



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL 129 OF 2005

HARRISON ELPHAS ALUBALE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in Criminal Case number 1035 of 2004 of the

Senior Resident Magistrate's Court at Maseno]

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk - Raymond/Laban

Appellant in person

JUDGMENT

The appellant Harrison Elphas Alubale was charged with robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the 6th September 2004 at Vihiga District Western Province jointly with another not before court they robbed M C M of her Kenya Shillings Five Hundred (Kshs. 500/=) and a pair of open shoes valued at Kenya Shillings Three Hundred and Fifty (Kshs. 350/=), and at or immediately before the time of such robbery used personal violence to the said M C M

The appellant pleaded not guilty to the charge and after trial before the Senior Resident Magistrate at Maseno he was convicted and sentenced to suffer death. He is dissatisfied with the conviction and sentence and now appeals before this court on the basis of the following essential grounds:-

- (i) That the trial Magistrate erred by failing to appreciate the evidential value of the very essential witnesses who failed to appear before the court to clear the onus of proof placed upon them.
- (ii) That the trial magistrate erred by losing sight of the technical fabrications advanced by the prosecution where a shamba dispute was turned into a robbery with violence case.
- (iii) That the trial Magistrate erred by considering the evidence of PW2 as corroborating yet his presence at the said scene was not proved at all, thus an incredible witness.

(iv) That the trial Magistrate failed to consider that the name given in the first report was not that of the appellant.

The appellant appeared in person and presented written submissions to elaborate and fortify his grounds of appeal. The State was represented by the Senior Principal State Counsel, Mr. Musau who did not support the conviction for the basic reason that the evidence on robbery is suspect thereby making it unclear whether the intention of the appellant was to steal or rape. He said that even the offence of rape was not proved and that the defence witnesses confirmed that there was a fight arising from a grudge between the complainant's and appellant's family.

As a first appellate court we are under a duty to re-examine and re-evaluate the evidence and arrive at our own conclusions and findings. The prosecution's case was that the complainant, C M M (PW1) was on the material date at about 6:45 p.m. fetching water in a river when she was suddenly hit on the left hand with a stick. She then saw the appellant and another person called Omukambi. The appellant had a stick while Omukambi had a jembe stick and panga. She was hit on the back and fell down. She was then carried to a ditch where she was raped by the appellant. Her money 500/= and shoes were stolen. She managed to escape from the scene and report the incident to a village elder. She later reported to the police leading to the arrest and arraignment in court of the appellant. The defence case was that on the 7th September 2004 the appellant, a timber dealer was with his customers when they heard shouts at about 6:00 p.m. The shouts emanated from the river. They went there and found the complainant, fighting with one Dorcas. They separated the two and told them to fetch water and go their own way. Later, the appellant was arrested and charged with an offence he did not commit. He attributed his predicament to a land dispute involving his and the complainant's family.

The issue arising for determination was and is whether the offence of robbery with violence was committed against the complainant and if so, whether the appellant was identified as having been among those responsible. The charge sheet shows that the offence occurred on the 6th September 2004 and not on 7th September 2004 as stated by the appellant. The particulars of the charge state that:-

“ jointly with another not before court robbed one M C M her Kshs. 500/= and a pair of shoes valued at Kshs. 350/= and at or immediately before the time of such robbery used personal violence to the said MC M”.

The particulars do not indicate, as they should, that the offenders were armed with dangerous or offensive weapons even though the evidence by the complainant showed that while the appellant had a stick, his colleague had a jembe stick and a panga. However, the appellant was accompanied with another person and that is an ingredient under Section 296 (2) of the Penal Code.

Nonetheless, the evidence pertaining to the fact of robbery is that of the complainant (PW1) alone. She said that she was raped and her property including Kshs. 500/= and a pair of shoes stolen from her. She said that she managed to escape from the scene and run to the home of a village elder where she reported the matter to the said elder. The village elder was not called to testify although a vital witness for purposes of confirming what was actually reported to him by the complainant.

Enos Alela (PW2) did not witness any offence of robbery or rape committed against the complainant. His evidence implied that the appellant and another merely assaulted the complainant. He implied that he was in the company of another person passing by and in the process they saw the appellant and another pursuing a lady (complainant) who was running away saying that her hand had been fractured. They told the appellant and his colleague to pardon the lady and restrained them from beating her.

