



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 14 OF 2019

(Being an appeal against conviction and sentence in Criminal Case No. 163 of 2017

at Voi delivered on 12/3/2019 by Hon. M. Onkoba, SRM)

JOSEPH MWAZIGHE MWABILI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein **Joseph Mwazighe Mwabili** was charged and convicted for the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars thereof are that on 17/3/2017 at around 4.20 a.m. at Voi area within Taita Taveta County, robbed JNM of her two mobile phones make Neon and Y6 Tecno, cash Kshs. 1,300/=, Tecno mobile phone charger and earphone all valued at Kshs. 12,800/= and at the time of the robbery used actual violence against the said JNM. He also faced two other charges.

2. The next one is an alternative charge to the foregoing charge i.e. handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. The particulars thereof are that on 19/3/2017 at Voi area within Taita Taveta County otherwise than in the cause of stealing, dishonestly received and retained a mobile phone make neon, a Tecno mobile phone charger and earphone knowing or having reasons to believe them to be stolen goods or unlawfully obtained.

3. The second count is that of attempted rape contrary to Section 4 of the Sexual Offences Act No. 3 of 2006. The particulars thereof are that on 17/3/2017 at around 4.20 a.m. at Voi area within Taita Taveta County intentionally and unlawfully attempted to cause his male genital organ (penis) to penetrate the female genital organ (vagina) of JNM by force.

4. During the trial the prosecution called four witnesses to prove its case. The accused person on his part gave a sworn statement and called no witness for his defence.

5. Briefly stated, the prosecution's case against the accused is that on 17/3/2017, the complainant herein JNM, then a second year Bachelor of Commerce student at [Particulars Withheld] University, was returning to college from her home. She testified that she alighted from the bus she had used to travel from Nairobi upon arrival in Voi town at around 4.15 a.m. That she alighted at the Caltex stage along the Nairobi-Mombasa highway to enable her look for local means to ferry her to college.

6. PW 1 told the court that immediately she alighted, a group of eager and enthusiastic boda boda riders rushed to where she was with an offer to ferry her to the destination. A majority of the riders stuck at Kshs. 200/= as fare to the said destination. However, the Appellant offered to take Kshs. 150/= which PW 1 accepted.

7. PW 1 had three bags and so for ease of travel, she gave one of the bags to the rider, and remained with two bags. The rider rode to the adjacent Bakri Petrol Station for refueling, after which they started the journey to college. They took the main road, but mid-way, the rider proposed that they branch into a short cut, while arguing that the main road was still under construction and therefore impassable.

8. PW 1 told the court that she was a bit uneasy with the proposal, but they nevertheless took the short cut. The rider rode for about 50 metres and then stopped the motorcycle, making PW 1 to think they had developed a mechanical problem. Immediately, the Appellant addressed her accusing university students of trapping boda boda riders to their death. With this statement from the rider she sensed danger, and disembarked quickly from the motor cycle and started running away towards the direction of the main road. That the rider of the motor bike, the Appellant herein, pursued her, and caught up with her as she could not run fast enough, as she had one of the bags on her back. The Appellant held her by the right hand and covered her mouth with one hand as she started screaming.

9. PW 1 testified that the Appellant pulled her towards the direction of the motor bike and then tripped her to the ground. She fell down on the surface facing upwards. The Appellant sat on her thighs and held both her hands. He firmly pinned her down to the ground using his knees, and threatened to stab her using a knife. She pleaded for mercy, saying she was a mere first year student and had nothing to do with the murder of his (Appellant's) cousin. The Appellant demanded for an identification card, and she complied by giving it to him.

10. After the accused saw the identification card, he asked her to say what she wanted him to do to her, to which she responded that she wanted him to release her. She offered to him everything material she had to spare her life. The Appellant responded he was not interested in her money. He then changed his mind and sought to know how much money she had on her. She had Kshs. 1,300/= which the Appellant took. The Appellant took a Tecno phone and lighted its torch to illuminate the money as he counted the same. After ascertaining the amount he placed both the money and the torch on the ground and led her to a path next to where the motor bike was.

11. PW 1 told the court that at some point, the Appellant turned facing her while talking to her urging her to cooperate and be let free. As he faced her while talking, she saw an opportunity to hit back. Using her hand, she hit him on his private parts. In response, the Appellant knocked her with blows to the face until she started nose-bleeding. At that juncture, she invoked the name of God as the accused started removing his clothes. That he grasped her blouse and tore it apart. In the middle of all this, she saw an opportunity to escape as the accused was adjusting his trousers. She made a quick rush into a thicket and hid herself. While thinking the accused could follow her, she heard him kick start the motor bike and ride it away.

12. A total of 4 witnesses testified against the Appellant. PW 1 was the main witness as she was the only person who witnessed the crime.

13. The accused person on his part gave a sworn statement and called no witnesses for his defence. He testified that on 17/3/2017, he alighted at Caltex area from a vehicle he had used to travel from Mombasa. That the vehicle dropped him around 11.30 p.m. That at the time it was impossible to get a vehicle to go to [Particulars Withheld]. He decided to talk to boda boda riders and see if he could negotiate and be ridden home. That in the process of negotiating, police officers arrived. The officers arrested the rider for failure to have a driving licence. That he too was arrested in spite of his explanation that he had just arrived from Mombasa. He was placed in a cell with other suspects. The following morning, he sought to know the purpose of his arrest. That later he was taken to participate in a parade. The person who came to identify them had seen him at the police station. That the following morning, police officers took him to his [Particulars Withheld] home. A search which yielded nothing, was done. He was nevertheless taken back to the police station, and the following morning, he was charged in court.

14. After the hearing the Appellant was found guilty and sentenced to serve 30 years.

15. In his written submissions filed herein on 8/3/2021, and during oral submissions in Court on 8/3/2021, the Appellant **abandoned** appeal on conviction and retained the appeal on sentence. The Appellant submitted that the 30 years' sentence was too punitive. In mitigation the Appellant submitted that he has reformed and that he is married with 2 children and has old parents and small brothers and sisters who are dependant on him. Further, that he did not use dangerous weapons in the robbery.

16. On his part **Ms. Mukangu**, learned prosecutor submitted that the Appellant was very brutal to the victim. The victim had boarded the Appellant's motor bike in an act of trust only for the Appellant to turn on her brutally with threat to kill her. Counsel submitted that the 30 years' jail is adequate punishment and that this Court should confirm the same.

17. This being the first appeal, this Court is required to re-evaluate the evidence adduced in trial court, and to reach its own finding on the issue. However, with the Appellant having abandoned appeal on conviction, this Court is now only left to consider aggravating and mitigating factors in sentencing.

18. I have carefully considered the submissions. The crime committed by the Appellant was so serious, and the torture he gave to the victim cannot be justified under any circumstances.

19. The Appellant was in a position of trust, but he grossly abused that position. This kind of crime must not be allowed to flourish. There are very many motorbike riders in this country. They are called boda bodas. The public daily entrust them with their lives and property, both day and night. In most cases their passengers are at their sole mercy. They can injure and kill their passengers at will. For women, they can even rape. This Court has the duty to protect society against such predators in this industry called boda boda. The Appellant deserves a most deterrence punishment. This Court could have jailed the Appellant to more than 30 years. However, I will not do that. But neither will this Court interfere with the sentence of 30 years imposed on the Appellant.

20. The upshot is that this appeal fails and is dismissed for lack of merit.

Dated, Signed and Delivered at Mombasa this 13th day of May,

2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Mr. Fedha holding brief Ms. Mukangu for State

Ms. Peris Court Assistant