



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 17 OF 2016

1. BONIFACE MAASI ALIAS MASHU.....1ST APPELLANT

2. ONGERA NYAKUNDI WYCLIFF.....2ND APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. C. Obulutsa - SPM Eldoret dated and delivered on the 5th day of February 2015 in the original Eldoret Chief Magistrate's Court Criminal Case No. 4627 of 2014}

JUDGEMENT

The appellants were jointly charged with Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars were that on 3rd July 2014 at [particulars withheld] Estate in Eldoret West District within Uasin Gishu County jointly while armed with dangerous weapons namely iron bars robbed RMK a mobile phone make Samsung galaxy ace, one handbag, one small pouch, national identity card, Co-operative Bank ATM card and cash Kshs. 700/= all valued at Kshs. 18,500/= and immediately before the time of such robbery wounded the said RMK.

Ongera Nyakundi Wycliff (the 2nd appellant) was separately charged with Rape contrary to Section 3 (1) (a) (b) (3) of the Sexual Offences Act the particulars being that on 3rd July 2014 at [particulars withheld] Estate in Eldoret District within Uasin Gishu County he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of RMK without her consent.

It was also alleged that in the alternative he committed an indecent act with her by intentionally causing his genital organ to come into contact with her genital organ contrary to Section 11 (1) of the Sexual Offences Act.

They both pleaded not guilty to the charges but upon hearing and evaluating the evidence of the prosecution witnesses as well as their defence, the trial Magistrate convicted the 1st appellant (Boniface Maasi) on the charge of robbery with violence and sentenced him to death. The 2nd appellant (Ongera Nyakundi Wycliff) was acquitted on the charge of robbery with violence but was convicted on the charge of rape and sentenced to thirty (30) years imprisonment.

They filed separate appeals which were then consolidated. In respect of the 1st appellant, there are five grounds of appeal which when summarized come to that the conviction was against the weight of evidence as the case against him was not proved beyond reasonable doubt.

The 2nd appellant contends that the evidence against him was manifestly insufficient, inconsistent and full of glaring gaps hence incapable of sustaining a conviction; that his defence was ignored and that the sentence meted was harsh and excessive in the circumstances of the case.

At the hearing of the appeal the appellants intimated they wished to rely on their separate written submissions and only the 2nd appellant highlighted his.

Ms. Busienei, Learned Prosecution Counsel for the respondent, opposed the appeal and submitted that the charges were proved beyond reasonable doubt and the sentences being lawful the appeal should be dismissed.

I have considered the submissions carefully and also as the first appellate court considered and evaluated the evidence in the court below so as to arrive at my own independent conclusion.

The conviction against the 1st appellant was based on the doctrine of recent possession. It was alleged that about three days after the robbery he sold a phone which was stolen from the complainant during the robbery to one of the prosecution witnesses (Pw4). Whereas there is no

doubt that a robbery was committed against the complainant on 3rd July 2014, it is doubtful that the 1st appellant was one of her attackers. There was no direct evidence that he was as indeed the complainant did not identify the attackers. The only evidence implicating him was the alleged handling of the phone and it is my finding that that fell short of the standard required. A closer perusal of the complainant's evidence will show that the phone stolen from the complainant was a Samsung but Pw4's evidence was that the phone in the 1st appellant's possession was a Nokia S 5830. Contrary to the complainant's testimony that her phone was tracked to the 1st appellant in Eldama Ravine, evidence tendered by Mark Chawayai (Pw5) was that it was him who had the phone produced in evidence and who led officers to its recovery. It was him who also had taken it to one Matthew who refused to buy it as he wanted a dual sim phone and they ended up selling it to somebody else. Neither Pw4 nor Pw5 claimed to have obtained from the appellant a phone fitting the description of the phone stolen from the complainant. I have perused the handwritten proceedings and the same state clearly that the phone the 1st appellant gave to Alex was a Nokia S 5830. The phone exhibited in court was a Samsung but not a Nokia S 5830 yet no clarification was sought from Pw4 as to whether that was the phone he received from the 1st appellant. The 1st appellant was for that reason entitled to the benefit of doubt. I find merit in his appeal.

As regards the 2nd appellant, I am satisfied from the evidence that he was positively identified by the complainant as the person who raped her. She knew him before as she and his mother attended the same Church, a fact which his mother (Dw2) confirmed. When therefore he spoke to her she recognized his voice. The 2nd appellant confirmed he spoke to her so her evidence that she recognized his voice was not farfetched or a figment of her imagination as he described it. He raped her once then left before returning and raping her again before going for his mother. He had said he could not assist her unless she agreed to having sex with him. I do find it a fact that she did not consent and that what he did amounted to raped. I have considered his defence and found that it offered no rebuttal to her very cogent and credible evidence and that therefore the charge against him was proved beyond reasonable doubt. As for the sentence the maximum prescribed is life imprisonment and it is my finding that in the circumstances of this case the term of thirty (30) years imprisonment is neither harsh nor excessive. The same is upheld and his appeal is dismissed in its entirety.

As for the 1st appellant (Boniface Maasi alias Mashu) the appeal is allowed, the conviction is quashed and the sentence of death is set aside and he should be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Signed and dated this 16th day of January 2020.

E. N. MAINA

JUDGE

Dated and delivered in Eldoret this 21st day of January 2020.

H. A. OMONDI

JUDGE