REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 101 OF 2017

JAMES MWANGI KAMAU.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against Conviction of Sentence in Nakuru

Chief Magistrate's Adult Criminal Case Number 1815 of 2016

by Hon. B. Mararo (Principal Magistrate).

J U D G M E N T

The appellant James Mwangi Kamau was charged with two main counts and an alternative charge.

(1) ***Robbery with violence Contrary to Section 296(2) of the Penal Code.***

It was alleged that on 20th June, 2016 in Lanet within Nakuru County jointly with others not before the court, while armed with guns robbed CNW of her cash Kshs. 45,000/- Nokia phone worth 2,500/=, Lenovo phone worth 17,000/=, 10 mc tablet worth Kshs. 30,000/=, Samsung phone worth Kshs. 5,000/=, Samsung Galaxy phone worth 1,500/= all totaling to Kshs. 114,500/= the property of CNW, and immediately before the time of such robbery threatened to use actual violence on the said CNW ***Rape Contrary to Section 7 of the Sexual Offences Act No. 3 of 2016***

That on 20th June 2016 in Lanet within Nakuru County he intentionally caused his penis to penetrate the vagina of SWM without her consent, a woman aged twenty two (22) years.

In the alternative that he committed an **indecent act with an adult Contrary to Section 11(A) of the Same Act.** That on the same date, time and place he touched the vagina of SWM with his penis against her will, a woman aged 22 years.

The prosecution called six (6) witnesses. The appellant gave an unsworn statement of defence and did not call any witnesses.

In a judgment delivered on 16th November 2017, the trial court found the appellant guilty of both main counts and sentenced him to death on the first count, and ten (10) years imprisonment on the second count, with the sentence on the second count held in abeyance.

Aggrieved by the conviction and sentence the appellant filed an appeal on 23rd November 2017.

In his grounds of appeal, he faulted the trial court for convicting and sentencing him on contradictory evidence, on the evidence of a single witness, in the absence of evidence of essential witnesses, on evidence of insufficient light, without the evidence of the OB report (1st report) to verify what was reported, without giving congent reasons for the dismissal of his defence.

Later he filed his written submissions dated 18th May 2020 accompanied by amended Grounds of Appeal, where he reiterated the above grounds, adding that the trial court erred in law and fact by failing to note that there no proper explanation of the mode and source of light which enabled identification, that there was no sufficient medical evidence to support the complainant's claims, and the failure by the trial court to comply with **Section 333 of the Criminal Procedure Code when** passing sentence.

At the hearing of the appeal the appellant highlighted the written submissions and told the court he would be relying on the same.

The appeal was opposed by the state through Ms. Wambui prosecuting counsel.

This being a first appeal, the appellant is entitled to a fresh re-look at the evidence and for this court to draw its own conclusions while keeping in mind that I never heard or saw the witnesses testify. see **Okeno vs Republic**.

The case for the prosecution was that at all material times, **CNW PW3** was a business lady running an Mpesa agency and selling beauty products. Her husband worked for Kenya Defence Forces. She lived with her cousin, **SWM (PW2).** It was her testimony, that the events of this case happened on 15th June 2016 at 8.00 p.m. Her neighbor PW1 had visited them. He had come to pay money she had deposited for him. PW2 was cooking, PW1 was leaving. She saw him to the gate. While they were there, she saw a light. He told her it was a motorcycle. As he stepped out of the gate, he was pushed back again. She was warned not to scream and could feel a pistol pressed on her neck. Both were ordered to raise their hands in the air. Inside the house they were ordered to lie on the floor of the sitting room, and PW2 was brought in from the kitchen, as more robbers came in. She would hear them speaking in Kikuyu language as one directed that they be covered with curtains. They demanded the pin for her Mpesa but her phone went out of the charge. They looked into her handbag and took Kshs. 45,000/= she had there and three phones. They were demanding for *the gun*, she told them it was not hers but her husbands. By now the three of them were tied with ropes. They untied her, took her to her bedroom demanding for the gun. They put off the lights. They wanted to rape her. She told them she was HIV positive. One of them removed a sword, undressed and told her to suck his penis. She threw up. He insulted her and returned her to the house and tied her up again. She did not know where PW2 was at the time but as the robbers left they were all three tied up in the same place. They warned them not to raise alarm until after twenty (20) minutes.

