REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 893 OF 2002

(From original conviction and sentence in Criminal Case No. 998 of 2002 of the Chief Magistrate's Court at Kibera)

SHINAVU OLE KUMUR…..…..…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The Appellant herein, Shinavu Ole Kumur, Cr. A. No. 893 of 2002 was charged with three counts, two of them Robbery with Violence contrary to Section 296(2) of the Penal Code, and the third count, rape, contrary to Section 140 of the Penal Code. The particulars of each charge were as follows:

Count 1:

That on 28/11/01 at[particulars withheld], Rift Valley Province, the accused jointly with others not before court robbed SIMON GAKUO of Kshs.1,200/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said SIMON GAKUO.

Count 2:

That on 28.11.01 at 3a.m. at [particulars withheld] Rift Valley province, jointly with others not before court robbed TIMOTHY MASUMBO Kshs.3,700/- and immediately before or immediately after the time of such robbery threatened to use actual violence to the said TIMOTHY MASUMBO.

Count 3

That on 28/11/01 at [particulars withheld], Rift Valley Province had carnal knowledge of T M without her consent.

The appellant was convicted and sentenced in Criminal Case No. 998 of 2002, S.P. Magistrate's Court at Kibera, and being dissatisfied with both the convictions and sentences, he has appealed before this court against both the convictions and sentence.

In his appeal, the appellant raises six grounds of appeal, as follows: the first ground of appeal is on identification; the second is contradictory evidence by the prosecution witnesses; the third challenge is his mode of arrest; while the fourth ground is lack of medical evidence to connect the appellant with the robbery and the rape. The fifth ground of appeal is that his defence was not fully considered by the Learned Trial Magistrate, while the last ground is a challenge on the standard of proof which appellant alleges was not met by the prosecution.

From the record of the lower court, the prosecutions case was briefly this On 28/11/01 at 3.30a.m. P.W. 1 – T M M- was in bed with her husband in Kiserian. The two were woken up by a knock at their house door and when the husband enquired as to who it was he was ordered to open the door or the attackers would break into the house. P.W. 1's husband lit a tin lamp and the door was hit with a stone and forced open. The appellant herein entered while two other men remained outside. Appellant was armed with a club and a Maasai sword. He hit P.W.1's husband with the club three times at the back and demanded money from him where upon P.W. 1 felt for him, screamed, and told appellant not to kill her husband, pointing to the appellant at a bag where the money was.

Appellant picked the bag, searched it and took out a pouch which had 3,000/- and P.W.1's identity card. Appellant then held P.W. 1 by the hand, pulled her outside while the other two men got into the house and held P.W.1's husband. Appellant led P.W. 1 to a dark place and ordered her to remove her clothes. P.W. 1 hesitated and appellant hit her at the back with the club; then again on her left hand. P.W. 1 complied and appellant laid her on the ground, removed his trouse,r and had sexual intercourse with her; after which he led her through long grasses towards a river. P.W. 1 had her pants in hand and fell along the way due to the long grass. When she fell, appellant hit her with the club ordering her to rise quickly an follow him. At a place he ordered her to lay again on the ground and he had carnal knowledge with her again. He then led her up to the riverside where he ordered her to strip naked and she complied and he had carnal knowledge of her till day break. When light fell she noted that appellant had a cut and wound scars on his upper thighs. Appellant ordered her to get into the river and take a bath. P.W. 1 complied but avoided washing her genitals. When appellant noticed what she was doing he throbbed her genitals with the club repeatedly ordering her to clean it properly. Appellant threatened to hurt her, and he actually carried out the threat by inserting the club into her vagina. P.W. 1 felt pain, screamed and cleaned her vagina. Appellant told her that he would go back and in case he saw her before 8.00a.m. he would kill her. Then Appellant left. P.W. 1 stayed there for a while, then dressed up and slowly walked back home. She found her husband searching for her. She was taken to Elitet Clinic and thereafter they reported the case at Kiserian Police Station.

P.W. 2, a neighbour of P.W. 1, was also invaded on that material night. The men struck her with a club and took her husband away. Upon return, her husband stated that he was beaten and his 1,200/- robbed. After appellant was arrested, P.W. 2 was able to identify him as one of the attackers.

That same morning, P.W. 3 was at Oleitikos, Kiserian at 7.0a.m. while going to pick a matatu, and he met the appellant. He, P.W. 3, knew the appellant before then. Appellant was muddy and had wet clothes. He had a torch and a club in his hands. P.W. 3 asked him how come he was in that state, and asked him where he was from. Appellant said he was from home; and he, appellant, left P.W. 3. Thereafter, P.W. 3 met with P.W. 1 and her husband, who told him what the appellant had done. P.W. 3 promised to assist in trying to trace the appellant. Later on appellant was traced and arrested, then charged with the present offences.

The trial court found that appellant had a case to answer and he was put on his defence, where he gave an un-sworn testimony and called no witness. He stated that he was arrested and taken to Kiserian Police Station by members of the public and locked in the cells; then taken to the O.B. office where his legs were chained and hands handcuffed. He was questioned, he said, about an offence he had not committed. He was later on charged. We have evaluated the evidence from the lower court's records on each of the grounds of appeal raised by the appellant. We begin with the issue of identification. This is crucial because no recovery was made of any allegedly stolen items from the appellant. Hence the only linkage between the appellant and the offences herein is identification by the respective complainants and prosecution witnesses.

