REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

CRIMINAL APPEAL NO. 27 OF 2019

JOSEPH KARIUKI THUO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon. K. Bidali

(CM) delivered on 7th August, 2019 in Naivasha CMCR No 1317 of 2016)

JUDGMENT

Background

1. The case against the appellant in the lower court was that on 3rd September, 2016 at ZZ lodging within Maai Mahiu, Naivasha, while armed with a pen knife, he robbed and raped EM (PW1) and also robbed BL. The offences of robbery with violence were stated to be contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code** and one count of rape contrary to **Section 3 (1)(a) (b) 3** of the **Sexual Offences Act**.

2. The prosecution availed six witnesses and the appellant gave an unsworn statement without witnesses. He was convicted with the counts of robbery with violence and sentenced to life imprisonment. For the offence of rape, his sentence was held in abeyance. The second accused in the lower court, James Mbugua, was acquitted of the offence, with the trial court having made a finding that the 2nd accused was not present at the scene.

3. The appellant's amended appeal herein is premised on four grounds, namely:

> *1. THAT, the learned trial magistrate erred in law by awarding the appellant a conviction and a sentence of death. On a defective charge sheet under Section 295 as read with Section 296 (2) of the Penal Code the charge was therefore duplicitous; the appellant should have been charged under section 296 (2) of the Penal Code.*
>
> *2. THAT, the learned trial magistrate erred in law and facts by holding that, the offence of robbery with violence was proved beyond reasonable doubt but failed to note that, the ingredients under Section 296 (2) of the Penal Code were not proved in evidence.*
>
> *3. THAT, the learned trial magistrate erred in law but holding that the evidence of PW1 could amount to rape that she was a commercial sex worker and had rented a house for the purpose of trading in sex.*
>
> *4. THAT, the learned trial magistrate erred in law by not analyzing the prosecution evidence adduced.*

4. This being a first appeal, the court's role is to re-evaluate and weigh the whole evidence in the case exhaustively and make its own findings and conclusions, taking into account that the court did not have the advantage of hearing the witnesses itself and seeing their demeanour. See **Okeno v Republic [1972] EA 32**.

The Facts

5. EMT (PW1), the complainant, spent the night in Room 7 at ZZ Lodge on 3rd September, 2016. At 6.30am as she woke up, someone entered her room and said he wanted to have sex with her. She said no. The person threatened to stab her. He pushed her onto the bed and

after a struggle, he overpowered and raped her, then left. She identified the man as the 1st accused Joseph Kariuki.

6. The man returned later with another man. They found her with one B (PW2), who was collecting room hire fees. They demanded some money alleging that he had left his torch with her and wanted it back or its value. They were given Kshs 300/= and another Kshs 500/=. They beat the complainant and also sought money from PW2. In the scuffle, the 1st accused broke a glass with which he threatened to cut PW2. It was then that PW2 screamed and people at the bar responded and called the police.

7. All this time the electric lights were on and visibility was clear. The 1st accused was arrested immediately by members of the public. The complainant then reported the robbery and rape at Maai Mahiu Police Station. She was sent to Naivasha District Hospital where she was treated. A P3 Form and PRC Form were filled in and produced in court.

8. In cross examination by the 1st accused, PW1 said she was a sex worker; that she has clients; that they agree on terms; that she and 1st accused had agreed on sex for Shs 300/=; and that she had not consented to sex with him. She further said that the 1st accused strangled her during the incident, hence she could not scream; that before raping her he put on a condom whilst holding a pen knife; that it was when she was in PW2's room to pay room hire cash that the men came in again and committed the robbery, before PW2 screamed.

9. In cross-examination by the 2nd accused, PW1 said he did not rape her; that the 1st accused is the one who demanded money from her and he, 2nd accused, collected it; that he robbed her when they were in Room 3 where PW2 was.

10. The evidence of PW2, BLM, was that she is a peer educator and commercial sex worker. She testified that on 3rd September, 2016 she was alone in Room 3 at ZZ Lodging when PW1 walked in closely followed by two men. Her room was lit by an electric bulb. She knew the two men by face and she identified them as the 1st and 2nd accused who were regulars at the bar.

11. When they came in, the men demanded a torch. The 1st accused started slapping and beating PW1 and she gave him Kshs 150/=. The men asked for more money and she gave another Kshs 150/=. The 2nd accused shouted that they should give Kshs 500/= each, which she gave to the 2nd accused. The 1st accused then smashed a glass and came to PW2 holding a piece of it. He forced her to bend saying women hide money in their genitalia. The men lifted her dress and tried to insert the broken bottle into her vagina. She screamed. People then came in response to the screams. Accused 2 opened the door and rescuers rushed in.

12. PW2 then called the caretaker, who called the police. A policeman came and arrested Accused 1. However, Accused 2 escaped. She reported the incident at Maai Mahiu Police Station. She was issued with a PW3 Form.

13. In cross examination by the 1st accused, PW2 said she collects rent from the sex workers which she gives to the landlord. She admitted that she did not know what had happened to PW1 before the incident in her own room. She stated that she gave the 1st accused Kshs 300/=; that 1st and 2nd accused beat her; that the 1st accused tried to insert a bottle into her vagina; that Maasais came to the room to rescue them; and that he was arrested at the stairs in the lodge.

14. In cross examination by the 2nd accused, she reiterated that the 2nd accused immediately followed the complainant into the room she was in; she contradicted her earlier evidence and stated that it was he, the 2nd accused, who tried to undress her to insert a bottle into her vagina.

15. PW3, MA, a commercial sex worker was at her room in ZZ Lodging on 3rd September, 2016. She woke up to take her rent to PW2's room. On reaching there, she found PW1 and PW2 and the two accused persons at about 6.30am; She heard the 1st accused demand a torch from PW1. She saw the 1st accused slapping PW1 after PW1 said she had no torch. The 1st accused demanded Kshs 150/=, and PW1 asked PW2 to give it. When the 1st accused demanded more money she was given Kshs 300/= for the torch. He continued making demands for more money and PW2 gave him Kshs 500/=.

16. According to PW3, she then saw 1st accused break a glass he was holding, he bent PW2 over and tried to insert the broken end into PW2's genitalia. She screamed. The door was knocked open and PW3 ran to the bar for help. In re-examination she said that accused 1 tried to insert a broken bottle into PW2's genitalia.

17. PW4 PC Henri K. Mutai was the one who arrested Accused 1. He was at Maai Mahiu police station on 3rd September, 2016, when the proprietor of ZZ Lodging called and told him a man had committed a robbery. He immediately rushed to the scene and found Administration Police Corporal Alex there, together members of the public who had arrested the 1st Accused. He re-arrested Accused 1. In cross-examination by the 1st Accused, he said it had been reported that 1st Accused attacked the complainants. It appears that at the time of the arrest, no formal complaint had been lodged through an OB report at Maai Mahiu Police Station.

18. PW5 Mesa Sylvester is a Clinical Officer attached to Naivasha Sub-County Hospital. He filled in the P3 Reports for PW1 and PW2 on 12th September, 2016 after examining the two patients. Other than what the patients told him, he found PW1 to be in fair general condition. He found she had a broken hymen, had two children, and had had voluntary sex on 2nd September, 2016. As for PW2 she had tenderness on the right side of her chest. Both patients told the clinical officers they had been assaulted by two people well known to each of them. However, their injuries do not, in my view, seem to reflect the beatings, forceful sex and attempted insertion of broken bottles into PW2's vagina, that they alleged had occurred.

19. According to the P3 reports both PW1 and PW2, gave a history of being assaulted by known persons. In the case of PW1 she reported to him that:

> ***"Someone well known to her entered into her room, was carrying a knife. He slapped and grabbed her by the neck. Undressed her and had penetrative sex with her."*** (Emphasis added)

Both complainants were treated at Naivasha Sub-County Hospital and a private clinic at Maai Mahiu. However no medical treatment notes were availed.

20. PW6 Corporal Mike Magenye of Maai Mahiu Police Station was allocated the case on 3rd September, 2016 at 3.00pm, following an earlier report of the incident. He recounted the evidence of PW1 and PW2. Although he said he conducted investigations, he did not say what he did in conducting the investigations and whether he visited the scene; spoke to patrons, collected broken glass and so on. In re-examination, however, he said he recorded the complainants' statements. In cross examination by the 1st Accused he said the rape was not reported in the first report in OB 7 of 3rd September, 2016. In re-examination, he said the rape case was reported the same day. The OB reports were not availed at the hearing.

21. The three issues for determination in this appeal are whether the charge sheet was defective; whether the ingredients of robbery with violence were proved, and whether the rape was proved.

Defective Charge Sheet

22. This is a fairly common argument in appeals where the charge sheet indicates the charge as being under **Section 295** as read with **Section 296 (2**) of the **Penal Code**. The argument is that the Charge sheet is duplicitious in that it charges the accused for two or more offences in one charge; that the correct mode should have been to charge the accused with the offence under **Section 296 (2)** of the **Penal Code**. It is argued that breach by using duplex charges leaves the accused with unclarity as to what is the charge that they are defending against. This results in fundamental prejudice to the accused person.

23. This question of duplicity in charges was considered at fair length by the Court of Appeal in **Paul Katana Njuguna v Republic [2016] eKLR**. There, the Court of Appeal cited with approval the following principles as the correct law:

> - The test is whether the application of the test must depend to some extent upon the circumstances of the case and the nature of the duplicity **Cherere s/o Gakuli v Republic [1955] 622 EACA**.
>
> - The vice at which the rule against duplicity is aimed and is intended to counter is uncertainty and confusion in the mind of the accused in having to deal with charges which are mixed up and uncertain **Amos v DPP [1988] RTR 198 DC**.

24. The Court of Appeal concluded as follows :

> ***"[39] We appreciate that Section 296 (2) of the Penal Code creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296 (2) of the Penal Code. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296 (2) were absent or were not demonstrated by the prosecution.***
>
> ***[40] In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective."*** (Emphasis added)

25. In the present case, the appellant was charged with robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. The offence is not stated to be in the alternative. As stated by the Court of Appeal, the charge was not prejudicial to the appellant because it was not framed in the alternative. Here, the charge was for stealing, and that there was violence in the process. The appellant was thus fully aware of the case he was meeting. The Court of Appeal held at Paragraph 38 in **Paul Katana Njuguna's** case (supra) 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 Section 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.***

26. In light of the above authorities, and the clear framing of the charge, it was not fatal in this case. This ground of appeal therefore fails.

Proof of Rape

27. The trial court was convinced that there was no consent by PW1 to having sex with the appellant. The trial magistrate made this finding on the basis that:

"As expected in such incidents there is no independent witness to confirm whether consent was given. It is the complainant's word against that of the accused person."

The court then referred to **Abdullah bin Wendo V. Republic (1953) 20 EACA 166** where the court made the following statement on the evidence of a *single witness on identification*:

""...subject to certain 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 greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to the guilt, from which a judge, or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

It appears to me that the question of identification was not in issue as the evidence disclosed, and trial court accepted, that PW1 knew the accused prior to the incident. That would be an issue of recognition. What the trial magistrate determined was that:

"I am of the view that she had no reason to frame the accused of this charge."

28. In her evidence-in-chief, PW1 did not give any indication that she knew the accused. She referred to him as "*a person*" or "*the person*", "*the man*". Similarly in her statement of 4th September, 2016 she referred to the accused as "*a male adult who I came later to know as Magathi*". She also testified that the accused persons were the ones who attacked her, and that she knew accused 2 by face. She thus gave an impression that the 1st accused was a stranger who she got to know only later. However, in the P3 Form and PRC Form, PW1 told the Clinical Officer, PW6, that the appellant was a person well known to her.