Cpl. Gerishon Opiyo (PW3) received the complainant's report at the Luanda Police Station. He said that she reported that she had been raped and robbed by persons known to her. He later apprehended the appellant and searched his house. He recovered nothing from therein. The clinical officer Emma Mboya (PW4) said that the complainant was examined after giving a history of having been assaulted and raped. She was found to have suffered bodily injuries but was not subjected to penetrative sex.

Non penetrative sex would connote lack of carnal knowledge. The P3 form produced by the clinical officer (i.e. PEX 1) shows that the alleged offences were rape and assault. The form did not mention the offence of robbery.

The appellant's defence was essentially that he did not commit any offence against the complainant and all that he did was to separate her from one Dorcas with whom she was fighting. He implied that a dispute over land and the complainant's parents' hatred of him, caused him to be arrested and charged. The said Dorcas (DW2) stated that she disagreed with the complainant over the fetching of water and in the process they engaged in a fight. She (DW2) raised alarm and the appellant (her cousin) and two others appeared at the scene and separated them. She stated that the appellant did not commit the offence. Jacob Kwendo (DW3), a carpenter, rushed to the river with the appellant after

hearing shouts. They found the complainant and Dorcas fighting over water. Henry Jole Abwasa (DW4), a school leaver also rushed to the river on hearing noises and found the complainant and Dorcas fighting.

From all the foregoing, there emerges strong indication that a fighting incident involving the complainant and Dorcas (DW2) occurred at the river on that material date and in a bid to interfere and normalize the situation the appellant and others appeared at the scene and separated the fighting duo. However, it would appear that the appellant further to separating the fighters went also to the rescue of his cousin Dorcas and this may explain why he was spotted by Enos (PW2) pursuing and beating up the complainant.

If there was any wrong committed by the appellant then it was the act of assaulting the complainant, rather than robbery or rape. The complainant's evidence that she was robbed and raped could not have been reliable in view of the subsequent reports made to the police and the clinical officer. It is not known what she told the village elder to whom she firstly reported the incident. The village elder was a very important witness. The failure by the prosecution to call him as a witness does in the circumstances raise the presumption that most likely that not, his evidence would have been unfavourable to the prosecution's case. Clearly, the complainant was not a trustworthy witness and her evidence ought not have been given due weight in the absence of independent corroboration and more so, her allegation of robbery made against the appellant.

We think that the trial magistrate erred in believing the complainant's evidence without first and foremost clearly determining whether or not the offence of robbery was committed. She should have done so prior to determining whether the appellant was involved. She proceeded under the presupposition that the offence of robbery was committed anyway and failed to seriously consider the defence case which raised reasonable doubt as to whether the offence of robbery was committed. It would appear that the trial magistrate was persuaded to disregard the defence case by the fact that the defence witnesses gave a different date regarding the commission of the alleged offence and that the clinical officer said that the complainant's genitalia was tender with vaginal laceration therefore overruling the allegation of a fight between the complainant and Dorcas.

However, rape was not proved and that is why the appellant was not charged with the offence. He would however, have been charged with attempted rape or indecent assault if at all he had sexually assaulted the complainant as the trial magistrate believed. Further, the clinical officer (PW4) did not state that lacerations in genital area could not have been caused by a fight which connotes violence applied to any part of the body including hidden parts. It seems to us that the trial magistrate shifted the burden of proof to the appellant as demonstrated in her following remark:-

“Accused person testimony is near possibility but considering the evidence of complainant and the kind of injuries she sustained and also considering evidence of PW2 which has not been challenged that he met accused pursuing the complainant, who was crying of a broken hand the defence evidence cannot stand”.

There having been no proof of the occurrence of the offence of robbery, the involvement of the appellant in respect thereof did not arise. He did not deny having been at the scene, he denied having committed the offence of robbery. His conviction and sentence was not based on sound evidence. It was therefore proper for the learned Senior Principal State Counsel to concede the appeal.

Consequently, the appellant's conviction is quashed and the sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 8th July 2008

J. W. MWERA

J. R. KARANJA

JUDGE

JUDGE

JRK/aao