Herman & another v Republic (Criminal Appeal 137 & 44 of 2023 (Consolidated)) [2024] KEHC 10945 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10945 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 137 & 44 OF 2023 (CONSOLIDATED)

DR KAVEDZA, J

SEPTEMBER 20, 2024

BETWEEN

OPANGA CLYDE HERMAN ..... 1ST APPELLANT

JESSE MWENDA M'KIUNGU ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. C.K Mwaniki (S.R.M) on 21st November 2022 at Kibera Chief Magistrate's Court Criminal Case No. 3023 of 2016 Republic vs Opanga Clyde Herman & Jesse Mwenda M'Kiungu)

JUDGMENT

1. Opanga Clyde Herman andJesse Mwanda M'Kiungu the 1st and 2nd appellants herein were jointly charged and convicted on two counts of offences; robbery with violence contrary to section 296(2) of the *Penal Code* and gang rape contrary to section 10 of the *Sexual of Offences Act* no. 3 of 2006. After a full trial, they were sentenced to serve ten (10) years imprisonment in Count I and 20 years imprisonment in Count II. The sentences were to run consecutively from the date of arrest. Being aggrieved, they each filed individual appeals which were later consolidated challenging their conviction and sentence.

2. In their respective petitions of appeal, they raised grounds that have been coalized into the following main grounds: The appellant challenged the totality of the prosecution's evidence against which they were convicted. They complained that the charge sheet was incurably defective. They argued that their right to a fair trial was curtailed by the trial court. They urged the court to quash their conviction and set aside the sentence imposed.

3. In response, the respondent filed grounds of opposition dated 30th July 2024. The grounds are that the appeal is misconceived and unsubstantiated; the appeal is an abuse of the court process as the

appellants were properly convicted before the trial court; the prosecution did discharge its burden of proof beyond reasonable doubt; the appeal lacks merit and should be dismissed.

4. Before I consider the merits of the appeal, the appellants challenged the charge sheet as being defective. They submitted that the charge sheet was defective for duplicity and incurable. The appellants contended that they were charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) which are two separate offences intertwined as one. They argued that as a consequence, their conviction on a defective charge sheet was unsafe.

5. The Court of Appeal in *Paul Katana Njuguna v Republic* [2016] eKLR considered the issue of duplicity where the appellant had been charged with the offence of robbery with violence contrary to Section 295 as read with section 296(2) of the *Penal Code*. The Court observed as follows;

> " Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the *Penal Code*. We observe that the offence under Sections 295 and 296 (2) were not framed in the alternative. So, following the decision in *Cherere s/o Gakuli v R* (supra) *Laban Koti v R.* (supra) and *Dickson Muchino Mahero v R.* (supra), the defect in the charge herein is not necessarily fatal."

6. In this case, the appellants understood the charge against them, participated in the hearing by cross-examining the witnesses, and mounted their respective defences at the close of the prosecution case. They did not raise any complaint before the trial court and in the circumstance, I find that there was no miscarriage of justice on the ground that the charge was duplex.

7. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)

8. The prosecution called 7 witnesses in support of their case. J.K.M (PW1) testified that around 7 p.m. on the day in question, she saw two young men leaving her home as she returned from her aunt's house. She asked what they were doing there, and they said they were looking for her brother. She recognized one of them as Jesse, the 2nd appellant, who had previously lived in the area. They asked for a drink of water, which her younger brother brought them.

9. As the men started to leave, she went back inside. At the entrance, the 1st appellant pushed the door open and forced her inside. He revealed a gun that had been concealed. Once inside, he ordered her and her younger brother and cousin to lie down, causing them to scream in fear.

10. The complainant recalled the 1st appellant pulled down her skirt while the 2nd appellant ran upstairs. When she resisted, the 1st appellant hit her on the head with the gun. He then forced her to the floor, lifting her skirt, but she continued to resist. The 2nd appellant returned downstairs, saw the struggle, and gathered her laptop, PlayStation, and mobile phone. He urged the 1st appellant to leave, but the 1st appellant refused. The 2nd appellant then went to the room where her sibling and cousin were being held captive.

11. The 1st appellant hit her in the mouth, loosening her teeth. He then proceeded to rape her. Thereafter, he went and picked up the television set and left in the company of the 2nd appellant. The complainant's brother and cousin then sought assistance from neighbours. Police officers came to the house and the

complainant was taken to Nairobi Women's Hospital where she was admitted for a week. Later she identified her assailants at the identification parade.

12. AAM (PW2) the complainant's younger brother provided a similar account to that of PW1. He reported that as soon as the assailants left, he and his cousin began shouting "Mwizi! Mwizi!" The 1st appellant then fled towards a nearby dam, firing shots into the air to scare off any potential pursuers. PW1 and PW2 later identified both appellants at an identification parade.

