REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 336 of 2002

CONSOLIDATED WITH
Criminal Appeal 3337 & 338 of 2002
(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in Criminal Case No. 602 of 2002 – R. KIRUI)

DONALD MAJIWA ACHELWA……..…1ST APPELLANT

DAVID TIEMA ODANGA……...……2ND APPELLANT

STEPHEN SHEM SHITUBI……...…….3RD APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT OF THE COURT

The appellants, Donald Majiwa Achelwa (*1st appellant*), David Tiema Odanga (2nd appellant) and Stephen Shem Shituba (3rd appellant) were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on the 4th of March 2002 at County Council quarters, Molo Township in Nakuru District, the appellants while armed with dangerous weapons namely pangas and rungus robbed GW of one mobile phone (make siemens), four pairs of shoes, three bags, one head phone and Kshs 1,000/= cash and at or immediately before or immediately after the time of such robbery wounded the said GW. The 1st appellant was also charged with the offence of rape contrary to **Section 140 of the Penal Code**. The particulars of the offence were that on the 4th of May 2002 at Casino estate within Molo Township, Nakuru District, jointly with others not before court, the 1st appellant had unlawful carnal knowledge of GW without her consent. The appellants pleaded not guilty to the charge. After a full trial, the appellants were convicted as charged on the first count. They were sentenced to the mandatory death sentence. The 1st appellant was convicted as charged in respect of the second count. He was sentenced to serve fifteen years imprisonment with hard labour and four strokes of the cane. Being aggrieved by their conviction and sentence, each appellant filed his separate appeal against his conviction and sentence. At the hearing of the appeals, the three separate appeals filed by the appellants were consolidated and heard as one.

All the appellants raise more or less similar grounds of appeal in their petitions of appeal. They were dissatisfied that the trial magistrate had relied on the evidence of identification to convict them whereas the said evidence of identification was insufficient and inconclusive to sustain a conviction. They were further aggrieved that they had been convicted on insufficient prosecution evidence. The faulted the trial magistrate for relying on the evidence of police identification parade which was not carried out in accordance with the law. In respect of the 3rd appellant, he was aggrieved that the trial magistrate had relied on the evidence that he purportedly made a confession whereas the said confession had been

obtained unlawfully. The appellants were aggrieved that the trial magistrate convicted them after finding that they had been found in possession of the stolen items whereas no evidence was adduced to connect the recovery of the said items to them. The appellants were aggrieved that they had been convicted by the trial magistrate inspite of the fact that the investigating officer had not testified in the case. In respect of the 1st appellant, he faulted the trial magistrate for convicting him on the charge of rape in the absence of any medical evidence being adduced to establish that the doctor had examined the 1st appellant to determine that he had raped the complainant. Finally, the appellants were aggrieved that the trial magistrate had not considered their defence before arriving at the decision convicting them on the charge of robbery with violence.

At the hearing of the appeals, each of the appellants, with the leave of the court, presented to the court written submission in support of his appeal. They all urged the court to allow their appeals. Mr Koech, Learned State Counsel, made oral submissions urging the court to disallow the appeals and confirm the conviction and sentences of the trial magistrate. We will consider the arguments made by the parties to this appeal after briefly setting out the facts of this case.

PW1 GWN (the complainant), a businesswoman operating a bar at Molo Township, was asleep in her house at Molo town on the night of the 3rd of March 2002. In her house was also PW2 Susan Wangechi. The complainant slept in the bedroom whilst PW2 slept in the sitting room. At about 2.00 am, the complainant was woken up by robbers who were breaking into her house. She screamed. The robbers managed to gain entry into her house. They beat up PW1 and PW2 whilst demanding money. PW1 gave them the sum of Kshs 1,500/= which was in her purse. The robbers were not satisfied. They wanted more money. They continued beating up the complainant. They robbed several items from the complainant including a Siemen mobile phone, several pairs of shoes and a pillow. The complainant further testified that the robbers then took her from her house to a nearby nursery school whereby two of them raped her in turns. Although the complainant saw two of the robbers for the first time on the night of the robbery, she was able to identify them about a week later when she pointed the two in an identification parade mounted by the police. PW3 Inspector Gaxton Kikwai and PW4 Inspector Julius Egiles conducted the identification parades at the Molo Police Station where the complainant unhesistantly identified the 1st and the 3rd appellants. The two were the 1st and the 3rd appellant.