On identification, appellant averred that he was not properly identified, and if he was, it was by only one witness, P.W. 1, and that is unsafe to convict on the evidence of a single witness. Our reading of the lower court's record clearly show that the appellant was first identified by P.W. 1, whom he had carnal knowledge of three times between 3.a0.m. and 7a.m. Even though the attack took place at night, there was no interval between 3.30a.m. when appellant took P.W. 1 from their house to the bushes, up to 7.30a.m. – broad day light – when appellant left her at the river.

We are convinced that appellant was positively identified by P.W. 1, if at no other time when the day broke out, up to 7a.m. P.W. 1 testified that she was able to see a cut and wound scars on the upper thighs of the appellant when he was having carnal knowledge of her totally undressed. P.W. 1 described the appellant in those terms and descriptions. This was corroborated by the Trial Court itself, during the proceedings when appellant was requested to pull up his trousers, and the court was able to see the scars by itself.

Rarely does evidence get corroborated in the court the way P.W. 1's evidence was corroborated in the lower court here.

Appellants counter to the above evidence by P.W. 1 regarding the scars was to the effect that all the Maasais have such marks. Without appearing to be shifting the burden of proof from the prosecution, the appellant called no witness – probably a Maasai too – to raise the necessary doubt which would have helped in his claim. He also said that P.W. 1 had seen the marks when the appellant was being beaten in the Police O.B. office during investigations. We have found no evidence to controvert that of P.W. 1 and the lower courts first hand view of the scars on the appellant's upper thighs.

But should that identification seem not sufficient and water/proof, P.W. 1 stated that she had seen appellant in the area before the night of the attack. But of even greater importance was the evidence of P.W. 3, by recognition of the appellant. P.W. 3 knew appellant very well and infact it was through his assistance that the appellant was arrested.

Our overall view is that the record in the lower court left no doubt on how positively appellant was identified, by P.W. 1 and by P.W. 3 (recognition). Accordingly, this ground of appeal has no merit and we dismiss the same as baseless. Turning to ground 2, contradictory evidence by the prosecution witnesses, we have gone through this ground, and it seems that it arises from the sum allegedly stolen from P.W. 1 and her husband where two figures – 3,000/- and 3,700/- are given. This, in our view,is negligible discrepancy in a case of this gravity. It is true that the Charge Sheet talks about 3,700/- while P.W. 1 said the sum was 3,000/-.

We note that there is no law that the specific amount must be stated. To have such a law would be sacrificing substance on the alter of detail. We are convinced that all that is required is that money was stolen from the victims of the robbery. Accordingly, we see no material difference to warrant upsetting the lower court's finding on this matter. The difference is negligible and the term contradictory is both exaggerated and unwarranted. We dismiss that ground of appeal.

The third ground of appeal is on the mode of arrest of the appellant. We find no merit in this ground either. The arrest must be considered together with the identification of the appellant by both P.W. 1 and P.W. 3, the two witnesses who testified that they knew the appellant very well. That was recognition, and especially by P.W. 3 who virtually was interrogating the appellant arising from his muddy appearances that material morning even prior to P.W. 3's knowledge of what had befallen P.W. 1 and her husband.

The fourth challenge by the appellant is on lack of medical evidence to connect him with the robbery and rape.

This court is not sitting here on the rape appeal. The main offence and under which we have re-evaluated the evidence on record is robbery with violence. Under this – Section 296(2) – there is no requirement for medical evidence to convict. All that is required is evidence that the victims – here. P.W. 1 – was robbed, and then proof of any of the elements stated in the above provision. We are satisfied that the offence

under Section 296(2) was proved, and to the required standard of proof by the prosecution evidence.

On the rape issue, which appellant has lumped together with robbery with violence under lack of medical evidence, suffice it to say that medical evidence is, in practice, required under the offence of rape. However, the court can still convict without such medical evidence so long as the court cautions itself of the dangers.

The lower court, at J5 and J 6, was clearly aware of the dangers and it did warn itself of the same at those pages before convicting the appellant herein. We hasten to reiterate that this bench was not constituted to hear the appeal against rape, but robbery with violence.

The fifth ground of appeal is that the appellant's defence was not fully considered by the lower court. The record shows that at J6 the lower court dismissed the defence as insufficient to shake or raise any doubt in the prosecutions case. We are satisfied with the lower court's findings and conclusions.

The last ground of appeal is on the standard of proof.

Our re-evaluation of the evidence on record is that the only discrepancy which could possibly raise that issue is on the sums in the Charge Sheet and the evidence of P.W. 1. We have already held that that discrepancy was negligible and is a detail which should not derail the court from the principle.

All in all therefore, we find no merit in this appeal and we dismiss the same, confirm the conviction and uphold the sentence by the Learned Trial Magistrate.

DATED and delivered in Nairobi this 26th Day of April, 2005.

O.K. MUTUNGI

JUDGE

F.A. OCHIENG

JUDGE