REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 46 OF 2019

REPUBLIC.....STATE

VERSUS

ELLAM MAFUTU WAMBASI.....ACCUSED

JUDGMENT

Ellam Mufutu Wambasi, the appellant herein, was charged in the lower Court with the offence of robbery with violence, contrary to section 205 as read with section 296(2) of the Penal Code.

The particulars of this offence are that on the 24th day of August 2017 at Kimumu Estate in Eldoret within Uasin Gishu County, the appellant jointly with others not before Court while armed with iron bars robbed one John Jepkorir Kisang of a mobile phone make Samsung Z2 IMEI No. 352200081191769, cash Kshs 14,000/-, a handbag, a blouse valued at Kshs 800/-, an eye pencil, lip balm and a gold coated finger ring all valued at Kshs 35,000/- and during the time of such robbery used actual violence to the said Joan Jepkorir Kisang.

The prosecution case is that in the year 2017, Joan Jepkorir Kisang the complainant in this case who gave evidence as PW-1, was working as a computer technician at the University of Eldoret. On 24/8/2017 she was on duty and left for home at about 9.41p.m. she was living in Kimumu, Eldoret Town. While walking towards home, at a place near Kimumu Secondary school, she noted of three persons who were following her. She continued walking but the three men closed in on her. The said school had bright security lights and there was full moon. She was able to see clearly. The appellant herein held the complainant on the hands and tried to snatch her handbag. Complainant tried to resist and was hit by him with something that resembled a metal piece. The appellant told the complainant to have sex with him. The complainant pleaded with them telling them that she was sick and from hospital. She lied that she was HIV positive. When they heard that they beat her up till she fainted. They took her bag and the valuables which were therein of which are, Kshs 14,000/-, flashdisk, a golden ring, Equity Bank ATM card, Ukwala supermarket card, National Identity card, house keys, blouse, lip balm, eye pencil and a Sumsang phone worth 30,000/-

She gained consciousness after about 3 hours. She had bled profusely from the head injury and had also a right leg injury. She walked with difficulty to her sister's place and slept there. In the morning they went to her house and broke the door. She bathed and they went to Reale hospital for treatment. According to PW-4, she had sustained a cut wound on the skull of which was stitched. She also had blunt injury on the right lower limb. Her treatment chit was produced by the witness as an exhibit.

On 4/9/2017 the complainant reported the matter to PC David Kurgat the Investigating officer in this case. She disclosed of the items of which were robbed from her by the assailants of which included a mobile phone, Samsung EMEI No. 352200081181769. She stated to the officer that she identified the assailants and would be able to identify them if an opportunity arised. She had the treatment chit from Reale Hospital. She produced the box in which she had bought the phone, of which had its IMEI Number. She also went to the shop where she had bought it and obtained a duplicate receipt as she had lost the original one.

PW-6 commenced investigations. He used Safaricom Data to trace the complainant's phone. It led him to PW-3 who was called using the said phone by Police on 26/9/2017. The Police met him and asked him how he had obtained the said phone. PW-3 explained that in early September 2017, he had lost his phone. He decided to go to the local Centre to buy a new one. The appellant was a Bodaboda rider and PW-3 was his customer. The appellant told him that he had a phone for sale. PW-3 sought to see the phone and it was shown to him. The appellant confirmed that it was his. The pin was functional. PW-3 decided to buy it. He bargained on price and they settled at 9,000Kshs. He paid 2,000/- at the moment and the balance of 7,000/- later. He used the phone till when the Police called and arrested him. He was taken to the Police station and shown the phone communications data. He led the Police to Kimumu area where he identified the appellant herein, whom he knew as Ellam, as the person who sold the phone to him. Ellam was arrested.

On 27/9/2017 PW-5, C.I Kipsang Ngetich was requested to conduct an identification parade. Between noon and 12.30p.m he did so. The appellant herein was in Police cells. He got him using the name given. He got 8 other members to stand in the parade. He complied with Police standing order in doing so. In total he had 9 members in the parade. The appellant stood between No. 2 and 3. The complainant was

called to try and identify the suspects. She was able to identify the appellant by his facial features and his cut right ear.

Another parade was conducted in which PW-3 participated as the suspect. However, PW-3 was not able to identify him. PW-3 was treated as a prosecution witness.

The complainant was issued with a P3 form of which was filled by PW-2 at Uasin Gishu County Hospital.

According to PW-2, she has a cut wound on the neck, blunt trauma on the head, blunt trauma to both lower limbs, blunt trauma on the knees and toe of the right leg. He thus filled the P3 form of which he produced in Court as an exhibit. The appellant was then charged and the recovered phone, its box, newly issued receipt (duplicate), Safaricom data on its use, and identification parade forms, produced in Court as exhibits.

The appellant was placed on his defence. In his brief defence he indicated that he was a Bodaboda operator. On 26/9/2017 he was at Sinai Centre, in Kimumu. He got a customer who requested to be taken to Eldoret Town. The appellant carried him. When they got to Alphax they found a roadblock mounted by Police officers. He was stopped and asked for an insurance certificate and his driving licence. He had only the driving licence. He was then arrested and taken to the Police station. The following day he was taken to Court and charged with the present offence. He did not commit the offence.

The Trial Court evaluated the evidence and found the appellant guilty as charged. He was sentences to serve 30 years imprisonment.

