Irabo & another v Republic (Criminal Appeal E174, E175 & 200 of 2022 (Consolidated)) [2024] KEHC 2572 (KLR) (Crim) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2572 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E174, E175 & 200 OF 2022 (CONSOLIDATED)

LN MUTENDE, J

MARCH 12, 2024

BETWEEN

BRAVIN IRABO ..... 1ST APPELLANT

JAMES HARUN EBU ..... 2ND APPELLANT

AND

VERSUS REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence delivered in Kibera Criminal Case No. 1240 of 2022 by Hon. Gandani - CM)

JUDGMENT

1. Bravin Irabo, 1st Appellant, and, James Harun Ebu, 2nd Appellant, were jointly charged with the offences of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code and Gang Rape contrary to Section 10 of the *Sexual Offences Act*.

2. Particulars of the 1st Count were that on 29th May, 2018 at about 23:00 Hours at Congo area of Kawangware within Nairobi County jointly with another not before court robbed Leah Kemunto Amwoma cash Ksh 4,950/= one mobile phone make Techno S 65 valued at Ksh 11,499/= and immediately after the robbery they threatened to use actual violence on Leah Kemunto Amwoma.

3. On Count 2, the appellants, in company of each other and in association with another not before court, intentionally and unlawfully penetrated with their penises, one after the other, the vagina of Leah Kemunto Amwoma on the said date at the said place within Nairobi County.

4. In the alternative they faced a charge of committing an indecent act with an adult contrary to Section 11 (A) of the *Sexual Offences Act*. Particulars being that on the stated day, month and year, and, place,

they unlawfully and intentionally allowed their male organ (penis) to get into contact with a female organ namely (vagina) of Leah Kemunto Amwoma a woman aged 29 years.

5. Having denied the charges, they were taken through full trial and convicted. Each appellant was sentenced to suffer death on Count 1 and to serve fifteen (15) years imprisonment for gang rape, a sentence that was held in abeyance.

6. To prove the case the Prosecution called two (2) witnesses. PW1 Leah Kemunto Amwoma, the complainant, testified that on 30th May, 2018 at about 2300hours, having left work she boarded a Motor vehicle to Kawangware and alighted at Congo where her boyfriend stayed. He was not around and she decided to head to her residence which was about 10 minutes walk away.

7. After walking for 3 minutes between buildings someone grabbed her from behind and another grabbed her bag. The assailants covered her eyes with clothe, they also covered her mouth and face and dragged her into a house. She could hear one say that the door be opened, she was pushed down and landed on a bed.

8. That one pulled her dress as the other was holding her hand. Her panty was removed as she was fighting and kicking them. She persuaded them to let her go and stated that she was in pain. Despite the allegation that she was going blind they did not listen to her. They raped her repeatedly one after another and threatened to kill her. After the act that took about one hour they gave her the underpants and pushed her belongings outside.

9. Although it was dark inside the house there was light outside and she could see that it was a stone building house with a steel door. She looked up as she saw the faces of the two assailants. She also pleaded with them to escort her as they had stolen her money, phone make Techno S65 valued at Ksh.6,500/= and Ksh 4950/= The pair escorted her up to where they found her and said they could not go further as the OCS was nearby and also said that she did not have anything left and they could as well kill her.

10. She walked on and found a night guard at the main road and on narrating what happened, he escorted her back to the scene where they found the door locked with two (2) padlocks; The house had windows with glass panes, the guard opened the gate. They entered the premises, peeped inside the house and saw her items scattered, she also saw a mattress.

11. They went to report the matter to the area chief, and the Administration Police (AP) at the camp, and, she was referred to Muthangari Police Station where she reported the incident the following day, the 31st May,2018. She was referred to Nairobi women hospital where she was examined and treated.

12. Subsequently, she got information about some thieves having been arrested, and, going to the place she found her brother and parents. Upon seeing the suspects, they were wearing the same clothes they had the previous night when she was molested and robbed save that the one with a hat did not have it.

13. The police told her to talk to the suspects but they could not agree. Therefore, she was instructed to go to the Police Station where she was told to give the police money for a vehicle, but she did not have any. Two (2) days later, the police took the suspects to Muthangari Police Station. All of them, the complainant inclusive, were taken to the police doctor on 5th June, 2018 for examination. She was later called to the station where she identified the appellant on an identification parade.

14. On cross examination by the 1st appellant she stated that she was held by the neck from behind, such that she could not tell of the two who grabbed and blind folded her.

15. PW2 Stephen Wachira Chief, Kongo Sub-location received a call from an anonymous caller who reported that there were two young men roaming around allegedly raping women. He rescued the young men who were being assaulted and took them to his office.

