



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 187 OF 2018

GILBERT MUNGAL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence in the Chief Magistrate's Court Makadara - criminal case no, 4838 of 2012 in the decision by Hon. A R Kithinji (Senior Principal Magistrate dated 20th June 2020)

JUDGMENT

1. On 19th day of September 2012, the appellant was arraigned in court before the Chief Magistrate's Court vide criminal case number 4838 of 2012, charged with the offences of: rape contrary to Section 3 of the Sexual Offences Act, No. 3 of 2006 (herein "the Act") and an alternative count of; indecent act, contrary to section 11 of the Act. The particulars of each count are as per the charge sheet.
2. He pleaded not guilty to both counts. On the 14th May 2013, the prosecution tendered a fresh charge sheet to substitute the charges, where upon an additional charge; robbery with violence contrary to; Section 296(2) as read together with Section 295 of the Penal Code was introduced, under count 1 and charges of rape and indecent act being count 2 and alternative count accordingly. The new charges were read to the appellant and he maintained a plea of not guilty on all counts.
3. The case proceeded to a full hearing whereupon the complainant described herein as "LW" testified that, she went to Githurai to, meet a friend by the name PM, who was to give her a book. That, at about 6.30pm, as she was waiting for her friend at the Railway Station, two people approached from Mwiki direction. They passed by and did not talk to her.
4. That, after a short while, they stopped, and one grabbed her under the arm without saying a word. She dropped her school bag as she thought that, they wanted to steal from her. However, one of them, whom she identified as the appellant herein, removed a panga and warned her not to shout but instead cooperate or they shoot her.
5. She was then pushed towards an area that was bushy with few houses. That, the appellant's companion took her bag and ransacked it, as the appellant ordered her to raise up her skirt and remove her pant. He then raped her, without using any protective wear. The appellant then dressed up and stood aside. His accomplice did not rape her, alleging that, he did not know the appellant's HIV status. However, he took her wrist watch, her mobile phone and Ksh 100 and they left.
6. The complainant "LW" went back home and reported the matter to her parents who took her to Medi point hospital for treatment. Thereafter, the matter was reported to; Kilimani Police station, and later taken to Meron Sans Frontiers Hospital at Mathare. Similarly, she was examined by the Police doctor, who also prepared and produced the P3 form in evidence.
7. The following day, PW1; "LW" in the company of her brother went to Mwiki area to look for the perpetrator and she saw the appellant and pointed him out to the brother. That, she was able to identify the appellant, as was still wearing the faded jeans with a white t-shirt he wore the previous day. Apparently, according to the witness, the brother indicated that, he knew the appellant as they "went to school together" and even knew his house. The brother then led a Police Officer Gitau to arrest the appellant who was charged accordingly.
8. At the close of the prosecution case, following the testimony of five witnesses, the trial court ruled the appellant had a case to answer. He was placed on his defence, whereupon he stated that, he is a vendor in the market at Mwiki. That, he does not know anything about the incident and urged the court to release him.

9. The trial court rendered its decision vide a judgment dated 20th June 2018, wherein, the appellant was convicted under, section 215 of the Criminal Procedure Code (Cap 75) Laws of Kenya, (herein “the Code”) on count 1, and 2. After considering the Probation Officer’s report, the appellant was sentenced to serve fifteen (15) years imprisonment on the 1st count, and 10 years on the 2nd count. The right of appeal within 14 days was explained to him.

10. The appellant being dissatisfied with the conviction and sentence filed a petition of appeal dated 26th September 2018, together with memorandum and/or grounds of appeal. These grounds are as reproduced herewith:

a. That, the learned magistrate erred in law and in fact, in holding that, the charges of robbery with violence proved against the appellant beyond trial was replete with inconsistencies;

b. That, the learned magistrate erred in law and in facts, by failing to find that, the appellant’s constitutional and fundamental rights as enshrined under Article 50(2) (b) and 49(c)_ of the Constitution were contravened hence access to justice and fair trial;

c. That, since the appellant cannot remember all that transpired at trial, he intends upon receipt of his trial proceedings to adduce amended/supplementary grounds of appeal and be present at the hearing of his appeal;

d. That, the appellant’s memorandum also be treated as his application to be supplied with a copy of the trial proceedings and judgment.

11. The appeal was served upon the respondent, on 8th February 2021. Thereafter, the court granted the respondent seven (7) days to respond. However, by the time of writing this judgment, and despite the court’s order of; 3rd May 2021, that the same if filed be availed, none had been filed.

