REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 73 OF 2018

(From Original Conviction and Sentence in Hamisi PMCCRC

No. 30 of 2017 (Hon. M Nabibya, SRM) of 20th September 2017)

STEPHEN AYODI MADUVI.....1ST APPELLANT

HUMPHREY MADEBE MUSAMBI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellants herein have proffered this appeal challenging their conviction and sentence in Hamisi SRMCCRC No. 30 of 2017, of the offense of robbery with violence, contrary to section 295, as read with section 296(2) of the Penal Code, Cap 63, Laws of Kenya, and in Hamisi SRMCCRC No. 695 of 2017 of gang rape, for the 2nd appellant, contrary to section 10 of the Sexual Offences Act, No. 3 of 2016. For robbery with violence they were sentenced to death, and for the gang rape, the sentences were held in abeyance.

2. The duty of a first appellate court was stated by the Court of Appeal, in *Gabriel Kamau Njoroge vs. Republic* (1987) eKLR (Platt, Apaloo JJA an Masime Ag JA), in the following words:

> *" ... it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."*

3. The facts of the case, as presented in the trial court, are that on at 1.00 AM on 12th January 2017 PW1, the complainant, was woken up by voices of people who were demanding money. They ransacked the house and took away assorted items. They harassed and beat her. They cut her dress and raped her in turns. They had torches, and she recognized the appellants, both physically and by voice, and she described them as neighbours. PW2, a grandchild of PW1, a child of tender years, identified the 2nd appellant as one of the assailants. He attacked both him and PW2, and he described how he pleaded with them not to hurt PW1. He said that there was light from a lamp at the chimney, and the assailants had torches. PW3 and PW5 participated in the arrests of the appellants and recovery of the stolen items. PW4 was the clinical officer who attended to PW1, while PW6 was the investigating officer.

4. The appellants were put on their defence, they gave sworn statements, and denied the charges. They said that they went to bed as usual on the material day, and gave details on what transpired on the day of their arrest.

5. At the end of the trial, the trial court evaluated the evidence, and was satisfied that the offence of robbery with violence had been proved to the required standard, convicted the appellants accordingly, and sentenced them to death. The court found that offence of gang rape was established only against the 2nd appellant, and convicted him accordingly, but ordered that the sentence be held in abeyance.

6. The appellants were aggrieved by the conviction and sentence, and proffered the instant appeal, raising several grounds of appeal. They aver that the identification evidence lacked merit, there was no prompt first report of the incident, no inventory of the items recovered was presented to court, and the prosecution case was full of inconsistencies to the extent that it could not support a conviction.

7. The appellants put in written submissions in support of their case. The respondent also put in written submissions. I have read the written submissions placed in the record before me, and I have noted the arguments made in all of them. I shall examine each of the grounds raised and argued in turns.

8. The first ground turns on identification. The appellants argued that the circumstances did not allow for a positive identification of the assailants. The incident happened in the dead of the night. The complainant told the court that she was able to identify the appellants from the light of the torches that they were armed with. I note that the incident took quite some time. The assailants took time to rough up their victims, and to even rape PW1. The rape incident brought them to very close proximity. In any event, the complainant said that she recognized the appellants, as individuals that she had dealt with earlier in the day. That then meant that that was not even a case of identification but recognition, as the appellants were known to the complainant and PW2. In *Mwendwa Kilonzo & another vs. Republic* [2013] eKLR (*Maraga, Nambuye & Mwera JJA*), the Court of Appeal, was persuaded that torchlight was adequate for identification purposes. *Maitanyi vs. R.* [1986] KLR 198 *(Nyaragi, Platt & Gachuki JJA*) and *Anjonini vs. R* [1980] KLR (*Madan, Law& Potter JJA*)) stressed on the superiority of recognition evidence over mere identification. The trial court was, therefore, not at fault when it found that the appellants were positively identified.

9. On whether the issue of recognition was not raised when the first report was made, it is my finding that the fact that the court was satisfied that there was adequate light, which was sufficient for the complainant to identify the appellants, and, more particularly the fact that the appellants were known by the complainant and PW2 was adequate for the purpose of identification, and that the fact that no prompt report was relayed to the police when the matter was reported did not undermine the case by the prosecution. I have taken note of the fact that the appellants took time to slap the complainant with a *panga* and to also gang rape her, which, as noted above, brought them into close proximity, which aided the process of identification.