29. Thus, PW1 and her alleged rapist were well known to each other. That explains the attitude and stance she had towards him as shown in her evidence. According to her, when the 1st accused entered her room he said he wanted to have sex with her, and she said no. This appears to be a rather civil amicable conversation between people who are not antagonistic to each other. In cross examination by him she said, "*we agreed that you would have sex with me at Kshs 300/=*". It was after this cordial discussion that he allegedly drew a knife. She said he raped her forcefully, but he said they consented to have sex. She said that he even put on a condom before he raped her - as she normally demands of clients. Not only did he put on a condom, it was perfectly done:

"You put on a condom properly."

It appears as if she actually checked to see whether the condom had been put on properly.

30. In my view, this is not the behaviour of a rapist who is holding a knife in a lodging with many rooms full of people, where help is readily available. It is quite curious that at the same time that, he was holding a knife and putting on the condom, he was also strangling her but she is crystal clear he put on the condom properly. This scenario would require more than two hands to accomplish so successfully. Further, she said:

"I never forgot the rape. I usually insist that clients wear condoms before we engage in sexual intercourse. You cannot forget a rape incident."

31. Yet she admitted that in her first report of 3rd September, 2016 she did not mention or even slightly allude to the unforgettable rape. This was confirmed by PW6 Corporal Mike Magenye who in cross examination by the 1st accused said:

"The rape was not reported in the first report……."

Later in re-examination PW6 stated the rape was reported the same day. In her written statement the following day on 4th September 2016, PW1 admitted:

"I forgot to report that I had been raped since the accused had used a condom…"

32. Given all these unusual circumstances I have pointed to, which give rise to strong doubts in my mind, I am more inclined to believe the evidence of the appellant that there likely was consensual sex, and that a disagreement arose only because the appellant afterwards returned to claim his torch. Accordingly, I do not find that the rape is demonstrated beyond reasonable doubt. Further, the fact that the medical records show a broken hymen proves nothing concerning sexual intercourse as the nature of PW1's trade would inevitably result in a broken hymen.

Proof of robbery with violence

33. The evidence for robbery with violence is that the accused returned to PW1 after the sexual encounter with her to request his torch. PW1 had no inkling about the torch. The accused, frustrated, hit her - or in her words - beat her. PW2 said the accused hit her with his hands and slapped PW1. He then broke a glass or a bottle - there is conflicting evidence on whether it was a bottle or a glass - and threatened to cut PW2 with it. There is also contradictory evidence regarding whether the money allegedly taken from the complainants was taken by accused 1 or accused 2, or both.

34. Nowhere, however, is there any evidence from any of the eyewitness (PW1, PW2, or PW3), of the use of a knife or penknife in the alleged robbery. Further, the alleged penknife was not found on the accused despite the fact that he was arrested whilst still in the brawl at the scene of the alleged robbery. Despite this evidence, he particulars of the charge were that the accused was "*armed with a dangerous weapon namely penknife*" when he robbed PW1 of Kshs 300/=.

35. Even with regard to the particulars of the offence of robbery with violence against PW2, the particulars of the charge are also that the accused was armed with a penknife. This occurred in Room 3 rented by PW2 B. Yet no evidence is given of the existence of a penknife except by PW1 just before her earlier alleged rape which incident has been debunked herein. Instead, the evidence availed concerning the allegation of the offence against PW2 was that accused1 used broken glass to aid him in the robbery.

36. An examination of the evidence concerning the alleged use of the broken glass is as follows: PW1 testified that one of the robbers - the 1st accused/appellant - had a glass in PW2's room; that the robber broke it and tried to cut B with it. She screamed for help and that is when the rescuers came. PW2's testimony regarding the use of the broken glass in the robbery was more graphic. She said that the 1st accused had a glass which he smashed on the wall. He remained with a piece of glass, forced her to bend, and tried to put the glass in her vagina; also that they tried to insert the broken bottle in her. She then screamed loudly and people came to the room. In cross examination by 1st accused, she altered her testimony and said that the 1st accused "*forcefully tried to use a bottle in my vagina*." Cross examined by accused 2, she said she told police that he - Accused 2 - forced her to bend so he could "*insert a glass in my vagina*". The evidence is contradictory.