13. Dr. Joseph Maundu (PW3) examined the complainant on 26th July 2016 and confirmed that she had a cut on her left ear and wounds on her forehead and scalp. The complainant was admitted to Nairobi Women's Hospital for a week having sustained injuries as a result of her ordeal. She received medical treatment, and a P3 Form was filled out to record her injuries.

14. Clinical Officer Triza Wambui, who initially treated the complainant, was unable to testify at the trial. Dr. John Njuguna (PW5) testified on his behalf referring to the medical records prepared by Dr. Triza Wambui, which noted similar injuries as PW3. The complainant's blouse which was stained with blood from the incident, was also produced as evidence.

15. Corporal Eswari Njuki (PW4) conducted the identification parade on 14th July 2016. He assembled nine individuals, including the appellants in two separate identification parades ensuring they were similar in dress, size, and appearance. The complainant identified the first appellant in the first parade and the second appellant in the second parade. PW4 completed the identification parade forms, which were signed by both the victim and the suspects.

16. On 11th July 2016, shortly after 7 pm, Police Corporal Geoffrey Mwangi (PW7) and other officers from Karen police station were alerted to a recent robbery in the Kambi Kisii area. Upon arrival, they found members of the public pursuing the suspects. The crowd identified one of the assailants as Jesse, the 2nd appellant herein. It was reported that one suspect had discarded a stolen TV and thrown something into the forest before fleeing. PW7 took possession of the discarded TV set and interviewed the victims at their home. He also collected a panty from the complainant, which had been removed during the sexual assault.

17. The following day, Administration Police officers arrested the suspects, who were then held at Hardy Police Station and later identified in an identification parade. The area of the forest where one suspect had thrown an item was subsequently cleared, and a Ceska pistol with three bullets was recovered. The firearm was forwarded to the government chemist for ballistic analysis and confirmed to be unlicensed by the Chief Licensing Officer of the Firearms Licensing Board.

18. Samples of bodily fluids taken from the suspects were sent to the government chemist for comparison with DNA material from the panty and the complainant. Government Analyst Emily Okworro (PW6) analysed the samples and found that the DNA profile from the blood on the panty matched the victim's DNA profile. However, no semen or spermatozoa was detected on the panty. Her report was admitted into evidence.

19. PW7 also established that the value of the stolen items was Kshs. 250,000. After interviewing the suspects and completing the investigation, he proceeded to charge them accordingly.

20. After the close of the prosecution's case, the appellants were found to have a case to answer and were put on their respective defences. Herman Clyde Opanga (DW1) stated that he was a shoe seller living in Gataka and operating his business in Hardy, Karen. On 13th July 2016, when he arrived at his business premises, he found police officers waiting for him. They accused him of being involved in a robbery.

He testified that the police seized his cash and personal belongings and then arrested him. He was taken to Hardy Police Station and later charged. He maintained his innocence.

21. Jesse Mwenda M'Kiungu (DW2) gave sworn testimony and recounted his arrest, stating that he was detained on 13th July 2016 at around 4:30 pm while returning home from work. He told the court that he was with the 1st appellant when police officers stopped them for questioning and conducted a search. During the search, officers found bhang in the 1st appellant's pockets, leading to both their arrests. The appellant later claimed that a woman identified him, after which he was assaulted by the officers. Subsequently, he was brought to court and charged. He denied any involvement in the crime maintaining his innocence.

22. After a full trial, the appellants were convicted accordingly. The appeal was canvassed by way of written submissions by the parties which have been duly considered and there is no need to rehash them. In Count, I, the appellants were convicted of the offence of robbery with violence. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It provides as follows-

> "if the offender is armed with any dangerous or offensive weapon or instrument, or 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 any other personal violence to any person, he shall be sentenced to death".

23. As regards the offence of robbery with violence, the issues for consideration by this court are whether the appellants were positively identified and whether the prosecution did prove its case beyond reasonable doubt. The evidence on record does prove that the complainant was attacked in her home by the appellants. They proceeded to ransack her home stealing, her mobile phone, laptop, PlayStation, and television set. During the ordeal, the 1st appellant was armed with a gun which he used to threaten the complainant and hit her.

24. The complainant picked out her attackers during an identification parade overseen by PW4. He identified the first appellant as the person who assaulted her during the ordeal and the second appellant as the one who was stealing items from her house. She insisted that the house was well-lit, allowing her to see her attackers. PW2, who witnessed the incident testified that he was frightened and raised an alarm after the attackers left. He also identified the appellants in court as the assailants of the material day.

25. During their defences, the appellants claimed they were arrested by police while jaywalking and did not know anything about the incident. They alleged that the police framed them for the charges.

26. From the material placed before the court, PW 1 and PW 2, were very clear on the facts of the incident, and their evidence was not shaken on cross-examination. It is my considered view that the appellants were properly and positively identified and apprehended after the incident. I find the testimony of the prosecution's witnesses to be reliable direct evidence of visual identification against the appellants.