The complainant however testified that she knew the 2nd appellant. She stated that the 2nd appellant was a handcart operator at Molo township who used to go to her bar to have a drink of beer. The complainant was certain that it was the appellants who robbed her because when the robbery incident took place, the robbers were using torches which enable her to identify them. She further testified that the period in which she was in the company of the appellants was sufficiently long enough to enable her to be positive about their identity. PW2 who was with the complainant on the material night of the robbery, confirmed the evidence of the complainant in so far as relates to the circumstances under which the robbery took place. She however was not able to identify any of the robbers who attacked them.

PW5 Police Constable Joseph Makelio received information of the robbery that took place in the house of the complainant in the early hours of the 4th of March 2002. PW5 accompanied by other police officers, mounted a road block along the Elburgon- Molo road. At about 5.00 am, he stopped motor vehicle registration number KAB 945W. He checked inside the vehicle. He saw a television set, a radio cassette and thirty six video cassettes. He suspected them to be stolen. He arrested the 2nd appellant, the person who claimed to be the owner of the items. The 2nd appellant volunteered to take the police to the house of the 1st appellant at Subukia. PW5 in the company of PW9 Police Constable Joseph Okumu escorted the 2nd to Subukia. When they reached the house of the 1st appellant, the 1st appellant, upon seeing them, ran away. PW5 and PW8 pursued him and they managed to arrest him. They managed to search the house of the 1st appellant. They found a pillow and two pairs of shoes which were later identified by complainant to belong to her. PW5 and PW8 also managed to retrieve a siemen mobile phone from the 1st appellant which was identified to belong to the complainant. While at Subukia Police Station, the members of the public brought the 3rd appellant whom they had apprehended after he had been seen running away from the house of the 1st appellant’s wife.

PW8 Inspector Henry Simiyu took the charge and cautionary statement from the 3rd appellant. In the said

statement, (*which was retracted by the appellant during the trial but was admitted after a trial within a trial*) the 3rd appellant confessed to having robbed the complainant in the company of his co-appellants and another person who was however acquitted during the trial before the trial magistrate.

When the appellants were put on their defence, they denied that they were involved in the robbery. They all claimed that they were beaten by the police during the investigation of the case. The 1st appellant admitted that the police searched his house and recovered some items. The 2nd appellant admitted that he was arrested by the police while in possession of items which he claims he did not know were stolen. The 3rd appellant testified that he was tortured by the police inorder to extract the confession that he had participated in the robbery. All the appellants denied robbing the complainant. This is a first appeal. As the first appellate court in criminal cases, this court is mandated to re-consider and re-evaluate the evidence adduced by the witnesses before the trial magistrate's court and reach its own independent determination whether or not to uphold the conviction of the appellants. In reaching its decision this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any finding as to the demeanour of witnesses (See **Okeno –versus- Republic [1972]E.A. 32)**. Having carefully considered the submissions made before us (including the written submissions prepared by the appellants), the issue for determination by this court, is whether on the evidence adduced the prosecution proved its case for the charge of robbery with violence to the required standard of proof beyond reasonable doubt.

In this case, to prove its case against the appellant the prosecution relied on three pieces of evidence; that of identification by the complainant of the 1st and 3rd appellants; the stolen items that were recovered in the possession of the 1st and 2nd appellants so soon after the robbery incident and finally the confession by the 3rd appellant. We will consider each piece of evidence in light of the submissions made and our re-evaluation of the evidence. The complainant testified that she was able to identify the 1st, 2nd and the 3rd appellant during the material night that she underwent the robbery and the rape ordeal. She testified that she knew the 2nd appellant prior to the robbery incident having seen him pushing handcarts within Molo Township. She further testified that the 2nd appellant used to be a patron at her bar which she operated at Molo township. She however testified that she had not known the 1st and 3rd appellants prior to the robbery incident. She was however categorical that she identified the said two appellants by the torchlights that the appellants had in their possession. The complainant testified that the appellant did not wear any masks nor conceal their identity. The complainant was with the appellant for a long period of time that would have enabled her to be certain about the identity of her assaillants. The complainant was beaten severally by her assaillants and then dragged out of her house and raped in a nearby nursery school. During all this period, the complainant conversed with her assaillants. A week after the robbery incident, the complainant attended an identification parade mounted by the police where she was able to, unhesistantly, point out the 1st and the 3rd appellants.

Although there is no evidence to suggest that the complainant had given the description of her assaillants to the police immediately after the robbery incident, we have no doubt that the complainant properly identified the appellants as being in the group of persons that attacked, robbed and then raped her in turns. We have warned ourselves, as required by the law, of the danger of convicting the appellants based on the evidence of identification made in circumstances that were difficult. Having re-evaluated the evidence adduced by the complainant, we are certain that the complainant properly identified the appellants. The identification parades which were conducted by PW3 and PW4, whereby the complainant identified the two appellants (i.e. the 1st and the 3rd appellants), were conducted in accordance with the law and therefore the said identification parades cannot be impeached as having any flaws.

