning that their village was attacked by robbers. Then on 12/7/2006 he was arrested. Dr. Truvosa Aswan Ndonga examined the complainant and found her with head injury and some injuries on genitalia but no spermatozoa. She classified injury as harm.

From the above stated it is clear that the complainant identified the appellant. She had known him since his birth. This is believable. He himself said she knew him before this incident and he did admit he lived in her village where he heard there was a robbery. It was right after midnight but she said it was not dark. But she said she identified him by his voice. This is not impossible of a neighbour. And she gave his description and name as soon as the police officers visited her in the hospital. The Trial Magistrate warned himself of the danger of basing a conviction on the evidence of a single witness and he addressed his mind to decided cases. On the issue of grounds of appeal there was proper identification in the circumstances. The appellant was well known to the complainant being a neighbour for a long time and the Trial Magistrate warned himself on the dangers of convicting on such evidence. On such evidence on rape the Trial Magistrate relied on evidence of the Doctor who found some injuries on the genitalia of the complainant. The complainant being 70 years old the evidence was sufficient to prove penetration. Again the Trial Magistrate did consider the defence statement. He found no grudge between appellant and complainant and therefore the case was not fabricated. Trial Magistrate found the complainant and her worker extremely honest and therefore he believed their evidence. That the appellant was with his friends drinking and watching football does not amount to an alibi. The incident was in the neighbourhood and occurred after the football had ended after 1.00 a.m. Ground 2 of the petition of Appeal concerns the issue of constitution violation of human rights. Section 72 (3) of the constitution provides. "A person who is arrested or detained upon reasonable suspicion of his having committed or being about to commit, a criminal offence and who is not released shall be brought before a court as soon as is reasonably practicable and where he is not brought before a court within fourteen (14) days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before court as soon as is reasonably practicable shall rest upon the person alleging that the provisions of this subsection have been complied with"

This ground of appeal cannot be dealt with on an appeal. It is a matter to be raised at the Trial. The reason is that the allegation has to be proved and an explanation is to be given why the provisions were not complied with. The trial court may find explanation proved or not. In this case the issue was not raised in the trial court and the appellate court is unable to decide whether the burden of proof has been discharged or not. In the circumstances, we find that the prosecution case was proved beyond reasonable doubt and we find no reason to interfere.

The appeal is therefore dismissed.

Dated this 7th day of March 2008.

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J. N. KHAMINWA

JUDGE

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M.S.A MAKHANDIA

JUDGE