37. PW3 MA also a sex worker went to PW2's room and found PW1 and PW2 inside with the alleged attacker. She testified that the 1st accused broke a glass he was holding against the wall. In cross examination she said she saw 1st accused smash the glass on the wall and tried to insert the broken half into PW2's genitalia.

38. In his testimony the appellant/accused admitted that there were beer bottles on a table; that he touched the table by mistake and they fell down. He did not admit holding any glass or piece of glass.

39. In PW1's written statement of 4th September 2016, she said that accused 1 broke a glass which he threatened to stab her and PW2 with. In PW3's (MA's) written statement of 11th September, 2016, she said that accused 1/appellant broke a glass which he had been holding in his hand which he threatened them with. She gave no evidence that there was an attempt to force the glass into PW2's genitalia. It is therefore unclear whether the alleged item was a glass or a bottle, and who was trying to insert it into PW2's vagina. In any event, no injuries were occasioned resulting from the attempts to insert the glass, as none are recorded in the P3 report.

40. The evidence of PW6 Corporal Magenye, the investigating officer, is that although it was reported that the 1st accused was armed with a pen-knife, none was recovered. Nowhere in his evidence does he refer to the robbery having been committed using a broken glass or broken bottle. When PW4 PC Henri Mutai rushed to the lodge on 3rd September, 2016 after receiving the report from the proprietor of the lodge, he arrested the appellant. However, he did not make a report concerning a knife or a broken glass or bottle nor was any exhibit found.

41. I therefore take it that it was not the case of the prosecution that a broken bottle or glass was used as a weapon in this case. There being no evidence or only doubtful evidence, of a knife used in the robbery, I am unable to agree with the trial court on that aspect.

42. Ultimately, and appreciating all the evidence together, I do not find any evidence as pointing to the use of a knife, nor is there evidence beyond reasonable doubt of use of a broken glass in the alleged robbery. The contradictions are many and raise more doubt than clarity. I also agree with the trial magistrate that there is doubt that the circumstances, outlined in his judgments altogether:

> ***"create doubt as to the involvement of the 2nd accused in the robbery."***

Like the trial magistrate, I agree that the said doubts should be held in the 2nd accused's favour, and I agree with the basis of his acquittal.

43. The net effect of all the foregoing, is that the 1st accused/appellant was alone in the robbery; that there is no proof of the use of a pen knife in the robbery, and that it was not the case of the state that broken bottles or glass were used as weapons in the said robbery.

44. In the end, I am satisfied that the evidence points to an incident that was no more than a disagreement on money that led to a simple robbery as defined by **Section 295** of the **Penal Code**. For that the 1st accused/appellant was liable for the penalty set out in **Section 296 (1)** of the **Penal Code**, where the offender was not armed with any dangerous or offensive weapon or instrument and was alone in so doing. The penal section results in liability to a sentence of fourteen (14) years' imprisonment.

Disposition

45. In summary, the ground of appeal as to defective charge sheet fails; The grounds of appeal as to proof of rape succeed; and the ground on proof of the ingredients of robbery with violence partially succeeds.

46. Accordingly, and for all the foregoing reasons:

a) I hereby set aside the conviction of the accused for robbery with violence in Count I and II and substitute therefore a conviction for the felony of robbery in both counts for which the accused is liable for imprisonment for fourteen years on each count.

b) Similarly the conviction for rape in Count III, is hereby quashed and set aside.

c) The appellant shall appear for sentencing upon mitigation on a date to be fixed at the time of the reading of this judgment.

Administrative directions

47. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

48. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

49. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 9th Day of February, 2021.

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R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP

2. Joseph Kariuki Thuo - Appellant in person - in Naivasha Maximum Prison

3. Court Assistant - Quinter Ogutu