16. Among those who had arrested the two suspects was Titi who told him that he found a woman crying the previous night and she told him that she had been raped by the two men, Titi accompanied the woman to the police station and recorded a statement.

17. PW2 escorted the men to the Hope Police Post. That at about 5:30 pm Titi returned with the woman who told him that she was raped and she had reported the matter at Muthangari Police Station to where he referred her again. He identified the appellants in court as the young men who were arrested.

18. The prosecution closed their case after the court had granted them a last adjournment.

19. Upon being placed on the defence, the 1st appellant stated that he resided in Kawangware and worked at a car wash. He denied committing the offence. He stated that he was arrested one day at a hotel and taken to the Chief's Office where he heard of the charges. He saw the 2nd appellant at the Chief's Camp and they were taken to Muthangari Police Station and later charged. That the complainant was a stranger to him.

20. The 2nd appellant also gave unsworn evidence. He stated that he resided in Kawangware 48 and that he was a casual labourer and also worked at a car wash. That one day he had gone to work and took a break on his way back to work he met a group of young men who told him that he had become proud since he had money, another one roughed him up; the young men claimed that he was a criminal but they did not have any reason.

21. That a man came and separated them. He told the chief to release him but he was taken to Hope Centre Police Patrol Unit and was later taken to Muthangari Police Station where he saw the 1st appellant, a person he did not know.

22. The court considered evidence adduced, found the appellants guilty as charged and convicted them on both counts.

23. Aggrieved by the court verdict, The 1st appellant, contends that: The charge sheet was defective; the prosecution did not prove ingredients of robbery with violence; the magistrate failed to note that an identification parade was crucial; ingredients of rape under Section 10 of the *Sexual Offences Act* were not proved; key witnesses mentioned were not called and this left gaps in the prosecution case; the court did not consider his defence which exonerated him; and, the death sentence was harsh, excessive oppressive and unfair considering the weak and doubtful evidence tendered by the prosecution.

24. The 2nd appellant contends that: The magistrate erred in law and fact by convicting on identification that was riddled with errors which go to the root of the case; the court failed to find that crucial witnesses were not procured to corroborate the case of the complainant; and, that the court sentenced the appellant as an adult when he was a minor contrary to Article 50 and 53 of *the Constitution*.

25. The first appellate court is required to reassess and analyze the evidence on record and to come up with independent conclusion on whether the evidence can convict the appellant , the court must however be minded that it never saw or heard the witnesses.

26. In David Njuguna Wairimu vs Republic [2010] eKLR, the Court of Appeal stated that:

> "...there is no set format for re-evaluation of evidence by a first appellant court, nor is it necessary for the appellate court to use the words re-evaluate, consider or analyze in order to

fulfill its duty. In our view, in line with Okeno v Republic, the judgment of the High Court must demonstrate that the evidence has been reconsidered by the first appellate court and subjected to an in-depth and meticulous re-evaluation."

27. The appellants faced to two (2) counts with an alternative count. The ingredients of robbery with violence are captured as the elements of the offence under Section 296 (2) of the Penal Code and were also discussed in the case of Johana Ndungu v Republic [1996] eKLR where the Court of Appeal held that:

> "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in S.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
>
> If the offender is armed with any dangerous or offensive weapon or instrument, or
>
> If he is in company with one or more other person or persons, or
>
> If, at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses violence to any person."

28. The elements are read disjunctively and the court can convict the accused where only one element is proved. (Also see Dima Denge & 7 Others vs Republic, Criminal Appeal No. 300 of 2007).

29. PW1 stated that the assailants took away her mobile phone and money worth 4500 /. Being blind folded so that she could not see, the violent and brutal manner that she was treated, molested and the threat to kill her were a vivid description of the violence used before the robbery.

30. With regard to the offence of Gang Rape Section 10 of the *Sexual Offences Act* enacts that:

> Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.

31. According to the complainant, the assailants had carnal knowledge of her against her will or consent and also used violence. The brutal manner in which she was handled and the explanation to the court of how they threatened and raped her in turns for one hour establishes the offence.

32. It is argued by the appellants that the charge of robbery with violence was defective, Section 214(1) of the Criminal Procedure Code provides that a charge sheet is defective where:

a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

b. It does not, for such reasons, accord with the evidence given at the trial; or

c. It gives a misdescription of the alleged offence in its particulars.

33. The appellants were charged with the offence of Robbery with violence. The charges were brought under Section 295 as read Section 296(2) of the Penal Code thus capturing both the offence of simple robbery and aggravated robbery in the same count. Whether this was fatal was addressed in the case of Paul Katana Njuguna vs. Republic (2016) eKLR where the Court of Appeal explained that the offence of robbery with violence includes the elements of the offence of robbery, and if the particulars of the charge sheet show the elements of the offence of robbery with violence which are proved, then this is a defect that is not fatal and can be cured under section 382 of the Criminal Procedure Code, that provides thus:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: [Rev. 2015] Criminal Procedure Code CAP. 75 C44 - 105 [Issue 1] Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

34. The question would be whether the accused were prejudiced and whether there was uncertainty on whether they understood the charges.

35. The particulars of the offence were clear that the offence was robbery with violence under Section 296(2) of the Penal Code. The complainant tendered evidence, was cross examined and defence adduced evidence in answer to the charges as well, which means that they understood the charge.

36. On the question of age, when the appellants were arraigned in court the 2nd appellant claimed to be 17 years. The matter was adjourned several times pending his age assessment and ultimately before plea could be taken the prosecution advised court that the 2nd appellant was about 21-22 years following age assessment. However, no age assessment report was presented in court. An age assessment would have been a credible way of determining his age. There was a lacuna in this respect.

37. It is contented that the identification of the assailants was not positive. The victim was alone during the incident; hence her testimony is of a single witness. Before convicting, the court was required to test the identification evidence to avoid instances of mistaken identity.

38. In Roria vs Republic (1967) EA 583 Court of Appeal stated at page 584 that:

> "A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

39. In Kiilu & Another v Republic [2005]eKLR, the Court of Appeal held that;

> "Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the

conditions favoring a correct identification were difficult. In such circumstances, whether it be circumstantial or direct, pointing to guilt, from where a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error."

40. PW1 testified that she was attacked at about 23:00 Hours. She described the scene and sequence of events as being blind folded from behind and dragged to a place then a door was opened and she was pushed and landed on a soft landing which she later realized was a bed.

41. The witness testified that the house was dark and after incident the door was opened and her belongings were thrown out, there was light outside and she could see buildings and the house had a steel door, and that she also saw the two assailants. However, she did not tell court the type of light and its source or its intensity.

42. In court, she described them as one having been tall, dark and was wearing a hat (God father) while the other one was short with shaggy hair. That the men escorted her to the place they found her, and declined to escort her to the road upon her request and when she told them she was not left with anything, they said they could as well kill her.

43. The appellants contend that an identification parade was necessary considering that the assailants were strangers to the complainant before the attack. In Kinyanjui & 2 Others v Republic [1989] KLR, cited in Samuel Kilonzo Musau vs Republic {{^}} (2014) e KLR. the Court of Appeal stated that:

> "The purpose of an identification parade is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion."

44. The court found and rightly so that the victim saw the assailants before the actual parade hence it was not necessary.

45. Pw1 testified that at the Police Station she was told to try and talk it out with the appellants but they declined. Then at later day she identified them at the Police Station. She did not state the mode / manner in which she identified them, whether it was by touching or by physical features. She stated that the 2nd appellant was the one with shaggy hair at the time of the incident but he had during the parade changed his clothes. And the 1st appellant had not changed his clothes.

46. The uncertainty on whether the parade complied with the police standing orders calling for scrupulous and fair parade could have been clarified by evidence from the parade officer and production of the parade forms.

47. This is a case where the prosecution that was granted a last adjournment was compelled to close the case. At the time, only two witnesses had testified, the complainant and the chief who re-arrested the appellants from a rowdy crowd of young men that were already assaulting them. PW2 stated that the crowd alleged that appellants were maligning their names by assaulting and raping women. That one of them called Titi had encountered a woman crying the previous night allegedly after a rape ordeal.

48. The stated Titi was not called to testify. Similarly, the Investigation Officer, and the doctor who examined the complainant and appellants, were not called, hence relevant documents were not tendered in evidence to establish results obtained.

49. There is no doubt that where witnesses are not called the court has the power to construe the omission in favour of the accused. In doing this the court assumes that the uncalled evidence would be adverse to the prosecution case.

50. In Bukenya and Others vs. Uganda (1972) E.A. the court held that:

> " The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

51. Titi was a crucial witness who could have clarified under what circumstances the appellants were arrested. The investigating officer could have clarified how the particulars of the offence indicated the perpetrators were three but not two as stated by the complainant. Medical evidence was crucial as the appellants were also examined.

52. In a criminal case, the prosecution had the duty of presenting before court all relevant facts and evidence which could help them prove the case to the required standard of proof beyond reasonable doubt. There was no enthusiasm of doing so to the detriment of the victim who from the outset did not get cooperation from the police per her testimony.

53. The upshot of the above is that the appeal is meritorious. Accordingly, the conviction is quashed, sentence meted out set aside. The appellants shall be released forthwith unless otherwise, lawfully held.

54. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 12TH DAY OF MARCH, 2024.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant 1 & 2

Ms. Tumaini Wafula for ODPP

Court Assistants – Asin & Gladys