12. Be that as it were, the respondent filed submissions on the appeal.

It suffices to note that, the appellant sought for time and was granted to file submissions, but none were filed. Even then, on 19th April 2021, the appellant while addressing the court orally, stated that, he wanted the sentence “consolidated”, as he was sentenced to a total of twenty-five (25) years imprisonment however the sentences imposed are not running concurrently. Further, he prays the period he has been in jail be considered.

13. I have considered the appeal in the light of the materials placed before the court, the oral arguments and submission by the Respondent, and I find that, the main issue to determine is whether the conviction herein is sound and/or safe and/or whether the sentence meted, is lawful, proper, and/or reasonable.

14. In that regard, the role of the 1st appellant court while hearing an appeal is settled as stated in the case of; **Okeno vs. Republic (1972) EA 32** where the Court of Appeal stated thus; -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

In the same vein, in **Kiilu & Another vs. Republic (2005)1 KLR 174**, the Court of Appeal reiterated the aforesaid holding save to add that, there is no set format to which a re-evaluation of evidence by the first appellate court should conform.

15. I have evaluated the evidence adduced by the prosecution in the trial court, in the light of the aforesaid, and find that, as regards the 1st count, the ingredients of robbery with violence were clearly set out by the Court of Appeal in the case of; **Oluoch –vs – Republic (1985) KLR** stated that, robbery with violence is committed in any of the following circumstances:

a. The offender is armed with any dangerous and offensive weapon or instrument; or

b. The offender is in company with one or more person or persons; or

c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person”

16. In the instant case, the complainant “LW” (PW1) testified that, the appellant was armed with a panga, and threatened to harm her if she screamed for help. That, he was in the company of another. Therefore, the elements of robbery with violence are evidently proved. The trial Magistrate made a similar finding that, the ingredient of a dangerous weapon was proved.

17. The trial court found that, the ingredients relating to the appellant being in the company of another was not proved; “as there was no eye witness to the attack and it may not be taken to have been proved beyond reasonable doubt that the attacker was in the company of one or more person”.

18. However, I find that, the complainant evidence was clear that, she was attached by two people and that, while the other person did not rape her he robbed her. That evidence is not rebutted and there is no basis upon which the trial court should have disregarded it. Indeed, it is noteworthy that, the panga which the appellant alleged had, was not recovered, yet the trial court believed the complainant that, the appellant was armed. In the same vein, the presence of the 2nd perpetrator should be accepted. Therefore, I find the element was established.

19. However, before I consider whether it is the appellant who committed the offence of robbery with violence; I shall analyze the evidence on the 2nd count. The offence of rape is defined under section 3 (1) and (2) of the Act as follows:

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

- (a) he or she intentionally and unlawfully commits an act which causes 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.

20. As such, for the offence of rape to be established the following elements must be demonstrated: -

- a. The intentional and unlawful penetration of the genital organ of a person by another.
- b. The absence of consent.
- c. Where consent is obtained by force or by means of threat or by intimidation of any kind.

21. In the instant matter, the complainant stated as follows

“The accused Gilbert told me to lie down while the other searched the bag.....Gilbert told me to raise my skirt and remove my pant. The accused Gilbert then raped me. He did not use any protection. I did not have any protection..... He raped me for about 15 minutes.

22. In the medical report produced by PW3; Maureen Akola, a Clinical Officer with MSF Doctors, it is indicated that, the complainant had multiple linear tears at the vestibule and posterior fourchette, fresh easily to bleed on touch. The vaginal entry was discharging clear, mucoid, non-smelly fluid. Hymen had tears at the 9 and 3 o'clock. Dr Zephania Kamau's P3 form report indicated normal vulva vagina, and an old hymenial tags.

23. It suffices to note that section 2 of the Act, defines “penetration: to mean “the partial or complete insertion of the genital organs of a person into the organs of another person”.