27. For consideration is whether force was used to rob the victim. It was the testimony of prosecution witnesses that one of the assailants was armed with a gun. This was used to threaten the complainant and later used to assault her and as a result, she was robbed. As a result of the violence against the complainant, she sustained injuries on the left ear and wounds on her forehead and scalp. The use of violence was therefore present. This court is satisfied that the prosecution proved that the appellants robbed and used actual violence to harm the complainant. Their conviction on count I for the offence of robbery with violence was therefore safe and is affirmed.

28. For the offence charged in count II, Section 10 of the *Act*, the key ingredients of the offence of Gang Rape include:

a) Proof of rape or defilement;

b) Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

29. Was the offence of rape committed? Section 3 of the *Act* defines 'rape' as follows:

(1) A person commits the offence termed rape if –

(a) he or she intentionally and unlawfully commits an act which cause penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act."

30. Rape is defined under section 3 of the *Sexual Offences Act* to mean, the intentional and unlawful penetration of a person's genital organ into another's genital organ without their consent. In *R v Oyier* (1985) KLR pg 353, the Court of Appeal held as follows: -

> " The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."

31. PW1 recounted a harrowing ordeal where two assailants came to her house, initially asking for water. However, they then brutally assaulted her, stole from her, and raped her. She described how, while the 2nd appellant was searching through the house, the 1st appellant tried to undress her and assaulted her with a gun. Despite her resistance, 1st appellant continued to attack her until he knocked her teeth loose, at which point he sexually assaulted the complainant.

32. During her ordeal, 1st appellant was holding PW1's younger brother and cousin hostage in another room. Although the 2nd appellant did not directly commit the rape, he had knowledge that his co-accused was committing the offence since he was in the next room guarding and restraining the family of the complainant who could have rescued her. Section 20 of the *Penal Code* which is a cardinal principle of the crime and on offences of joint enterprise says -

20(1) when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually

committing it (and these include - every person who actually does the act or make the omission which constitutes the offence (Section 20(1)(a)).

33. And Section 21 says of joint offenders in prosecution of a common purpose

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purposes an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

34. The 2nd appellant is therefore deemed to have shared a common intent and acted in association with the first appellant in committing the offence.

35. PW 1's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the victim was telling the truth. The trial magistrate found PW1 to be a truthful witness and found no evidence as to any previous interaction between the appellants and the complainant that would make her give a false testimony against the appellants. Further, I have thoroughly looked at the court record and note that PW1 was consistent in her narration of the series of events. Despite being subjected to rigorous cross-examination by the appellant, her evidence was not shaken on cross-examination.

36. Additionally, there is corroborating evidence that the complainant visited the hospital after the ordeal. However, upon examination, there were no injuries on her genitalia but she had a whitish discharge. She was treated and discharged after a week. The prosecution evidence therefore proves intentionally and unlawful penetration of PW1's genital organ without her consent.

37. On identification of the appellants, PW1 and PW2 identified the appellants after they were arrested. In addition, the complainant recognised the 2nd appellant who had been previously living in the area. There was therefore no margin of error or mistaken identity. The appellants' conviction for the offence of gang rape is therefore affirmed.

38. On sentence, the appellants were each sentenced to serve 10 years each for Count I and 20 years imprisonment for Count II. The sentences were to run consecutively. In the sentencing proceedings, the trial court considered the appellants' mitigation and the pre-sentence reports on record. The sentence imposed was a cumulative term of 30 years imprisonment.

39. The *Sentencing Policy Guidelines* provide as follows: -

> "7.13 – Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims the sentences should run consecutively".

40. The Court of Appeal has defined the phrase 'same transaction rule' in the case of *Republic –vs- Saidi Nsabuga S/O Juma & Another* [1941] EACA and revisited it in *Nathan –vs- Republic* [1965] EA 777 where the court stated as follows: -

> "If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction."

41. In the instant case, the charges in counts I and II indicate that the offences therein were committed in a transaction involving one complainant. The said offences were committed with the intention to rob and sexually assault the complainant and were connected by the proximity of time, criminal intent, by the relation of cause and effect, constituting the same transaction. In my view, the trial court ought to have ordered the sentences in counts I and II to run concurrently. The trial court indeed acted on wrong principles in that regard.

42. The upshot of the above analysis is that the appeal partially succeeds. The sentence imposed in counts I and II is maintained. The sentences shall however run concurrently from 14th July 2016 the date of the appellants' arrest having spent the entirety of their trial in remand custody.

It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF SEPTEMBER 2024.

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D. KAVEDZA

JUDGE

In the presence of:

1st and 2nd Appellants present on the platform

Mr. Maroro for the Respondent

Achode for Court Assistant.