After the robbers left PW1 using his teeth untied both of them. They then put on the alarm. PW1 went to his home. It is then PW2 called her and told her she had been raped. They reported at Lanet Police Post and later went to Nairobi Women Hospital where she was treated.

It is not clear when but she testified that she later heard that a neighbour's home had been raided. Two days later, the neighbour called her and told her that one of the robbers had been arrested. She and PW2 went to the police station. PW2 said that the person they found arrested was the one who had raped her. PW1 too said identified him as the one who followed PW2 into the house while armed with a police gun when all lights were on. On cross examination she said she saw him well, he was behind PW2 and she could identify him well.

According to **PW1 Januari Mutua Kilile** the offences were committed on 20th June 2016 when about 8.30 p.m. he went to PW3's house, who were his neighbours. About 9.16 p.m. he was leaving and she escorted him to the gate. When he got out, there was a motorcycle with three people. It stopped, two men appeared from the motorcycle, one armed with AK 47, the other with a black pistol, the one with AK said he was a police officer and ordered him to "hands up". He testified that there was sufficient light because "our respective security lights were on."

PW3 who was trying to close her gate was ordered not to. Both were escorted into her house, where the two robbers were joined by two others. They tied them up. They took their phones. They beat them up. He saw one of the robbers take away PW2, and heard screams from the room where she was taken. She was brought back 20 minutes later, and tied up beside him. He also saw them take away PW3 to another room.

At 11.00 p.m., they told him to take them to his house, he told them he was looking for work. The two armed ones took him with them to the neighbour's where they tried to force their way in. Apparently they did not succeed and he was hit with the butt of the gun. They took him back to PW3's house where they demanded for a gun. They later left after warning them not to raise any alarm until after twenty (20) minutes, they complied.

He then untied the other two (2).

They went to the police post and reported.

Police visited the scene.

They went to Nairobi Women's Hospital where they were treated. He too was called after arrest of the suspect. He identified him as the one who had the AK 47, and who told him to "hands up". He said this was the one who took him to his place, the one who hit him with a gun. That he had previously seen him at Works but had not spoken to him.

At this point the appellant requested to be supplied with an extract of the first report.

The same was not supplied.

PW2 testified, that on 20th June 2016 at 9.00 p.m. she was cooking as PW1 and PW2 went out. Then she heard more people enter the house. They demanded for phones as they ordered them to lie down. She noticed that one of them, whom she later identified as the accused, had a gun and was wearing a jumper. She testified that she recognized him. That he then untied her, took her out and raped her while threatening her with death. That he hit her with a gun, told her to undress, made her suck his penis, then penetrated her. He ordered her to dress up and tied her up again. That the robbers ate the food. The robbers also covered their (the complainant and others) faces with curtains, and left warning them not to raise alarm until after twenty (20) minutes.

After the robbers left the police were called, she was taken to Nairobi Women's Hospital where she was treated.

She testified that she was later called to identify the suspect who had been arrested. She found him being assaulted and identified him. She said that during the robbery there was enough light and he had a jumper. That they stole her phone and tablet. That the robbers stayed for two (2) hours. That upon his arrest she *"was told to identify him as the one who had raped her."*

PW5 Doctor Kanyotu Njoroge produced the P3 form on behalf of Doctor Chemtai. The P3 was filled on 30th June 2016. There was no significant finding. It just indicated that everything was normal.