Further as was held in the case of **Maitanyi –vs- Republic [1986]KLR 198 at page 201** where any doubt is raised as to the evidence of identification, the court should consider any other evidence whether direct or circumstantial that would lend credence to the said evidence of identification. In this case the 2nd appellant was arrested by PW5 a couple of hours after the robbery incident with goods which were suspected to be stolen. The 2nd appellant led the police to the house of the 1st appellant where some of the items robbed from the house of the complainant were recovered. The said recovered items, in particular the two pairs of shoes and the siemens mobile phone, were later identified by the complainant to be her properties stolen during the robbery.

The 3rd appellant was also apprehended by the members of the public as he tried to escape from the house of the 1st appellant's wife and handed over to the police. The 3rd appellant later confessed to PW8 that he had robbed the complainant whilst in the company of his co-appellants. The evidence of the recovery of the stolen items a few hours after the robbery incident clearly attracts the application of the doctrine of recent possession. The 1st appellant was found in possession of the items which were robbed from the complainant so soon after the robbery incident in circumstance that leads to no other inference other than that the 1st appellant participated in the robbery. The 1st appellant did not give any reasonable explanation as to how he came into possession of the said items which were recovered from his house. Infact when the 1st appellant testified in his defence, he confirmed that the said items were recovered from his house after the police had conducted a search in his house.

The conduct of the 1st appellant during his arrest further pointed to his guilt. When the 1st appellant saw the police, in the company of the 2nd appellant, he attempted to escape from his homestead. It is only after the police had fired several shots in the air that the 1st appellant surrendered to the police and was thereafter arrested. The 1st appellant's conduct was incompatible with a conduct of an innocent man. We therefore hold that the prosecution proved its case as against the 1st appellant beyond any reasonable doubt. The defence offered by the 1st appellant was rightly rejected by the trial magistrate, as we hereby do, as being a sham. The said evidence offered by the 1st appellant in his defence did not dent the overwhelming evidence offered by the prosecution on the charge of robbery with violence. The evidence adduced by the prosecution of identification and the recovery of the stolen items as against the 1st appellant was watertight.

As regards the 2nd appellant, he was arrested immediately after the robbery. He was identified by the complainant. He led the police to the arrest of the 1st appellant and 3rd appellants and the recovery of some of the stolen items. We do hold that the prosecution proved that the 2nd appellant was one of the robbers who robbed and raped the complainant. The evidence of the complainant as regards the 2nd appellant was that of recognition. The complainant knew the 2nd appellant prior to the robbery incident. The fact that the 2nd appellant led the police to the house of the 1st appellant where the stolen items were recovered implicated him in the robbery. As was held by the Court of Appeal in **C.A. Cr. App. No. 185 of 2004 Samuel Mucheru Kariuki & Anor –versus-**

Republic (Nakuru) (unreported) at page 10:

"From the evidence that the 1st appellant led police to the house of the 2nd appellant where the second appellant was arrested and the stolen goods recovered, it can be inferred that he knew that the 2nd appellant was involved in the robbery and that he was in possession of the stolen goods. In the circumstances, he is deemed to have been in constructive possession of the stolen goods jointly with the 2nd appellant. An inference that he was also involved in the robbery was also drawn…"

The holding by the Court of Appeal in the **Samuel Mucheru Kariuki's** case (supra) clearly applies to the 2nd appellant in this case. The 2nd appellant's defence did not dent the strong prosecution's case. We reject it. As regard the 3rd appellant the evidence of identification by the complainant and his retracted confession proved that he participated in the robbery.

The upshot of our re-evaluation and reconsideration of the evidence adduced is that the prosecution proved its case against all the appellants to the required standard of proof beyond any reasonable doubt. The ingredients that constitutes the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** were proved. The appellants, who numbered more than one robbed the complainant and in the course of the robbery used actual violence on the complainant by assaulting and raping her. We find no merit whatsoever in the appeals filed by the appellants. Each of the appeal filed separately by each of the appellant is consequently dismissed. The convictions of the appellants and the death sentences imposed are hereby confirmed. The sentence of ten years imprisonment imposed on the 1st appellant on the charge of rape is however set aside in view of the death sentence imposed.

DATED at NAKURU this 16th day of November 2005.

MUGA APONDI

JUDGE

L. KIMARU

JUDGE