24. Similarly, the provisions thereof of section 43 of the Act states as follows:

43. (1) An act is intentional and unlawful if it is committed –

- (a) in any coercive circumstance;
- (b) under false pretences or by fraudulent means; or
- (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is –

- (a) use of force against the complainant or another person or against the property of the complainant or that of any other person;
- (b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
- (c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

25. Based on the aforesaid evidence I find that, there is adequate evidence that, the complainant was raped.

26. The next issue to determine is; whether the prosecution has proved beyond reasonable doubt that, the appellant committed the offence. The complainant testified that, she was able to identify the appellant. She stated as follows:

“The train arrived at 6.30pm. As I was waiting, the accused and his accomplice approached me from Mwiki direction about one metre from me. They passed me shortly. They did not talk to me. The accused present was wearing a blue jeans faded (trouser) and a white T-shirt, while the co-accused was shorter and slimmer than the accused in court wearing a marvin maroon jacket.”

She went on to state:

“The accused Gilbert did not have a cover on his face but his co-accused had a marvin”

Further that:

“The following day, after the act, I went with my brother to Mwiki then I saw the accused. He was still in the faded jean trouser, with a T-shirt as he was the previous day. I told my brother that it was him”

27. PW1 “LW” further testified that, she noted the appellant had a scar and pointed at the scar (although, the trial court observed that it was not clear). During cross examination by the appellant, she maintained that, she was able to recognize the appellant because of the mark on his face.

28. I have considered the analysis of this issue in the judgment of the trial court, and I note that, the learned trial magistrate that, the issue of identity of the appellant as perpetrator and/or involvement in the offence was not dealt with.

29. Be that as it may, the evidence adduced in my opinion is sufficient to prove that, the appellant committed the offence of rape. There is no evidence that, the complainant was known to the appellant and/or had any reasons to frame the appellant. Indeed, the offence was committed day time and therefore the complainant would be able to positively identify the perpetrators.

30. I shall revert to the offence of robbery with violence. Apparently, the Honourable trial magistrate did not address the issue of whether; the element of theft of the stolen goods, had been proved. The offence of robbery with violence requires inter alia; proof of the theft of goods or property. Being armed with a dangerous weapon per se is not sufficient.

31. The complainant testified that, she was robbed of a wrist watch, mobile phone, and Kshs 100. That, she purchased the phone at I&M building, in 2011, and she gave the receipt to the Police officers. However, when PW5 No. 55097 Police Constable Lilian Wekesa testified, she did not produce that receipt. She simply testified as follows:

“I compiled the file and accused was brought to court. I charged (sic) him with rape. When he came to court 2nd count of robbery was added. She had reported loss of her phone and Kshs 100.”

32. In cross examination she is recorded as saying:

“She (the complainant) said she lost her phone and her bag. That is why I did not charge you with robbery. I was not there when you were arrested. I don’t know how you were arrested. That is all”

33. The question is, where did the receipt go? Where therefore is proof of the stolen items(?) Furthermore, during her evidence in chief, the complainant did not testify as to the value of each stolen items to support the particulars of the charge.

34. I find that, from the evidence of the Investigating officer, the offence of robbery with violence was an afterthought and indeed no energy was expended in gathering evidence to support the same. That is very unfortunate. I therefore find that, theft of the items in the 1st count was not proved. As a consequent thereof, the conviction on the 1st count is not safe and I hereby quash the same, and set aside the sentence of 15 years imposed on the appellant on the same.

35. However, the complainant’s evidence on the 2nd count was not recanted or rebutted by the appellant in his defence. All that the appellant advanced in his defence was a mere denial of the offence(s). He completely kept off the events of his whereabouts on the date of the incident, and/or how he was dressed and/or of the alleged scar on his left body which the complainant relied on to identify him.

36. I am therefore convinced beyond reasonable doubt that, he was involved in the offence of rape. I decline to interfere with and/or quash the conviction.

37. Finally, I find that, on the issue of sentence, the sentence provided for the offence of rape is stated under section 3(3) of the Act as follows:

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

38. The appellant was sentenced to ten years’ imprisonment. The sentence is lawful. However, the trial court upon convicting the appellant, did not expressly state whether the sentence was to run concurrently. Be that as it were, having set aside conviction on the 1st count, the issue of the sentencing running concurrently, does not arise. Similarly, from the evidence, it is the appellant kept on delaying matter. On 24th September 2012, he refused to have finger prints taken and on 4th April 2014 and 8th May 2014, he kept on seeking for adjournments on various grounds and therefore he cannot benefit from period in remand, pursuant to Section 333(2) of the code.

39. The upshot is that, the conviction on the 2nd count is upheld together with the sentence which will run from; date of conviction ordered.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 17TH DAY OF MAY 2021

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant present in person

Ms Kimaru for the Respondent

Edwin – Court Assistant