The appellant dissatisfied with the said conviction and sentence appealed to this Court on the grounds that:-

1. He was convicted on the basis of inconsistent, contradictory and legally inadmissible evidence.

2. His defence was not properly weighed.

3. The sentence meted was harsh and disproportionate.

4. The facts and the applicable law were not well considered.

5. Circumstantial evidence relied on was insufficient.

6. The appellant was not properly identified.

7. The prosecution case was not proved by the Prosecution beyond reasonable doubt.

The appellant availed written submissions and requested that he be availed in Court as there was something they wished the Court observe on him in relation to his alleged identification. On 11/3/2001 he was availed and Mr. Okara, his advocate, indicated that though complainant claimed that she identified him as he has one ear cut, the appellant had both ears cut. The Court observed that from where he had stood in Court, I could clearly see that his right ear was cut on the outer part. However, I could not see from that distance of about 4 metres of the claimed cut left ear. He came closer and its only after the advocate pointed out the alleged cut area of the ear that I was able to see it. It was just a slight cut of which was not easily visible.

The appellant mostly challenged his claimed identification by the complainant as one of the three assailants who robbed from her.

The prosecution opposed the appeal on the grounds that the identification of the appellant was proper. The incident happened at a scene where there were security lights at a nearby secondary school and full moon. The complainant was able to see and note that the appellant had a cut ear. He is the one who intended to rape her and the incident took about 20 minutes, of which was long enough to favour positive identification. She was later able to pick him from an identification parade.

To corroborate the evidence is the recovered phone of which was sold to PW-3 by the appellant herein. The appellant does not challenge the allegation.

Prosecution further submitted that the conviction was safe and the 30 years imprisonment sentence lenient, given that the maximum sentence for the offence is death imprisonment.

I have evaluated the charge, evidence adduced by the prosecution witnesses, the defence case, judgment by the lower Court, grounds of appeal and submissions by both sides.

Before I weigh the evidence herein, I wish to observe that crimes mostly happens without prior notice and in ordinary life activities and circumstances to the victims and eye witnesses where applicable. As such the mind set of the victims and other eye witnesses is not caught perfectly tuned to the need for registering the details with the intention of recalling them perfectly in future. The initial shock and surprise, safety concerns for victims and probably confusions on the part of the other eye witnesses on how to help or to keep safe, affects how they perceive the facts at the scene. As stated earlier, the occurrences are not witnessed bearing in mind the need to give a correct account of the happening in a Court of law in future, and as such the mind does not pick and register the details meticulously.

Given the foregoing, the Court is entitled while weighing the evidence to overlook minor, trivial and irrelevant discrepancies in the evidence

given by different witnesses. Of concern should be whether the evidence when weighed as a whole, establishes beyond reasonable doubt that the alleged offence took place, and that the accused or appellant took part in its commission. If the Court find such established, irrespective of minor discrepancies in the evidence offered, also considering that between the time the offence took place and the time the evidence was offered some witnesses may have forgotten some minor details, will safely proceed to find the offence proved beyond reasonable doubt and convict the suspect.

It might as well be a concern to Court where several eye witnesses give a perfect reprica of each other's evidence in all minute details. Such may portray a situation where the evidence is well rehearsed by the witnesses prior to giving evidence, and one that is not offered naturally. Only few things if any, and processes in this world are perfect. As such, such evidence would be suspect. In short, what I am saying is that minor, trivial and irrelevant discrepancies, which can be naturally understood or explained, are of no negative effect on the scale of truth in a case.

Coming back to this case, after weighing the entire evidence I can confidently say this is an open and shut case. The complainant was able to establish through her evidence that the circumstances at the scene favoured positive identification. There were lights from Kimumu secondary school nearby and a full moon. She was able to describe the appellant to the Police stating that he has his right ear cut. Such was confirmed when the appellant was arrested through tracing of the robbed Samsung mobile phone of which had been sold by the appellant to PW-3. When the appellant was arrested and an identification parade conducted, the complainant was able to identify him. The Court witnessed the stated cut on the right ear. Though the defence claimed both ears are cut, of which is true, the left cut as was witnessed by this Court during the hearing of the appeal is slight and not easily visible from a distance or without close scrutiny. Such may have reasonably passed the complainant during the incident.

The recovered phone of which doubtlessly belong to the complainant, and of which was robbed from her during the incident, and later sold by the appellant to PW3, is by itself, without a reasonable explanation offered by the appellant on how he got into its possession, enough evidence that the appellant took part in commission of the alleged offence. The doctrine of recent possession would apply as was held in the case of ***David Mugo Kimunge -Vs- Republic (2015) eKLR.***

Though the appellant had no possession of the phone at the time of its recovery, he had its possession when he sold it to PW3. It was established that it belonged to the complainant and had been robbed from her recently prior to its recovery.

PW-3 was well exonerated as a suspect when he offered a reasonable explanation on how he got into possession of the said phone. He led the Police to the one who had sold it to him, the appellant herein. PW-3 as a suspect had identification parade conducted in his respect and the complainant by failure to identify him, having well established she had identified her assailants, exonerated him as a suspect. He was a truthful witness, and his evidence is credible.

Other witnesses had no cause whatsoever to fix the appellant and are as well witnesses of truth.

The appellant's defence was of mere denial. He could not have been arrested in a traffic case and then connected to the robbery incident out of no cause. He denied knowledge of PW3 and the evidence is vivid that he knew him well as his customer. Prosecution evidence as it appears, was water tight and offered no escape vent to the appellant by way of a defence. The trial Court rightly dismissed the shoddy defence.

I therefore conclude that the conviction was proper and safe.

On sentence, the offence carries a maximum of death sentence. The appellant herein, of the three assailants appears to have been the most aggressive. He is the one who held the complainant on the hand, hit her on the face and demanded to have sex with her.

Given the circumstances, the Court was lenient enough in considering the 30 years imprisonment. I find no justifiable ground on which I can vary the said sentence downward.

The upshot is that the appeal lacks merit and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF MAY, 2021

In the presence of:-

Appellant appears in person

Ms. Limo for state

Gladys - Court assistant