PW6 No. 70046 Cpl Phineas Kaari testified that on 20th June 2016 at 1.00 a.m. he received a report that some people had been ambushed. He went to the report office and the people told him that they *"had been raided, robbed and one lady raped."* He visited the scene. There was a perimeter wall. On interviewing the victims, he said they told him robbers entered their house, armed with crude weapons, ate their supper, stole 48,000/= and raped a girl.

He and his colleagues combed the area in vain.

On 25th June, 2016, one of the thugs was sighted at Kiamunyeki and beaten up by members of the public. Police were called and they rescued him and took him to Provincial General Hospital from where he was later charged after the complainants identified him.

According to the prosecution it is **PW4 Rodgers Mwangi Kiama** who identified the appellant as one of the robbers.

In his testimony, Rodgers told the court that on 25th June 2016 he was at his home in Kiamunyeki reading his Bible. Around 11.30 a.m. he saw the person who had robbed him on 23rd June 2016 standing outside his gate talking on his phone. That he saw that person pass passed outside his gate four times. He hid behind a thicket to observe and confirmed it was him. He then went to mobilise the community ostensibly to arrest him but on return found he had boarded a matatu and left.

He followed him with a friend, and they found him on the road and arrested him. He was mob injusticed.

They took him to his house in a bid to recover his stolen property and only recovered a dagger. According to PW6, when they arrested him they recovered two (2) mobile phones belonging to him. It was alleged some of the stolen items were sold at Umoja. They went there but recovered nothing

He called PW3 who came together with PW2 and they identified him as the robber and rapist. He was taken to hospital.

In his defence the appellant denied the offence and spoke about his arrest.

I have carefully considered the evidence on record and the submissions by both the appellant and the prosecuting counsel. The main issue for determination is whether the appellant was properly identified, and generally whether the case for prosecution, the charges facing the appellant of robbery with violence and rape were proved beyond reasonable doubt to warrant the conviction. Let me just begin by pointing out that the robbers in this case, by their acts of sexual assault against the two females in the house, were the most low life, disgusting inhuman criminals, human beings who are so debased, that they seek to use the little power assigned to them by the guns or weapons they carry to debase other human beings, as if it was not enough that they were robbing them.

I do not doubt that the trial court was persuaded that a robbery occurred, that two (2) disgusting men, forced the two women they found in the house to suck their penises, and one not only did this but also penetrated his victim.

The question at hand is whether the prosecution presented sufficient evidence to prove the charges, and to establish that the appellant was among those men.

The appellant's position is that the case was not proved, the state, that it was.

The appellant submitted that the time of offence was indicated in the charge sheet and hence it was difficult to state whether there was sufficient light to warrant a positive identification. The state took the position that the evidence showed it was 8.30 p.m. The appellant went on to demonstrate that PW1 said it was 9.16 p.m. on 20th June 2010, PW3 that it was 8.00 p.m. on 15th June 2016, hence the prosecution had presented different dates and times.

Be that as it may, what is clear from the evidence is that the attack may have occurred anytime between 8.00 p.m. and after 9.16 p.m. This was at night.

According to PW1 and PW3 they were at the gate. PW1 had stepped out or was stepping out. These two must have stood at the gate for a while for PW3 to notice the light which PW1 said came from a motorbike. So how much light was at the gate? It is not clear because PW1 only said the security lights in the respective compounds were on. It is not clear whether there were lights at the gate, what kind of light and how much time the two spent with the two robbers at the gate. However, it would appear like it was *kufumba na kufumbua,* two men alighted from the motorbike armed with guns, and AK and a pistol and gave the "hands up" order, ordered PW2 to stop closing the gate and pushed them into the house. Neither of these two (2) witnesses state here that he or she saw the faces of the robbers or recognized the voice.

Inside the house they were ordered to lie down, tied with ropes and covered with curtains. None of the witnesses stated that there was time, to see the faces of the now four (4) robbers or identifying their voices.

PW3 said she was escorted to her bedroom as they searched for a gun. Once again no evidence was led as to what light was in the bedroom and how she was able to see the robbers in order to later identify the appellant as one of them. She said at some point the light was put out. Apart from the language she heard them speak she gave no evidence that she was able to see any of them sufficiently to describe them later.