10. The second ground is on the non-production of an inventory of what was recovered from the appellants by the police. There was evidence that the items presented as exhibits were recovered from the house of the 2nd appellant. The inventory that the police, in accordance with their procedures, prepare is not a mandatory requirement, and so is its production in court. It is an internal process within the police force to assist them with their investigations. Failure to compile an inventory or to produce one in court is not fatal to a criminal prosecution, for it is not mandatory that one be prepared and presented in court as an exhibit. See *Stephen Kimani Robe and others vs. Republic* [2013] eKLR (Muchemi, Odunga JJ), *Kimani Kimanjuri and another vs. Republic* [2013] eKLR (Muchemi, Odunga JJ), and *Leonard Odhiambo Ouma and another vs. Republic* [2011] eKLR (O'Kubasu, Aganyanya and Nyamu JJA).

11. The trial court convicted the appellants on the basis of the doctrine of recent possession, which, if it is sufficiently established that the appellants had recent possession of the items found to be stolen, would obviate any need to produce an inventory. The elements of the doctrine were laid out in *Arum vs. Republic* Kisumu CACRA No. 85 of 2005, and include proof that the property was found with the suspect, was positively identified by the complainant, was stolen from the complainant, and was recently stolen from the complainant. In *Peter Kariuki Kibue vs. Republic* [2001] eKLR (*Shah, Bosire 7 Keiwua JJA*)), it was stated that the fact of being found in possession of such stolen items creates a rebuttable presumption that the possessor was the receiver of the stolen items or otherwise the person who stole the items, which then requires the possessor to offer a reasonable explanation or account of how he came to be in possession of those items. In *Malingi vs. Republic* [1989] KLR 225 (*Bosire J*), the court said that doctrine applies to shift burden of proof from the prosecution, on that point, to the defence, and it is on that basis that the defence is called upon to explain itself. Both appellant denied that any of the items were recovered from their houses. The evidence on record indicates that the recovery was at the house of the 2nd appellant, and the items recovered were identified by the complainant as hers. The 2nd appellant did not explain how they came to be in his house. the fact that they were found in his possession so recently after they had been stolen from the complainant, and the fact that the complainant and PW2 placed the 2nd appellant at the scene of the offence, would mean that he was among those that stole those items. The finding by the trial court cannot, therefore, be faulted.

12. The third ground is that the case by the prosecution was full of contradictions, and was not corroborated, and the appellants especially pointed at the testimonies of PW1 and PW2, with regard to the number of people in the room at the material time, among others. Regarding contradictions and inconsistencies, the court, in *Twehangane Alfred vs. Uganda* Crim. App. No. 139 of 2001 [2003] UGCA 6 *(Mukasa-Kikonyogo DCJ, Engwau & Byanugisha JJA*), said that not every contradiction warrants rejection of evidence, and they can be ignored unless they point to deliberate untruthfulness or do not affect the main substance of the case by the prosecution. It was also said, in *Philip Nzaka Watu vs. Republic* [2016] eKLR (*Makhandia, Ouko & M'Inoti JJA*), that it was humanly impossible for two witnesses to recall exactly the same thing to the minutest detail, emphasizing that inconsistency in evidence may signify veracity and honesty, while unusual uniformity may signal fabrication and coaching of witnesses. See also *Erick Onyango Ondeng' vs. Republic* [2014] eKLR (*Githinji, Musiaga & M'inoti JJA).* I have perused through the trial record, and especially the testimonies of the eyewitnesses, PW1 and PW2, and I am persuaded that, despite whatever discrepancies they might be in the narratives, they were honest and truthful, and they gave a fair account of what transpired on the material day.

13. The final ground is on the defence not being considered. I have gone through the trial record. I note that the trial court did narrate the testimonies of the two appellants, at pages 6 and 7 of the judgment. In the analyses of the evidence, the court did not refer to the defence narratives. That should not be construed to mean the court did not take them into account. It is the trial court which heard and recorded that evidence, and narrated it in the judgment. It must have had it at the back of its mind as it considered the rest of the facts. Furthermore, the defence narratives only dwelt on the events surrounding the arrest of the appellants, and amounted to mere denials. Am alive to the fact that the burden of proof in criminal cases rests on the prosecution, and the standard of proof is beyond reasonable doubt. The defence statements made by the appellants did not displace, in any way, the case built by the prosecution, which placed the appellants at the scene of the crime, and in which one of them was found in possession of items stolen at that incident, for which he had offered no explanation, not even in his defence statement.

14. Overall, I am not persuaded that the appellants have presented case, on appeal, to warrant disturbance of the verdict of the trial court. The appeal is, therefore, without merit, and I do hereby dismiss the same.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE