REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 349 OF 1998

RENJE KAMBI KITSAO …….. APPELLANT

VERSUS

REPUBLIC ……..……...… RESPONDENT

JUDGEMENT

The Appellant RENJE KAMBI KITSAO was charged with the offence of Robbery with Violence contrary to Section 296 (2) of the penal code in that on 21/2/1998 at about 3.00 am at Mtwapa Market of Kilifi District within Coast Province while armed with iron bar and arrows robbed James Kuta Oyindi of cash Kshs. 5,000, I Seiko 5 w/w and one cloth material all valued at Kshs. 9,500/- before or immediately after such robbery used actual violence on the said James Kuta Oyindi.

He was also charged with defilement of a girl under 14 years contrary to Section 145 (1) of the Penal Code in that on 21-2-1998 at about 3.00 am at Mtwapa Market in Mtwapa Location of Kilifi District within Coast Province had carnal knowledge of Joyce Nyevu Mramba a girl under the age of 14 years. The learned Magistrate after hearing the evidence convicted the appellant of the two offences and sentenced him to death in the first count and 10 years for the second count. He now appeals against both conviction and sentence on both counts.

The evidence against the appellant was given by PW 1 James Oyindi Kuta who stayed with his wife Lydia Kadzo at Mtwapa near where he worked as Maintenance Engineer with a Company called Zacharia & Sons.

On 21-2-1998 at around 3.00 am thieves forced their door open with a bang. His wife woke up and saw some people enter the house. He notice appellant who came in first carrying an iron bar.

Lights were on which he usually left on due to the child. Appellant spoke to PWI asking him to turn and not to face him. He held him and removed Kshs. 50/- from his pocket he asked form more money. Appellant then asked PWI to go to the toilet and shut it. PWI went to the toilet but did not lock the toilet door and from the gap at the door he could see the appellant and his movements in the house.

Appellant asked them of their tribe to which both PWI and PW2 replied. Appellant asked PW2 to remove her pants but PW2 refused saying she had a child. At that juncture appellant noticed PWI looking and then ordered him to the kitchen then again asked PW I to enter under the bed. Appellant hit PWI and forced him to lie under the bed. From the house PWI heard PW2 his 12 year old sister in law crying and at that time appellant was in the kitchen.

PW I says their encounter took about 20 minutes and when they left they locked the door from outside. PWI noticed appellant had shaved his head and had two cuts. The other man was a thick short

man, dark in colour. On checking he found they had stolen Kshs. 500/- Seiko watch, clothing material and a red cap.

After some time PW I reported the robbery to the police base at Mtwapa and informed the police that they could identify one of the robbers. He also reported rape of PW 2 upon which he was given P3 form. Later on 19-4-1998 about 57 days after the robbery PWI was able to identify accused at Majengo grounds but before 19-4-1998 he had noticed him near a Catholic Church at that time he was with his in-law MWENI MASHA who recognized the appellant. This time he reported to the District Officer and led the authorities to appellants home. As a result of this appellant reported at the District Officer's and was arrested.

PW2 the wife of PWI reiterated what PW I said except that she recognized the appellant as one who had been at school with her.

PW2 JOYCE NYEVU MORAMBA a 12 year old girl said she went to school at Barani Primary School and stayed with her sister PW3 at Mtwapa and stated how on 21-2-1998 at night a thief entered into her room and raped her threatening to cut her with a knife if she screamed. She bled. She was taken to VIPINGO Health Centre but she could not identify who raped her. PW3 however said that he heard appellant tell PW2 to keep quiet while he was in the kitchen and that while appellant did all this the second robber ransacked the house of money.

PW4 Shadrack Kahindi Jefwa clinical Officer at Vipingo Health Centre examined PW2 and found tears in her private parts and found that she had STD. She filled the P3 form (Exhibited at the trial).

PW5 a neighbour of PWI and PW2 suffered the same violent visit on the same night at the same time when he was robbed of Kshs. 1,500/- but his home was dark so he did not identify any one.

PW6 APC Alex Junje received report of rape and robbery on 21- 4-1998 at the District Officer's Office and on 24-4-1998 he arrested the appellant.

In his defence appellant gave an unsworn statement saying he was not involved in the robbery or in the rape. DW2 Kadzo Mole spoke of the coming of police on 19-4-1998 and the arrest and DW3 Abdala Munyi, Village Elder spoke of the appellant having heard that police looked for him went to him to find out. DW3 went to the District Officer to enquire and found the appellant was required for offence of rape and robbery. The learned Magistrate found the identification evidence sufficient and circumstances also showing appellant to be the one who raped the PW2 Joyce Nyevu. He convicted him and sentence him to death.

In his amended grounds of appeal which were 13 in all appellant attack the evidence on identification by both PWI and PW2 saying the time was too short, unfavorable fleeting viewing of the allege robbery. That the positioning light was not described. That there was no identification parade, that PW3 did not inform the police that she had recognized the appellant.

Of offence of rape the appellant reasons that the evidence did not show that he was the robber who raped PW2. That the sheet with which the rapist cleaned himself was not analyzed by Government Chemist. It was not suggested by PW5 how old the injuries were.

We should in this appeal start with the appeal against conviction on defilement. It is common ground that the complainant was a minor and the law under Cap 15 The Statutory Declaration Act requires that the Magistrate should test the ability of the minor to see if she can speak truth under oath. He should hold an exercise of enquiry and should not just imagine the capability the minor and make an affirmation as was done here. Secondly being a minor the evidence needed some corroboration which the learned Magistrate failed to refer to here. However the most important aspect of this case is that there was no direct evidence as the girl was unable to identify her attacker. The presumption that appellant was the attacker was based on the evidence of PWI that appellant was in the kitchen for about 5 – 6 minutes at the time PW2 screamed and cried.

According to PW3 appellant went to the kitchen and she heard him telling PW2 to keep quiet. This was the entire evidence. PW3 did not see appellant come out of the kitchen nor was it shown that the person she heard tell PW3 to be silent was in fact appellant's voice and to show if she had established familiarity with his voice. She did not say it. All the evidence here was circumstantial so the Magistrate ought to have reminded himself if the principle's requirement that for a conviction to be bass on circumstantial evidence, the inculpatory facts must point to the accused as the one who committed the offence without any other reasonable hypothesis.

The learned Magistrate came to the conclusion that appellant was the rapist on mere assumption that he was the one who was there but without directing himself properly on the principles as to circumstantial evidence.

Secondly there ought to have been corroboration of the evidence of the complainant PW2 who was herself at 12 a minor.

The learned Magistrate said evidence of PW1 and PW2 corroborated PW3 evidence but this was not corroboration. Thirdly, there ought to have been corroboration of her evidence on the basis that this was a sexual offence and although, it is not a rule of law it is always better to have such evidence corroborated. The learned Magistrate made no reference nor did he direct himself on these before reaching the verdict.

We feel this was a misdirection and this conviction cannot stand and we quash it.

As for identification of the appellant PW1 testified that he saw the thieves after they had forced the door open and woken him up.

He was the two that came inside. He described one graphically as being thickly set and another shaved. Lights were on from a 60 watt bulb. Appellant talked to him. He noticed he had two cuts on hi chest. He had no kofia. Appellant was in the room with PW1 ordering him about for about 2 minutes. When PW1 was ordered to hide in the toilet he had opportunity to peep about through the open slit on the door and observe the appellant. We believe the identification of the accused was water light. The circumstances were fair for positive identification and identification itself is water tight even a single witnesses evidence can properly support a conviction. See RORIA V R (1967) EA 583. We feel that conviction for robbery with violence was proved. The robbers were more than one and they used violence. Offence under S. 296 (2) was complete.

Appeal against conviction for robbery with violence is dismissed. Right of appeal to the court of appeal in 14 days explained.

Delivered this 31st day of May 2002.

A.I. HAYANGA

JUDGE

P. M. TUTUI

COMMISSIONER OF ASSIZE