According to her the person who sexually assaulted her was not the accused because by then he had left with PW2. She said she saw the accused ***follow*** PW2 outside., Did she see his face? If he was behind PW2 then what did she see about him to enable her identify him?

She said accused was armed with a police gun. According to PW1 it is one of the robbers who took PW2 to a room. It is noteworthy he did not identify this 'one' as the one who had the AK 47.

PW2 spoke about the accused who had a gun, she did not say which gun, as there were two (2) guns according to PW1 and PW2. She said he was in a jumper, but neither PW1 nor PW2 mentioned this.

This jumper was a clue, a connection with the rapist yet there was no effort to have the jumper described, and searched for when the suspect was arrested and taken to his house.

She said she recognized him, yet she said she had never seen him before.

She said she was taken out and raped. This out place was not defined. PW1 testified that he heard her scream from the 'room' where the rape took place. However, that was not PW2's testimony. I do not know what scene the police visited upon receiving the report, because the scene of the rape was not described. Was it outside the house, was it in a separate room? Was there light in that place where the rape took place? Unfortunately, the record is so devoid of details about that ***out*** place that it gives no clue as to whether there was light, whether the circumstances were such that there was a tenable chance of a positive identification.

The arrest of the appellant throws the greatest doubt with regard to the identification of the appellant as one of the robbers who committed these offences.

The prosecution put all the weight on the testimony of PW4. He testified that he identified him as the **one of the robbers who robbed him on 23rd June 2016**. This just fell from the prosecution's sky. There was no evidence that he was robbed on 23rd June 2016. No evidence that he had made any report of the alleged robbery, what time, place, and what he was robbed of, who he was with etc. etc., I mean the circumstances of the alleged robbery are not on record. Neither the prosecution nor the trial court considered this important yet it was the sole reason for which the appellant was arrested and mob injusticed, the unfounded word of PW4.

Without any evidence that he had been robbed, his identifying evidence is suspect and worthless, creating the impression that it was conjured out of his imagination.

Nothing was recovered from the appellant.

The purported confession that he used to hire guns and Kshs. 10,000/= was not placed before the court in any acceptable manner. Nothing of the unknown alleged items were stolen from PW4 were recovered.

Of great significance with regard to the identification by the witnesses herein, there was no evidence of any description given by either PW1, PW2 or PW3 to the police when the robbery was reported in the wee hours of 21st June 2016 to support the alleged identification of the appellant as the robber and rapist.

The first report was not produced as requested by the accused person and PW2 said she did not say in her statement that could identify the perpetrators.

The jumper she said she was not described to assist in identification. PW1's testimony that he once saw the accused at Works was not pursued, by the prosecution, at to when, in what circumstances, and whether he had told the police or his fellow complainants that the accused was known to him.

It was important for the court to satisfy itself that the appellant was properly identified by the evidence on record.

In **Wamunga vs Republic [1981] eKLR (1989) KLR 424** the Court of Appeal dealing with a similar situation stated;

> **"What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant.**
>
> **Evidence of visual identification in Criminal Cases can bring about miscarriage of justice and it is of vital importance that such evidence be examined carefully to minimize this danger. Whenever the case against a defendant depones on wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on the correctness of the identification."**

In this case the trial court did not examine with caution all the evidence regarding identification, beginning with the that of PW4.

In **R vs Turnbull (1976) 3 All ER 459** cited in the same case, the court set out the process of examining this evidence.

> **"…. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be. How long did the witness have the accused in observation? What distance? Was the observation impeded in any way…? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"**

The need for a description to the police when a report is made cannot be overlooked. In this case, none had been made.

It is evident that the police conducted no investigations at all.

It is alleged that the robbers spent two (2) hours in the complainant's house. No evidence was led as to whether the PW1, PW2, PW3 had time to observe the robbers long enough to identify them. PW6 did not testify as to whether he interrogated these witnesses on this very specific issue. Perhaps that would explain why the first report or OB report was not produced as requested as it would not support the case for the prosecution.

Hence, I must arrive at the conclusion that proper identification of the appellant was not done.

Did the prosecution prove the case beyond reasonable doubt?

The offence of Robbery with Violence consists of theft or stealing from the victim while either armed with dangerous weapon or in the company of another or by use of threats to violence or violence itself on the victim.

In this case, all three witnesses stated they were robbed of mobile phones, but the charge sheet said nothing about PW1's and PW2's phones. According to the police and prosecution, only PW3 was robbed.

Secondly the prosecution did not make any effort to prove the theft of the mobile phones by placing evidence of their existence, value and ownership by the complainants before the court. That also relates to the money the prosecution did not lead evidence to show that PW3 had the money at that time.

Were the robbers armed? What weapons? PW6 said that he received a report that robbers were armed with crude weapons. The PW1, PW2, PW3 spoke of guns. There is a big difference between crude weapons and guns.

What about the threat of or use of Violence? The record shows that all three said they were beaten up, and hit with the gun butt at various times during the robbery. However, the prosecution did not produce a single treatment document to support the allegation yet they all went to hospital immediately after the robbery. They were tied with ropes, no evidence of such, and none were recovered at the scene.

PW2 was raped. While this can be proved from the evidence of the victim, when the prosecution chooses to bring medical evidence then it must not be for the sake of having documents produced for their sake.

Reading through the P3 one gets the cold feeling of a robotic filling of this documents, it does not give life to the victim's story, as to what happened. The same reports on the outcome of the examination of the vaginal area only. Surely this could not have been enough as this was an adult who had had sexual intercourse before.

There was the PRC. Unfortunately, it was completed on 30th June 2016 more than a week after the ordeal. By then there were no physical injuries, and everything was normal. The panty had been left at NWH but no action had been taken. The psychological assessment registered some anxiety on the outcome of the ordeal and some pre occupying thoughts were noted.

So what happened at NWH on the wee hours of 21st June 2016? What did the hospital do with her treatment documents? For how long shall courts continue to point out the necessity of investigating officers ensuring all the evidence is put together and prosecution to ensure it is there in the file?

The other unfortunate thing is the fact that the police and the prosecution did not take into account what happened to PW3, being forced to suck a robber's penis and causing her to vomit. The investigating officer said nothing about this.

When the police visited the scene they did not establish where this sexual assault took place and how the scene was.

The charge sheet does not demonstrate an understanding that rape, and sexual violence, apart from being two (2) distinct offences are also ingredients of the violence in robbery with violence. The fact of threatening the PW3 with rape, forcing her to suck a penis, that was violence, against her, the fact of PW2 being forced to suck another robber's penis and being penetrated, that was violence against her, then there was the substantive offence of rape, and the indecent acts committed against the two women. The fact that the two (2) robbers penises came into contact with the mouths of PW2 and PW3 clearly amounted to indecent act, as defined, the unlawful and intentional act causing;

> ***"contact between any part of the body of a person with the genital organs [of another] …"***

Here were forced, intentional unlawful acts, and dehumanizing acts, but which the investigators and the prosecution did not consider to place on the charge sheet.

In conclusion, what is the fate of the appeal?

I have pointed out the dearth evidence on identification of the appellant as one of the robbers, lack of evidence placing him at the scene of the robbery and rape, the lack of investigations and failure of the prosecution to prove the charges beyond a reasonable doubt.

In the upshot, I must find that the appeal succeeds.

The conviction is quashed, the sentence set aside and the appellant be set at liberty unless otherwise legally held.

Delivered and Signed at Nakuru this 2nd September, 2020.

In the presence of: VIA ZOOM

Court Assistant Edna

For state Ms Kibiriu

Appellant present

Mumbua T. Matheka

Judge

2nd September, 2020.